Medicare Gives Refunds? How Can My Client Get One?

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Repaying Medicare for conditional payments is a necessary but unpleasant process which can result in a greatly reduced net recovery or no recovery at all for an injured Medicare beneficiary. The Medicare Secondary Payer Statute has a repayment formula that is designed to maximize the return of funds to Medicare and provides no consideration for the future well-being of the Medicare beneficiary. The only consideration that Medicare makes in applying its repayment formula is whether or not the amount of the Medicare Conditional Payments is less than, equal to or greater than the gross settlement. (42 C.F.R. 411.37(c); 42 C.F.R. 411.37(d)). Despite Medicare's blind application of the repayment regulations, there is a way for the injured Medicare beneficiary to increase his/her net recovery. This is by way of obtaining a refund from Medicare which sounds crazy, but it works.

In the worst case scenario where the amount of Medicare Conditional Payments is equal to or exceeds the gross settlement, the injured Medicare beneficiary experiences the harshest treatment. In that circumstance, the Medicare beneficiary must return all of their net settlement (after attorney fees and costs) to Medicare, resulting in a zero net recovery to the plaintiff. The regulations provide:

"If Medicare payments equal or exceed the judgment or settlement amount, the recovery amount is the total judgment or settlement payment minus the total procurement costs."

(42 C.F.R. 411.37(d))

This is a situation that is happening with increased frequency as the cost of medical treatment rises and a contracting economy forces many parties to carry only the mandatory minimum limits of insurance coverage. The practical effect of this regulation is seen daily by the attorneys who represent injury victims as they wrestle with the equitable and ethical issues of resolving a policy limits case wherein only the attorneys/Medicare will see any portion of the settlement funds. It may even be the case that the only settlement funds come from the Medicare beneficiary's own Uninsured Motorist coverage. In that case, the injured plaintiff has been paying premiums for insurance coverage just so Medicare and their attorney can be paid in the event they suffer massive injuries. (See 42 C.F.R. 411.50(b) authorizing repayment to Medicare from UIM proceeds).

In an attempt to reduce the unforgiving nature of the repayment formula, many attorneys have looked for ways to ensure their clients see at least a nominal amount of the personal injury settlement. These client centric attorneys often want to reduce or waive their fees and costs once they have received the "Final Demand" from the MSPRC. Despite the good intentions of these attorneys, if they reduce or eliminate their fees without updating the settlement information provided to MSPRC they are committing Medicare fraud. According to the regulations:

"Recovery against the party that received payment—

(1) General rule. Medicare reduces its recovery to take account of the cost of procuring the judgment or settlement, as provided in this section, if—

(i) Procurement costs are incurred because the claim is disputed; and

(ii) Those costs are borne by the party against which CMS seeks to recover."

(42 C.F.R. 411.37(a))

If the costs (including attorney fees) are not borne by Medicare beneficiary then under the above regulation Medicare would not have applied the reduction formula to their demand for repayment. Yet informing Medicare that the attorney has waived fees or costs will only result in Medicare increasing its repayment demand in the same amount, still leaving the injured plaintiff with nothing. This leaves the only option of "gifting" all or a portion of the attorney fees back to the client, which involves its own set of tax consequences and potential ethical quandaries.

As an answer to this problem, Synergy has developed a low-cost way for Medicare beneficiaries to take advantage of seldom used statutes/regulations to obtain a refund of all or part of the funds which were paid to MSPRC in satisfaction of Medicare's "Final Demand." There are three statutory provisions under which Medicare may accept less than the full amount of its Conditional Payment:

1. §1870(c) of the Social Security Act;

2. §1862(b) of the Social Security Act; and

3. The Federal Claims Collection Act (FCCA).

Each statute contains different criteria upon which decisions to waive or compromise Medicare's claim are considered. Additionally, the authority to grant a waiver or compromise under each of these statutes is limited to specific entities. Medicare contractors have authority to consider beneficiary requests for waivers under §1870(c) of the Act. Whereas, authority to waive Medicare claims under §1862(b) and to compromise claims under FCCA, is reserved exclusively to the Center for Medicare and Medicaid Services ("CMS").

