Compliance with the Medicare Secondary Payer Act: What's New for 2023

LexVid
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Please feel free to email or call with questions at any time.

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Medicare Eligibility

- 65 and Older
- Persons from Age 22 to 64: Social Security Disability.
- Minors and young adults: May be able to utilize a parent's work history to qualify for SSD and Medicare.

Medicare Eligibility

- How to Confirm Medicare Status/SSD status
  - Defendant/insurance company can "query" the injured person on the SSA database via the Section 111 reporting system.
  - Plaintiff can provide a Benefits Verification statement from this website: https://www.ssa.gov/myaccount/
  - Remember to verify the plaintiff's SSD status periodically until the case is fully resolved.

The Medicare Secondary Payer Act

- 42 USC 1395y (December 1980)
- Three basic requirements:
  - The Section 111 Reporting Requirement
  - Maintain Medicare as Secondary Payer post-settlement
  - The Conditional Payment Reimbursement

Can I completely avoid the MSP statute?

$750.00

(Note: 2023 Threshold)

Does not apply to cases of: ingestion; exposure; implantation

- Medicare Conditional Payments:

Conditional Payments
Parts A, B, C, and D

Conditional Payments

- Statutes and Regulations (A, B, C, D)
  - 42 USC 1395y(b)(2)(B)
  - 42 CFR 411.24
  - 42 CFR 411.26 (subrogation and right to intervene)
  - 42 CFR 411.39 (Final CP Process)
  - 42 CFR 411.50
  - 42 CFR 411.52
  - 42 CFR 411.108 (Part C)
  - 42 CFR 423.462 (Part D)
  - 42 CFR 401.613 (Compromise)

Conditional Payments Continued

- Conditional Payment: Payments made by Medicare for the accident related injury from the Date of Injury to the Date of Settlement.
- Two Contractors do Conditional Payment Searches for Medicare A/B: Benefits Coordination and Recovery Center (BCRC) and Commercial Repayment Center (CRC)

Conditional Payments: General

- Medicare can recover, as conditional payments, any payment(s) paid by the Medicare program for the injury/illness from the date of injury (or date of Medicare entitlement) to the date of settlement.
- Make sure all parties agree on the date of injury.
- Plan Ahead: It will take the Medicare Contractor a minimum of 21-45 days to provide a tentative conditional payment letter or notice.

Conditional Payments: General

- Medicare can seek recovery for any payment with a date of service prior to your date of settlement even if the bill is paid after your settlement.

- If an expensive item (surgery) is not included in the tentative conditional payment letter; do some research and find out how the bill was paid. If billed to Medicare, notify the contractor of the excluded costs and ask for a revised letter.

Conditional Payment: General

- Disputes and appeals will take a minimum of 30 to 60 days to process.
- Unless utilizing the Final CP process, the Final Demand amount cannot be obtained from Medicare until after you have finalized your settlement and signed a legally binding settlement agreement that creates a payment obligation.

*The date of your mediation or arbitration is not the “date of settlement” if your state requires execution of a settlement agreement.

Conditional Payment: General

- Both the BCRC and CRC can only provide conditional payment information for Medicare Part A and Part B payments.

(Part C and D conditional payment searches will be discussed later in the presentation)

Conditional Payment: BCRC (Bodily Injury, UM, UIM, Med Mal etc.)

- The BCRC is the recovery contractor for Liability cases and any other case where the Medicare Beneficiary is deemed the “primary debtor” or “debtor of record”

- You must be the Medicare Beneficiary or have permission from the Beneficiary to obtain conditional payment information from the BCRC.

Conditional Payment: CRC (PIP or Med Pay; workers compensation)

- The CRC will only work with the Responsible Reporting Entity (Defendant/Insurance Provider) or their designated recovery agent.

- The CRC is the recovery agent for all Workers Compensation cases and No Fault cases newly reported to CMS after October 5, 2015.

Conditional Payment: CRC

- For cases with continuing ORM obligation, the CRC will maintain an open file in “continuous recovery status”.

- The CRC will audit all “open” files a minimum of one time per year and a maximum of four times per year.

Conditional Payment: CRC

- Due to the “audit” process, the CRC may issue conditional payment notices or letters up to four times per year. If no action is taken, a demand will be issued and payment of the conditional payment is required.

- This periodic review of the file will continue until ORMs are terminated.

