Workers' Comp

Do You Need a Medicare Set-Aside?

June 5, 2018
10 MIN READ
Author profile image

Deborah Robinson Stewart

National Manager, Medicare Services

Workers' compensation payers are under increasing pressure to consider and protect Medicare's interests when settling claims. In this edition of Inside Workers' Comp, Deborah Robinson Stewart, National Manager of Medicare Services at Genex, breaks down the basics of MSAs and offers insight of when they should be established.

Tom Kerr (TK): Workers' comp payers are under increasing pressure to consider and protect the interests of Medicare when settling claims. This is especially true with claims shifting, which can result in heavy penalties and fines. In this episode, we talk with Deborah Robinson Stewart, national manager of MSA Services at Genex, who helps us better understand how MSAs can assist in meeting these obligations.

Deborah, thanks for joining us.

Deborah Robinson Stewart (DS): Well, thanks for having me today.

TK: So, let's start off. What is a Medicare Set?Aside?

DS: So, in its simplest form, a Medicare Set?Aside is a pool of money that is set aside to pay for future accident? related treatment once a workers' compensation case is settled. It typically applies when a person is a Medicare beneficiary.

TK: And this is considered part of a workers' comp claim ...

DS: It is considered part of a workers' compensation claim. We do have some clients that will ask us to do Medicare Set?Asides for liability claims. At this time, there are no rules in place by Medicare for liability set? asides, but word has it that they're on the horizon.

TK: OK. And when does MSA come into play in a workers' comp claim?

DS: So, typically, when the carrier is about to settle or has settled a file that includes somebody who's a Medicare beneficiary or someone who has, what's been termed by Medicare as, a reasonable expectation of becoming a Medicare beneficiary — and that's somebody who will, by virtue of age or disability status, become a Medicare beneficiary within 30 months of settlement. That's typically when we are referred a case to prepare Medicare Set?Aside allocation.

TK: And, who is a good candidate for an MSA?

DS: So, again, typically, somebody who's a Medicare beneficiary 65 years or older, or somebody who's been adjudicated disabled through the Social Security Disability process. That's when we see those referrals for the Medicare Set?Aside, because the carrier is looking to settle out those files.

And, through the Medicare secondary payer laws, there's a regulation in the Code of Federal Regulation that says that Medicare has to be a secondary payer, not a primary payer. And, therefore, when a work comp case settles, if future medical care is necessary for the individual, the carrier has to take measures to ensure that Medicare remains secondary and that there's some money that's available for that injured worker to pay for their future care.

TK: So, when most think of Medicare, they think of a federal insurance program for people 65 or older. So how would MSA be applicable to say, a 46-year-old, who sustains a catastrophic injury that prevents him from walking?

DS: So, typically, what would happen is a 46?year?old who has some sort of catastrophic injury, like a pallet falls on their foot and has extensive damage, they can't walk, what would normally happen is that person would apply for Social Security Disability benefits.

If they are adjudicated disabled by Social Security and receive Social Security Disability benefits, after 24 months of being on Social Security Disability, they're automatically enrolled into Part A Medicare. And, I say that loosely. That's the typical thing that happens.

There are some other things that are involved. They have to have a strong work history because there's quarters or work credits in the Social Security system. So, you have to pay into the system and work an adequate amount of time, I think it's five out of the last 10 years, to be fully insured or be covered to get Social Security Disability.

But that's typically how it will work, how someone younger would be able to receive Social Security Disability, and then enroll into Medicare and be a younger Medicare beneficiary.

TK: Is the process difficult to obtain an MSA?

DS: No, the process is fairly simple to obtain an MSA. You could contact an MSA vendor. At Genex, what we request is that you provide the injured worker's medical records. We typically use the last two years of treatment records. We use pharmacy records and then the payment history just so that we can align that with the medical records. And we have nurse allocators that will prepare MSA report and provide an allocation of future medical. It's pretty simple.

TK: So, let's talk about the advantages of having an MSA, starting with the injured worker? Why would an injured worker want an MSA?

DS: Well, for the injured worker, I would say one of the advantages is knowing that you're going to have your file settled and there's going to be some money there for you that you can use to pay for your accident?related treatment.

The problem that we have a lot of times is we'll do the MSA for our client, and the case will settle but nobody actually ever explains to the injured worker how they're supposed to handle the funds. And so, they spend the money.

I've had this happen several times where the client will call and say, "Hey, I know you did the MSA for me, and now Medicare is calling me because I used my Medicare card, and now they're sending me a bill. And, what am I supposed to do?"

And, that happens because no one has explained to them that that's the fund, that they're supposed to use to pay for that accident?related treatment.

Now, I get this question all the time, what if they use all the money up and spend it properly towards their medical care? Well, Medicare says if you exhaust all of your funds and you can show them an accounting of how you've spent those funds, then Medicare steps in and will become the primary payer. But, they have to follow the directions.

