

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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MEMORANDUM

DATE: July 24, 2006

FROM: Director
Financial Services Group
Office of Financial Management

SUBJECT: Questions and Answers for Part D and Workers'
Compensation Medicare Set-aside Arrangements

TO: All Regional Administrators

This memorandum **supersedes** the Part D and Workers' Compensation Medicare Set-aside Arrangements (WCMSA) memorandum that was published on December 30, 2005. It includes policy regarding the inclusion of future prescription drug treatment costs/expenses in WCMSAs.

NOTE: References to prescription drugs in this document are limited to those prescription drugs that are for the treatment of the Workers' Compensation (WC) related injury(ies) and/or illness(es)/disease(s), (hereinafter referred to as "WC injury") and those where Medicare provides coverage.

Question 1: What is the Centers for Medicare & Medicaid Services' (CMS) policy regarding the inclusion of prescription drugs in WCMSAs with the implementation of the MMA?

Answer 1: All WC settlements that occur on or after January 1, 2006 must consider and protect Medicare's interests when future treatment includes prescription drugs along with the future medical services that would otherwise be reimbursable by Medicare. The recommended method to protect Medicare's interests is to include a WCMSA as part of the WC settlement. However, if the WC claim settled prior to January 1, 2006, the WCMSA proposal does not need to include an amount for future prescription drug treatment.

Question 2: How does CMS define a WC “settlement”?

Answer 2: A WC “settlement” is an executed settlement agreement that is approved by the court of competent jurisdiction for the applicable state.

Question 3: What are CMS’ submission requirements if the WC claim did not “settle” (as defined in Answer 2 above) prior to January 1, 2006?

Answer 3: If the WC case did not “settle” (as defined in Answer 2 above) prior to January 1, 2006 and the WCMSA proposal is received by CMS’ Coordination of Benefits Contractor (COBC) on or after January 1, 2006, then the submitter must include separate amounts for future medical treatment and future prescription drug treatment in the cover letter. In addition, the cover letter must include an explanation as to how the submitter calculated the future prescription drug treatment amount (*i.e.*, actual costs, average wholesale price, etc.).

For structured WCMSA proposals, the submitter must also indicate whether any portion of the future prescription drug treatment amount has been included in the initial deposit (*i.e.*, seed money). Per Question and Answer Number 5 of the October 15, 2004 memorandum, the seed money for a structured WCMSA must include a sum equal to the amount of monies calculated to cover the first surgery procedure and/or replacement and two years of annual payments (which must include prescription drug treatment). The remainder of the approved amount should be divided by the remainder of the claimant’s life expectancy (or a shorter defined period of time if CMS has agreed to a shorter time period).

NOTE: The amount for future prescription drug treatment should **not** be a separate annuity from the future medical portion of the WCMSA.

Question 4: What happens if CMS closes its case because the submitter failed to provide requested information in a timely manner?

Answer 4: If the WC case did not “settle” (as defined in Answer 2 above) prior to January 1, 2006, and the submitter provides additional documentation with regard to the closed case on or after January 1, 2006, the case is considered a new WCMSA submission and the requirements included in this memorandum related to: (1) future medical treatment; and, (2) future prescription drug treatment will be applied to the new WCMSA submission.

If the WC claim settled prior to January 1, 2006 and the submitter provides additional documentation with regard to a closed case, the case is considered a new WCMSA submission; however, the WCMSA proposal **does not** need to include an amount for future prescription drug treatment.

Question 5: Should submitters provide an explanation in the cover letter when the claimant has not been prescribed drugs for the work-related injury, illness/disease or if the drugs prescribed are excludable under the MMA?

Answer 5: Yes. Submitters should provide such an explanation in the cover letter when submitting their WCMSA proposals to CMS.

Question 6: Where a WC claim settled prior to January 1, 2006, can the claimant use the WCMSA funds to pay for prescription drug expenses related to the WC injury?

Answer 6: No, the claimant cannot use the WCMSA funds to pay for prescription drug expenses related to the WC injury. If the WC settlement included an allocation for non-Medicare covered medical and/or prescription drug expenses, the claimant must exhaust those funds prior to billing Medicare for prescription drugs. However, the claimant does not have to transfer these funds to the existing WCMSA account or include them in the annual WCMSA accounting. After exhausting these funds, if the claimant enrolls in a Part D plan, Medicare may be billed for prescription drug expenses related to the WC injury, assuming that the claimant does not have any other coverage primary to Medicare.

NOTE: The above questions clarify Question and Answer Number 5 of the July 11, 2005 memorandum.

Question 7: Should submitters include an amount for future prescription drug expenses if the claimant has not enrolled in a Part D plan?

Answer 7: Yes. Claimants who have not enrolled in a Part D plan need to include future prescription drug expenses in their WCMSA proposals if the current treatment records indicate that the claimant has been prescribed drugs and/or may need future prescription drug treatment related to the WC injury.

Question 8: Has CMS' review of WCMSA proposals changed with the implementation of the MMA on January 1, 2006?

Answer 8: The CMS' review of WCMSA proposals has not changed with the implementation of the MMA. The CMS continues to review and independently price for future Medicare-covered medical expenses in WCMSAs in accordance with CMS' published policy memoranda dated: July 23, 2001; April 21, 2003; May 23, 2003; May 7, 2004; October 15, 2004; July 11, 2005; and April 25, 2006.