Conditional Payment: Disputes/Appeals

- Any tentative conditional payment amount can be disputed.
- A final demand amount can be appealed.
- Should you continue to pursue the appeals process, the next level of review is with an outside contractor. When submitting a file for reconsideration with the outside contractor, make sure to include all possible reasons…

Conditional Payment: Disputes/Appeals

- for your appeal. Failure to introduce evidence at this level may waive your ability to introduce it later in the appeals process, such as at the district court.

- Every review process (dispute, appeal etc..) takes several weeks or months to complete.

Conditional Payment: Disputes/Appeals

- If a final demand has been issued, the final demand amount must be paid within 60 days to avoid interest.
- Interest will accrue on the Final Demand amount while an appeal, compromise, or waiver is pending.

Conditional Payments: Disputes/Appeals

- Payment of the Final Demand amount while an appeal is pending does not lessen your likelihood of success.
- Payment does not equal admission that the conditional payment amount is appropriate.

Conditional Payment: Waiver

- Can only be filed after a Final Demand issued
- Reviewed by the contractor
- Can ask for a waiver of the entire conditional payment amount
- Initial decision can be appealed
- Interest will accrue if waiver request takes longer than 60 days for review.

Conditional Payment: Compromise

- Can be requested on a Tentative or Final
- Must be willing to pay something
- Review by the Regional Office.
- Cannot be appealed

Conditional Payment: Part C and Part D

- 42 CFR 422.108: The Medicare Advantage organization will exercise the same rights to recover from a primary plan, entity, or individual that the Secretary Exercises under the MSP Regulations in subparts B through D of Part 411 of this chapter.

- 42 CFR 423.462 applies the provisions of 42 CFR 422.108 to Part D plans.

Conditional Payment: Part C and Part D

- Part C and Part D plans administered by private health insurance companies.
- You must contact the plan separately to obtain their conditional payment information.
- You must still do a “traditional” Medicare conditional payment search (A/B) as a beneficiary can opt into and out of plans annually.

Conditional Payment: Part C and Part D

- If the A/B search returns $0.00 conditional payments this may be a red-flag that the plaintiff is participating in a Medicare Part C plan.
- If the plaintiff required medications for your injury, make sure to verify how the medications were paid. Possible Part D or C plan.
- Most current case law finding in favor of plan recovery rights. See In re Avandia, 2016 Humana decision and Aetna/Guerrera (March 2018 CT case).

Conditional Payment: Part C and Part D

P.A.I.D Act

- The Provide Accurate Information Directly Act became law on December 11, 2020

- Law requires CMS to provide identifying information for any Part C or Part D Medicare plan an injured person has participated in for the last three year.

Conditional Payment: Part C and Part D

- Data will be made available to insurance companies via the Section 111 portal
- Only provides data for the three most recent years
- Will not provide contact information for the plans
- Will not provide conditional payment amounts
- Testing started September 2021
- Went “live” December 2021

Conditional Payment: Final CP Process

- 42 CFR 411.39
- January 1, 2016
- Allows parties to settlement to request the final demand amount prior to finalizing settlement.
- Must complete the process within 120 days
- Can appeal each conditional payment one time
- Must sign settlement agreement within three days AFTER final demand requested.

Conditional Payment: Final CP Process

- 42 CFR 411.39(d): Obligations with Respect to Future Medical: Final conditional payments obtained via the web portal represent Medicare covered and otherwise reimbursable items and services related to the Beneficiary's settlement, judgement, award, or other payment.

Conditional Payment: Final CP Process

- The Final CP Process is only available for Workers' Compensation and Liability settlements. (in reality just Liability)
- It is not available for No Fault settlements.
- The exact language from CMS is the process "may" be available; which means it may not be available for all cases.

Actions by US Attorneys Offices

- 4 cases filed by US against plaintiff's law firms from June 2018 to January 2020
- All for failure to reimburse conditional payments.
- 2 of the settlements required the law firms to acknowledge they may have violated the False Claims Act.

Conditional Payment: CIGA Case

- California Insurance Guarantee Association v CMS
- United States District Court Central District California
- January 5, 2017 Judge issued order on Motion to Dismiss and Motions for Summary Judgment

Conditional Payment: CIGA Case

- Workers Compensation Case
- California Workers Compensation law a factor
- CMS practice of seeking recovery for full conditional payment amount even if the date of service includes non-compensable ICD codes unlawful.

