

Justice
Independence
Dignity
Security



1330 Broadway, Suite 525,
Oakland, CA 94612
510-663-1055 Fax: 510-663-1051
oakland@nsclc.org www.nsclc.org

Medicare Part D Materials for Advocates

THE LOW INCOME SUBSIDY (LIS) FOR MEDICARE PART D ENROLLEES

Summary of Regulations and Procedures

February 2007

Table of Contents

I.	WHO IS ELIGIBLE FOR A SUBSIDY?	1
A.	FULL-BENEFIT DUAL ELIGIBLES	1
B.	MEDICARE SAVINGS PLAN ENROLLEES (PARTIAL DUALS) AND SSI-ONLY	3
C.	ELIGIBLE INDIVIDUALS WHO MUST AFFIRMATIVELY APPLY FOR LIS	4
1.	Requirements for full LIS	5
2.	Requirements for partial LIS	7
II.	WHAT INCOME AND RESOURCES DOES SSA INCLUDE IN ITS CALCULATIONS?	8
III.	WHO MAY FILE A SUBSIDY APPLICATION?	9
IV.	HOW DOES SSA DETERMINE THE FILING DATE OF AN APPLICATION?	10
V.	WHERE SHOULD AN APPLICANT FILE?	11
VI.	WHAT ARE AN APPLICANT’S APPEAL RIGHTS?	12
A.	TIMING	12
B.	HOW TO APPEAL	12
C.	REVIEWER	12
D.	HEARING	12
E.	FURTHER AGENCY REVIEW	13
F.	COURT REVIEW	13
G.	REMAND	13
VII.	REDEEMING AND REDETERMINATION	13
A.	CMS REDEEMING OF BENEFICIARIES WHO WERE AUTOMATICALLY ELIGIBLE FOR THE LIS	13
B.	SSA REDETERMINATION OF LIS ELIGIBILITY FOR INDIVIDUALS WHO APPLIED FOR THE BENEFIT.	14
1.	Redeterminations based on marriage	14
2.	End-of-year redeterminations	15
3.	Special Enrollment Period for beneficiaries who lose LIS	16
	APPENDIX A	18

The Low Income Subsidy (LIS), also called “extra help,” is a benefit available automatically to full-benefit dual eligibles and some other Medicare eligibles participating in Medicare’s prescription drug program, known as Part D.¹ Many others who could qualify must affirmatively apply in order to receive benefits. The subsidy is available to individuals enrolled in Medicare Advantage plans with Part D prescription drug coverage (MA-PD plans) and to individuals enrolled in stand-alone Part D prescription drug plans (PDP plans).

The Social Security Administration (SSA) published its final rules² on eligibility and appeals for the LIS in December 2005.³ Since then, beneficiaries have had a year’s experience with administration of the LIS and have been through one cycle of redeterminations and redeeming. Payment and qualification amounts also have changed according to formulas set by statute.

This memorandum summarizes the regulations governing applications for LIS, appeals and redeterminations. It also sets out the benefits for each category of LIS recipient and provides advocacy tips based on experience to date with administration of the LIS.

A chart setting out LIS categories is found at Appendix A.

I. Who is eligible for a subsidy?

Three groups are eligible for the Low Income Subsidy. They are:

- Full-benefit dual eligibles – Automatically qualify for LIS.
 - MSP enrollees (also called partial duals) and SSI-only – Automatically qualify.
 - Others who meet income limits (150% FPL) and resource limits – Must apply.
- A. Full-benefit dual eligibles**

All full-benefit dual eligible individuals are automatically enrolled in LIS. This includes all persons with full-benefit Medicaid, including Medicare Savings Program beneficiaries who also have Medicaid, i.e., Qualified Medicare Beneficiary Plus/QMB Plus, and Specified Low-Income Beneficiary Plus/SLMB Plus.⁴

Available Subsidy:

- Full-benefit dual eligibles with income below 100% of the Federal Poverty Level (FPL) receive the full LIS subsidy with the lowest co-pay. This benefit consists of:

¹Authorization for Part D is found in the Medicare Prescription Drug Improvement and Modernization Act of 2003 (MMA) at 42 U.S.C. §1395w-101 et seq.

² 70 Fed. Reg. 77,664 (Dec. 30, 2005).

³ 42 U.S.C. §1395w-101 et seq.

⁴ 42 CFR §423.773(c); 20 CFR §418.3105.