MSPRC has the authority to grant full or partial waivers to beneficiaries for whom repayment of Medicare's Conditional Payments would pose a financial hardship. According to the regulations:

"There shall be no recovery if such recovery would defeat the purposes of this chapter or would be against equity and good conscience."

(See, 42 U.S.C. § 1395gg (c), §1870(c) of the Social Security Act; 42 C.F.R. 405.355-356; 42 C.F.R. 405.358; 20 C.F.R. 404.506-512; Medicare Secondary Payer Manual (MSP), Chapter 7 § 50.5.4.4).

In order to apply for this "Financial Hardship" waiver, the Medicare beneficiary must file form SSA-632-BK with MSPRC which documents their financial situation. Synergy also includes in this request a letter drafted by the Medicare beneficiary (not their attorney) explaining the undue hardship that repaying Medicare would cause. These decisions by MSPRC are made on a case by case basis. The MSPRC's manual explains their approach well and provides indicators of whether or not a waiver should be granted.

In addition to a request made to MSPRC for a "Financial Hardship" waiver under §1870(c) of the Social Security Act, Synergy requests a "Best Interest of the Program" waiver direct from CMS under §1870(b) of the Social Security Act. Requests for a waiver under this statute are often overlooked by even the most seasoned attorneys and lien resolution companies. Synergy however understands that the settlement proceeds for which the Medicare beneficiary is fighting to retain is the only source of a recovery for the injuries sustained and must provide for their future needs. Therefore, Synergy vigorously pursues every avenue that can be used to obtain a refund from Medicare. CMS has authority to waive in full or in part Medicare's claim for repayment when it is "in the best interest of the program." This rather vague criteria is nowhere further defined and lies completely at the discretion of CMS.

It is important to note that an evaluation by CMS of a "Best Interest of the Program" waiver is a separate and distinct evaluation than a request for a Compromise under the Federal Claims Collection Act (FCCA). As the stakes are high for the Medicare beneficiary, Synergy always makes both a request for this waiver and a request for a compromise when seeking a refund from CMS of the amounts the beneficiary has already paid to satisfy the "Final Demand."

The third and final method for obtaining a refund from Medicare is a Compromise request made to CMS. Authority to grant a Compromise is granted to CMS under the Federal Claims Collection Act (FCCA). (31 U.S.C. 3711).

The Medicare Secondary Payer Manual compiles the statutory and regulatory sources, articulating the criteria in a straight forward manner as follows:

"[31 U.S.C.3711] gives Federal agencies the authority to compromise where:

- The cost of collection does not justify the enforced collection of the full amount of the claim;
- There is an inability to pay within a reasonable time on the part of the individual against whom the claim is made; or
- The chances of successful litigation are questionable, making it advisable to seek a compromise settlement."

(Medicare Secondary Payer Manual (MSP), Chapter 7 § 50.7.2)

As one can see, there are many things for CMS to evaluate on a case by case basis to determine if the proposed Compromise should be accepted or not. Synergy has developed detailed processes to insure that each relevant factor is brought to the attention of CMS so that the

Medicare beneficiary has the best possible chance for obtaining an acceptance of the offered Compromise.

Obtaining a refund from Medicare of all or part of the funds paid to satisfy the "Final Demand" is not an easy task. It requires intimate knowledge of a variety of statutes, regulations, and the Medicare Secondary Payer Manual. However, it may be the only method by which a severely injured Medicare beneficiary will be able to obtain any portion of their personal injury settlement funds. Synergy has the knowledge and experience to employ all available tactics to obtain a refund for our customers. We also have a successful track record in obtaining substantial refunds for Medicare beneficiaries. We understand the importance of preserving settlement funds for the injured plaintiff and share the client centric mentality of the plaintiff's bar. To that end, Synergy provides a Medicare Lien Resolution Service at a very low up front cost by taking our fee in proportion to how successful we are in obtaining a refund for the Medicare beneficiary (% of savings).