TK: What about the employer or carrier? Why would they seek an MSA?

DS: So, typically, the employer sees the MSA as, "OK, I've done my due diligence in protecting Medicare." Because, remember the purpose of all this is to protect Medicare's interest, because that's what the Medicare secondary payer law says. And a lot of our carriers or employers have in their guidelines of claim handling that, on these particular cases, if this case meets these particular criteria, "we're going to get an MSA."

We'll have customers and I'll say, "Well, you don't have to get an MSA." MSA is really a tool, it's something that has been constructed to protect Medicare, but Medicare doesn't really say specifically how you have to protect them. Medicare Set?Aside is voluntary. And CMS says that all the time, "You don't have to send it to us. But if you do send it to us, you have to follow our rules."

But, we have a lot of customers who say, "I want to get it done. I want to submit it to Medicare. I want Medicare's blessing on it, and then I'll feel like I've done everything that I need to do to protect Medicare's interest."

TK: So, it seems like you have to answer a lot of questions regarding the MSA. What are employers or injured workers most confused about when it comes to the set-aside?

DS: Well, typically, we don't talk to injured workers directly unless they're unrepresented. Um, but if they're unrepresented, then, we'll answer questions. The questions we typically get is, "what happens if I use all my

money?” So, Genex has an MSA that says, $20,000 is needed over the life expectancy, and CMS says, "OK, we agree with you." And the claimant goes out, has unforeseen circumstances in relation to their injury, like a surgery that wasn't projected, and they end up spending all their money. We explain to worker that once you show CMS that you've spent that money in relation to the work injury, then they will step in and pay.

From the employer or from the carrier, I always get, "Well, my settlement is going to be this number and I'll save $15,000, so I don't need an MSA." And people often will get confused about what CMS says with regard to the guidance for submission and settlement. So, CMS says that if you have a file where you have a Medicare beneficiary, and the total settlement is going to be over $25,000, then we will review that MSA. People get confused because they think, "If I settle under $25,000, then I don't need an MSA."

Well, that's not true. It just means that CMS won't review it. Remember, the purpose of the MSA is to protect Medicare. So, if the person is going to need future medical care, it doesn't matter how much the settlement is. It can be $2. But, as long as the person needs some future care, you should put some money aside. It doesn't have to be necessarily that you have to create the actual report, but you should put some money towards future medical.

I did get a question yesterday, which was very interesting. A client told me that they injured worker was not legal citizen. And the question was, “Do we need to do an MSA for them?” And so, in that particular case, it depends. Individuals with green cards and a Social Security Number can pay into the Social Security System and they can buy into Medicare when they become 65.

But, an individual who is actually here illegally and who does not have a Social Security Number, there's no necessity to do an MSA because they're not here legally, so they don't have a Social Security Number and they're not paying into the system.

TK: Is there any legislation in the pipeline that might change the MSA process?

DS: The one thing that has been talked about is the addition of a process for liability MSAs, which, at this point, CMS has issued proposed rulemaking for liability Medicare Set?Asides and they've pulled it back, and then they've issued again and then pulled it back.

So, everybody's on the edge of their seats trying to see when Medicare is going to come out with this particular process because liability is so much different than workers' compensation, in that you have all these constraints to a case where there's not necessarily money, where there is with workers' comp. With liability, there's no money until their file settles, and then you have things like comparative fault and contributive fault.

And so, with MSA, you could have somebody who's injured and it's a severe injury, say for a car accident and the policy limits for the entire auto policies they're involved is $100,000, but the medical far exceeds that. So, how do you put a catastrophic injury into an MSA where the money is only $100,000?

So, that's the kind of the thing that CMS has been struggling with in trying to figure out how we do an MSA for a liability, and that's why we've seen the back and forth — they'll issue rules and then propose rules and then they'll pull them back. So, that's the only thing that I see right now that's coming down the pike.

CMS is also addressing opioids. I handled a case not too long ago where the initial work injury was in 1988 and the person had been taking some form of opioids for at least 15 of the 20 years that he had been injured.

And so, it's just interesting that we're now just addressing this, and then there's a disconnect in CMS that, the larger Medicare is addressing opioid where the, smaller piece that handles Medicare Set?Asides is still allowing

the contractor to allocate opioids over life expectancy.

So, that's a real disconnect, and it's something that's being addressed by the Medicare Set?Aside industry. The organization NAMSAP (National Alliance of Medicare Set-Aside Professionals) have taken things to the Hill and made some congresspersons aware of what's going on. So, hopefully, we'll see some changes with regard to that.

TK: Thanks, Deborah. And we look forward to featuring more important topics like yours in our next editions of Inside Workers' Comp. In the meantime, if you'd like to catch up with our episodes, you can find our podcasts on iTunes and Stitcher. Until then, Thanks for listening.

This article is for general information purposes and is not intended to be and should not be taken as legal advice.



©2022 Enlyte Group, LLC.

mitchell | genex | coventry