- A premium subsidy equal to the regional benchmark amount;⁵
 - No deductible;
 - For 2007, a **\$1 co-pay** for generic drugs and preferred multiple source drugs and a **\$3.10 co-pay** for all other covered drugs;⁶
 - No coverage gap (“doughnut hole”);
 - A \$0 catastrophic co-pay.
- Full-benefit dual eligibles with income above 100% of the FPL have the same coverage except that their co-pay, for 2007, is **\$2.15 /\$5.35**.⁷
 - Full-benefit dual eligibles in nursing homes have a **\$0 co-pay** once long-term care eligibility is established.⁸

Enrollment and Effective Date of Subsidy:

All full-benefit dual eligibles, if they have not chosen a plan themselves or affirmatively opted out of enrollment, are auto-enrolled in a plan effective the first day of their dual eligibility. Any individual who is newly determined to be a full-benefit dual eligible receives LIS benefits as of the first day of the first month in which the individual both is dually eligible and enrolls in or is auto-enrolled in a Part D plan. No additional form is required. SSA notifies the individual of the change in subsidy status. Plans are required to reimburse beneficiaries for any overpayments of premiums and co-pays if the beneficiary’s LIS status was retroactive or if it was not reflected in pharmacy computers as of the date of eligibility.

⁵ Beneficiaries who enroll in plans with premiums below the benchmark amount will, therefore, have a \$0 premium liability. See 42 U.S.C. §1395w-114(b). For 2007, CMS has indicated that beneficiaries in plans with premiums less than \$2 over the benchmark amount will also pay no premium. Full subsidy beneficiaries who enroll in plans more than \$2 over the regional benchmark will pay the difference between the plan’s premium and the regional benchmark.

⁶ These co-pays are indexed annually based on the consumer price index. 42 CFR § 423.782(a)(2)(iii)(A).

⁷ See 42 U.S.C. §1395w-114(a); See “Medicare Part D Benefit Parameters for Standard Benefit: Annual Adjustments for 2007, Office of the Actuary, CMS (April 5, 2006) (“2007 Rate Adjustment”) found at http://www.cms.hhs.gov/MedicareAdvtgSpecRateStats/downloads/2007_Part_D_Parameter_Update.pdf. Note that this memorandum discusses subsidy levels as they apply to PDP plans. The impact of a full or partial LIS on premium and co-pay costs to an individual in an MA-PD plan depends on the structure of that plan.

⁸ The \$0 nursing home co-pay begins the first full calendar month in which an individual is in a nursing home. In 2006, if the individual left the nursing home prior to the end of the calendar year, the \$0 co-pay status continued until the end of the calendar year. See http://questions.cms.hhs.gov/cgi-bin/cmshhs.cfg/php/enduser/std_adp.php?p_faqid=7907&p_created=1159192716&p_sid=em2BxSri&p_accessibility=0&p_lva=&p_sp=cF9zcmNoPTEmcF9zb3J0X2J5PSZwX2dyaWRzb3J0PSZwX3Jvd19jbnQ9OCZwX3Byb2RzPTAmcF9jYXRzPSZwX3B2PSZwX2N2PSZwX3NIYXJjaF90eXBIPWFuc3dlnMuc2VhcmNoX25sJnBfcGFnZT0xJnBfc2VhcmNoX3RleHQ9UGFydCBElGluc3RpdHV0aW9uYWxpemVk&p_li=&p_topview=1

EXAMPLE: Peter is a Medicare beneficiary and becomes eligible for Medicaid in July 2007. He is auto-enrolled in a Part D plan starting July 1, 2007 and begins receiving his LIS as of the same date. Angela is a Medicare beneficiary who has been enrolled in a Part D plan for several months. In August 2007, she becomes eligible for Medicaid. Her LIS is effective as of August 1, 2007.

All dual eligibles have a continuous Special Enrollment Period (SEP) that allows them to change Part D plans at any time, effective the first day of the month following their election.⁹

NOTE: In practice, there have been time lags, often significant, between the date an individual becomes dually eligible and the date that status is reflected in CMS and plan computer systems. Another continuing problem is that LIS beneficiaries who change plans find that their LIS status does not always follow them to their new plan.

B. Medicare Savings Plan enrollees (partial duals) and SSI-only

Individuals in Medicare Savings Plans only (Qualified Medicare Beneficiaries Only/QMB-only; Specified Low Income Beneficiaries Only/SLMB-only), Qualified Individuals (QI-1), and all Medicare eligible persons on SSI who are not receiving Medicaid (SSI-only) also are deemed eligible for the full LIS.

