

It's Not All About the Medicare Set Aside

By David Korch, EPS Settlements Group

I recently reflected back on the many years I have been involved in negotiating and resolving workers' compensation claims. As you might surmise, many changes have occurred throughout the years including the introduction of the Medicare set-aside allocation and the boom of the industry surrounding same. When I reflect on this process, I reminisce back to the resolution of workers' compensation claims prior to 2001 when it was "Not All About the Medicare Set Aside".

Settlement of workers' compensation claims, regardless of a need for a Medicare Set Aside (MSA), have always been about reaching the best claim outcome while providing for the wants and needs of the injured worker. The injured worker has numerous needs to be addressed including security, independence, healthcare and sustenance. Money is not the answer but a means to achieve these goals. Meeting an injured worker's needs creatively through the discovery of the core interests and satisfying them cost effectively utilizing periodic payments will result in an agreed upon resolution.

Coverage of Future Healthcare Needs

Prior to the "Patel memorandum" in 2001, there was no formalized workers' compensation Medicare review process in place and workers' compensation settlements encompassed the future medical needs for the claimant as well as their income loss. These were settled utilizing structured settlements which provided a tool to settle the entire workers' compensation claim below the present cash value and provide for lifetime funding for medical expenses. During that time period, one advocate that pioneered the protection of Medicare in workers' compensation settlements was Roger Bernstein, Esq. of Coral Gables, Florida. He published a white paper relating to protecting Medicare's interest and assisted numerous carriers and injured workers in settling up their claims. During that time a number of cases were submitted to the regional Medicare office for review. Not all cases were submitted to Medicare for review, however, we dealt instead with a process of setting aside funds in a Custodial Medical Account for future medical treatment of the injured worker.

The Custodial Medical Agreement is a document that illustrates the method by which a predetermined amount of money will be deposited and utilized for the future medical expenses of an individual. Most often there are three parties that are identified within a custodial agreement. They are 1. *Payor* (generally an insurance company), 2. *Beneficiary* of the agreement (generally the injured party) and 3. *Custodian* who will administer the account. The terms of the Custodial Medical Agreement illustrate the allowable benefits and other details such as the type of investments to be used by the Custodian.

The Custodian has a fiduciary responsibility to the payor and the beneficiary to carry out the terms of the Custodial Medical Agreement over the life of that agreement. The Custodian should make certain the viability of the agreement is ensured by exercising discretion when spending the account funds as described under the allowable benefits portion of the agreement. The Custodian provides expert medical claims administration over the life of the agreement. Also, the Custodian renders periodic reports to the payor and the beneficiary or their representative of the activity of the account.

The services or "benefits" that can be provided through a Custodial Medical Agreement are disposable medical supplies, durable medical equipment, physician services, nurses, attendant care, home modifications, specially equipped vehicles, hospitalization, and therapies. What should be avoided, if possible, are cash disbursements from the Custodial account to the beneficiary. An example of an inappropriate cash payment might be a monthly payment for "loss of income". Generally that type of benefit is best handled by a separate payment made to the beneficiary directly by the payor or by the purchase of a separate annuity unrelated to the Custodial Medical Agreement. Of course the Custodian can send payments to the beneficiary to reimburse them for approved medical expenses.

These accounts not only include future Medicare expenses but also cover expenses that would not be covered under the Medicare program such as attendant care and transportation needs. These are items that are most often overlooked but are a concern of the injured worker as well as his counsel. If these needs are not addressed, the settlement may not move forward.

As you can see, the process provides payment of future medical expenses that would otherwise be covered by Medicare if the injured worker was a Medicare beneficiary. These accounts eventually expanded into the current professionally administered Medicare accounts we see today. The custodial medical account still exists but is not used as extensively as in the past.

The funding of these types of accounts is similar to a Medicare set aside account. In funding them in this manner, an annuity can be used which results in a substantial savings to the carrier/employer which normally amounts to approximately 37 percent of the lifetime amount.

Dual Eligibility (Medicare and Medicaid 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. Of the individuals qualified for Medicaid 14.9 percent, 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.

Utilizing the Concept of Dual Eligibility in Settlements

When resolving a workers' compensation case for a Medicare eligible individual, a Medicare Set Aside 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 Supplemental Security Income (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 MSA 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 award beyond the limits of assets and income established by the government 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 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 receives a substantial cost savings by settling in this manner because they no longer have the unpredictable long-term expense of a long term care facility.

The third benefit of including a SNT in the settlement is that it encourages the injured worker to settle and shortens the length of time to reach a successful settlement.

Spendthrift Settlement Trust

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 payment of more items and services. The settlement planning trust provides spendthrift protection for inexperienced beneficiaries. In other cases, it protects their assets from early dissipation that were set aside for specific, pre-defined needs.

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, protecting the worker from the possibility of outliving their money. The trust adds flexibility to meet unforeseen future needs. Blending multiple products together provides a more complete settlement package that is more likely to be satisfactory to all parties involved.

Providing Security, Independence for the Injured Worker

How can we resolve the indemnity portion of the workers' compensation claim and provide independence and security for the injured worker while resolving the case below the present value? The structured settlement is a great tool for achieving this since structured settlements (periodic payments) are really no different than the indemnity payments to an injured worker which are also periodic payments.

Section 224 of the Social Security Act (42 U.S.C. 424a) places a ceiling on combined Social Security disability benefits (SSDI) 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 percent 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 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.

When settling a workers' compensation case the SSDI offset is guided under the POMS (Program Operation Manual System) of Medicare. Chapter DI 52110.001 deals with Annuities and Trusts. Subsection B deals specifically with workers' compensation settlement awarded as an annuity. It states that where the workers' compensation 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 off-settable 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 off-settable 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 or greater than the injured worker would receive if they remained on workers' compensation. 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, i.e. the 80 percent ACE level, we may be able to reduce the cash needed up front to satisfy claimant and attorney's fees. Also, the utilization of the rated age would reduce the costs of the annuity thereby having more cash available for up front needs.

When settling a workers' compensation case, it is important to look at all the options available to you, not just the Medicare Set Aside. The items above are often overlooked tools that can be instrumental in bringing a successful resolution to the case for everyone. Having an assortment of tools available that satisfy all parties will also bring quicker closure to the case.

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