



## Resolving Catastrophic Claims for Dual-Eligible Beneficiaries of Medicare and Medicaid

by David J. Korch

**W**hen looking to resolve catastrophic claims, we always get into the dilemma of how to address the what if's... what if the injured party needs some attendant care or skilled nursing care? What if there are not enough funds to cover the non-Medicare medical expenses? We will discuss the intertwining of various government benefits with other settlement tools to resolve catastrophic claims. These government benefits include Social Security Disability, Supplemental Security Income, Medicare and Medicaid.

### Disability Income from Social Security

Social Security Disability (SSDI) is income replacement for the disabled worker and is an entitlement program. An individual who qualifies for SSDI becomes a Medicare beneficiary after a 24 month waiting period.

Section 224 of the Social Security Act (42 U.S.C. 424a) places a ceiling on combined Social Security disability benefits and State workers' compensation benefits. The statute states that Social Security benefits "shall be reduced" by the amount necessary to ensure that the sum does not exceed 80% of the pre-disability average current earnings (ACE). The offset applies until the claimant

reaches 65 years of age or when payments end. Usually the offset affects low income workers more often, and more dramatically, than higher income workers.

In all but 13 states, Social Security will offset the SSDI benefits based on the workers' compensation benefits as well as any other disability benefits that the injured worker receives (if the benefit was paid for by the employer). The 13 reverse offset states (states in which the carrier receives the benefit of the offset) are California, Colorado, Louisiana, Minnesota, Montana, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Washington and Wisconsin.

The SSDI offset, when settling a WC case, is guided under the POMS (Program Operation Manual System) of Medicare. Chapter DI 52110.001 deals with Annuities and Trusts. DI 52110.001B deals specifically with workers' compensation awarded as an annuity. This states that where the WC award provides that a worker shall have the option of receiving a lump sum or an annuity in lieu of statutory periodic benefits, the lump sum or purchase price of the annuity (not including interest) is offsettable according to the normal proration rules. It further indicates that if the worker has no option, (e.g., the carrier's policy is to pay in a certain manner) the amount of the lump sum or purchase price of the annuity is offsettable as of the time the annuity payments are actually received by the party.

When we utilize 52110.001 in our negotiations, we can generate an income equal to or greater than the injured worker would receive if they remained on WC. This can be achieved through the use of periodic payments funded through a structured settlement annuity.

This is a great negotiation tool and can help reduce settlement costs. If we can generate the same income level as the claimant is receiving prior to settlement, you may be able to reduce the cash needed up front to satisfy the claimant's needs and attorney fees. Also, the utilization of the rated age would reduce the costs of the annuity thereby having more cash available for other needs.

By utilizing a structured settlement to negotiate benefits (not cash) for the injured worker we can meet their needs and achieve a better outcome for the insured, carrier and or self-insured.

Supplemental Security Income (SSI) is a disability income program for individuals who have an income

below the federal poverty level and administered by Social Security. A person who qualifies for SSI becomes eligible for Medicaid.

As SSI and Medicaid are poverty programs, not entitlement programs, receipt of other forms of public assistance or recoveries will affect these benefits.

## Medicare

Medicare is federally funded and administered by the Centers for Medicare / Medicaid Services ("CMS"). See 42 U.S.C. § 1395y. It is comprised of:

- Part A (Hospital Insurance)
- Part B (Supplementary Medical Insurance)
- Part C (Medicare Advantage)
- Part D (Prescription Drug Coverage)

Medicare covers acute-care such as hospitalization, short term care and post acute care. This includes services at a nursing facility for acute illness or surgery.

## Medicaid

The Medicaid Program provides medical benefits to groups of low-income people, some who may have no medical insurance or inadequate medical insurance. Although the Federal government establishes general guidelines for the program, the Medicaid program requirements are actually established by each State. Whether or not a person is eligible for Medicaid will depend on the State where he or she lives.

States are required to include certain types of individuals or eligibility groups under their Medicaid plans and they may include others. States' eligibility groups will be considered one of the following: categorically needy, medically needy, or special groups. Following are brief descriptions of some of the key eligibility groups included under States' plans. These

descriptions do not include all groups. Contact your state for more information on all Medicaid groups in your state. (For more information, see [www.cms.hhs.gov/medicaid/whoiseligible.asp](http://www.cms.hhs.gov/medicaid/whoiseligible.asp)).