Available Subsidy:

The LIS coverage for these individuals is the same as for full-benefit dual eligibles except that their co-pay, for 2007, is **\$2.15** for generic drugs and preferred multiple source drugs and **\$5.35** for all other covered drugs and they do not benefit from the \$0 co-pay for nursing home residents. The co-pays increase annually.¹⁰

NOTE: As with full-benefit dual eligibles, the subsidy for individuals with new or newly determined eligibility is effective the first month that they have deemed eligibility status.¹¹

Enrollment and Effective Date of Subsidy:

⁹ See PDB Manual, Ch. 3, “PDP Guidance Eligibility, Enrollment and Disenrollment” at 20.3.3 (“Enrollment Guidance”) <http://www.cms.hhs.gov/PrescriptionDrugCovContra/Downloads/CurrentPDPEnrollmentGuidance.pdf>.

¹⁰ These co-pays increase annually by a percentage that is equal to the annual percentage increase in average per capita aggregate expenditures for Part D drugs in the United States for Part D eligible individuals and is based on data for the 12-month period ending in July of the previous year (“Part D Drug Price Increase Formula”). The increase is rounded to the nearest 5 cents. 42 CFR §423.782(a)(2)(i). See 2007 Rate Adjustment.

¹¹ 20 CFR §418.3105.

These individuals, though automatically eligible for LIS as of the date of their MSP or SSI eligibility, are not immediately auto-enrolled in Part D plans. Those who do not choose a plan themselves are facilitated into a benchmark plan approximately two months after eligibility for the LIS is determined.¹²

Individuals in Medicare Savings Plans (QMB-only and SLMB-only) and Qualified Individuals (QI-1), because they are partial duals, have a continuous Special Enrollment Period (SEP) that allows them to change Part D plans at any time, effective the first day of the month following their election.¹³

SSI-only individuals have a SEP that extends from the date of their LIS eligibility notice until their enrollment is facilitated. If they do not enroll in a plan during this SEP and, instead, wait to be facilitated, they have another SEP that gives them one opportunity to move from the plan into which they were facilitated into a plan of their choice. This SEP extends from the date their facilitated enrollment is effective until the end of the calendar year.¹⁴ SSI-only individuals who had the LIS in 2006 and have it again in 2007 are granted an additional SEP that allows them to make one election between January 1, 2007 and November 30, 2007.

For 2006 and 2007, CMS has waived late enrollment penalties for all LIS beneficiaries, including these individuals.¹⁵

C. Eligible Individuals Who Must Affirmatively Apply for LIS

To be eligible for any level of subsidy, an individual applying for the LIS must meet the following requirements:

- Be eligible for Medicare Part D (i.e. eligible for Medicare Part A or enrolled in Medicare Part B);
- Be enrolled in, or seeking to enroll in a Part D plan;
- Reside in the fifty states or the District of Columbia.¹⁶

¹² Enrollment Guidance at 30.1.5.

¹³ Enrollment Guidance at 20.3.2.

¹⁴ Enrollment Guidance at 20.3.8(8).

¹⁵ “No Medicare Part D Late Enrollment Penalty for 2007” (CMS Press Release Jan. 9, 2007) at <http://www.cms.hhs.gov/apps/media/press/release.asp?Counter=2070&intNumPerPage=10&checkDate=&checkKey=&srchType=&numDays=3500&srchOpt=0&srchData=&keywordType=All&chkNewsType=1%2C+2%2C+3%2C+4%2C+5&intPage=&showAll=&pYear=&year=&desc=&cboOrder=date>. Without the waiver, these individuals pay a penalty for late enrollment in Part D, but it is reduced to 20% of the regular penalty and limited to five years. 42 U.S.C. §1395w-114(a)(1)(A)(ii).

¹⁶ 20 CFR §418.3101; 42 U.S.C. §1395w-114(a)(3)(A) and (a)(3)(F).

Applicants can qualify for the full LIS, which is identical to the LIS for dual eligibles with income above 100% of the FPL, or one of three levels of partial LIS, depending on income and resources.

1. Requirements for full LIS

To be eligible for a full subsidy, an individual must:

- Have countable income below 135 percent of the FPL applicable to the individual's family size. For 2007, the countable income limits for the full premium subsidy are \$13,783 for an individual and \$18,481 for a married couple living together; and
- Have countable resources that, for 2007, do not exceed \$7,620 if single or \$12,190 if married and living with one's spouse (including the resources of the spouse).¹⁷ These amounts are indexed to the consumer price index annually.¹⁸ See II, below, for a discussion of what income and resources are countable.

