

(2) *Effect of remand.* (i) The Administrator may instruct the hearing officer to take further action with respect to the development of additional facts or new issues or to consider the applicability of laws or regulations other than those considered during the hearing.

(ii) The hearing officer takes the action in accordance with the Administrator's instructions in the remand notice and again issues a decision.

(iii) The Administrator may review or decline to review the hearing officer's remand decision in accordance with the procedures set forth in this section.

(i) *Finality of decision.* The Administrator's review decision, or the hearing officer's decision following remand, is the final Departmental decision and is binding on all parties unless the Administrator chooses to review the decision in accordance with this section, or the decision is reopened in accordance with §411.126.

§411.126 Reopening of determinations and decisions.

(a) A determination that a GHP or LGHP is a nonconforming GHP or the decision or revised decision of a hearing officer or of the CMS Administrator may be reopened within 12 months from the date on the notice of determination or decision or revised decision, for any reason by the entity that issued the determination or decision.

(b) The decision to reopen or not to reopen is not appealable.

§411.130 Referral to Internal Revenue Service (IRS).

(a) *CMS responsibility.* After CMS determines that a plan has been a nonconforming GHP in a particular year, it refers its determination to the IRS, but only after the parties have exhausted all CMS appeal rights with respect to the determination.

(b) *IRS responsibility.* The IRS administers section 5000 of the IRC, which imposes a tax on employers (other than governmental entities) and employee organizations that contribute to a nonconforming GHP. The tax is equal to 25 percent of the employer's or employee organization's expenses, incurred during the calendar year in which the plan

is a nonconforming GHP, for each GHP, both conforming and nonconforming, to which the employer or employee organization contributes.

Subpart F—Special Rules: Individuals Eligible or Entitled on the Basis of ESRD, Who Are Also Covered Under Group Health Plans

§411.160 Scope.

This subpart sets forth special rules that apply to individuals who are eligible for, or entitled to, Medicare on the basis of ESRD. (Section 406.13 of this chapter contains the rules for eligibility and entitlement based on ESRD.)

[60 FR 45367, Aug. 31, 1995]

§411.161 Prohibition against taking into account Medicare eligibility or entitlement or differentiating benefits.

(a) *Taking into account.* (1) *Basic rule.* A GHP may not take into account that an individual is eligible for or entitled to Medicare benefits on the basis of ESRD during the coordination period specified in §411.162(b) and (c). Examples of actions that constitute taking into account Medicare entitlement are listed in §411.108(a).

(2) *Applicability.* This prohibition applies for ESRD-based Medicare eligibility to the same extent as for ESRD-based Medicare entitlement. An individual who has ESRD but who has not filed an application for entitlement to Medicare on that basis is eligible for Medicare based on ESRD for purposes of paragraphs (b)(2) and (c)(2) through (c)(4) of §411.162 if the individual meets the other requirements of §406.13 of this chapter.

(3) *Relation to COBRA continuation coverage.* This rule does not prohibit the termination of GHP coverage under title X of COBRA when termination of that coverage is expressly permitted, upon entitlement to Medicare, under 26 U.S.C. 4980B(f)(2)(B)(iv); 29 U.S.C. 1162.(2)(D); or 42 U.S.C. 300bb-2.(2)(D).¹

¹COBRA requires that certain group health plans offer continuation of plan coverage for 18 to 36 months after the occurrence of certain "qualifying events," including loss of

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