

National Practitioner Data Bank

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1. Introduction.

a. The National Practitioner Data Bank (NPDB) was established under Title IV-B and B of Public Law 99-660, 42 U.S.C. Section 11101-11152, "The Health Care Quality Improvement Act of 1986." The NPDB, which is maintained by the Department of Health and Human Services (DHHS), contains a record of adverse clinical privileging, licensure, and professional society membership actions taken primarily against physicians and dentists, and medical malpractice payments made on behalf of all health care practitioners who hold a license or other certification of competency.

b. Groups that have access to the NPDB include hospitals, other health care entities that conduct peer review and provide or arrange for care, state boards of medical or dental examiners, and other health care practitioner state boards. Individual practitioners are also able to self-query the NPDB.² The reporting of information to the NPDB is restricted to medical malpractice payers, state licensing medical boards and dental examiners, professional societies that conduct formal peer review, and hospitals and health care entities.

2. What is Reported by the Army.

a. Within the Army, there are two bases for reporting health care providers (HCPs) to the NPDB: adverse privileging actions and medical malpractice payments. The only authorized NPDB reporting entity within the Army is the United States Army Medical Command (MEDCOM).³

(1) Adverse Privileging Actions.

(a) Adverse privileging actions can be taken against privileged providers for acts such as: a single

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²For a recently instituted fee of \$10.00; see 64 Fed. Reg. 10,007 (1999). The NPDB will, however, continue its practice of sending to the practitioner in whose name a report was submitted -- automatically, without request, and free of charge -- a copy of every report received by the NPDB for purposes of verification and dispute resolution.

³See AR 40-68, para. 4-13e.

incident of gross negligence; a pattern of inappropriate prescribing; a pattern of substandard care; incompetence or negligence causing death or serious bodily injury; abuse of legal or illegal drugs or a diagnosis of alcohol dependency; physical or psychiatric impairment; or significant unprofessional conduct. Generally speaking, MEDCOM reports only those privileging actions taken against physicians and dentists to the NPDB,⁴ but does report privileging actions taken against all providers to the applicable state or other regulatory entities.⁵

(b) A simplified summary of the basic process is as follows: the act(s) or omission(s) occurs; the Military Treatment Facility (MTF) Commander becomes aware of it (through report, patient complaint, the filing of a claim, etc.); the Credentials Committee of the MTF meets to decide whether cause exists to take an adverse action against the privileged HCP(s) involved; the privileged HCP(s) is given notice of the Committee's intent and the opportunity for a hearing; the hearing occurs; the Committee makes a recommendation to the MTF Commander; and the MTF Commander ultimately decides what, if any, action to take against the HCP's privileges. If the MTF Commander's decision is to take any action affecting the provider's privileges,⁶ an appellate process is then afforded to the HCP; the highest appellate authority available is The Surgeon General (TSG) of the Army. If the privileging action taken involves a physician or dentist and is to last for a total of more than 30 days, it must be reported to the NPDB.

(2) Medical Malpractice Payments.

(a) Medical malpractice payment reports compose the majority of all NPDB reports by the MEDCOM. Reports in this area are made on the basis of: 1) a monetary payment of a claim, suit, or settlement; and 2) a

⁴Other privileged providers are subject to reporting by the MEDCOM, and the NPDB will, in fact, accept such reports, but this is only done on a case-by-case basis and remains the exception rather than the rule.

⁵These include, for example, the Federation of State Medical Boards, the National Council of State Boards of Nursing, the American Association of Dental Examiners, the National Register of Health Providers in Psychology, the National Commission on Certification of Physician Assistants, and individual state medical licensing boards.

⁶For example, suspension (the temporary removal of all or part of a practitioner's privileges), restriction (the permanent or fixed period removal of part of a practitioner's privileges), or revocation (the permanent removal of all clinical privileges, normally accompanied by an action to terminate the practitioner's Government service) are all actions affecting a provider's privileges under AR 40-68, para. 4-9.

decision by TSG⁷ that the standard of care was not met by a particular provider(s).

(b) A simplified summary of the basic process is as follows: a "Potentially Compensible Event" (PCE) occurs; the MTF Commander becomes aware of it (through report, patient complaint, the filing of a claim, etc.); the Risk Management Committee meets to gather facts, statements, and opinions, and to review the event in detail; the Committee makes a facility-level determination as to whether the standard of care was met;⁸ a claim is filed; and the case is forwarded to the Consultation Case Review Branch (CCRB) for an independent medical/legal review of the underlying treatment provided. If the claim is then paid based upon the acts or omissions of an HCP, the standard of care determinations of both the MTF and the CCRB are examined; if both agree that the standard of care was not met, the file will be forwarded to TSG⁹ for decision and a report will generally be made. If the MTF and the CCRB disagree as to whether the standard of care was met on a paid claim, however, a MEDCOM Special Review Panel will then be convened to make the final standard of care determination for the Army. If the Special Review Panel finds that the standard of care was not met, the file will then be forwarded to TSG for decision and a report will generally be made.¹⁰

(c) An HCP identified as having breached the standard of care is provided all of the documentation relied upon by MEDCOM in reaching its reporting determination, and is afforded the opportunity for written comment, as well as submission of any information not previously considered by the MEDCOM.