Available Subsidy:

These individuals receive the following benefits:

- A premium subsidy equal to the regional benchmark amount;¹⁹
- No deductible;
- For 2007, a **\$2.15 co-pay** for generic drugs and preferred drugs available from multiple sources and a **\$5.35 co-pay** for all other covered drugs;²⁰
- No coverage gap (“doughnut hole”);
- A \$0 catastrophic co-pay.

¹⁷ The limits were set at three times the amount of resources an individual may have and still be eligible for benefits under the Supplemental Security Income (SSI) program. Note that the first indexing of resource limits occurred in 2007. 42 U.S.C. §1395w-114(a)(3)(D). These limits assume that the applicant and spouse, if living with the applicant, each intend to use at least \$1500 for burial and funeral expenses. If the applicant does not respond affirmatively to the question on the application asking whether listed resources will be used for funeral expenses, the limits drop to \$6,120 and \$9,190.

¹⁸ 42 CFR §423.773(b)(ii). SSA Program Operations Manual System (POMS) HI 03001.001(E). <https://s044a90.ssa.gov/apps10/poms.nsf/subchapterlist!openview&restricttocategory=06030>.

¹⁹ Beneficiaries who enroll in plans with premiums below the benchmark amount will, therefore, have a \$0 premium liability. See 42 U.S.C. §1395w-114(b). For 2007, CMS has indicated that beneficiaries in plans with premiums less than \$2 over the benchmark amount will also pay no premium. Full subsidy beneficiaries who enroll in plans more than \$2 over the regional benchmark will pay the difference between the plan's premium and the regional benchmark.

²⁰ These co-pays are indexed annually based on the consumer price index. 42 CFR §423.782(a)(2)(iii)(A).

The \$2.15/5.35 co-pay levels increase annually according to the Part D Drug Price Increase Formula.²¹ These individuals do not receive the \$0 nursing home co-pay benefit.

Enrollment and Effective Date of Subsidy:

If an applicant is already enrolled in a Part D plan on the date the application is filed, the subsidy is effective retroactively to the first day of the month in which the application was filed. See IV below for definitions of “filing date.” Retroactivity applies both to premium payments and to cost-sharing, both of which will be reimbursed by the plan. If the applicant is not enrolled in a Part D plan by the filing date, the subsidy is effective as of the first month that enrollment in a Part D plan is effective.²² A timely appeal of an initial denial preserves an applicant’s filing date.

EXAMPLES: Maria signed up for a Part D plan in December 2006 and her coverage began January 1, 2007. She filed an application for a subsidy on February 15, 2007. If approved, her subsidy will be retroactive to February 1, 2007. Joe also filed a subsidy application on February 15, 2007 but he had not yet signed up for a Part D plan. He enrolls in a Part D plan on February 16, 2007 and his enrollment is effective March 1, 2006. If approved, his subsidy is effective March 1, 2007. Emma, who already had joined a Part D plan, applied for a subsidy on February 15, 2007. Her application was denied and she appealed. Her appeal took several months to process but she ultimately proved her eligibility. Emma’s subsidy is retroactive to February 1, 2007.

If they do not choose a plan, these individuals are facilitated into a plan approximately two months after eligibility for the LIS is determined.²³ They have a SEP that extends from the date of their LIS eligibility notice until their enrollment is facilitated. If they do not enroll in a plan during this SEP and, instead, wait to be facilitated, they have a SEP that gives them one opportunity to move from the plan into which they were facilitated into a plan of their choice. This SEP extends from the date their facilitated enrollment is effective until the end of the calendar year.²⁴

Beneficiaries who had the LIS in 2006 and have it again in 2007 are granted an additional SEP that allows them to make one election between January 1, 2007 and November 30, 2007.

For 2006 and 2007, CMS has waived late enrollment penalties for all LIS beneficiaries, including these individuals.²⁵

²¹ 42 CFR §423.782(a)(2)(i). See I.A.2 above.

²² See 42 U.S.C. §1395w-114(a)(3)(B)(ii); 20 CFR §418.3201(b); LIS Guidance at 80.3 and Appendix I.

²³ Enrollment Guidance at 30.1.5.

²⁴ Enrollment Guidance at 20.3.8(8).

²⁵ See note 14.

