MEDICARE AND WORKERS' COMPENSATION CLAIMS

WHO'S ON FIRST?

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Introduction

For many years, employers and workers' compensation carriers have ignored and not considered future medical payments made under Medicare. Frankly, for many years Medicare ignored this issue also. However, Medicare is now acutely aware of this issue and is extremely wary of making any payments for medical expenses under Medicare which arguably should be the responsibility of an employer or workers' compensation carrier.

The Medicare Secondary Payer statute was enacted to prevent Medicare from having the burden of paying for medical expenses which should rightfully be paid by other insurance plans including workers' compensation. 42 U.S.C. §1395Y(b)(2). A copy of the statute is attached hereto as an appendix.

Pursuant to the Medicare Secondary Payer statute, the Centers for Medicare and Medicaid Services (formerly HCFA), the federal agency that administers Medicare, has for the past several years undertaken a comprehensive effort to make sure that Medicare doesn't pay for services which should be paid by the employer or workers' compensation carrier. Similarly, they are making efforts to collect money improperly paid.

Medicare as Secondary Payer

The Medicare Secondary Payer statute provides in part that Medicare may not pay for an individual's medical treatment if payment can “reasonably expect to be made promptly” under a workers' compensation law. In such an instance, Medicare is a “secondary payer” while the insurance company or the employer remains the “primary payer.” The statute further provides that in the event Medicare does pay such expenses, those expenses shall be subject to reimbursement. If reimbursement is not made within the established time period, interest may be charged on the
I've attached to this article a copy of the Centers for Medicare and Medicaid Services website along the website page dealing with workers' compensation and coordination of benefits.

Over the last several years, there has been significant discussion as to Medicare's rights with respect to workers' compensation claims and ways for employees, employers and carriers to resolve disputes involving these issues. The Deputy Director finally issued an opinion paper July 23, 2001, a copy of which is attached. That letter analyzes employee and employer rights and sets forth the parameters for obtaining approval of Medicare Set Aside Trust agreements.

**The Medicare Set Aside Custodial Agreement**

Medicare Set Aside Custodial Agreements have been recognized as a way of achieving a settlement satisfactory to all parties including the employee, employer, the claimant's attorney, the carrier, and Medicare. The Medicare Set Aside Custodial Fund is established with a sum of money designated to cover future medical expenses which Medicare would ordinarily cover but are in fact the responsibility of the employer. The beneficiary of the fund may either submit the bills for medical treatment related to his workers' compensation injury to the custodian of the fund or the bills may be sent directly by the medical provider to the custodian. After the fund is exhausted, the beneficiary may become eligible for Medicare to pay for any and all future medical expenses that Medicare would normally cover.

Prior approval of the custodial fund must be obtained from CMS. In order to obtain approval of the settlement agreement incorporating a Medicare Set Aside Custodial Fund, CMS must be provided with all relevant facts concerning the injury and the employee's past and future medical treatment. CMS uses a number of factors to evaluate the propriety of the Medicare Set Aside Trust. The factors are listed in response to Question No. 5 in the Deputy Director's opinion paper.
The facts considered by Medicare are as follows:

1. Date of entitlement to Medicare.
2. Basis for Medicare entitlement.
3. Type and severity of injury or illness.
4. Age of beneficiary.
5. Workers’ compensation classification of beneficiary.
6. Prior medical expenses paid by workers' compensation.
7. The amount of the lump sum or the structured settlement.
8. Is the commutation for the beneficiary's lifetime or for a specific time period?
9. Is the beneficiary living at home?
10. Are the expected expenses for Medicare covered items and services appropriate in light of the beneficiary's condition?

**When should the employer or carrier consider a Medicare Set Aside Agreement?**

The employer or carrier should consider getting Medicare approval for any settlement or agreement that includes future medical if:

1. At the time of the settlement the employee is a current Medicare beneficiary, or
2. At the time of the settlement, the employee will be a Medicare beneficiary within 30 months of the date of the settlement, and the anticipated amount of the settlement including indemnity is expected to be greater than $250,000.00.

If at the time of the settlement the employee is not receiving Medicare but is entitled to Social Security Disability benefits, consideration of the Medicare Set Aside must be considered. Individuals become eligible for Medicare once they have been receiving Social Security Disability benefits for a period of 24 months. Social Security Disability benefits generally do not begin until six months after an individual becomes totally disabled from all forms of employment. Therefore,
from the date of disability until the date of receipt of Medicare benefits, a period of 30 months generally has run.

**Each Claim Is Unique**

There is no general rule for setting up a Medicare Set Aside Trust. There are many different factors to consider and each case will be evaluated by Medicare on an individual basis. The employer or carrier's liability is definitely an issue. The primary target of Medicare in workers' compensation claims are those cases which are totally undisputed for which the employee is permanently and totally disabled and has a reasonable expectation of significant future medical care. However, Medicare's rights are severely limited if the employer has a basis for dispute under state law. Negotiated disputed settlements even for a large amount of money are not necessarily subject to Medicare review. If an employer has a legitimate basis for disputing liability under state law and negotiates a settlement with the claimant even for a large amount of money, Medicare cannot challenge that settlement.

**Penalty for Ignoring Medicare**

The employee takes the greatest risk in ignoring Medicare. The most likely result of ignoring Medicare is that Medicare will deny liability for future expenses. The employee will be subject to paying his own medical bills.

However, the employer and the carrier are not immune. The statute gives Medicare broad rights. It allows Medicare to bring an action against the primary payer directly. Further, the statute allows that Medicare may recover from the primary payer “double damages.” This scenario is more likely where Medicare has erroneously made payments and subsequently learns that the primary payer improperly shifted responsibility to Medicare. Medicare has the option of pursuing the employee, medical provider, attorney, state agency, or private insurer. Medicare can bring this cause of action against any entity who knew or should have known about Medicare's conditional
payments but failed to protect Medicare's recovery rights. The statute has been broadly written to
discourage carriers from ignoring Medicare and to encourage them to actively investigate a
claimant's Medicare rights.

Conclusion

Medicare has for years been the dumping ground of permanent total disability cases. Claimants and their attorneys have settled cases getting larger indemnity dollars and presuming that Medicare will cover the claimant's future medical expenses even though the workers' compensation case is closed out. Medicare is now aggressively pursuing these cases and their pursuit must be recognized by the workers' compensation carrier. Fortunately, most cases are not so catastrophic as to cause a concern. Further, disputed cases can successfully be settled without Medicare intervention. However, those cases that do involve undisputed permanent total disability with the expectation of significant future medical care do require extra scrutiny. If we wish to settle those cases, we must recognize Medicare's rights and obligations. We should consider the establishment of a Medicare Set Aside Trust to protect the claimant but also the employer and the carrier.