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Medicare Conditional Payment Outline

The purpose of this handout is to provide a practical guide to the Medicare lien search process (also known as the Medicare Conditional Payment). It is not intended to provide a historical or theoretical overview of the lien search process, but rather to provide helpful tips and guidance to assist the practitioner in obtaining both the tentative and final Medicare lien amount.

I. Step by Step Guide to obtaining the Lien amount (Conditional Payment)

a. As of February 2014 all conditional payment recovery efforts for Medicare Part A and Medicare Part B are handled by the Benefits Coordination & Recovery Center (BCRC). The MSPRC is no longer a relevant contractor and all work previously performed by the MSPRC is now handled by the BCRC.

b. As of October 5, 2015 the BCRC only handles Medicare Part A/B conditional payment recovery efforts for Liability Cases and cases where CMS is seeking direct recovery of conditional payments from the Medicare beneficiary.

c. Once initial case data is provided to the BCRC a file will be established in the BCRC system within 5-7 business days

d. Once the file has been created in the system, draft a letter to the BCRC specifically notifying them of the case and requesting the lien amount

e. Thirty to forty-five days after you send your letter, you will receive the Tentative Medicare lien notice from the BCRC. NOTE: Do not pay the tentative lien amount.

f. Review the tentative lien letter; if you believe an error has occurred and the BCRC has included inappropriate payments for reimbursement, you can draft a dispute letter to the BCRC requesting the lien amount be corrected/modified. The dispute process generally takes 1.5-3 months.

g. If you are satisfied with the tentative lien amount, send a letter to the BCRC with a copy of the fully executed settlement agreement and proof of attorney's fees and costs for the Medicare beneficiary and request the final Medicare lien amount.

h. Once you receive the final Medicare lien amount you will have 60 days to pay the lien. Failure to pay the lien amount within 60 days will result in the BCRC accruing interest on the lien amount.

i. In 2009 The Arizona District Court imposed an injunction on CMS from placing conditional payment funds in collections proceedings while an appeal or waiver request was pending. On September 4, 2013 the Ninth Circuit Court of Appeals issued an opinion overturning the 2009 injunction. See Haro v. Sebelius September 4, 2013 included with these materials.

j. On October 5, 2015 the Commercial Repayment Center (CRC) started lien collection practices for any new case filed after October 5, 2015 where CMS is seeking direct recovery of the debt from the Workers' Compensation carrier or No Fault carrier. The BCRC will continue to handle all debt collection proceedings against the Medicare beneficiary and in Liability cases.

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k. The CRC will issue a Conditional Payment Notice (not letter; CPN) to the responsible entity when notice is given of an on-going responsibility for medical (ORM) through Section 111 reporting by a responsible reporting entity (RRE). Once the CPN is issued the RRE must respond within 30 days if it wishes to dispute any charges outlined in the Conditional Payment Notice. If no response is made within the 30 day time period the CRC will automatically issue a Final Demand notice which must be paid within the time frame indicated on the final demand notice. The RRE does have formal appeal rights if it wishes to appeal the final demand amount. This process is only for ORM notification. The CRC may issue multiple Conditional Payment Notices on a file until the file is closed and ORM terminated.

l. The CRC will review the file a minimum of once per year and a maximum of four times per year. During any such review, if conditional payments are identified the RRE will receive a CPN. Therefore, it is possible the CPN and lien recovery process may happen as frequently as four times per year until the case is closed and ORM is terminated. If no conditional payments are identified at the time of a CRC file review, no letter will be generated.

m. For conditional payment recovery files at the BCRC, the Medicare beneficiary is the primary debtor of record. For conditional payment recovery files at the CRC the Primary Payer or Plan is the primary debtor of record. The primary debtor of record is the entity from which CMS will first seek recovery of the conditional payment amount. The primary debtor of record is the only entity that can dispute or appeal a conditional payment amount. NOTE: 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)).

n. Beginning January 1, 2016 there is the option to begin the process of determining the final Medicare A/B conditional payment amount from the BCRC prior to settlement. The process is called The Final CP Process. To utilize this new process the parties must be within 120 days of settling the claim. A number of other procedures apply to this process, including the requirement that the claim must be settled within three (3) days after the final conditional payment amount is requested. Failure to meet any of the time periods required by the Final CP Process voids the entire process. NOTE: The Final CP process can only be done one time per claim. If you begin the process and it is voided for any reason you cannot re-start the process.

o. Beginning April 1, 2019 an Electronic Payment option for the Medicare A/B conditional payment amounts is available.

p. Beginning December 2021, Responsible Reporting Entities will have access to Medicare part C and Part D plan information for Medicare beneficiaries for the three prior years. Data provided only includes Plan identifying information; no actual conditional payment data will be provided via the PAID Act.