2. Requirements for partial LIS

To qualify for partial subsidy, an individual must:

- Have countable income less than 150 percent of the FPL applicable to the individual's family size. For 2007, that amount is \$15,315 for a single person and \$20,535 for a couple; and
- Have countable resources that, for 2007, do not exceed \$11,710 if single, or \$23,410 if married and living with one's spouse (including the resources of the spouse). This amount is indexed to the consumer price index annually.²⁶ See II, below, for a discussion of what income and resources are countable.

Income limits can be higher for individuals who support other family members who live in the same household, have earnings from work, or live in Alaska or Hawaii.

Available Subsidy:

Individuals receiving a partial LIS receive the following benefits:

- Premiums subsidized on a sliding scale based on income
 - 75% premium subsidy for a benchmark plan if income is greater than 135% and at or below 140% of FPL;
 - 50% subsidy if income greater than 140% and at or below 145% FPL;
 - 25% subsidy if income greater than 145% and at or below 150% FPL);
- A deductible of up to \$53;²⁷
- 15% co-insurance after meeting the deductible;
- No coverage gap;
- A \$2.15/\$5.35 catastrophic co-pay.²⁸

The deductible and catastrophic co-pay amounts increase annually according to the Part D Drug Price Increase Formula.²⁹ For 2006 and 2007, late enrollment penalties are

²⁶ 42 U.S.C. §1395w-114(a)(3)(E); 42 CFR §423.773(a); SSA POMS HI 03030.025. Note that the dollar amounts for resource limits for partial LIS subsidies were set by the MMA and, unlike the resource limit for full subsidy, were not keyed to SSI limits. These limits assume that the applicant and spouse, if living with the applicant, each intend to use at least \$1500 for burial and funeral expenses. If the applicant does not respond affirmatively to the question on the application asking whether listed resources will be used for funeral expenses, the limits drop to \$10,210 and \$20,410.

²⁷ If the plan has no deductible, the beneficiary will not be charged a deductible.

²⁸ 42 CFR §§423.780(d) and 423.782(b); 2007 Rate Adjustment.

waived. Without the waiver, individuals with partial LIS would be subject to the full late enrollment penalty.

Enrollment and Effective Date of Subsidy:

LIS beneficiaries who qualify for a partial subsidy have enrollment options and effective subsidy dates that are identical to those for beneficiaries who qualify for the full subsidy on the basis of an application.

ADVOCACY TIP: *Certain individuals who have creditable coverage under an employer or other group plan and who are unsure whether they qualify for LIS face a dilemma. These individuals may have creditable coverage that is as good as or better than a Part D plan without LIS but that is more expensive than LIS-subsidized coverage. Because they may not be able to re-enroll in a dropped non-Part D plan and because they do not face late enrollment penalties,³⁰ the safer approach may be to stay with their current coverage until they are sure of their LIS eligibility.*

If individuals do not have creditable coverage from a non-Part D plan, the preferred course in most cases is to enroll in a Part D plan as soon as possible and not wait for LIS approval (if they are not in an enrollment period, they do not have this option). If they are found eligible for LIS, the subsidy will be retroactive to the month of the LIS application, so they will receive a refund of some premiums and drug co-pays, if any. If they do not qualify for LIS and, by waiting to enroll in a Part D plan, miss an enrollment period, they will be subject to the late enrollment penalty when they do enroll in a plan.

II. What income and resources does SSA include in its calculations?

The SSA definitions of earned and unearned income and resources for purposes of LIS are similar but not identical to those used for SSI counting.³¹ Where they differ, the LIS rules are more favorable to individuals.

All earned and unearned income received or expected to be received during the calendar year for which eligibility is being determined is counted. However, for an initial application, income is calculated starting with the month for which eligibility is calculated through the end of the calendar year. Income limits also are pro rated for the relevant portion of the calendar year.³² Income of a spouse residing with the applicant is countable but the income of dependent family members, other than the spouse, living with the applicant does not count. Although the income of these family members is not

²⁹ 42 CFR §§423.782(b)(1) and 423.782(b)(3).

³⁰ Late enrollment penalties do not apply to individuals with creditable coverage. 42 CFR §423.46.

³¹ See 20 CFR §§418.3301-418.3350 (income) and §§418.3401-418.3410 (resources).

³² 20 CFR §§418.3320(f) and 418.3340(b).

counted, the number of dependent family members living with the applicant does determine the applicable income cut-off for LIS eligibility.

In counting resources, up to \$1,500 is exempt if declared to be set aside for funeral and burial expenses.³³

ADVOCACY TIP: SSA does not require that applicants segregate funds in order to claim the funeral and burial expense exemption from resource limits. Rather, applicants need only express a general intent to use funds for that purpose by checking the appropriate box on the SSA application. Applicants should be alerted to the importance of that question on the application.

