

March 28, 2014

Department of Health and Human Services
Centers for Medicare and Medicaid Services
Financial Services Group
7500 Security Boulevard, Mail Stop C3-14-16
Baltimore, Maryland 21244-1850

Re: Comments on Proposed Expansion of the Workers' Compensation Medicare Set-aside Re-Review Process

Thank you for the opportunity to provide comments in response to the Proposed Expansion of the Workers' Compensation Medicare Set-Aside Arrangement (WCMSA) re-review process that was posted on the CMS Office of Financial Management web site on February 11, 2014.

UWC – Strategic Services on Unemployment & Workers' Compensation is a national non-profit membership organization representing business in workers' compensation policy and legislative advocacy.

We are pleased that CMS has taken the initiative to expand the re-review process and to provide stakeholders in the process an opportunity to provide comments in establishing the new policy.

We agree that the current limited re-review policy is not sufficient in providing a method by which to assure that WCMSAs are accurately determined. Expansion of the circumstances under which a re-review may be requested and setting the time frames for completion of these reviews will improve the accuracy of the amounts set-aside and the timeliness of determination that are critical to finalizing workers' compensation settlements. With this in mind we submit the following comments.

- 1. The circumstances under which the parties to a workers' compensation settlement may request a re-review of a WCMSA should not be limited as proposed.**

The determination of the amount of a workers' compensation settlement amount is made under the applicable workers' compensation law, and may be amended or re-opened at any time as limited by the applicable workers' compensation law. CMS and its contractor should be prepared to adjust the WCMSA accordingly to be consistent with the determination under workers' compensation law.

The total settlement amount may be adjusted, the treatment plan may be changed, the prescription drugs and dosage to be taken may be changed under the applicable workers' compensation law. The WCMSA should be determined in

accord with the applicable workers' compensation law with flexibility on the part of CMS to make the necessary modifications at any time upon request of the parties to the settlement.

The option to submit a request at any time should not be limited to mathematical errors or when original submissions included case records for another beneficiary.

2. The time frame within which CMS is to re-review requests should be clear in defining the number of business days in which the reviews are to be completed and a re-review determined.

Business days should be clear not to include weekends and federal holidays and also to be clear about how days when the government is closed are to be counted. There were a number of snow days in 2013 and 2014 that could have affected the response time for reviews.

3. The time for re-review after initial review should not be limited to 180 days.

In many cases future medical treatment plans contemplate a lifetime of treatment that may change with changing circumstances. The process of determination under the applicable workers' compensation law may include a final determination with respect to indemnity payments but leave future medical open for a number of years pending additional medical information.

An artificial time within which there may be a re-review should not be set based on a number of days after a CMS determination, but based on the finality of the settlement under the applicable workers' compensation law in conjunction with the initially approved WCMSA, recognizing that modifications may be made after initial approval due to changes of law and fact.

It may be a better approach to set a regular time after final workers' compensation settlement and initial WCMSA determination, while also providing for changes due to changed circumstances without a formal re-review process.

4. Re-reviews should not be flatly prohibited because a case has not yet been finally settled in total.

In the event that there has been a workers' compensation settlement proposed by the parties contingent on the determination of a WCMSA amount by CMS, the workers' compensation may not be final, but there may be a need for revision of the proposed settlement in whole or in part in light of the WCMSA amount, or there may be a need to modify the WCMSA amount to be in line with the proposed settlement.

Workers' compensation settlements may also be re-opened under workers' compensation law and a revision may be needed to the WCMSA accordingly.

5. There should be no limit on the submission of re-reviews based on whether there was a prior re-review submitted.

The goal of the process should be to determine the appropriate WCMSA and not to sanction those who may seek multiple re-reviews. CMS can certainly determine that re-reviews are not needed without artificially cutting off proposed re-reviews with merit.

Obviously, there should be recognition of process abuse in the submission of re-reviews, but a flat limitation may result in an inaccurate determination and hardship for an injured worker or the other parties to the settlement.

6. There should be no threshold below which a re-review may not be submitted.

Each settlement includes a different mix of costs to be covered, including attorney fees, conditional payment recovery, indemnity payments, and future medical that may be provided for in cash maintained in an individual's bank account or through an annuity. The valuing of the change amount can not only be difficult given the time over which a change in future medical may be in effect, but it may also result in the denial of Medicare medical benefits to which the individual should be entitled.

7. The reasons for which a re-review may be sought should not be limited.

It may be helpful to recognize a list of common issues that may be the subject of re-reviews to assist in streamlining responses and consistency in administration. The list provided in the proposal is helpful as guidance in identifying these for the parties to a settlement.

However, the determination of whether there should be a re-review or modification of the WCMSA rests first with the determination of the workers' compensation settlement under the applicable workers' compensation law.

8. Re-reviews should be conducted by an expert independent authority

An independent review by a party other than the contractor is needed to assure that the re-review process is viewed as credible. The current process CMS and contractor selected cases for re-review has led to confusion about the circumstances under which a re-review may be conducted. An independent and open process adds credibility and accountability.

In addition, the independent authority should rely on individuals who are clearly qualified and expert in review of workers' compensation laws and application.

9. Appeals of re-reviews should be available in all cases without discrimination by an independent authority.

There is value in the statement in the proposal indicating the kinds of cases in which CMS may choose to have the re-review elevated to a CMS regional office. However, the exercise of discretion by CMS in determining which cases are to be reviewed creates distrust among the parties seeking review about the standards being used to decide the cases to review, results in a lack of uniformity of administration, and results in the inequitable results and the denial of Medicare entitlement to injured workers.

Certainly a failure by the WCRC contractor to adhere to court findings would be grounds to elevate a re-review to an independent authority but also grounds for direct legal action in federal court.

Identifying "policy disputes" as a reason to elevate a re-review is so broad a standard as to apply to most cases.

Cases in which a "carrier maintains Ongoing Responsibility for Medicals for treatment that has been included in an approved WCMSA" is also a very broad standard.

Broad standards are helpful in assuring that re-reviews may be elevated, however, they may also result in distrust if some of those requested to be elevated are not accepted by CMS.

Conclusion

We recognize that it may be difficult to administer a complicated review process for all potential submissions with a limited contract staff and limited dedicated resources. However, a process that has such a significant impact on injured workers, employers and workers' compensation plans should be designed to assure timely reviews and appeals to assure that the appropriate WCMSA is determined, the workers' compensation law and Medicare Secondary Payer statutes are properly followed and there is evenhanded administration under the law for all parties to workers' compensation settlements.

Sincerely,

Douglas J. Holmes
President

UWC – Strategic Services on Unemployment and Workers’ Compensation
910 17th Street, NW, Suite 1070
Washington, DC 20006
202-223-8904
holmesd@uwcstrategy.org