

Preservation of Medicare Benefits & Medicare Set Asides

Introduction

If an injury victim is covered by Medicare, then the Medicare Secondary Payer (MSP) statute is implicated. The MSP is a series of statutory provisions enacted during the 1980s as part of the Omnibus Reconciliation Act with the goal of reducing federal health care costs. The MSP provides that if a primary payer exists, Medicare only pays for medical treatment relating to an injury to the extent that the primary payer does not pay. CMS, the agency that administers the Medicare program, has interpreted the act to require personal injury victims to consider Medicare's "future interest". What this means is considering whether a Medicare Set Aside should be created. Below is an overview of set asides and the considerations for creating one. Synergy's experts in its Medicare Secondary Payer Compliance group can guide you through the decision making process about whether or not to create a set aside.

What is the legal basis for why I should consider a Medicare Set Aside?

"Section 1862(b)(2)(A)(ii) of the Social Security Act precludes Medicare payment for services to the extent that payment has been made or can reasonably be expected to be made promptly under liability insurance. This also governs Workers' Compensation. 42 CFR 411.50 defines liability insurance. Anytime a settlement, judgment or award provides funds for future medical services, it can reasonably be expected that those funds are available to pay for Medicare covered future services related to what was claimed and/or released in the settlement, judgment, or award. Thus, Medicare should not be billed for future services until those funds are exhausted by payments to providers for services that would otherwise be covered by Medicare."

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What is a Medicare Set Aside?

A Medicare set aside (hereinafter MSA) is a tool that allows an injury victim to preserve Medicare benefits by setting aside a portion of the settlement money in a segregated account to pay for future Medicare covered medical services. The funds in the set aside can only be used for Medicare covered expenses related to your personal injury settlement, award or judgment. Once the set aside account is exhausted, you get full Medicare coverage without Medicare ever looking to your remaining settlement dollars to provide for any Medicare covered health care. Medicare may approve the amount to be set aside in writing and agree to be responsible for all future expenses once the set

aside funds are depleted. However, there is no requirement for Medicare to review and approve the set aside amount. Many regional offices for Medicare refuse to review/approve set asides so it may be impossible to get written approval. If the settlement is a Workers' Compensation settlement, then they are reviewed and approved.

Who needs an MSA and why do you need one?

If you are currently a Medicare beneficiary and you settle your case you may want to consider doing an MSA. In addition, if you are not a current Medicare beneficiary but have a "reasonable expectation" of Medicare enrollment within 30 months of the settlement date then you may want to consider establishing an MSA. Assuming you fall into one of these two categories, if you do not set up an MSA you could lose Medicare eligibility for your accident related, medical conditions.

Who determines the amount set aside?

A professional who specializes in "allocations" examines your injury related medical records and makes recommendations based on the amount of future care that will be covered by Medicare. The company hired to perform the allocation determines how much of your future medical care is covered by Medicare and then multiplies that by your remaining life expectancy to determine the suggested amount of the set aside. Medicare does not necessarily simply accept the allocation recommendation. Medicare could require more to be set aside than the amount suggested in the MSA allocation; although, that is a rare occurrence outside of Workers' Compensation settlements.

How is the Set Aside funded?

The set aside can be funded with a single lump sum out of the settlement proceeds or with future periodic payments using a structured settlement. A single lump sum funding makes the set aside easier to administer but means more must be set aside than using a periodic payment arrangement. Funding with future periodic payments via a structured settlement makes the administration of the set aside harder but it is a much cheaper way of funding the set aside. When a set aside is funded with a lump sum, as soon as the account is exhausted Medicare begins to pay for injury related health care. However, when a set aside is funded with periodic payments via a structured settlement annuity it functions much like a yearly insurance deductible. Each year, the structure payment would flow into the set aside and when the funds are exhausted in that year Medicare would begin paying for services related to the physical injury. If the funds are not all spent in the year the periodic payment is made they carry over to the next year. Thus, Medicare only pays once all funds for any given year have been exhausted.

Why is a rated age with a structured settlement so important to my MSA?

