WEIGHING YOUR OPTIONS

Capturing Cost-Containment When Structuring Medicare Set-Aside Allocations

By Duke Wolpert

It is not often that you can utilize a valuable tool at no cost and reap the benefits of significant cost containment and improved outcomes. By structuring a Medicare Set-Aside (MSA), parties can reduce their overall costs and comply with Medicare's policy in this area of compliance.

A recent study, conducted by Ringler Associates, supports that primary payers can save approximately 37 percent of the cost of typical MSAs simply by funding them with structured settlements as opposed to lump-sum payments. As a result, the industry is developing claims best practices that incorporate the use of structured settlement funding when settling claims involving MSA allocations.

While not compulsory, Medicare has taken aim at workers' compensation settlements that close out future medicals since 2001 with the issuance of the Patel Memorandum. Since that time, the Centers for Medicare & Medicaid Services (CMS) has issued myriad subsequent memoranda that culminated in the Workers' Compensation Medicare Set-Aside Arrangement (WCMSA) Reference Guide in 2013. Under current CMS policy, parties can fund an MSA using the following funding methods: payment in a single lump sum or an established structured settlement where payments are made to the account on a defined schedule—an initial deposit, or "seed," representing the first procedure or surgery and two years of expenses plus annual payments for the claimant's anticipated lifetime.

Anticipated Lifetime Annual Payments

A structured settlement is a financial arrangement that involves parties to a personal injury or workers' compensation claim where the claimant settles the case by receiving a lump-sum payment plus additional future periodic payments for a fixed period of time or the claimant's lifetime. In the United States, structured settlements are subject to stringent regulations, which are found in the Internal Revenue Code.

Under the terms of the annuity contract, the claimant receives a specified payment

that is followed by other future payments. These future payments are defined by the terms of the annuity contract and generally fall into the following categories:

- **Temporary Life Annuity** provides an annual MSA payment for the claimant's life expectancy, only if the claimant is living. This is usually the least expensive annuity used in funding an MSA annual payment. The disadvantage of this type of annuity is that the payments stop at the death of the claimant and there is no residual value or payment that can pass to a claimant's beneficiary or as a refund to the employer's insurer. For example, if an insurer pays $75,000 to provide $3,000 per year for 25 years and the claimant dies after one year, the insurer has paid $75,000 for a $3,000 payment. This type of annuity is attractive for small MSA amounts.
- **Life Only Annuity** provides an annual MSA payment for the claimant's lifetime. All payments cease on the death of the claimant. This annuity is usually slightly more expensive than a Temporary Life Annuity. As with a Temporary Life Annuity, all payments cease on the death of the claimant. There is no opportunity for recovery of any funds by the defendant or the possibility of the claimant's beneficiary receiving anything on the death of the claimant.
- **Life with Cash Refund Annuity** provides an annual payment for the life of the claimant and provides a refund of the unused portion of the annuity premium in the event of the death of the claimant. For example, if the insurer spends $100,000 for the annuity and the claimant dies after $50,000 has been paid out, the claimant's beneficiary or the defendant will receive $50,000 upon the claimant's death.
- **Period Certain Annuity** provides an annual payment for the claimant's life expectancy, whether or not the claimant is living. This payment is guaranteed to the claimant's beneficiary or the employer's insurer on the claimant's death. On death, the payments will continue to be paid to the beneficiary (claimant's heirs or the insurer). As an alternative, many life insurance companies that offer structured settlement annuities provide a commutation product that allows the beneficiary or the defendant to receive a lump sum of the commuted value of any remaining payments on the death of the claimant.

Discount for Present Value

Structured settlements reduce MSA costs in two ways. The first is through a discount for present value. Medicare Set-Aside allocations assume funding on a dollar-for-dollar basis with no discount for present value. If the MSA allocation calculates a medical expense to be incurred in 10 years will cost $1,000, Medicare expects $1,000 to be set aside to fund it today. In contrast, a structured settlement involves the purchase of an annuity, guaranteed to pay on a specified date under the terms of the annuity. The annuity earns interest over its term. Within a comprehensive funding arrangement, the cost to fund that $1,000 expense 10 years from now might be around $750 today.

Rated Age

The second way structured settlements save money is through the use of a rated age. Maybe you have seen Internet quizzes that ask you questions and calculate your "biological age" based on your answers. If you are in great physical condition, it will say your biological age is younger than your chronological age. If you smoke or your medical condition includes issues such as cancer, diabetes, asthma, opioid use, or cardiac disease, your life expectancy is calculated to be more like that of someone older than your chronological age.

Life insurance companies that issue structured settlement annuities employ underwriters who will review a claimant's medical records, address comorbidity factors, and issue rated ages. If the payments need to cover a shorter life expectancy, the cost for those benefits is less than for someone with a normal life expectancy.

A structured settlement broker requests rated age determinations from the life insurance underwriters. Multiple rated ages are often requested from various companies.

When using a rated age in an MSA that will be submitted to CMS for approval, it is important to review the WCMSA Reference Guide regarding agency policy. Under existing policy, the following information is required:

- CMS requires rated age confirmation with a WCMSA proposal. This means that the following statement must be included in the submission: "Our organization certifies that all rated ages we have obtained and/or have knowledge of regarding this claimant, and generated at any time on or after the Date of Incident for the alleged accident/illness/injury/incident at issue, have been included as part of this submission of a proposed amount for a Workers' Compensation Medicare Set-Aside Arrangement (WCMSA) to the Centers for Medicare & Medicaid Services." If this language is not included, CMS will reject the submission of rated ages and, instead, estimate the claimant's remaining life expectancy using their actual age.
- A stand-alone statement indicating that all rated ages obtained on the claimant are included.
- Each rated age is presented on company letterhead for each insurance company that made the rating and for each settlement broker that obtained them from the insurance company. (Note: Letterhead includes the name and address of the insurance company or settlement broker.)
- All rated age sources shall be independent in fact and appearance of the submitter, carrier, and claimant.
- If more than one rated age is submitted, CMS will use the median of all rated ages submitted.
- When multiple rated ages are provided, the submitter becomes subject to enforcement of the requirement to use the median rated age and must provide all rated ages to CMS.
- All rated ages shall be accompanied by a written justification on how such age was determined. For example, if a rated age obtained from life insurance companies for like injuries or illnesses is the method of evaluation, include documentation to support the life expectancy using the Centers for Disease Control (CDC) Tables unless documentation from a medical professional provides justification for an alternative projection.

The WCMSA Reference Guide also advises parties on what not to include when submitting a WCMSA with a rated age. This includes the following:

- Actuarial charts or life expectancy charts from the CDC or elsewhere or statements that there are no rated ages.
- Any documents on rated ages that contain redacted data.

Investigating how a structured settlement can reduce the cost of an MSA is strongly encouraged and should be a claims best practice. There is absolutely no cost to any party to use a structured settlement broker to facilitate the effort.

As the study pointed out, finding significant savings through the use of structured settlements will apply to any organization working with MSAs. Clearly, reducing the cost of the MSA component of a settlement can position primary payers to resolve claims and oftentimes offer significant cost containment value. CM

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