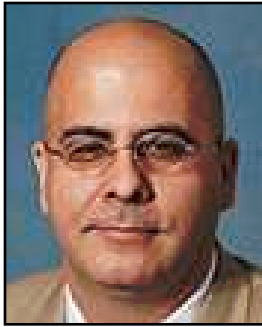




# Minimize the Cost to Fund a Medicare Set-Aside

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It is widely known that Medicare's Interests need to be protected when a Workers' Compensation or a Liability case is settled. There may be disagreement on how, when and why Medicare's Interests need to be protected, but everyone should know that Medicare's Interests need to be protected. Currently, Medicare is accept-

ing the Medicare Set-Aside as the vehicle to ensure Medicare's Interests are protected.

The Medicare Set-Aside is simply a report that projects the anticipated injury related medical treatment and prescriptions needed by the injured party over the remainder of their life expectancy. The anticipated medical care and prescription medication are priced out and the total is the amount needed to fund the Medicare Set-Aside. As you can imagine with the skyrocketing costs of medical treatment and prescription medication, the funding of a Medicare Set-Aside can be a roadblock to the settlement of a case.

Even though Medicare Set-Asides have been around for over 10 years in Workers' Compensation and have been hovering around liability settlements for a long time, the parties still approach Medicare as an afterthought. All too often, the mention of a Medicare Set-Aside does not surface until a day or two before the mediation when someone wonders out loud "is a Medicare Set-Aside needed?" Worse yet, sometimes the Medicare Set-Aside question comes up, for the first time, after the settlement. In either scenario, the Medicare Set-Aside will undoubtedly end up costing more than necessary. A little planning will go a long way in lowering the cost of funding a Medicare Set-Aside. Proper planning reduces the Medicare Set-Aside.

Just by following a few basic planning options, a primary payer will end up saving thousands of dollars by greatly reducing the amount needed to fund a Medicare Set-Aside. In order to limit Medicare exposure, bring closure to cases and to minimize the cost of settlements, Medicare compliance needs to be addressed early on. The following are just a few examples of how to limit the amount needed to fund a Medicare Set-Aside.

## Early Identification:

The foundation of lowering the cost of funding a Set-Aside is early identification. Early identification allows identification of cases that have Medicare Beneficiaries or cases that have a claimant with a reasonable expectation of Medicare enrollment within 2 years. This early Identification is imperative as the cases can be handled with Medicare in mind.

Section 111 Mandatory reporting has a query application that gives the Medicare beneficiary status of the claimant. While this should prove to be a useful tool, the author recommends sending the claimant a Consent for Release of Information form (SSA-3288). This form allows the primary payer or their representative to receive Medicare information on the injured party. The form must be signed by the injured party or their representative. It usually takes two to three weeks to get the requested information after the form is submitted to Social Security.

Having the Medicare beneficiary status of the injured party available early on allows for a dialogue to start with the claimant's attorney so that Medicare can be addressed as the case progresses. Going into a mediation and addressing Medicare for the first time is not going allow for a productive mediation. Addressing Medicare after the settlement is never going to be a good idea. A completed Medicare set-Aside has a shelf life of about 6 months, after that it will more than likely need to be updated. If a Medicare Set-Aside is going to be needed, it is very important to enter a mediation or settlement negotiations with the Medicare Set-Aside and its cost and available funding options.

## Rated Age

A Medicare Set-Aside is priced out based on the injured party's life expectancy. Medicare uses the Center for Disease Control's life tables to determine an individual's life expectancy. However, these tables are based on how long people are expected to live on average.

Sometimes, an individual has certain diseases or physical conditions that will reduce his life expectancy. A rated age is the tool used to determine a specific person's life expectancy. As such, it is an excellent tool to reduce the amount needed to fund a Medicare Set-Aside. A rated age is just an upward adjustment to an



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individual's actual age based on the claimant's related and unrelated physical condition and diseases. Simple everyday conditions, such as smoking or obesity can adversely affect an individual's life expectancy.