Age ratings can save on the cost of the structured settlement annuity and reduce the amount of the set aside. A rated age is a life expectancy adjusted age used to calculate the cost of a structured settlement. If you receive a rated age it means that the life insurance company has decided that your life expectancy is less than normal due to your medical conditions and accordingly allows the annuity to be priced as if you were older. Shortened life expectancy translates into a lower structured settlement cost when compared to a structured settlement priced with normal life expectancy. Additionally, CMS considers a reduction in life expectancy when determining how much must be set aside. As evidence of reduction of life expectancy, CMS will look at the median age rating issued by the life insurance companies issuing age ratings. Therefore, not only does it cost less to fund a set aside with a structure but it also reduces how much must be set aside in the first place.

Why should I fund my MSA with a structured settlement annuity?

There is a cost savings by purchasing a stream of benefits today that will provide benefits tomorrow especially if there is a rated age. What this means is that less money must be set aside when a structure is used to fund the set aside. In addition, interest earned on the funds in the structured settlement is not taxable. The structure becomes a tax free, cost free investment to fund the set aside. CMS routinely approves set asides being funded with structured settlement annuities and mentions their use in their memorandums regarding MSAs.

If I am not yet eligible for Medicare, can I use the MSA funds?

For those who are not yet Medicare beneficiaries, the MSA may be used prior to becoming a beneficiary because the amount of the set aside was based on the date of the expected settlement. Use of the MSA is limited to services that are related to the personal injury conditions and that would be covered by Medicare if the injury victim were a Medicare beneficiary.

Will the MSA also protect my Medicaid eligibility?

No. An MSA only protects future Medicare eligibility. If you receive Medicaid in addition to Medicare, a special needs trust (hereinafter SNT) might be necessary to preserve Medicaid eligibility. If it is necessary, a hybrid MSA/SNT can be created to deal with this issue.

If I am no longer entitled to Medicare can I withdraw funds from the MSA?

No. You are not entitled to release of the MSA funds if you lose your Medicare entitlement. However, the funds in the MSA may be expended for medical expenses specified in the MSA arrangement until Medicare entitlement is re-established or the MSA is exhausted.

How is the Medicare Set Aside account administered?

CMS guidelines indicate that the set aside funds may be either professionally administered or self-administered. Professional administration fees are funded with a structured settlement annuity. It should be noted, the guidelines are the same, whether or not the MSA account is self-administered or professionally administered.

What are my options for a professionally administered Medicare Set Aside account?

If you are considering professional administration, you have several options. Most professional administrators of set asides provide the service through a custodial arrangement or trust agreement. A custodial arrangement is an agreement under which a nominee or registered owner holds an asset or property as a custodian on behalf of an actual owner (beneficial owner). These custodial arrangements are contractual agreements and do not create the same level of fiduciary obligation on the part of the administrator as is possible with a trust. Typically, custodians do not need any type of licensure whereas trust companies or banks do, which is another layer of protection for your MSA funds.

Setting up the MSA Bank Account

You must deposit your MSA money from the settlement in its own account, separate from any other accounts you may have. You will use the funds from this account to pay your future medical treatment and prescription costs related to the WC injury. It must be an account that earns interest, and should be insured by the Federal Deposit Insurance Corporation (FDIC). We also recommend an account that does not charge fees when you have a low balance, and that you can write checks from easily.

What medical and prescription expenses can I pay for from this account?

Once your MSA account is set up, you can only use it to pay for medical treatment or

prescription drugs related to your accident related claim, and only if the expense is for a treatment or prescription Medicare would cover. This is true even if you are not yet a Medicare beneficiary (not yet enrolled in Medicare). Medicare-covered services generally include inpatient care in hospitals and skilled nursing facilities, hospice care, home health care, doctor and health care providers' services, outpatient care, and durable medical equipment. Some prescription drugs are also covered, under Medicare Part A, B, or D—check with your Medicare prescription drug plan to be sure. For an extensive list of services covered and not covered by Medicare, get a copy of the booklet “Medicare & You” from your Social Security office, or see <http://www.medicare.gov/medicareand-you/medicare-and-you.html> to get a copy electronically. If you have a question regarding Medicare's coverage of a specific item, service, or prescription drug, please call 1-800-MEDICARE (1-800-633-4227) or visit Medicare's website at <http://medicare.gov/>, where you can search for the item, service, or drug to see if it's covered.

