

MEDICARE NEWS FOR ATTORNEYS

By David A. Bryant
and Gregory A. Benker, Editor

February 2010, Vol. 1, Issue 2

Giving Reasonable Consideration to Expected Beneficiaries

When entering into a lump sum settlement (annuitized or not), the Medicare Secondary Payer (MSP) statute, 42 U.S.C. Section 1395y(b), requires that you give reasonable consideration to Medicare's interests, including expected future medical costs. This should be a factor you consider in every case as, perhaps surprisingly, you may be subject to these rules even if your client is not currently on Medicare.

According to the Centers for Medicare and Medicaid Services (CMS), See 42 CFR 411.46. (Ref: 7/23/01 Memo Q1(c)), you are also required to consider Medicare's interest if there is a "reasonable" expectation that your client will become a Medicare beneficiary within thirty (30) months of the settlement. This naturally leads to the question, what is a "reasonable" expectation? Fortunately, this is not as difficult as it may sound:



4 Questions to Ask EVERY Client

1. Are you currently on Medicare?
2. Are you at least 62.5 years old?
3. Have you applied for social security disability insurance (SSDI) benefits and over 50 years of age as of the date of the alleged onset of disability?¹
4. Do you have any of the following conditions: End Stage Renal Disease, HIV/AIDS, ALS (Lou Gehrig's Disease), or blindness?

If you receive a "yes" answer to any of these questions, then your client has a "reasonable" expectation that they will become a Medicare beneficiary. Medicare's interests must be considered in every case and additionally a CMS-approved Medicare Set-Aside is required if the amount of the settlement exceeds \$250,000. (Ref: 4/21/03 Memo Q2).

However, just because you receive all "no" answers, does not mean you are done considering Medicare's interests. Given the months or years it can take to reach a final settlement these answers can change over time. Ask your client these questions not only at the beginning of the case, but again right before you enter into a settlement. Consider having your client sign a statement with his answers and include it with the settlement documents as evidence that you reasonably considered Medicare's interest.

Consider an NCA (Non-Covered Allocation) with your MSA

By now you are likely familiar with Medicare Set-Aside (MSA) allocations in your Workers' Compensation cases. However, keep in mind that an MSA is designed to protect Medicare's interests, not your client's. When your client transitions from Workers' Compensation insurance to becoming a Medicare beneficiary, do not forget to consider what your client may be giving up as a result.

¹ While the Medicare memo states that your client has a reasonable expectation if they have applied for SSDI regardless of their age, individuals over 50 are particularly likely to be approved for Social Security disability benefits given the Grid Rule 201.00(g).

An MSA typically only addresses inpatient treatment, outpatient treatment and prescription drugs as those are the areas which Medicare will likely cover once the client becomes a beneficiary. However there are a number of covered benefits under Workers' Compensation insurance which most likely will not be covered by Medicare.

What is NOT covered by Medicare

While this list is not intended to be exhaustive, some things that Medicare does not cover are: premiums for inpatient/outpatient treatment²; co-pays and deductibles; prescription drugs not covered by Medicare or those that fall under the "donut hole" which require a 100% co-pay³; claim administration costs if your client requires a professional custodial administrator as a result of brain injury or incompetence; payment of medical care specifically excluded by Medicare⁴; and Medical Transportation costs to name a few.

Factoring these Costs into your Settlement

One way to protect your client is to consider incorporating a NCA (Non-Covered Allocation) with your MSA. An NCA is quite simply an informational document you create with your client to provide an accounting of those expected costs that will not be covered under Medicare.

Not only will this avoid any unwelcome surprises to your clients once they become Medicare eligible, an NCA can be a useful tool during the settlement process to try to avoid shifting these burdens onto the injured worker. While an NCA is currently not required, by documenting these costs, both the client and the opposing party will be fully informed as to the potential impact of the settlement and you can make sure to factor these additional costs into any proposed settlement amount.

David A. Bryant is a founding partner of the law firm of Daley, DeBofsky & Bryant concentrating in Individual Disability Insurance, ERISA Disability, Pension, Social Security Disability, Life Insurance, Medicare/Medicaid and General Insurance Coverage Issues. Mr. Bryant is a graduate of the University of Wisconsin-Madison and John Marshall Law School and has been admitted to the Illinois bar, Northern District of Illinois and Illinois State Supreme Court in 1996, Eastern District of Wisconsin in 1997 and the Seventh Circuit Court of Appeals in 2002. Mr. Bryant is the author of a variety of articles on ERISA and social security matters and speaks nationally on these topics. Mr. Bryant may be reached at dabryant@ddbchicago.com or by phone at (312) 372-5200.

Gregory A. Benker is an attorney with the law firm of Daley, DeBofsky & Bryant concentrating in disability law, insurance law, employment discrimination, Medicare/Medicaid issues and employee benefits litigation, primarily in the areas of disability insurance and health insurance. Mr. Benker is a graduate of Lewis University, earned a Master of Science in Education from Northwestern University and received his Juris Doctor, cum laude from the Loyola University of Chicago School of Law. Mr. Benker was admitted to the Illinois State Bar in 2006, the Northern District of Illinois in 2007, Central District of Illinois in 2008 and the Seventh Circuit Court of Appeals in 2009. Mr. Benker may be reached at gbenker@ddbchicago.com or by phone at (312) 372-5200.

² See <http://www.cms.hhs.gov/apps/media/press/factsheet.asp?counter=3534> for an explanation of premiums for 2010

³ See Medicare Prescription Drug Benefit Manual, available at <http://www.cms.hhs.gov/PrescriptionDrugCovContra/downloads/PDMChapt14COB.pdf>.

⁴ See <http://www.medicare.gov/Coverage/Home.asp> or <http://www.medicare.gov/Publications/Pubs/pdf/10116.pdf>