

## Mechanisms for Containing Medicare Part D Prescription Drug Costs in MSA Allocations

The inclusion of future prescription drug costs otherwise covered by Medicare Part D in Workers' Compensation Medicare Set-Aside Arrangements has significantly increased Medicare Set-Aside (MSA) allocation amounts and therefore, has made it more difficult to settle workers' compensation (WC) claims. On December 30, 2005, The Centers for Medicare and Medicaid Services (CMS) released its much anticipated memorandum addressing Medicare Part D prescription drug coverage and MSAs. As a result, all WC settlements occurring on or after January 1, 2006, must include consideration for prescription drugs otherwise covered by Medicare Part D (Walters, December 2005).

To date, CMS has not published guidelines regarding the pricing mechanism that should be used to calculate future Medicare Part D covered prescription drug costs in MSAs. Furthermore, the Workers' Compensation Review Center (WCRC) is not currently reviewing or independently pricing future Medicare Part D covered prescription drug costs as it does for future Medicare Part A and B covered medical expenses. CMS has indicated that it will provide advanced notification when it plans to begin independently pricing future Medicare Part D covered prescription drug costs (Walters, July 2006).

According to CMS, for MSA proposals received by the Medicare Coordination of Benefits Contractor (COBC) on or after January 1, 2006,

*...CMS will provide in its written opinion the total WCMSA amount that adequately protects Medicare's interests with regard to the claimant's future medical treatment. However, CMS' written opinion will also note the submitted prescription drug amount. The CMS' written*

*opinion will provide the total WCMSA amount, which is a combination of the future medical treatment reviewed by CMS and the future prescription drug costs noted in the submitters cover letter. The parties to the WC settlement must note the total WCMSA amount in the final settlement agreement. Once the final settlement agreement is submitted to CMS' COBC, the claimant and all other parties to the WC settlement can rely on CMS's written opinion regarding whether the WC settlement adequately protects Medicare's interests (Walters, July 2006).*

In the absence of specific guidelines from CMS, both WC carriers and MSA consultants have struggled with the most appropriate mechanism to contain the cost of future prescription drugs while still reasonably considering Medicare's interests in a WC settlement involving future medical benefits. As a result, there are a variety of mechanisms being utilized in the industry today including cost calculation options, use of generic substitutions, pharmacy utilization review, MSA reduction by Medicare Part D co-payments and deductibles as well as other mechanisms. It is unknown if CMS policy, when issued, will support the use of these mechanisms.

### Cost Calculation Options

Prescription drug costs otherwise covered by Medicare Part D may be calculated at Average Wholesale Price, actual charges, or another selected method and the submitter must include an explanation of how the future prescription drug amount was calculated (Walters, December 2005). Some calculation methods currently being utilized include:

#### (1) Average Wholesale Price (AWP)

The AWP was intended to represent the average price at which wholesalers sell drugs to physicians, pharmacies, and other customers. According to the *Red Book*, the pricing information is "based on data obtained from manufacturers, distributors, and other suppliers" (Medical Economics Staff, 2002). AWP is typically

derived from self reported manufacturer data for both branded and generic drugs. Many state Medicaid programs and private health insurers base their reimbursement formulas on a fixed discount from AWP.

### (2) *Workers' Compensation (WC) Reimbursement Rate*

The WC reimbursement rate is determined by the WC statute in the state of claim jurisdiction. Typically, the WC reimbursement rate is higher than the AWP with some exceptions such as California where the WC reimbursement rate is lower than the AWP.

### (3) *Actual Billed Amount*

This is the amount actually billed to, and paid by, the WC primary payer. The amount can be determined by reviewing the primary payer's medication claim payment ledger. The use of this methodology enables payers who have negotiated discounted network rates below the WC reimbursement rate and AWP to utilize these discounted rates when calculating the future prescription drug component of the MSA.

### (4) *Lowest Attainable Cost*

This method involves a search for the lowest cost at which a particular drug can be attained. Some MSA consultants will limit the search to a claimant's geographical location while others will include suppliers located in other geographical locations who deliver by mail to the claimant's location. Some national pharmacy networks that have historically provided pharmacy benefits to WC carriers now offer discounted pharmacy programs to claimants for use with MSA accounts post settlement.