As with SSI definitions, a person's home and certain other personal property are excluded from counting. Additionally, most non-liquid resources that would be counted for SSI purposes are not counted when determining LIS eligibility.³⁴ Resources of one's resident spouse are included but those of dependents are not.

ADVOCACY TIP: SSA looks at resources held by an individual as of the first moment of the first day of the month for which SSA is considering eligibility. There is no look-back period. However, individuals considering a transfer of resources in order to qualify for LIS should be warned of the potential impact such action could have on future eligibility for Medicaid long-term care benefits.

III. Who may file a subsidy application?

The following may file an application and represent an applicant at all stages of the application:

- The applicant;
- An individual who is authorized to act on behalf of the applicant;
- If the applicant is incapacitated or incompetent, someone acting responsibly on the applicant's behalf; or
- An individual of the applicant's choice who is requested by the applicant to act as his or her representative in the application process.³⁵

If an individual dies during the month an application was filed, the application may be processed if the individual was alive the first day of the month of filing.³⁶ Thus it

³³ As noted earlier, resource limits set out in this memorandum all assume that the applicant and spouse have affirmed their intent to use part of their resources for burial and funeral expenses.

³⁴ CMS Guidance to States on the Low-Income Subsidy (May 25, 2005) ("LIS Guidance"), <http://www.cms.hhs.gov/States/Downloads/GuidancetoStatesonLimited-IncomeSubsidy.pdf>.

Note, however, that real estate that is not the principal residence of the applicant is counted as a resource under both sets of rules.

³⁵ 20 CFR §418.3215; 42 CFR §423.772.

³⁶ 20 CFR §418.3230(d).

appears that a representative can file a subsidy application on behalf of a deceased individual so long as the individual was alive on the first day of the month that the application was filed.

EXAMPLE: Robert was enrolled in a Part D plan but, though he qualified, he had not applied for a subsidy. He died February 15, 2006. His executor filed a subsidy application on February 28, 2006. The application was approved and Robert's estate received a retroactive subsidy for premiums and co-pays for the period from February 1, 2006 through February 15, 2006.

ADVOCACY TIP: Personal representatives for purposes of applying for a subsidy are more broadly defined than representatives for purposes of enrolling in a Part D plan or filing for exceptions and appeals in Part D plans. Here anyone "acting responsibly" on behalf of an incapacitated or incompetent individual may apply on that individual's behalf. In contrast, CMS defers to state law on the question of who may represent an incapacitated or incompetent individual for purposes of enrolling in a Part D plan and pursuing exceptions and appeals.³⁷ Because very few states have issued guidance on the standards they intend to apply, family members and others seeking to represent individuals in enrollment and appeals matters face an uncertain landscape.

IV. How does SSA determine the filing date of an application?

The filing date of a subsidy application is the earliest of any of the following dates:

- The date a completed application is received by an SSA employee at an SSA office or by an SSA employee authorized to receive it at another place.
- The date a completed application is received by a state Medicaid office.
- A date five days earlier than the date on which a mailed application is received by SSA. However, if an individual can demonstrate that an application was mailed earlier, the earlier date will be used.
- The date the applicant or representative makes a written or oral inquiry to SSA about the individual's subsidy eligibility or the date SSA receives a partially completed internet subsidy application from its internet web site, but only if a complete application is filed with SSA within 60 days of the inquiry or incomplete internet application.³⁸

ADVOCACY TIP: Especially if the end of the month is approaching, it is important to get a filing date established through a phone inquiry or a partially completed web

³⁷ 42 CFR §423.560; CMS Prescription Drug Benefit Manual: Chapter 18 – Part D Enrollee Grievances, Coverage Determinations, and Appeals, Rev. 2 (June. 22, 2006) at sec. 10.4.1.

³⁸ 20 CFR §§418.3220 and 418.3230.

application. This procedure gives the applicant time to gather necessary information without losing a month or more of subsidy coverage.