Conditional Payment: CIGA Case

- The presence of one covered code does not ipso facto make CIGA responsible for reimbursing the full amount of the charge.
- CMS must consider whether the charge can reasonably be apportioned between covered and non-covered codes or treatments.
- Upon such consideration, CMS might still conclude that apportioning the charge is unreasonable.

Conditional Payment: Misc.

- The CMS system can only handle one type of claim file per date of injury. Therefore, if a plaintiff brings a case against multiple liability defendants, the system can only handle the first reported liability case. All subsequent cases will be handled at the time of settlement.

Conditional Payment: Misc.

- Automobile cases that have both a liability and no fault (PIP/Med Pay) claim, will have two lien search processes:
  - one with the CRC
  - one with the BCRC

Conditional Payment: Misc.

- Impact of PIP/MED Pay payments:

When requesting a Final A/B demand you are required to indicate any payment of PIP or MedPay benefits received directly by the Medicare beneficiary. If the amount of PIP/Med Pay amount paid the beneficiary exceeds the final demand amount; no reduction for fees and costs is given.

Conditional Payment: Misc.

- CMS can still seek recovery from the Primary Plan or Payer even if they are not the initial primary debtor of record on a file (42 CFR 411.24(i)).

- If it is necessary for CMS to take legal action to recover the conditional payment amount from the primary payer, CMS may recover twice the amount. (42 CFR 411.24 (c)(2)).

- CMS can either assert a recovery action against the primary payer (42 USC1395(b)(2)(B)(iii)) or against any entity that received payment from the primary payer or proceeds from a payment made by the primary payer including the attorney representing the Medicare beneficiary (42 CFR 411.24(g)). See: United States v. Paul J. Harris

Conditional Payment: Misc

- If Plaintiff will be handling the conditional payment search; ensure defendant/insurance receives a copy of all correspondence to and from CMS/BCRC.

- Plaintiff will always be copied on correspondence from CMS.

Conditional Payment: Misc.

- Remember: Each Settlement is required to do its own conditional payment search.
- A prior conditional payment search, even if for the same date of incident, does not satisfy your requirement to give notice of settlement and do a conditional payment search.

Conditional Payment: Misc

- If the Final Demand amount is not paid timely, an “Intent to Refer” notice will be sent.
- Intent to Refer = Department of Treasury.
- Do Not let it get to Treasury!

Conditional Payment: Misc

- If no conditional payment search is started, CMS will automatically check for conditional payments at the time of the defendant's Section 111 report of settlement.

- Conditional Payments must still be reimbursed even if the plaintiff has died.

Conditional Payment: Self-Calculation

- Available for Liability Cases
- Must settle for $25,000.00 or less
- Must be done with all treatment for 90 days
- Date of incident must have occurred at least six months ago
- Must be a physical trauma injury; cannot be caused by ingestion, exposure, or implanted device.

Section 111: No Fault (PIP and Medpay; Workers Comp)

- Must report when notified of claim; On-going Responsibility for Medicals (ORMs) begins.
- Second report when ORMs are terminated by:
  - Exhaustion of policy limits – payments to medical providers
  - Payment of balance of policy limits to Medicare beneficiary
  - Responsibility for ORMs terminated by statute, settlement, judgement, or other payment.

Section 111: Liability (Bodily injury; UM; UIM)

- Report case at the time of settlement.
- No ORMs in a liability case; only one Section 111 Report.

Section 111: Penalty

- February 18, 2020 CMS published a proposed Rule regarding Section 111 Civil Money Penalties (CMP)
- Final version of rule expected by February 2023
- CMS is proposing that a CMP be assessed against an RRE when the RRE has an error reporting amount above the newly established error reporting threshold of 20%. If an RRE has an error rate of 20% in the Section 111 reporting for four out of eight consecutive reporting periods, then a CMP will be assessed.

Section 111: Penalty

- CMS is proposing a tiered system for penalties
  - The first offense will result in a fine of $250.00 per day.
  - The second offense will result in a fine of $500.00 per day.
  - The third offense will result in a fine of $750.00 per day.
  - The fourth offense will result in a fine of $1,000.00 per day.

Section 111: Penalty

- No CMP will be assessed if the following provisions can be documented:
  - The RRE has communicated the need for identifying information to the Medicare beneficiary or their attorney.
  - The RRE has made at least two written requests and one phone call or one electronic mail request for the necessary information.
  - The RRE certifies that it has not received a response to its requests for the necessary information.
  - The RRE has documented all efforts to obtain the necessary data to facilitate a Section 111 report or determine the need for a Section 111 report.