For a WCMSA proposal received by COBC on or after January 1, 2006, CMS will provide in its written opinion the total WCMSA amount that adequately protects Medicare's interests with regard to the claimant's future medical treatment. However, CMS' written opinion will also note the submitted prescription drug amount. The CMS' written opinion will provide the total WCMSA amount, which is a combination of the future medical treatment reviewed by CMS and the future prescription drug costs noted in the submitter's cover letter. The parties to the WC settlement must note the total WCMSA amount in the

final settlement agreement. Once the final settlement agreement is submitted to CMS' COBC, the claimant and all other parties to the WC settlement can rely on CMS' written opinion regarding whether the WC settlement adequately protects Medicare's interests.

The total WCMSA amount (future medical treatment and future prescription drug treatment) must be deposited in an interest-bearing account. The administrator of the WCMSA must forward an annual accounting, separately identifying the expenditures for the medical treatment and prescription drug treatment, to the Medicare contractor responsible for monitoring the claimant's case. For example, if the total WCMSA amount in CMS' written opinion is \$10,000 (\$7,000 identified for future prescription drug treatment and \$3,000 identified for future medical expenses), then the administrator must forward an annual accounting that separately identifies how much of the \$10,000 was spent for medical expenses and prescription drugs. Exhaustion of the total WCMSA amount is not limited to the separate amounts set-aside for future medical expenses and future prescription drug treatment. As long as the annual accounting shows bona fide payments were made from the total WCMSA account, CMS will consider the account appropriately exhausted. For example, final actual expenditures may be \$6,000 for future prescription drug treatment and \$4,000 for the future medical expenses that may appropriately exhaust the \$10,000 WCMSA.

Question 9: What happens if a WCMSA proposal received by the COBC on or after January 1, 2006, does not include an amount for future prescription drug treatment?

Answer 9: If the cover letter does not include an amount for future prescription drug treatment, and the current treatment records indicate that the claimant has been prescribed drugs and/or may need prescription drugs related to the WC injury in the future, the submitter did not adequately consider Medicare's interests. In such a case, CMS, in its written opinion, will advise the submitter that the parties to the WC settlement have not protected Medicare's interests.

If the cover letter does not include an amount for future prescription drug treatment, and there is no indication in the current treatment records that the claimant will need future treatment with prescription drugs related to the WC injury, then CMS will accept that Medicare's interests have been adequately protected. Medicare will then pay primary for future prescription drugs if the beneficiary has enrolled in a Medicare prescription drug plan and does not have any other coverage that is primary to Medicare.

Question 10: Has CMS published any guidelines about how to price for future prescription drug expenses in WCMSAs?

Answer 10: No. The CMS has not published any guidelines regarding the pricing for future prescription drug expenses in WCMSAs.

Question 11: Should funds for future prescription drug treatment be included in the calculation of the total settlement amount to determine if the WCMSA proposal should be reviewed by CMS?

Answer 11: Yes, the total settlement amount calculation should include an amount for prescription drugs if the future treatment indicates that the claimant has been prescribed drugs and/or may need drugs in the future. As stated in the July 11, 2005 memorandum, the computation of the total settlement amount includes, but is not limited to, wages, attorney fees, *all* future medical expenses, and repayment of any Medicare conditional payments. Payout totals for all annuities to fund the above expenses should be used rather than cost or present values of any annuities. Also note that any previously *settled* portion of the WC claim must be included in computing the total settlement amount.

Current review thresholds for Medicare beneficiary and non-beneficiary WCMSA proposals will remain in effect as stated in the following policy memoranda: July 23, 2001; April 21, 2003; May 23, 2003; May 7, 2004; October 15, 2004; July 11, 2005; and April 25, 2006.

NOTE: Question and Answer Number 11 is not a change in CMS' policy for determining whether a WC settlement that includes a WCMSA meets CMS' review thresholds.

Question 12: Do claimants have to resubmit their WCMSA proposals if CMS already issued a written opinion as to the total WCMSA amount?

Answer 12: No, claimants do not have to resubmit their WCMSA proposals if CMS has already issued a written opinion as to the total WCMSA amount.

NOTE: If the WC settlement occurred prior to January 1, 2006, and the WC settlement included an allocation for future prescription drug treatment, then the claimant must exhaust those funds before Medicare can be billed for those future prescription drugs. For example, if the WC settlement allocates \$5,000 for prescription drugs related to the WC injury, then the claimant must exhaust that amount from the settlement funds before Medicare can be billed for prescription drug costs incurred on or after January 1, 2006. However, the claimant does not have to transfer these funds to the existing WCMSA account or include them in the annual WCMSA accounting.

NOTE: The above note clarifies Question and Answer Number 15 of the July 11, 2005 memorandum.

Question 13: Will CMS begin to independently price for future prescription drug treatment in WCMSAs beginning on January 1, 2007?

Answer 13: No. Beginning January 1, 2007, CMS will not change its current procedures and will not independently price for future prescription drug treatment in WCMSA

proposals. The CMS will provide advanced notification when it plans to begin to independently price for future prescription drug treatment in WCMSAs. The CMS will continue to review and independently price for future Medicare-covered medical expenses in WCMSAs in accordance with CMS' published policy memoranda dated: July 23, 2001; April 21, 2003; May 23, 2003; May 7, 2004; October 15, 2004; July 11, 2005; and April 25, 2006.

/s/

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