V. Where should an applicant file?

The MMA provides that both state Medicaid offices and SSA must accept and process LIS applications. However, the overwhelming majority of applications are being filed through SSA. CMS guidance encourages states to steer applicants to use SSA's subsidy applications unless an individual specifically requests that the state make the subsidy determination using the state's application form.³⁹ Despite this institutional bias, filing at a state Medicaid office and insisting that the application be processed using state rather than SSA procedures, may be advantageous to some LIS applicants:

- State Medicaid offices have a duty to screen and enroll all persons for potential eligibility in Medicare Savings Programs (MSP) as well as any other Medicaid program. People found eligible for Medicaid or an MSP program are automatically deemed eligible and do not need to apply for the LIS. Moreover many states have more liberal income and resource rules in MSP programs. Therefore, someone applying for the LIS at the state office may be determined to be a dual eligible and thus automatically eligible for assistance without an application (as well as receiving MSP benefits). The same person applying at SSA could be denied the LIS.
- State appeals procedures are governed by Medicaid law, which has specific timelines for processing appeals. There are no time limits that apply to the SSA appeals process.

One potential disadvantage of filing through the state is the possibility of a greater paperwork burden. States do not have access to the databases used by SSA and may require submission of statements from financial institutions that would not usually be required by SSA.⁴⁰

ADVOCACY TIP: Individuals who wish to apply for LIS through state Medicaid offices will need to be persistent and specifically insist that the state offices process their applications. Otherwise, most states will help with LIS applications, but send them to SSA for processing. Because the burden for applicants wanting state processing is so difficult, advocates may wish to arm them with a copy of the SSA guidance to show when they visit their state Medicaid office.

³⁹ LIS Guidance at 10.3.3.

⁴⁰ LIS Guidance at 40.

VI. What are an applicant's appeal rights?

If an individual files through a state Medicaid office, appeal procedures from an initial determination of eligibility and from a redetermination are governed by the state Medicaid agency's rules.⁴¹

If an individual files through SSA, the following procedures apply:

A. Timing

The individual has 60 days in which to appeal. If the matter being appealed is a redetermination and if the individual appeals within 10 days, the individual continues to receive his or her current subsidy pending the outcome of the appeal.⁴² If the final decision is unfavorable, the individual will not be required to return subsidies paid during the appeal.⁴³ If an individual misses either the 10 day or the 60 day deadline, SSA may grant an extension of time upon a showing of good cause.⁴⁴

B. How to appeal

A request for appeal may be filed with any Social Security office in person, by mail, by fax or by telephone.⁴⁵

C. Reviewer

The reviewer is a paralegal who was not involved in the initial decision.⁴⁶

D. Hearing

An individual is entitled to a telephone hearing. Procedures are available to subpoena witnesses and documents. If the individual waives a telephone hearing, the decision is made on the basis of a review of the case file. SSA must provide the individual with the opportunity to review the case file prior to the hearing. The individual may submit additional materials.⁴⁷ Review is de novo.⁴⁸

⁴¹ 42 CFR §423.774.

⁴² 20 CFR §418.3510.

⁴³ Id.

⁴⁴ 20 CFR §418.3630. Although the regulation does not clearly state that the good cause exception is available for the 10-day requirement, the commentary states that SSA intends to apply the good cause provisions to both the 10-day and the 60-day deadlines. See 70 Fed. Reg. at 77,668 (Dec. 20, 2005). Criteria for good cause exceptions and examples of circumstances where good cause may exist are found at 20 CFR §418.3640.

⁴⁵ 20 CFR §3630(b).

⁴⁶ 20 CFR § 418.3625; see also 70 Fed. Reg. at 77,674 (identifying the hearing officer as a paralegal).

⁴⁷ 20 CFR §418.3625.

⁴⁸ 20 CFR §418.3650; 70 Fed. Reg. at 77,674.

E. Further agency review

No additional level of agency review is available for LIS applications. However, within 60 days of the date of receipt of a dismissal notice, the individual may request that the decision be vacated and show good cause why the request should not be dismissed.⁴⁹ In addition, SSA may, within 60 days of a hearing or of issuing an initial determination, revise the determination on the basis of clerical error. The revised determination will be treated as a new initial determination for purposes of review. No back payment will be required if the revision is unfavorable.⁵⁰

F. Court review

An individual may file an appeal in Federal District Court within 60 days of receipt of a final adverse determination. Requests for extension of time to file must be submitted to the SSA decisionmaker, not the court.⁵¹

G. Remand

If a Federal court remands a decision back to SSA, the remanded case will be decided by the paralegal decisionmaker who issued the decision.⁵²

VII. Redeeming and Redetermination

A. CMS redeeming of beneficiaries who were automatically eligible for the LIS

An individual whom CMS has deemed eligible for the subsidy maintains that deemed status through the calendar year even if the individual loses eligibility for the program on which the deemed status is based (i.e., the individual become ineligible for SSI, Medicaid or MSP).⁵³

NOTE: Individuals who are required to “spend down” to Medicaid are deemed eligible for the full LIS subsidy for full-benefit dual eligibles as of the first month in which they meet their Share of Cost (SOC). Their full LIS eligibility continues throughout the calendar year, even if they fail to meet their SOC in any subsequent month.