Section 111: Penalty

- The statute of limitations for CMP is 5 years from the date of when non-compliance was identified by Medicare.
- Case Law: Ruiz v Rhode Island (April 27, 2020):
  - Liability case
  - Case settled with no specific requirement in the release agreement that Mr. Ruiz provide the data necessary to verify his Medicare status.
  - Mr. Ruiz refused to provide his SSN
  - State did have 4 digits of the SSN and made over 100 queries to try and verify his Medicare status
  - Court determined State's efforts to verify the Medicare status of Mr. Ruiz was done in good faith and should exempt the state from a CMP.
  - Important to remember case decided before a final rule issued by CMS.
  - Case speaks to the importance of ensuring the settlement agreement makes clear that payment of settlement funds is contingent on compliance with the MSP statute and that the Medicare beneficiary will cooperate when necessary to ensure such compliance is obtained.

Future Medical Allocations (MSA)

- 42 USC 1395Y(b)(2)(A)(ii): Requires that Medicare cannot make a payment with respect to any item or service to the extent that "payment has been made, or can reasonably be expected to be made under a workmen's compensation law or plan…or under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance.

MSA continued

What Is Missing?

The magical phrase “Medicare Set Aside”

But does this matter?

MSA continued

- Medicare Set Asides are TOOLS for compliance with the MSP statute's requirement that Medicare remain a secondary payer.
- The MSA is the preferred method for compliance with the MSP, but even CMS acknowledges there may be other ways to comply, but CMS has never approved any other financial method or tool for compliance with the MSP.

MSA Continued

- Your settlement is primary to Medicare if a claim for future medical (or permanent medical; lifetime medical) damages was claimed by the plaintiff and this claim is “released” as part of the settlement agreement.

- Tip: Injured party controls the scope of the alleged damages/injuries not the insurance company.

MSA Continued

- Is there any way to avoid an MSA (or future medical allocation) if a claim for future medical damages was made at some point in the history of the case?

- YES! CMS Memo issued September 29, 2011

MSA continued

- What if I cannot get the doctor's statement? What about case law?
- Aranki v. Burwell: October 16, 2015 out of Arizona.
- Duff vs Mass Gen (September 13, 2016)
  - No Judge has ever stated the MSP statute and its requirement to keep Medicare secondary does not apply to Liability cases.
  - Narrowly tailored questions to the court: does MSP mandate use of a Medicare set Aside. This is not the same as asking the court to rule on the applicability of the MSP statute.
  - Re-read the cases with "fresh eyes"!

MSA Continued

- What medical care does the MSA pay for?
  - Medicare covered treatment related to the injury or illness in question
    - Office visits, diagnostic imaging studies, physical therapy
    - Surgery
    - Medications
    - Durable Medical Equipment
    - Pain management injections
    - Implantable devices

MSA Continued

- Ways to reduce the MSA exposure
  - Rated ages
  - If possible, see if the Plaintiff can be switched to generic medications or weaned off medications
  - Surgery/implantable device statements: 1) Doctor and 2) Plaintiff. NOTE: CMS not legally bound by either statement.

MSA Continued

- Ways to reduce the MSA exposure cont.
  - Obtain a treatment statement from the treating physician
    - Treatment statement must come from the actual treating physician; not an IME or Second Opinion physician. *This approach may backfire; use caution.

**42 CFR 411.47 is NOT a basis for reducing a future medical allocation. See July 11, 2005 CMS memorandum question/answer 11 and section 15.2.1 of the WCMSA reference guide.

MSA Continued

Evidenced Based MSAs

- January 2022 and March 2022 CMS added Section 4.3 to the WCMSA Reference Guide: The Use of Non-CMS-Approved Products to Address Future Medical Care.

- CMS specifically stated so-called “evidenced based” or non-submit” MSAs may not adequately protect Medicare.

MSA Continued

Evidenced Based MSAs

- CMS may treat use of these MSA products as a potential attempt to shift a financial burden to Medicare.
- If the MSA is deemed a burden shift, CMS will deny payment for medical services related to the injury until proof is shown that an amount equal to the total settlement less procurement costs has been spent on medical care related to the injury.

MSA Continued

- Can I get CMS approval of the MSA?
  - For No Fault and Liability – probably not, but you can try. This is likely to change at some point.
  - For Workers Comp –yes so long as the review thresholds are met.