While Medicaid covers most of the same services provided through Medicare, it also covers many prescriptions not covered in part D of Medicare and will also cover the services provided at a skilled nursing facility for the long term.

When we discuss Medicaid benefits we are considering benefits that require the individual meet both low income and low asset tests. The income levels vary from state to state so this discussion will not be addressing the eligibility requirements but the benefits of incorporating these benefits into a settlement. Medicaid is a state run program partially funded by the federal government and is considered a means-based program. To receive Medicaid a recipient must first qualify for and receive at least one dollar from SSI. In 2011, to qualify for SSI, an individual could not have more than \$2,000 in resources or more than \$674 in monthly income. For a couple the resource limit is \$3,000 and the monthly income limit is \$1,011.

## Dual Eligibility

According to a recent report by the Congressional Budget Office (CBO) which used statistics from 2009, there were 65 million individuals who met the eligibility requirements for Medicaid. At the same time there were over 50 million persons on Medicare. These individuals qualified by either reaching the age of 65 or had been diagnosed with a medical condition causing them to meet the eligibility requirements as disabled through the Social Security system.

Of the individuals qualified for Medicaid 14.9%, or 9 million individuals,

were dual eligible individuals who qualified for both Medicare and Medicaid benefits. 7 million were full dual eligible (qualify for full benefits under both programs) and 2 million were partial dual eligible qualifying for Medicaid to pay some of their medical costs. CBO estimated that the federal and state governments

expended more than \$250 billion for these dual eligible individuals.

## Utilizing the Concept of Dual Eligibility in Settlements

Often times in settling a workers' compensation case a Medicare Set-Aside (MSA) is established to pay for

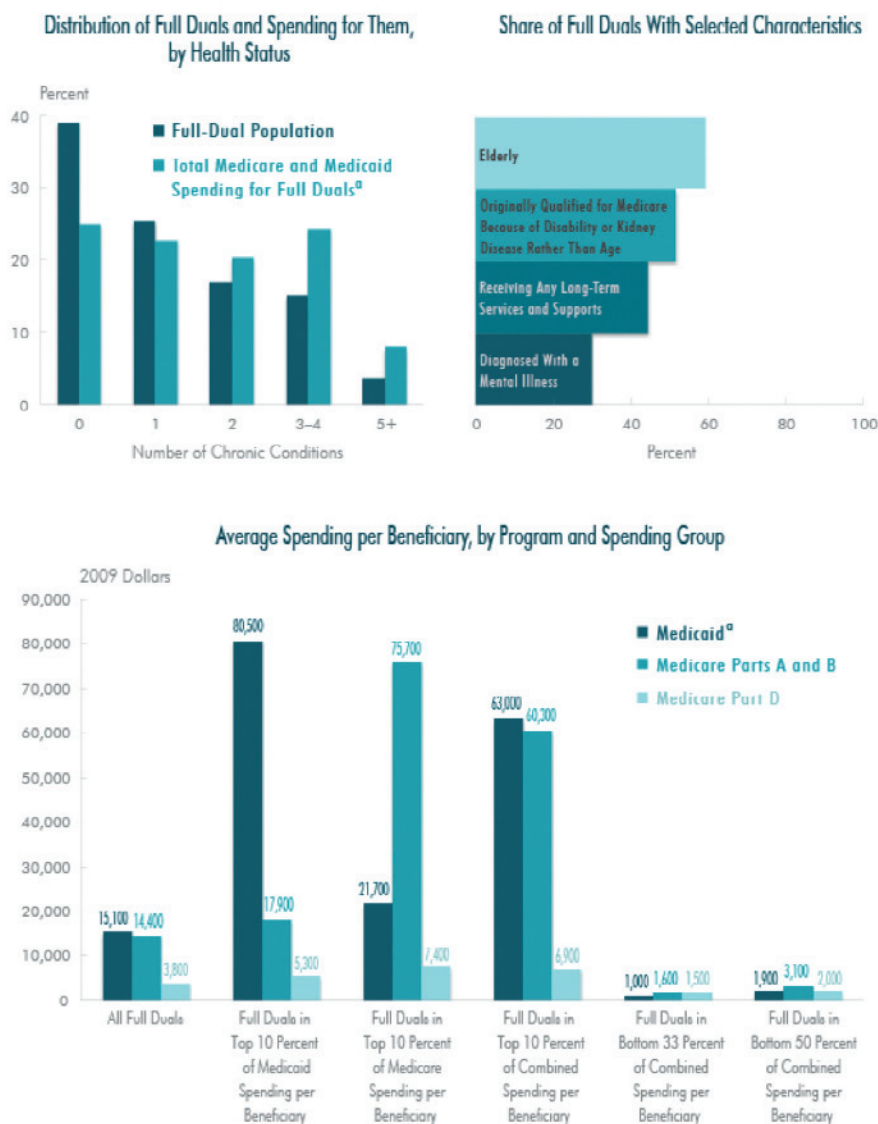
Medicare covered services that are related to the worker's injury. The MSA may be in the form of a trust, custodial account or self administered account. Remaining portions of the settlement typically take the form of a lump sum, annuity or combination of the two. By utilizing the MSA we have protected Medicare's interests as well as assisted in protecting the availability of Medicare for the injured worker.