II. Helpful Hints

a. Provide a detailed description of the body part or illness that is the subject matter of the pending settlement. Also include a list of non-accident related medical conditions and specifically notify the BCRC or CRC that payments for the non-accident related medical conditions should not be included in the lien amount.

b. Receipt of PIP or MedPay payments directly by the Medicare Beneficiary may nullify or reduce the fee and cost reduction on Medicare A/B conditional payment amounts.

c. If you believe conditions such as financial hardship may exist that limit the party's ability to fully satisfy the lien amount, include these details in your initial contact letter with the BCRC. Do not wait to plead these factors in an appeal or waiver request.

d. Waivers of the conditional payment amount can only be requested after the Final Conditional Payment Letter has been issued by the BCRC. Therefore, you must be mindful of interest accruing while your waiver request is pending.

e. A compromise of the conditional payment amount issued by the BCRC can be proposed at any time; however, these decisions are reviewed directly by the CMS Regional Offices and the decisions cannot be appealed.

f. The Medicare lien search process can take several months to complete; therefore, it may be prudent to begin the process well before settlement negotiations begin.

g. 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)).

h. As of January 1, 2023 CMS will not exercise its MSP right of recovery for cases that settle for $750.00 or less. (Does Not Apply to cases of: Ingestion; exposure; implantable devices)

i. If your Liability case settles for $25,000.00 or less you may have the option of self-calculating your final Conditional Payment Amount prior to settlement. However, a number of conditions apply for this option to be valid. See model language from BCRC (formally the MSPRC) included with materials. NOTE: This calculation method is not available for workers compensation or no fault cases.

j. If your Liability case settles for $5,000.00 or less you can elect to pay a fixed percentage of the total settlement amount (25%) as the conditional payment amount. See model language from BCRC included with materials. NOTE: This calculation method is not available for workers compensation or no fault cases.

k. At present there is a split in the circuits regarding whether or not Medicare must apportion its conditional payment amount. See Bradley v. Sebelius and Hadden v. USA both included with these materials.

l. 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 included with these materials.

m. Effective July 10, 2013 a three year statute of limitations will apply to certain MSP recovery actions. The three year statute of limitations will begin to run upon receipt of the Section 111 report (essentially upon receipt of notice of a payment). (See the Smart Act for more information and MSPA Claims v Kingsway Amigo February 2020 out of Eleventh Circuit Court of Appeals)

n. August 2022 Eleventh Circuit Court of Appeals held that a four year statute of limitations (28 USC section 1658(a)) will apply when a Medicare Advantage plan brings suit under the Private Cause of Action provision of the MSP. But the SOL begins to run with the action "accrues"; not necessarily when the

Plan receives notice of settlement. See MSPA Claims 1 LLC v Tower Hill Prime Insurance 2022 U.S. App. Lexis 22162.

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o. Please be aware that the conditional payment search through the BCRC and CRC is for payments made by Medicare Parts A/B only. If the injured person is participating in a Medicare Part C (HMO/Medicare Advantage plan) or a Medicare Part D (drug) plan additional conditional payment searches will be required with the Part C/D plan administrator(s). Please see In Re Avandia and Humana v. Western Heritage Insurance Company (2016 decision) for a discussion of Part C Plan recovery rights.

p. Regarding Part C plan recoveries: in March 2018 United States District Court for Connecticut held that a Part C plan could bring a private cause of action for recovery of unpaid conditional payments but could only bring the recovery action against the Defendant (the primary plan or payer) if the Part C plan was seeking double damages. The Part C plan could not bring the recovery action against the Medicare beneficiary or the Beneficiary's attorney. Given the holding in this case, Defendants who allow Plaintiff's to do the Part C conditional payment search must obtain copies of all letters and documents from the Part C provider. Further, it is recommended that the Defendant pay the Part C provider directly rather than distributing all settlement funds to plaintiff. See: Aetna Life v Guerrera.