## **Generic Substitution**

Brand-name drugs are substantially more costly than generic equivalents. When utilizing this mechanism, brand name drugs are substituted with generic equivalents whenever available.

## **Pharmacy Utilization Review**

If a particular case appears to fall outside standard practice guidelines without documented justification, a pharmacy utilization review is becoming a popular mechanism to attempt to support a more appropriate MSA

future prescription drug projection. Utilizing this mechanism involves a licensed pharmacist review of the medical records, prescription drug utilization and prescribing patterns with attention to the use of multiple drugs in the same class, use of contraindicated drugs, potential drug interactions, availability of less expensive alternatives, etc. The MSA consultant may utilize the pharmacist's recommendations to support MSA future prescription drug projections.

## **MSA Reduction by Medicare Part D Co-Payments and Deductibles**

Perhaps the most controversial of the mechanisms currently being used when projecting future MSA Medicare Part D prescription drug costs is the reduction of these costs by the Medicare Part D annual deductible and co-payment amounts.

Those in favor of the use of this mechanism argue that the MSA is for injury related medical and prescription drug expenses that are otherwise covered by Medicare. Therefore, since the Medicare Part D co-payment and deductible amounts are not covered by Medicare, they should not be included in the MSA. Additionally, it is argued that if the claimant exhausts the funds in the MSA account and turns to Medicare Part D for coverage, the claimant will be required to pay the Medicare Part D deductible and co-payment amounts from non-MSA funds prior to Medicare making payment. If the deductible and co-payment amounts are included in the MSA funds, the claimant could be subject to payments equivalent to a double deductible and co-payment amount. This is particularly of issue when the MSA is being funded annually via a structure.

Those against the use of this mechanism argue that CMS has not historically allowed future Medicare Part A and B medical costs to be reduced by deductible and co-payment amounts and therefore it is anticipated that CMS will not support this mechanism when it ultimately issues policy. Additionally, it is argued that this mechanism will complicate administration of the MSA as the claimant may be required to utilize non-MSA funds to pay for the equivalent of the Medicare Part D deductible and co-payment amounts before utilizing the MSA funds for these prescription drug costs.

## Sample Medicare Part D Reduction

*The following is an example of how an MSA is reduced by Medicare Part D deductible and co-payment amounts. The example case involves a claimant with a 10 year life expectancy and a future Medicare Part D prescription drug projection of \$58,000.*

**Step 1-** Determine the total estimated future prescription (RX) drug costs otherwise covered by Medicare Part D for the claimant's life expectancy (or commutation period if less than life expectancy). (*Example case: \$58,000*)

**Step 2-** Divide the total future RX drug cost in Step 1 by the life expectancy (or commutation period) to obtain the annualized RX drug cost. (*Example case: \$58,000 total RX drug cost divided by 10 year life expectancy = \$5,800 annualized RX cost*)

**Step 3-** Calculate the total annual deduction allowance for each coverage category below:

Coverage Category	Formula	Example of annual deductions in case with annual RX drug cost of \$5,800
a. Deductible	Deduct 100% of the first \$265 of annual RX drug cost (Maximum deduction of \$265)	\$ 265
b. 25% Co-Pay	Deduct 25% of annual RX drug cost between \$265 and \$2,400 (Maximum deduction of \$533.75)	\$ 533.75
c. 100% Co-Pay	Deduct 100% of annual RX drug cost between \$2,400 and \$5,451.25 (Maximum deduction of \$3,051.25)	\$ 3,051.25
d. 5% Co-Pay	Deduct 5% of annual RX drug cost over \$5,451.25 (No maximum)	\$ 17.43 (5% of \$348.75)
Total Annual Deduction	Add deductions in coverage categories a-d to obtain total annual deduction	\$3,867.44

**Step 4-** Subtract the total annual deduction amount in Step 3 from the annualized RX drug cost in Step 2 to obtain the adjusted annual RX drug cost. (*Example case: \$5,800 minus \$3,867.44 = \$1,932.56*)

**Step 5-** Multiply the adjusted annual RX drug cost by the life expectancy to obtain the total cost of RX drugs to be included in the future MSA Medicare Part D projection. (*Example case: \$1,932.56 multiplied by 10 year life expectancy = \$19,325.63*)

Utilizing this mechanism, the MSA Medicare Part D projection in the example case was reduced from a total of \$58,000 to a total of \$19,325.63.

