February 21, 2014

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-6055-P
P.O. Box 8013
Baltimore, Maryland 21244-8013

Re: Comments on Right of Appeal for Medicare Secondary Payer Determinations

Thank you for the opportunity to provide comments in response to the Proposed Rule published for comment on December 27, 2013. UWC – Strategic Services on Unemployment & Workers' Compensation is a national non-profit membership organization representing business in workers' compensation policy and legislative advocacy.

UWC members include self-insured employers, insurance carriers and third party administrators who may be entities or representatives of entities subject to determinations under Section 1862(b) of the MSP Act (42 U.S.C. 1395y(b).

The proper administration of appeals provisions is a useful tool in not only assuring that Medicare Secondary Payer (MSP) determinations with respect to recovery of conditional payment amounts are accurate but also building confidence on the part of affected entities that they have a right of appeal and a meaningful process and procedure under which their appeals are considered and determined.

In the enactment of the Strengthening Medicare and Repaying Taxpayers (SMART) Act of 2012 congress recognized that amendment was needed to establish a right of appeal for workers' compensation plans (including self-inured employers) to determinations by the Centers for Medicare & Medicaid Services (CMS) and and/or CMS contractors.

The amendment was prompted by the recognition that determinations with respect to recovery of conditional payment amounts were often not accurate, determinations took too long, items or services for which reimbursement was demanded often were not for injuries of illness covered under the applicable workers' compensation plan, and there was no right of appeal for entities that were adversely affected.

The specific language enacted in the Strengthening Medicare and Repaying Taxpayers Act of 2012 (SMART Act) provided as follows:

‘(viii) RIGHT OF APPEAL FOR SECONDARY PAYER DETERMINATIONS RELATING TO LIABILITY INSURANCE (INCLUDING SELF-INSURANCE),NO FAULT INSURANCE,AND WORKERS’ COMPENSATION LAWS AND PLANS.—

The Secretary shall promulgate regulations establishing a right of appeal and appeals process, with respect to any determination under this subsection for a payment made under this title for an item or service for which the Secretary is seeking to recover conditional payments from an applicable plan (as defined in paragraph (8)(F)) that is a primary plan under subsection (A)(ii), under which the applicable plan involved, or an attorney, agent, or third party administrator on behalf of such plan, may appeal such determination. The individual furnished such an item or service shall be notified of the plan’s intent to appeal such determination’’.

Comments

1. **The proposed rules are contrary to the letter of the statute and congressional intent that clearly established a right of appeal that is not limited as proposed by CMS.**

Contrary to the intent and letter of the statute, the proposed rules would exclude determinations by CMS to seek recovery from a WC plan from the determinations that may be appealed.

The proposed rules would amend Section 405.926 (a) (3) to include determinations under MSP provisions of Section 1862(b) of the debtor for a particular recovery claim as actions that are by definition not initial determinations and are **not appealable.**

This is flatly contrary to statutory language which specifically provides for appeal of determinations under Section 1862(b). In interpreting statutory language it is fundamental to avoid absurd results. The proposed rule would result in an entity being permitted to appeal the amounts for items and services for which conditional payment recovery is being sought, but not the determination as to whether the entity was subject to demand for recovery in the first place.

The very caption of the appeals section indicates a “right of appeal for secondary payer determinations”.

Contrary to the intent and letter of the statute, the proposed rule would limit the right of appeal to those instances in which Medicare is “pursuing recovery directly from an applicable plan”.

There is no such limitation provided by statute. The right to appeal is provided whether recovery is sought directly or indirectly.

The proposed rules would amend Section 405.924 in defining initial determinations that are subject to appeal to when "Medicare is pursuing recovery directly from an applicable plan".

The right of appeal should not be limited so as to deny the right of an entity to pursue appeal when there are multiple parties that may be liable for some or all of the reimbursement being sought or when the liability for recovery from the workers' compensation plan may be primary in relation to Medicare, but secondary to other parties from which recovery may also be sought.

The intent of the statute and plain language of the statute indicate that the right of appeal is not limited based on the method by which the Secretary chooses to pursue recovery. The statute provides broader authority to protect the rights of entities to appeal when they are adversely affected by determinations under the applicable provisions of the MSP statute.

2. **The proposed rules should more clearly specify that appeals are subject to judicial review**

By amending the provisions of the existing regulation pertaining more generally to beneficiaries, providers of services and suppliers, the proposed rules could be read in concert with other rules to limit judicial review.

Section 405.904 provides general procedures for Medicare initial determinations, redeterminations and appeals. Subsection (b) of the section in describing "Non-beneficiary appellants" limits the rights of providers to judicial review.

Section 405.904 and Section 405.906 address the general process of determinations and appeals through administrative appeals to judicial review. Although there is an addition to Section 405.906 which describes the circumstances under which applicable plans are considered to be parties to initial determinations, redeterminations, reconsiderations, hearings and reviews, there is no clear statement of a right to judicial review for applicable plans included in Section 405.904.

3. **The Notice of Initial Determination sent to an applicable plan must include specific statutory authority for determinations and notification of appeal rights**

The proposed rules would include a new notice provision in Section 405.921 which provides that the notice of initial determination must contain

(i) the reasons for the determination,
(ii) the procedures for obtaining additional information concerning the contractor's determination, such as a specific provision of the policy, manual, law or regulation used in making the determination,

(iii) information on the right to a redetermination if the workers' compensation plan is dissatisfied with the outcome of the initial determination and instruction on how to request a redetermination, and
(iv) any other requirements specified by CMS.

The proposed rule only requires that there be a specification of the "procedures for obtaining additional information concerning the contractor's determination". There is no requirement that there be a specific citation to statutory authority for the determination. There is only an indication in the proposed rule that a specific provision of the CMS policy, manual, law or regulation could be included in the notice.

There must be a specific citation to the statute upon which CMS is basing its authority for the determination and any applicable regulations to assure that an applicable plan receives legal notice upon which to file appeal.

The proposed rule also provides for the inclusion of information on the right to a redetermination if the workers' compensation plan is dissatisfied with the outcome of the initial determination and instruction on how to request a redetermination. Although this is helpful, the Notice of Initial Determination should also include the right to appeal based on the law being applied and the facts upon which the determination was made. A finding of fact and law is necessary for reference by an applicable plan seeking to perfect a request for redetermination and subsequent appeal.

Finally, the proposed rule provides a catch all authority for "any other requirements specified by CMS". Although we can appreciate the concern on the part of CMS that other items may come up that should be included after these rules are finalized, such broad authority is not appropriate in the section that specifies the notice requirements. It could be read so broadly as to be inconsistent with the statute upon which the authority is provided. This broad authority should be deleted. If there is a need for subsequent items to be included in the notice such items should be the subject of subsequent rulemaking procedures.

Conclusion

The CMS proposed rules with respect to "establishing a right of appeal and appeals process" should clearly provide for appeal of determinations of whether an entity is subject to MSP conditional payment recovery in the first place. Appeals should not be limited based on the method of CMS recovery, or limited as other appeals of "non-beneficiaries" under existing statutory and regulatory authority.
Administrative appeal procedures and judicial appeal rights should be clearly specified and the Notice of Determination should provide the basis upon which an entity may understand the reasons for the determination and the legal basis for it. The notice should enable affected entities to effectively preserve further appeal.

Sincerely,

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