CMS Publishes WCMSA Reference Guide - Substantive Issues Remain

A new reference guide was posted to the CMS web site on March 29th providing a guide to processes and procedures and CMS interpretation of MSP requirements as applied to the voluntary WCMSA submission process. The link to the reference guide is http://www.cms.gov/Medicare/Coordination-of-Benefits/WorkersCompAgencyServices/Downloads/March-29-2013-WCMSA-Reference-Guide-Version-13.pdf

According to CMS, the guide reflects information compiled from all WCMSA Regional Office (RO) Memorandums issued by CMS, and from information provided on the CMS website. However, CMS advises that for comprehensive explanations readers are also referred to the requisite WCMSA RO Memorandum. There are no statutory or regulatory provisions requiring that a WCMSA proposal be submitted to CMS for review.

A number of substantive issues remain that CMS has not changed from previous positions, including appeals of WCMSA future medical amounts, treatment of compromised settlements and many more. Below are selected quotes of interest.

4.2 When Establishing a WCMSA is Not Necessary
It is unnecessary for the individual or beneficiary to obtain CMS approval for a proposed WCMSA amount if **all** of the following are true:

a) The facts of the case demonstrate that the injured individual is only being compensated for past medical expenses (i.e., for services furnished prior to the settlement);
b) There is **no evidence that the individual is attempting to maximize the other aspects of the settlement** (e.g., the lost wages and disability portions of the settlement) to Medicare's detriment; and
c) The individual's treating physicians conclude (in writing) that to a reasonable degree of medical certainty the individual will no longer require any Medicare-covered treatments related to the WC injury. However, if Medicare made any conditional payments for WC-related services furnished prior to settlement, then Medicare will recover those payments.
In addition, Medicare will not pay for any WC-related services furnished prior to the date of the settlement for which it has not already paid.

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15.2.1
Compromise of Future Medical Expenses
CMS does not compromise or reduce future medical expenses related to a WC injury. 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. The CMS does not allow the compromise of future medical expenses related to a WC injury. In addition, CMS has no process to accept upfront cash payments in lieu of a CMS reviewed WCMSA.

16.0
Re-Review
When CMS does not believe that a proposed set-aside adequately protects Medicare's interests, and thus makes a determination of a different amount than originally proposed, there is no formal appeals process. However, there are several other options available.
If the WCMSA is not approved on re-review and the case is settled, CMS will not recognize the settlement. Medicare will not pay for the medical expenses related to the injury or illness until WC settlement funds expended for services otherwise reimbursable by Medicare exhaust the entire settlement. At this point, when Medicare denies the beneficiary's claim, the beneficiary may appeal that denial through Medicare's regular administrative appeals process. CMS will send you information on your appeal rights whenever it denies a claim.

The reference guide may be helpful for those considering whether to submit WCMSA proposals for review, but careful review of the underlying memos is advised as additional detail is often needed in submissions that is not specifically in the reference guide. Also, the reference guide does not address many substantive issues that may need to be addressed on appeal in court proceedings or through legislation.

We continue to review this latest reference guide as we work on legislation which we expect to be introduced this year by Rep. Reichert.