## Other Mechanisms

Other mechanisms utilized when projecting future MSA Medicare Part D prescription drug costs include the use of a rated age, professional judgment, intervention with the prescribing physician, and exclusion of drugs not covered under Medicare Part D.

### (1) Rated Age

CMS currently permits the use of a rated age to reduce the life expectancy of a claimant for the purpose of calculating the MSA. A rated age is typically obtained from a life company via a structured settlement consultant. The life company utilizes a medical underwriter to review the medical records and determine the rated age.

The reduction of the claimant's life expectancy through the use of a rated age can significantly reduce the number of years over which the Medicare Part D prescription drug costs will be projected and therefore reduce the total projected amount. A rated age may be utilized whether or not the MSA will be funded by structured payments.

### (2) Professional Judgment

Professionals completing MSAs should use their best professional judgment to project future prescription drug use. It is a generally accepted practice when projecting future medical costs that if a definitive medical procedure, surgery, or treatment program is projected for the future, the professional will make the assumption that the procedure, surgery or program will be successful and adjust future medications accordingly.

### (3) Intervention with Prescribing Physician

When the anticipated frequency and duration of future prescription drugs is not apparent based upon review of the medical records, it may be appropriate to obtain this information in writing from the prescribing physician so that drugs are not projected over the entire life expectancy inappropriately.

### (4) Exclusion of Drugs not Covered Under Medicare Part D

The MSA should only include future prescription drugs that would otherwise be covered by Medicare Part B and Part D. MSA consultants as well as the WCRC may undergo a learning curve regarding which drugs are covered under Medicare Part D. This is further complicated by the fact that there are differences between what drugs will be covered among the various Part D prescription drug plans.

Of the following drugs that are excluded from Medicare Part D plans, barbiturates and benzodiazepines are the most commonly encountered in the treatment of WC injuries. While inpatient drugs are not covered under Medicare Part D, many inpatient drugs are covered under Medicare Part B.

### Drugs Excluded from Medicare Part D

1. Drugs used for anorexia, weight loss, or weight gain
2. Drugs used to promote fertility
3. Drugs used for cosmetic purposes or hair growth
4. Drugs used for the symptomatic relief of cough and colds
5. Prescription vitamins and mineral products, except prenatal vitamins and fluoride preparations
6. Non-prescription drugs
7. Inpatient drugs
8. Barbiturates
9. Benzodiazepines

Until CMS issues written policy regarding the mechanisms that can be utilized when projecting future prescription drugs otherwise covered by Medicare Part D, WC carriers and MSA consultants will continue to struggle with the most appropriate means of reasonably considering Medicare's interests without losing the ability to settle WC claims.

CMS has historically not allowed compromise of the future WC related medical expenses to be included in a MSA proposal. CMS addressed this issue in a 2005 memorandum as follows:

*Some submitters have argued that 42 C.F.R. §411.47 justifies reduction to the amount of a WCMSA. The compromise language in this regulation only addresses conditional (past) Medicare payments. CMS does not allow the compromise of future medical expenses related to a WC injury. (Walters, July 2005).*

With the inclusion of Medicare Part D drug costs, the majority of the anticipated future medical costs will now be included in the MSA projection. Since WC settlements are typically based on a compromise of future costs, the use of some of the above mechanisms may be the only way to settle some WC claims. However, until CMS issues policy, it is unknown how many of the mechanisms discussed will be accepted by CMS in the future.