By identifying a case with Set-Aside implications early on, it allows time for the gathering of information. Rated age strategies may include deposition questioning, obtaining records from local hospitals and local pharmacies to ascertain the individual's prior medical history. This information is gathered and given to an annuity company that will search for a rated age. By reducing the life expectancy of an individual, a Set-Aside automatically gets reduced by the same number of years. For example, if the anticipated annual expenditure for a Medicare Set-Aside is \$5,000 and the rated age takes of 5 years from the claimant's life expectancy, then the savings are \$25,000. Savings such as that are only realized by the early identification and gathering of pertinent information (information that probably would not have been gathered without the early identification that the claimant was a Medicare beneficiary).

### Deposition strategies

The information gathered about a claimant's unrelated physical condition will assist during the deposition of the injured party. Deposition questioning strategies will need to be tweaked to get more detailed information of the individual's medical past. In addition to unrelated medical conditions, there are a few other areas that should be addressed during the claimant's deposition. For example, prescription medications that are being prescribed as a result of the injured party's accident need to be included in the Set-Aside. This could be the single most cost prohibi-

tive item on the Set-Aside. Prescription medication strategies include:

- The brand name of any medications the individual is taking;
- Whether they have taken the generic equivalent of the above medications;
- The dosage of the above medications;
- Who prescribed the above medications;
- Why they are taking the above medications;
- How long they have taken the above medications;
- Are they taking the above medications as prescribed;
- How long do they need to take the above medications; and
- Is the individual taking the medication as prescribed.
- Where is the individual getting the prescription filled?

The idea behind this strategy is to limit the future prescription medication cost on the Set-Aside. If the individual was taking medications prior to the accident, there is a good chance that medication will not need to be included in the Set-Aside. Prescription medication cost on the Medicare Set-Aside can be reduced by substituting brand name medications with generics and by reducing or removing duplicative medications. If it found out at the deposition or via medical bill reviews that the injured party is not taking the medication as prescribed, the treating physician may alter or eliminate that prescription. The idea is to find ways to reduce the cost of the Set-Aside by maximizing any and all potential reductions.

Physician deposition strategies will need to include Medicare pertinent questions. The deposition questioning strategy should include a line of questions centered around the need for the individual's future medical treatment, including prescriptions, as it relates to the subject accident or injury they sustained.



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- How many visits will the individual need on an annual basis;
- Will the individual require less office visits as the years progress;
- How many years does the physician anticipate that the claimant will need office visits;
- Will the individual need any surgeries/removals/revisions in the future, why;
- What diagnostic testing will the individual needs over the years and the frequency of same, why;
- What prescription medication will the individual need, why;
- How long will they need the prescription medication, if for a long period, why;
- Can they take the generic equivalent, if not, why not;
- When will the individual's dosage be lowered; if not, why not;
- Talk to the physician about the other medications the individual is taking to,;see if they conflict;
- Ask the physician whether the individual needs the prescription medication if based on review of the medical records, it shows that the individual is not buying the medication or is buying the medication at intervals that would indicate they are taking it less than prescribed or if the deposition transcript shows that the individual is not taking the medication as prescribed;
- Get the cost for office visits, surgical procedures, diagnostic testing, prescription medications;
- Find out if the prescription medication they are prescribing is being prescribed for any pre-existing condition;
- Find out how the individual's future medical treatment is related to the accident or injuries sustained in the subject case;
- Find out why the physician is recommending future medical treatment. i.e. is it medically necessary, is it based on the individual's subjective complaints, is it based on sound medical decision making, would the recommendations stand up to peer scrutiny.

The idea behind the physician deposition questioning strategy is to reduce future medical treatment. By reducing office visits, medications, diagnostic testing, or any other medical procedure, the Set-Aside is being reduced as well.

## Structured Settlements

Probably the best and easiest way to reduce the amount needed to fund a Medicare Set-Aside is through the use of a structured settlement. With a

structured settlement, the claimant gets an annual allotment (annuity) of money that should cover his or her Medicare needs for that year. The use of a structured settlement can reduce the funding of an MSA by thousands of dollars. The beauty of the annuity is that you are buying the future treatment at today's prices. The longer the life expectancy, the more of a savings that will be realized.