q. NOTE: If you have reason to believe Medicare has made payments for the injury in question, but the Medicare A/B lien search (from the BCRC or CRC) comes back showing a zero-dollar conditional payment amount; this is likely a red-flag that the person is participating in a Medicare Part C plan. You must inquire with the Medicare Beneficiary or their attorney and determine if the beneficiary has opted into a Part C plan.

r. NOTE: If the injured party ever required prescription medications for the injury in question, it is recommended that the attorney ascertain how these medications were paid. If paid by a Medicare Part C or D plan, an additional Medicare conditional payment search is required.

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s. California Insurance Guarantee Associates (CIGA) v. Burwell et. al. On January 5, 2017 Judge Wright ruled on a Motion to Dismiss and Motions for Summary Judgment. CIGA argued that CMS had no right to seek recovery for conditional payments with ICD codes unrelated to the compensable workers' compensation injury. The Judge agreed with CIGA and determined that CMS could not seek full recovery for a conditional payment amount simply because the date of service in question include one code related to the compensable work injury. The Judge determined that even the MSP code and internal rules indicated that CMS was to be reimbursed for a "service" or an "item". The Judge did not find CMS' argument persuasive when the government indicated that it was the Agency's practice to "seek full reimbursement for a conditional payment as long as one diagnosis code was related." However, before the practitioner gets too excited regarding the CIGA case, the final determination from the Judge indicates as follows: "The presence of one covered code does not ipso facto make CIGA responsible for reimbursing the full amount of the charge. Instead, CMS must consider whether the charge can reasonably be apportioned between covered and uncovered codes or treatments. Upon such consideration, CMS might still conclude that apportioning the charge is unreasonable. In addition, even if the charge should be apportioned, the Court takes no position on how CMS should do so (e.g., pro-rata by covered codes versus uncovered codes, or some other method)." A copy of the CIGA case is included with these materials.

t. Future Medical Obligation: 42 CFR 411.39(d) is titled "Obligations with respect to future medical items and services" and states: Final conditional payment amounts obtained via the web portal represent Medicare covered and otherwise reimbursable items and services that are related to the beneficiary's settlement, judgement, award or other payment. This means if the web portal is utilized for the final conditional payment process, Parties to settlement must ensure that they are only paying for transactions with ICD-9 and ICD-10 codes related to your specific injury. If you pay for a code unrelated to the actual injury, Medicare may refuse to pay for it in the future. It is important to review the codes in both the tentative and final conditional

payment letter very carefully prior to issuing any payment. The CFR section is vague and it is unclear if it applies to all requests for the final conditional payment amount through the web portal or only those claims utilizing the Final CP Process which went into effect January 1, 2016.

u. June 18, 2018: Press Release from the United States Attorney's Office Eastern District of Pennsylvania. Settlement reached with plaintiff's law firm that required the firm to pay a financial settlement to the government, make internal policy and staffing changes, and required the firm to acknowledge a possible False Claims Act violation due to the wrongful retention of government funds.

v. March 18, 2019: Press Release from the United States Attorney's Office District of Maryland. Settlement reached with plaintiff's law firm that required the firm to pay a financial settlement to the government and make internal policy and staffing changes. However, no requirement to acknowledge a possible False Claims Act violation.

w. November 4, 2019: Press Release from the United States Attorney's Office District of Maryland. Settlement reached with plaintiff's law firm that required a law firm to reimburse conditional payments even if that law firm was not the primary firm handling the case for the plaintiff.

x. January 8, 2020: Press Release from the United States Attorney's Office Eastern District of Pennsylvania. Settlement reached with plaintiff's law firm that required the firm to pay a financial settlement to the government, make internal policy and staffing changes, and required the firm to acknowledge a possible False Claims Act violation due to the wrongful retention of government funds. Settlement specifically referenced the prior June 2018 case handled by this same office.

III. Where to find additional information

a. For additional information regarding the lien search process, including copies of letter templates from the BCRC, go to: https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Coordination-of-Benefits-and-Recovery-Overview/Overview.html

b. For verification of a person's Social Security or Medicare status, a benefits verification letter can be requested here: https://www.ssa.gov/myaccount/

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