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## References

Walters, G. (July 11, 2005). *Medicare Secondary Payer (MSP) – Workers' Compensation (WC) Additional Frequently Asked Questions*. Retrieved May 2, 2007 from <http://www.cms.hhs.gov/WorkersCompAgencyServices/Downloads/71105Memo.pdf>

Walters, G. (December 30, 2005). *Part D and Workers' Compensation Medicare Set-Aside Arrangements (WCMSAs) Questions and Answers*. Retrieved May 2, 2007 from <http://www.cms.hhs.gov/WorkersCompAgencyServices/Downloads/123005Memo.pdf>

Walters, G. (July 24, 2006). *Questions and Answers for Part D Workers' Compensation Medicare Set-aside Arrangements*. Retrieved May 2, 2007 from <http://www.cms.hhs.gov/WorkersCompAgencyServices/Downloads/72406Memo.pdf>

Medical Economics Staff, *Red Book, 106th Ed.* (Montvale, N.J.: Thomson Medical Economics, 2002), 169.

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## H.R. 2549: To amend section 1862 of the Social Security Act with respect to the application of Medicare Secondary Payer rules to workers' compensation settlement agreements and Medicare set-asides under such agreements

**H.R. 2549** was introduced on May 25, 2007 as the Medicare Secondary Payer and Workers' Compensation Settlement Act of 2007. This bi-partisan bill, which is a reintroduction of H.R. 5309 from last year, is sponsored by Rep. John Tanner (D-TN) and co-sponsored by Rep. Phil English (R-PA), Tom Reynolds (R-NY) and Chris Van Hollen (D-MD).

The bill attempts to address some of the difficulties and delays currently encountered during settlement of a workers' compensation claim in regard to Medicare Secondary Payer compliance and CMS review of Workers' Compensation Medicare Set-Aside Arrangements.



The bill is in the first stage of the legislative process where it is considered in committee and may undergo significant changes in markup sessions. The bill has been referred to the following committees: House Ways and Means and House Energy and Commerce.

The full text of H.R. 2549 can be viewed at [www.NQBP.com](http://www.NQBP.com).

## Professional Services

### Allocation Services

#### MSA I

Includes MSA allocation, Social Security and Medicare status determination, Medicare conditional payment claim identification and determination of rated age life expectancy.

#### MSA II

Includes all aspects of MSA I above plus a detailed projection of non-Medicare allowable costs to provide a total cost projection.

#### MCP with Free MSA

Apportions both Medicare allowable and non-Medicare allowable future injury related medical costs. Costs are calculated at WC reimbursement rates or rates actually paid, when available, over the rated age life expectancy.

Utilize to set reserves, obtain settlement authority or as a settlement tool now, and receive a free MSA allocation within one year of the MCP report completion date, if needed.

#### Low Dollar Settlement MSA

MSA allocation for total settlements of \$25,000 or less. Does not include Social Security and Medicare entitlement determination, COBC reporting or conditional payment inquiry.

#### Prescription Drug Utilization Review

Includes an independent Pharmacist utilization review and recommendations regarding the most appropriate and cost effective future prescription drug utilization. May provide supporting documentation to justify reductions in future prescription drug utilization in the MSA allocation.

#### Submission of MSA to CMS for Approval

Includes preparation of submission document and all required attachments and ongoing communication with CMS throughout the review process.

#### Submission of \$0 Allocation to CMS for Approval

Includes preparation of submission document and supporting attachments requesting approval of a \$0 MSA allocation in disputed/denied cases, and ongoing communication with CMS throughout the review process.

### Administration Services

#### MSA Custodial Account Administration

Professional administration complies with CMS administration requirements for the life of a MSA account. Includes preparation of individualized Custodial Agreement.

#### MSA Self Administration Support Program

Provides instruction manual, forms, contacts and other resources necessary for self-administration of a MSA account. Includes professional support via our toll-free Help Line for 1-year following account activation. Available in English or Spanish.

#### Medical Custodial Account

Professional administrator provides services to protect, conserve or extend settlement dollars post settlement through network access, discount pharmacy program, care coordination, bill review and payment. May be used in conjunction with a MSA account or stand alone.

### Additional Services

#### Social Security & Medicare Status Determination only

#### Rush Referral (MSA allocation in 1 - 5 business days)

#### Updating a MSA allocation

#### Medicare Conditional Payment Claim Identification

Provides an estimate of Medicare conditional payments

#### Medicare Conditional Payment Claim Negotiation

Includes a review of Medicare's claim and requests removal of inappropriate claims