⁷Or his designee, depending on whether the payment resulted from a judicial determination of negligence or was administratively paid or settled. See Department of Defense Instruction 6025.15, Section D.1.e.

⁸Ideally, that determination is made close in time to the event, but this does not always occur for a number of reasons -- chief among them the two-year statute of limitations on the filing of tort claims (which provides an incentive for claimants to delay their filings until just before the statute runs), coupled with the general failure of MTFs to devote adequate time and attention to as-of-yet-unfiled claims.

⁹Or, again, his designee.

¹⁰If the ultimate Army determination, however arrived at, is that the standard of care was met on a paid claim, current guidance from the Assistant Secretary of Defense (Health Affairs) requires the Army to forward the file to the Keystone Professional Review Organization (KePRO), an external civilian review panel whose role is to review cases that have been closed without NPDB report because of a Service determination that either the standard of care was met, or that the negligence was attributable to a systems error rather than a human one.

3. Sources of Guidance.

a. The relevant guidance for DoD NPDB reporting is contained in four basic sources: Department of Defense Directive (DoDD) 6025.14, "Department of Defense Participation in the National Practitioner Data Bank"; Department of Defense Instruction (DoDI) 6025.15, "Implementation of Department of Defense Participation in the National Practitioner Data Bank"; Army Regulation (AR) 40-68, "Quality Assurance Administration"; and Title 45, CFR, Public Welfare, Subtitle A, Department of Health and Human Services, Part 60, "NPDB for Adverse Information on Physicians and Other Health Care Practitioners." Because the reporting of properly taken adverse privileging actions is rarely an issue, the significant provisions of these references with respect to medical malpractice will be focused upon and discussed in turn.

(1) DoDD 6025.14, "Department of Defense Participation in the National Practitioner Data Bank (NPDB)," dated 1 November 1990, provides the general policy for NPDB reporting. Read without reference to other sources, it almost seems to imply a straight "payment equals report" approach for medical malpractice settlements that some advocate is preferable to the DoD's insertion of an additional standard of care determination into the process.¹¹ From a substantive perspective, the accompanying DoDI provides much more in the way of guidance than does the DoDD.

(2) DoDI 6025.15, "Implementation of Department of Defense Participation in the National Practitioner Data Bank (NPDB)," dated 9 November 1992, details the requirements of NPDB medical malpractice reporting. Under section D, "Policy," it indicates that:

(a) An investigative and/or fact-finding process must occur at the MTF for every claim of alleged malpractice;

¹¹The advocates of this position also typically assert that this is the civilian standard; it both is, and is not, as claims and suits paid by health care entities rather than individual providers are currently not reportable; but see 63 Fed. Reg. 71,255 (proposed December 24, 1998) for a discussion of the proposed amendment, specifically designed to prevent the evasion of NPDB malpractice reporting requirements by civilian facilities, to mandate reports of payments made on behalf of practitioners who provided medical care that is the subject of a paid claim or suit, whether or not the individual practitioners were actually named as defendants.

(b) A reasonable effort must be made to afford all involved providers an opportunity to respond to the claim during this investigative and/or fact-finding process;

(c) In addition to the MTF's review, TSG must ensure that a further professional review is conducted in order to render an opinion as to whether the standard of care was met (within the Army, this is conducted by either the CCRB, the MEDCOM Special Review Panel, or both, depending on whether the MTF initially found that the standard of care was or was not met);

(d) If the claim made ultimately results in a monetary payment, regardless of amount, all providers identified as having breached the standard of care, and therefore identified as being potential subjects of NPDB reports, must be afforded an opportunity to submit written comments on their involvement in the case prior to TSG's final review and decision. Significantly, immediately after establishing this right to comment, the DoDI then states, "[h]owever, a NPDB report is not an adverse action and full due process procedures are not involved" -- a provision which MEDCOM relies upon to deny requests for hearings and other personal appearances by HCPs (and the attorneys who represent them) who have been notified of potential NPDB reports.

(e) In all claims that result in payment, TSG must review the MTF's risk management review and standard of care determination; all professional reviews conducted (by CCRB, the MEDCOM Special Review Panel, outside experts consulted by U.S. Army Claims Service (USARCS) or U.S. Army Litigation Division for the purpose of claim or suit settlement, MEDCOM Consultants to TSG, etc.); a summary of the administrative claim adjudication or litigation disposition (i.e., the USARCS or Litigation Division closure document); and the written response of the notified HCP(s). If TSG then determines that the payment was made for the benefit of an HCP who breached the standard of care, TSG must then make a report to the NPDB in the name of that HCP.

(f) The DoDI does make a point of defining when exactly a payment is made "for the benefit of a practitioner," and specifically excludes by illustration cases of pharmaceuticals mislabeled by the supplier, equipment and power failure, and accidents unrelated to patient care. It further indicates that cases settled for "administrative or litigation considerations" (sometimes referred to as "nuisance value" settlements) are *not* made

for the benefit of a practitioner. As a practical matter, though, these DoDI exclusions have little effect on MEDCOM NPDB reporting determinations, as they are ones in which the HCP generally would not have been found to have breached the standard of care in any event.