What do you tell your health care providers?

Before you get treatment for your accident-related injury, you must advise your health care providers about your MSA. Your health care providers should bill you directly, and you should pay them out of your MSA account, if:

- The treatment or prescription is for the accident related injury, and
- The treatment or prescription is something Medicare would cover.

Who should my health care providers bill?

If your health care providers mistakenly bill Medicare for your accident-related treatment, remind them to bill you directly so you can pay them from your MSA account. Your health care provider is responsible for refunding any payments received from Medicare for bills related to treatment of the accident related injury.

What if my health care provider is also treating me for other problems?

If your health care provider is also treating you for conditions not related to your injury, be very certain that you do not pay for such treatments using your MSA account. Use other insurance, including Medicare or your own funds. If you are not certain whether a treatment is related to your accident related injury, ask your health care provider.

Reviewing and paying your bills

You should review the bills your health care providers send you to make sure they are billing you only for those items and services both related to your accident and covered by Medicare. If the bill meets both conditions, you can pay it from your MSA account.

Record keeping

You will need to keep clear and accurate records of everything you do with the MSA account. Medicare will use these records to determine if the account funds were spent properly. We recommend that you record your settlement date, diagnosis or injury, and date of injury. For each transaction with the account, please keep track of:

- Transaction date
- Check number (if any, or transaction number if present)
- “Payable to” or health care provider name
- Date of service
- Description (procedure, service, item received; deposit; interest; other allowable expense)
- Amount paid
- Any deposit amount
- Account balance

Keep an itemized receipt or other proof of each payment made. Also, keep bank statements and tax records. You will not submit these records annually, but Medicare may request them as proof that you are using the account correctly.

Can I borrow money from my Medicare Set Aside account?

No, you cannot borrow money from your account, unless you do not plan on using Medicare in the future.

Accounting and attestation of the MSA account

The set aside administrator must maintain accurate records of all expenditures from the Medicare set aside account. Using an exclusive debit card is an easy way to keep an accurate accounting. Anytime you treat with a provider, you simply use the debit card to pay for the qualified medical expense. If the account balance ever gets down to zero, you can print out the bank statements to send to Medicare.

The administrator must submit a final accounting ledger within 60 days of the MSA funds being depleted. The annual and final accounting should include evidence of all the expenditures from the Medicare set aside account. For liability MSAs, the accounting only has to be done upon the account balance reaching zero. In worker’s compensation cases, there are annual reporting requirements. The purpose of these account filings is for Medicare to confirm the MSA funds have been spent appropriately.

Once an MSA account has been completely exhausted and assuming the funds have been spent properly, plaintiff has met the obligation to protect Medicare's interests. At that point, injury related medical bills can be submitted to Medicare again and the plaintiff should send a final attestation to Medicare as proof the funds were spent appropriately. The current address for sending final accounting for a set aside account is:

Medicare Secondary Payer Recovery Center
Attention: MSP-Medicare set aside Reconciliation (NGHP)
P.O. Box 138832
Oklahoma City, OK 73113

What happens to the funds in the MSA should I pass away?

The MSA funds, either in lump sum or structured settlement (if guaranteed), would go to your beneficiaries under the MSA arrangement. Medicare only requires the funds to be used for your future Medicare covered injury related expenses. Therefore, once you pass away those funds can flow to your family or named beneficiary. If a structured settlement is set up and you want money to go to your family or named beneficiary, you should request that the annuity be "guaranteed" instead of life only.

Source: Self-Administration Toolkit for Workers' Compensation Medicare Set-Aside Arrangements (WCMSAs) For WCMSAs Approved by the Centers for Medicare & Medicaid Services (CMS) Version 1.1 January 5, 2015

<https://www.cms.gov/medicare/coordination-of-benefits-and-recovery/workers-compensation-medicare-set-aside-arrangements/downloads/self-administration-toolkit-for-wcmsas.pdf>