In some cases, particularly in catastrophic cases, an injury victim may qualify for SSI and Medicaid, in addition to their Medicare benefits, due to their injuries and financial status. The Medicaid program supplements the coverage provided by the Medicare Set Aside and Medicare by providing services and supplies that are not available through the Medicaid program such as nursing facility care beyond the 100 day limit covered by Medicare, prescription drugs and eyeglasses. This arrangement works out because Medicaid considers Medicare as primary to Medicaid and Medicare considers the MSA as primary to Medicare. In other words, the payment responsibility would first fall to the MSA, then to Medicare and then finally to Medicaid. Combining government programs may be the only way to cost effectively fund a catastrophically injured worker's future care.

Any settlement beyond the limits (see earlier paragraph for criterion) would prevent the injury victim from qualifying for SSI and Medicaid. The solution is to establish a special needs trust (SNT), which provides a safe harbor for the injured worker's award. This would include any lump sum cash payments and/or structured settlement annuity payments which would flow through the SNT.

An important point to remember in this scenario is that the MSA is a countable resource in determining

## Characteristics of Full Dual-Eligible Beneficiaries, 2009



Note: Dual-eligible beneficiaries are people who are enrolled in Medicare and Medicaid at the same time and who are eligible to receive benefits from both programs. "Full duals" qualify for full benefits from both programs.

a. Includes federal and state spending for Medicaid but excludes Medicaid payments for Medicare premiums.





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SSI and Medicaid eligibility unless it is placed within the SNT.

When applied in a workers' compensation settlement, the SNT can accomplish several things for the settling parties. First, the settlement can provide a higher standard of living for the injured worker. In one particular case part of the settlement funds that were deposited in a special needs trust were used to purchase a modest home in which the injured worker could reside. The SNT owned the home and was able to provide for its care and upkeep. Prior to the settlement the injured worker had been living in a long-term care facility paid for by the carrier. The advantage to the injured worker was they could live on their own and gain back some dignity and feeling of self worth by living in their own home. They also took comfort knowing that there were multiple resources available to cover their medical needs. Either from the MSA, Medicare, Medicaid, or the special needs trust.

Secondly, the carrier received a substantial cost savings by settling in this manner because they no longer had the unpredictable long-term expense of a long term care facility.

The third benefit of including a SNT in the settlement was that it encouraged the injured worker to settle and shortened the length of time to reach a successful settlement.

If the injured worker does not qualify for SSI and Medicaid benefits another useful trust in settling a workers' compensation case is the medical expense trust. The medical expense trust a.k.a. settlement planning trust, much like the special needs trust, can pay for additional items and services not covered by the MSA or Medicare. Since the claimant is not on needs based Government benefits, and there is no need to protect SSI

and Medicaid benefits, the language in the medical expense trust can be relaxed to allow for payments of more items and services. The settlement planning trust provides spendthrift protection for inexperienced beneficiaries or beneficiaries that can be easily taken advantage of.

A structured settlement annuity can be used in conjunction with any of the trust products mentioned here. The trust and annuity are very complementary tools and work well together. The annuity provides guaranteed income that can last for the lifetime of the injured worker and the trust adds flexibility to meet unforeseen future needs and protect the worker from outliving their money. Blending multiple products together provides a more complete settlement package that is more likely to be satisfactory to all parties involved.

When settling a workers' compensation case, it is important to look at all the options available to you. The trust is an often overlooked tool that can be instrumental in bringing a successful resolution to the case for everyone. Having tools available that satisfy all parties will also bring quicker closure to the case. ■

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