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MEMORANDUM

**DATE:** May 14, 2010

**FROM:** Director  
Financial Services Group  
Office of Financial Management

**SUBJECT:** Medicare Secondary Payer--Workers' Compensation--INFORMATION

**TO:** Consortium Administrator for Financial Management and Fee-for-Service Operations

The purpose of this memorandum is to clarify guidance provided in the Centers for Medicare & Medicaid Services' (CMS') April 3, 2009 and July 1, 2009 procedure memoranda regarding prescription drugs administered to Medicare beneficiaries for off-label and/or unlabeled outpatient uses and whether these drugs are considered covered by Medicare Part D and, therefore, appropriately included in a Medicare Workers' Compensation Set-aside Agreement (WCMSA) proposal. Also, this memorandum changes the Rated Age (RA) language to be included in WCMSAs, as detailed in the August 25, 2008 procedure memorandum.

Our first priority is the health and well being of beneficiaries. This includes ensuring that beneficiaries receive the most value from the services paid for by Medicare. To this end CMS is providing more guidance about covered drugs and rated age. I wanted to make you and your staff aware of these changes.

**Definition of Covered Part D Drugs:**

A "covered Part D drug" is "a drug that may be dispensed only upon a prescription and that is described in subparagraph (A)(i), (A)(ii), or (A)(iii) . . ." of 42 U.S.C. section 1396r-8(k)(2). 42 U.S.C. Section 1395w-102(e)(1)(A). For a Part D drug to be covered by Medicare, and thus included properly in a WCMSA, the drug should be prescribed for an outpatient use that is approved under the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. § 301 et seq.], or supported by one or more citations included or approved for inclusion in any of the compendia described in subsection (g)(1)(B)(I) of 42 U.S.C. Section 1396r-8.

- **Effective June 1, 2010**, for those workers' compensation (WC) settlements effectuated prior to June 1, 2010, and where the settlement included non-covered Part D drugs as part of the WCMSA, CMS will consider funds spent for those non-covered Part D drugs by beneficiaries and claimants as being an appropriate expenditure of funds as part of the WCMSA.
- For those WC claims that were **not settled prior to June 1, 2010**, and where the settlement includes non-covered Part D drugs as part of the WCMSA, CMS will consider a re-pricing of those cases that included non-covered Part D drugs. Once

CMS performs a re-pricing of the WCMSA, beneficiaries and claimants may not use funds from their WCMSA to pay for non-covered Part D drugs. Doing so constitutes an inappropriate expenditure of WCMSA funds.

- For those WC settlements resolved on or after June 1, 2010, and where the settlement does not include non-covered Part D drugs as part of the WCMSA, beneficiaries and claimants may not use funds from their WCMSA to pay for those non-covered Part D drugs. Again, doing so constitutes an in-appropriate expenditure of funds as part of the WCMSA.

### **Rated Age**

The previous Rated Age (RA) statement from the submitter that all rated ages obtained on the claimant have been included is now rescinded.

- **Hereafter**, to mitigate confusion and eliminate ambiguous statements concerning RA, all WCMSA submitters must include the following certification statement in association with RA information:

*“Our organization certifies that all rated ages obtained on the claimant, at any time during that individual claimant’s lifetime, have been included as part of this submission to the Centers for Medicare & Medicaid Services.”*

- The CMS will not accept any variation or substitute wording. If a submitter is including RA information in its WCMSA proposal, the new certification language must be included as written, with no exceptions. If this appropriate statement is not included as part of the WCMSA proposal, CMS will not accept the RA provided. Instead, CMS will estimate the claimant’s remaining life expectancy using Actual Age.
- **Note:** All other requirements of acceptable proof of a Rated Age for a claimant are unchanged. Acceptable proof of Rated Ages is demonstrated through inclusion of independent rated ages on the letterhead of an insurance carrier or settlement broker.

Your staff may direct questions or concerns to Frank Johnson of my staff at (410) 786-2892.

*Gerald Walters*

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