(g) A peculiar anomaly in the DoDI is that it specifies that TSG's decision-making authority to report a provider when the payment results from a "judicial determination of negligence" cannot be delegated to a subordinate official.¹² It further indicates that even if TSG determines that the standard of care was met in such a case, a NPDB report must still be made, but should include in the comment section the statement: "The Surgeon General determined that the practitioner met the standard of care in this case."¹³ Counsel for the Assistant Secretary of Defense (Health Affairs) has indicated that the insertion of these particular provisions into the DoDI was the result of compromise between various interested parties with divergent opinions as to NPDB reporting generally. Within the Army at present, TSG delegates all reporting authority to the Chief, Health Policy and Services, MEDCOM, save those emanating from a court's decision.¹⁴

(3) AR 40-68, "Quality Assurance Administration," Interim Change No. 3, paragraph 4-13, provides the Army regulatory guidance for NPDB reports.

(a) Paragraph 4-13c(1) establishes the basis for convening a MEDCOM Special Review Panel. In essence, a MEDCOM Special Review Panel is conducted whenever there is a disagreement between the MTF and the CCRB in the standard of care rendered in a paid malpractice claim. MEDCOM Special Review Panels consist of at least three members, one of which must be in the discipline or specialty area of the involved provider(s). The Chief, Quality Management Directorate, MEDCOM, acts as both chairperson and voting member of the Panel. If the Special Review Panel makes a determination that the standard of care was not met by a specific HCP, then that HCP is afforded up to 30 days to provide a written response. This response, if any, is then reviewed to determine whether it raises any new or substantive issues; if so, the case may be repeneled to address them. The ultimate decision of the MEDCOM Special Review Panel on the standard of care determination is a

¹²See DoDI 6025.15, subparagraph D.1.f.(2).

¹³DoDI 6025.15, subparagraph D.1.h.

¹⁴and has not, to date, been presented with a case in which he found that the standard of care was met despite a judicial decision to the contrary.

final one, meaning that there is no further avenue of appeal available on that issue within the Army or DoD.¹⁵

(b) Once the HCP's response has been reviewed and addressed, the entire file is forwarded to the Office of the Staff Judge Advocate, MEDCOM for a legal sufficiency review. If found to be legally sufficient, the file is then forwarded to TSG¹⁶ for final decision on whether a report will be made.

(4) Title 45, CFR, Public Welfare, Subtitle A, Department of Health and Human Services, Part 60, "NPDB for Adverse Information on Physicians and Other Health Care Practitioners" is a mostly-overlooked but important element of the due process provided to an HCP who is reported to the NPDB. Neither the Army nor the DoD own or operate the NPDB itself, and are therefore not the ultimate arbiters of what reports are accepted and maintained within that database. Instead, the Department of Health and Human Services is the agency responsible for the NPDB, and provides HCPs a process by which they may dispute the accuracy of a NPDB report concerning themselves. The procedures for filing such a dispute are:

(a) Within 60 days of receipt of the report from the Secretary of Health and Human Services, the provider must inform the Secretary and the reporting entity (i.e., MEDCOM), in writing, of the disagreement and the basis for it;

(b) Request that the information be entered into a "disputed" status and be reported to inquirers as being in a "disputed" status;

(c) Attempt to resolve the dispute with the reporting entity. If the reporting entity does not revise the reported information, the Secretary will review the written information submitted by both parties and make a determination as to whether the reported information is accurate and correct.

¹⁵The HCP may, of course, dispute the overall accuracy of the NPDB report itself with the DHHS (see 45 CFR Section 60.14, above), but since the insertion of a "standard of care not met" reporting prerequisite is purely a DoD invention, a dispute which challenges the underlying standard of care determination (as opposed to, for example, the facts) is less likely to be successful.

¹⁶Or, again, his designee.

(d) If the Secretary concludes that the information submitted was accurate, a brief statement by the HCP describing the disagreement, as well as an explanation of the Secretary's decision that it is accurate, will be entered into the report.

(e) If the Secretary finds that the information is incorrect or inaccurate, notice of the corrected information will be sent to all previous inquirers.

4. Conclusion.

a. The NPDB, maintained by the DHHS, contains a record of adverse privileging actions taken against physicians, dentists, and other privileged providers. The NPDB also contains a record of medical malpractice payments made on behalf of all licensed or certified health care practitioners, whether or not privileged. Although access to the NPDB is limited to hospitals and other health care entities, individual practitioners are able to make inquiry to the NPDB to receive reports submitted under their own names. MEDCOM is the only organizational entity authorized to make a NPDB report within the Army.

b. The Army's NPDB reporting process for medical malpractice generally consists of three key findings: the MTF standard of care determination; the CCRB standard of care determination; and the final MEDCOM Special Review Panel determination. An HCP identified by MEDCOM as having breached the standard of care is provided all of the documentation relied upon in reaching its determination, and is afforded the opportunity for comment prior to TSG's final decision. The DHHS, the agency which operates and maintains the NPDB, also provides HCPs a further process by which they may dispute the accuracy of a NPDB report.