

MEMORANDUM

DATE: December 30, 2005

FROM: Director
Financial Services Group
Office of Financial Management

SUBJECT: Part D and Workers' Compensation Medicare Set-aside
Arrangements (WCMSAs) Questions and Answers

TO: All Regional Administrators

Beginning January 1, 2006, Medicare will begin its Part D prescription drug coverage as a result of the implementation of the Medicare Modernization Act of 2003 (MMA). This memorandum includes policy regarding the inclusion of prescription drugs that Medicare will cover as of January 1, 2006, in Workers' Compensation Medicare Set-aside Arrangements (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.

Question 2: Will the submission of WCMSA proposals change with the implementation of the MMA on January 1, 2006?

Answer 2: Yes, the submission of WCMSA proposals will change with the implementation of the MMA on January 1, 2006. For WCMSA proposals received by CMS' Coordination of Benefits Contractor (COBC) on or after January 1, 2006, the cover letter must include separate amounts for: (1) future medical treatment, and (2) future prescription drug treatment. 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.).

Question 3: What happens if a WCMSA proposal received on or after January 1, 2006, does not include an amount for future prescription drug treatment?

Answer 3: 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 will advise the submitter in its written opinion that the parties to the WC settlement may not have 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 4: Will CMS' review of WCMSA proposals change with the implementation of the MMA on January 1, 2006?

Answer 4: The CMS' review of WCMSA proposals will not change until it begins to independently price for future prescription drug treatment for WCMSAs received by the COBC on or after January 1, 2007. Until the review of future prescription drug treatment begins on January 1, 2007, 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; and July 11, 2005.

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. In addition, CMS' written opinion will 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 5: Will the submission of WCMSA proposals change when CMS begins to review and independently price for future prescription drug treatment on January 1, 2007?

Answer 5: When CMS begins to review and independently price for future prescription drug treatment on January 1, 2007, the submitter must include in the cover letter separate amounts for: (1) future medical treatment, and (2) future prescription drug treatment. 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.). Moreover, the submitter must include with the submission a payment history of the prescription drugs paid by the WC carrier, as follows:

- If the injury occurred less than 2 years from the date of the submission, a payment history should include those prescription drugs paid from the injury date through the date of submission.
- If the injury occurred more than 2 years from the date of the submission, a payment history should include the last 2 years of payments for prescription drugs.

The CMS will review WCMSAs that include an allocation for future treatment with prescription drugs based on the required payment history, anticipated future prescription drug treatment information, and Medicare Part D data. If the submitter fails to provide a payment history or the payment history reflects that the WC carrier did not previously pay for prescription drugs indicated for the claimant's future treatment, CMS will independently price the Medicare-covered prescription drugs using CMS information available from current Medicare Part D data.

Question 6: 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 6: 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; and July 11, 2005.

Note: Question/Answer #6 is not a change in CMS' policy for determining whether a WC settlement that includes a WCMSA meets CMS' review thresholds.

Question 7: Do claimants have to resubmit their WCMSA proposals if CMS already issued a written opinion as to the total WCMSA amount?

Answer 7: No, claimants do not have to resubmit their WCMSA proposals, if CMS has already issued a written opinion as to the total WCMSA amount for settlements occurring prior to January 1, 2006, or where the WCMSA review occurred prior to January 1, 2006, the MMA implementation date.

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 prior to billing Medicare 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 billing Medicare 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.

THE ABOVE NOTE CLARIFIES Q/A #15 OF THE JULY 11, 2005 MEMORANDUM.

/s/

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