



CMS Advances Future Medicals in All Injury Cases

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CMS ADVANCES FUTURE MEDICALS IN ALL INJURY CASES

The Centers for Medicare and Medicaid Services (CMS) took steps last week regarding enforcement of the Medicare Secondary Payer (MSP) Act. All attorneys (plaintiff and defense), claim management teams and interested stakeholders in workers' compensation and personal injury (including no-fault/auto) should exercise caution and understand the significance of this announcement.

Effective October 1, 2017, Medicare Administrative Contractor (MACs) will deny payment for items or services that should be paid from a Liability Medicare Set-aside (LMSA) or No-Fault Medicare Set-aside. This policy shift is similar to enforcement mechanism in place for workers' compensation claims.

Who Is Impacted By This New Guidance?

While on its face, the memorandum is directed to physicians and suppliers, everyone who practices law in injury/workers' compensation litigation and other parties should take note. This is especially the case for attorneys and members of the claims management team who have not been considering Medicare's interests in non-workers' compensation personal injury cases. Continued practice of overlooking future medical issues will likely render injured Medicare beneficiaries ineligible for injury-related care and result in unpaid medical bills. These bills will then ultimately be the responsibility of the plaintiff.

Attorneys representing parties in personal injury cases will now be at greater risk. This includes the increasing potential for legal malpractice claims by former and existing clients. There will also likely be an unwelcome uptick in professional responsibility complaints made against attorneys representing persons in all personal injury claims who fail to take notice of this CMS notice.

Insurance defense attorneys and claims management professionals should also take greater care when settling injury cases involving claimants with a reasonable expectation of Medicare entitlement, or those currently receiving benefits under Medicare and Medicare Advantage Plan programs. The bottom line is clear—this new CMS directive will impact all interested parties in personal injury cases. Workers' compensation practitioners and stakeholders should also take immediate note.

The purpose of this document is to identify and discuss issues in an educational manner and is not intended to constitute legal advice as to any particular claim or situation. Always consult your attorney as to specific situations.

What Are The Consequences of Not Including Future Medicals in Injury Cases?

The warning is real for those who do not take immediate action. Medicare will not pay for those services related to the diagnosis code (or related within the family of diagnosis codes) associated with the open LMSA or NFMSA MSP record when the claim's date of service is on or after the MSP effective date and on or before the MSP termination date. CMS has now designated specific MAC codes that include:

- N723—Patient must use Liability Set-Aside (LSA) funds to pay for the medical service or item; and
- N724—Patient must use No-Fault Set-Aside (NFSA) funds to pay for the medical service or item.

MACs have permission to pay for injury related care and treatment only in instances where “benefits are exhausted/terminated,” or not related to the injury claim. This means plaintiffs in injury related cases will be required to demonstrate the following criteria:

1. The settlement agreement did not shift the burden onto Medicare for future injury-related medical care and treatment (*eg*—a Medicare Set-aside or some other tool to demonstrate consideration of Medicare's interests). See 42 C.F.R. §411.46;
2. The amount set-aside is reasonable; and
3. Those settlement funds designated for future Medicare reimbursable care and treatment were properly exhausted.

Where Does CMS gets Its Authority for This Announcement?

The plain text of the Medicare Secondary Payer Act empowers CMS to issue this policy memorandum. Under 42 U.S.C. §1395y(b)(2), Medicare is precluded from making payment when payment “has been made or can reasonably be expected to be made under a workers’ compensation plan, an automobile or liability insurance policy or plan (including a self-insured plan), or under no-fault insurance.”

Regardless of what you think, or think you heard, the Medicare Secondary Payer Act applies to all injury related cases. The absence of a voluntary review and approval process of future medicals in non-workers’ compensation injury cases does not give plaintiff's and their legal counsel a free pass when it comes to considering Medicare's interests.

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Why Are Future Medicals Important in Injury Cases?

The solvency of the Medicare Trust Fund remains an important political issue regardless of one's ideology or political persuasions. Recently appointed Secretary of Health and Human Services Tom Price, has made the solvency of the Fund a top priority. It is expected Seema Verma will champion this same issue once she is confirmed as CMS Administrator. Strict enforcement of the MSP Act is one method CMS can employ to promote a robust Medicare program without reducing program benefits.

Conclusions

Now is the time to educate yourself on the MSP Act. All attorneys and interested stakeholders need to think about compliance with the Act early and often. They also need to take reasonable steps, even within the context of cases involving policy limits. One way to accomplish these objectives is to understand how to implement effective best practices in your company or law firm when considering Medicare's interests and protecting your clients.

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