A structured settlement can be difficult at times, special language needs to be included in the settlement documents, the injured party has to agree with it, the laundry list of excuses go on and on. It is important to note that structured settlements cannot be used on every Set-Aside. The breakdown of the Set-Aside sometimes does not warrant the use of a structured settlement. A structured settlement is best utilized in a case with a large Set-Aside amount and a long life expectancy.

A structured settlement consists of two parts, upfront seed money and an annuity. A good rule of thumb on whether a structured settlement should be used, is to look at the first surgical procedures and/or replacements, if it makes up the bulk of the Set-Aside amount then a structured settlement may not be beneficial since the bulk of the Medicare Set-Aside will be given to the injured party in a lump sum payment (seed money).

The structured settlement also offers additional benefits as it offers protection to the primary payer, the defense attorney and the claimant's attorney. If the injured party uses the annuity funds for a purpose other than his Medicare covered medical needs as it relates to his injuries, then Medicare can deny any additional treatment for the remainder of that year. The good thing is that if the claimant uses his annuity funds for a purpose other than Medicare covered medical needs as it relates to his injuries, then he is only penalized for that one year. Once the injured party gets the next annuity payment he can use it to get Medicare covered medical needs as it relates to his injuries. A structured settlement offers certainty that the injured party will not be throwing away his settlement money.

## CMS Submission

Only settlements that meet the review threshold should be submitted to CMS. The best time to submit a Set-Aside to CMS is when the claimant is at MMI and is receiving palliative care. CMS will make their Set-aside determination based on review of the two prior years of medical treatment. So it will be in the best interest of all, to wait until the treatment dies down a little before submitting an MSA, lower medical expenditures translates to a lower MSA. A risk analysis needs to be done, there appears to be a growing



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trend to have a MSA prepared, attach it to the settlement documents and settle the case without CMS submission. Needless to say, this is a risky proposition. The author of this article does not recommend this scenario. However, it is an option for the risk taker. Not submitting an MSA to CMS allows the MSA to be priced out at a more realistic cost. For right now, Medicare for the most part, is not reviewing liability set-asides.

### Settlement After MMI/Surgery

Another way to limit the cost of a Set-Aside is to settle case after the claimant reached Maximum Medical Improvement or after the injured party undergoes any needed surgeries. The way that the future Medicare covered medical treatment is estimated is through a review of the injured party's medical records, if the individual is undergoing active medical treatment, the Set-Aside will have to reflect the active medical treatment. If the medical care has plateaued and the injured party is being seen on a palliative nature, the Set-Aside will reflect the lessened medical treatment. As a result, it costs less to fund an MSA for an individual who is being seen on a palliative nature.

### Pre-Existing Conditions

As discussed earlier, it is imperative that an injured party's prior medical history be investigated in detail during discovery. If the injured party had previously injured the body parts that were injured in the subject

injury, then it will cost much less to bring the injured party back to baseline. .

### Subsequent Accident

Same thing for subsequent injuries, if the individual gets into a subsequent injury, then the primary payer's responsibility is limited as well, hence reducing the cost of funding an MSA or removing it its entirety.

The above recommendations are made to assist the reader in reducing the amount needed to fund a Medicare Set-Aside. The recommendations are not an exhaustive list, however, they are made as a result of several years of experience in this field. The best gem to take away from this article is that in the stressful and rapid environment that we live in Medicare will be an afterthought, take that to the bank. There will be cases that will get to the medication table and Medicare will not have been even a thought in anyone's mind. That being said, Medicare's interests still need to be addressed. Do what needs to be done to ensure the cases are identified properly, a different color folder, making notations on folders, calendaring computer files, hiring a Medicare Set-Aside Allocator early on to assist with the files or any other tool that helps identify files so that the case is approached with the mindset of reducing the amount needed to fund Medicare Set-Asides.

We have all come across a case in which the MSA has not allowed for closure of a case. An expensive MSA will put a burden on reaching a settlement on some cases. By simply following a few of the above planning tools, an expensive MSA will become a more manageable MSA and will lead to a more equitable settlement.



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