MSA Continued

- With no formal MSA review process, how does CMS know the settlement is primary? And how much is primary?
  - Section 111 Reporting
  - Changes to the Common Working File effective October 1, 2017

MSA Continued

- Common Working File Changes (Effective: October 2017)
  - Tells Medicare billing when to pay
  - The Bulletin notifying of the change specifically states CMS is creating two new MSA processes: Liability and No Fault
  - If no MSA is created, the case will be evaluated under current MSP policy.

  *MSP states the entire “primary payment” (settlement) is primary to Medicare.

MSA Continued

- November 8, 2017 CMS issued a MLN educational bulletin aimed at the Medical community. The title of the bulletin: Accepting Payment from Patients with Medicare Set-Aside Arrangements. Bulletin specifically tells medical providers that the Medicare is “always a secondary payer to liability insurance (including self-insurance), no fault, and workers compensation.”

MSA Continued

- December 2018: CMS issued an alert notifying the stakeholder community of its intent to publish a Notice of Proposed Rule Making. This NPRM was formally withdrawn in October 2022.

- Even though the NPRM has been withdrawn this in no way changes your obligation to fully comply with the MSP statute.

MSA Continued

- Companion Workers' Compensation Claim
  - What is the status of the WC claim now?
  - If the WC claim closed out medical, did they do an MSA?
  - If the WC claim is open, will WC continue to pay medical benefits after your liability settlement?
  - Never lose track of the WC claim.

MSA Continued

- MSA Funding
  - Lump Sum
  - Annuity
- MSA Administration
  - Self-Administration
  - Self-Administration with Assistance
  - Professional Custodian/Trustee

MSA Continued

- Lower Valued Settlements still need to comply with the MSP statute.
- Even if the settlement is not sufficient to fully fund an MSA allocation for the person's life expectancy, some type of future medical allocation may be appropriate.
- Low value settlements can be very challenging and should always be viewed on a case by case basis.
- No guidance from CMS (Yet!)

MSA continued

- What “fee schedule” is used when calculating an MSA?
  - Actual charges
  - Possibly workers’ compensation fee schedule
  - NEVER: Medicare Fee Schedule
  - Medical bills must be paid utilizing the fee schedule used to calculate the MSA.

MSA Continued

- How long does the money have to stay in the MSA account?
- What happens to the MSA funds at the death of the beneficiary?

Practice Tips

- Include MSP language in the earliest possible writing:
  - High-low agreements (even if on “the courthouse steps”)
  - Mediation agreements
  - Arbitration Agreements
  - Failure to include complete MSP language early may prohibit you from including it in a later writing.

Practice Tips

- Confidentiality Clauses
  - You will need to provide settlement information to CMS for conditional payment purposes. Make sure all parties are aware of this disclosure requirement. Discuss up-front if this disclosure will violate the confidentiality clause.

Statute of Limitations:

- In general there is a three year statute of limitations for most MSP recovery actions. Therefore, ensure you have all file related records for a minimum of three years. Our office recommends keeping a complete electronic copy for minimum of seven years.

Practice Tips

- To ensure you obtain all Medicare Conditional payment information (A, B, C, and D); obtain a copy of the front and back of all “insurance cards” issued to the Plaintiff.

- Remember to check with Plaintiff from time to time to see if they changed their Medicare plan *Open Enrollment!

Practice Tips

- CMS is not bound by any allocation of settlement dollars in the Release Agreement. Therefore, even if all settlement dollars are allocated for “non-medical” damages or “pain and suffering” CMS may still determine that future medical damages were in fact “released” as part of the settlement agreement. CMS will look at the case as a whole; specifically, looking at what claims or pleas for damages were made by plaintiff in any court filing or in any formal/informal demand letter or other writing. (See CMS Dallas Regional Memo)

Practice Tips

- If there is no need for a Future medical allocation (MSA) in your settlement, state that and state the reason why no allocation is necessary.

*if you have a “no treatment” statement make sure to include it as an exhibit to the settlement release agreement.

Practice Tips

- Consider placing a portion of the settlement dollars in an escrow/trust account until all MSP issues are resolved.

- This can be a good strategy to meet statutory requirements to disburse settlement funds in 30-60 days; but still ensure funds are available to fund an MSA or reimburse a conditional payment amount.

Conclusion

- If you believe you have MSP issues in your case, address them early.
- If you feel overwhelmed, consult an expert.
- Do not ignore the statute and “hope for the best”.

THANK YOU!