Annually, CMS conducts a “redeeming” process for the following year. CMS reviews the July files received from the states’ Medicaid offices on the status of each beneficiary. If a beneficiary’s name appears on the state’s July file as enrolled in a program that

⁴⁹ 20 CFR §418.3670. Because the regulation is silent on the issue, it appears that a request to vacate would not stay a reduction or termination of an individual’s subsidy.

⁵⁰ 20 CFR §418.3678.

⁵¹ 20 CFR §418.3675.

⁵² 20 CFR §418.3680.

⁵³ SSA POMS HI 03050.005(C)(2).

automatically qualifies the individual for the LIS, the beneficiary is deemed eligible for the LIS for the entire next year (e.g., appearing in the July 2006 file qualifies the individual for the LIS through December 2007). This LIS eligibility will not be revoked, even if the beneficiary's name does not appear on a state file in a later month. If a beneficiary's name appears on any month's file from July until the end of the calendar year, the beneficiary will also be deemed eligible for all of the following year.

In October, CMS sends letters to all beneficiaries who did not appear on the July files sent by the states and will, therefore, not be redeemed for the following year unless they take (or have already taken) action to requalify. Individuals who will remain eligible, but whose co-payment level will change also receive notices in October. Individuals who are redeemed at the same level receive no notice confirming their continued eligibility for the LIS.

NOTE: The redeeming process does not require any action by the beneficiary; however, those who lose deemed status should try to reinstate their deemed status (for example, by meeting their share of cost) and/or file LIS applications based on income and resources.

B. SSA Redetermination of LIS eligibility for individuals who applied for the benefit.

The Social Security Administration has responsibility for reviewing LIS eligibility for beneficiaries who applied for the benefit through SSA. SSA review is a "redetermination."

1. Redeterminations based on marriage; resumption of living together with a separated spouse; death of, divorce from, annulment from or separation from a spouse living with the individual, unless a separation is temporary.⁵⁴

The changes in marital status listed above are the only changes that affect LIS eligibility mid-year. Once SSA has been notified of any of these events, either by the beneficiary or otherwise, the agency sends a redetermination form to the beneficiary to be completed within 90 days. If the form is not returned, the subsidy is terminated as of the month following the expiration of the 90 day period.⁵⁵ An adjustment in subsidy status based on a change in marital status will be effective the month subsequent to the first report of the change to SSA.⁵⁶

⁵⁴ The definition of "temporary" for purposes of this rule is found at 20 CFR §404.347.

⁵⁵ 20 CFR §418.3123(c).

⁵⁶ 20 CFR §418.3123(a); SSA POMS HI 03050.005(B)(1). The regulations do not state clearly whether, if the change in status results in a lower subsidy amount, SSA will attempt to recover subsidy payments. The definition of "redeterminations" found at 20 CFR §418.3125 states that a redetermination concerns "future subsidy eligibility" which suggests no retroactive application. However, as just discussed, the regulation concerning change in marital status suggests that a redetermination could have retroactive effect to the first date of a report to SSA.

NOTE: Although the penalty for failure to respond to SSA by returning a redetermination form is denial of all LIS benefits, beneficiaries are not required to initiate a report of changes in status to SSA and there are no penalties if an individual fails to initiate a timely report.⁵⁷

2. End-of-year redeterminations

All redeterminations by SSA that are not related to marital status are made in the last months of the year, effective January 1 of the following year.

Initial Redetermination:

As required by the MMA, an individual's LIS eligibility must be redetermined within a year of the initial eligibility determination.⁵⁸

Unless SSA already has information suggesting that an individual's income or resources have changed, the agency uses a "passive" process, sending a letter saying what information SSA has on file and asking the individual to respond only if the information is incorrect.⁵⁹ If the beneficiary does not respond and if data checks do not show any discrepancy, the LIS will be renewed.

There is no set schedule for additional redeterminations after the first year. SSA will initiate redeterminations based on new information, the likelihood that an individual's circumstances will change, and random checks.⁶⁰

Redeterminations based on change in income or resources:

If the beneficiary responds to the "passive" notice by reporting that there has been a change in income or resources or if the beneficiary had earlier notified SSA of a change or if SSA had learned of a change from other sources, SSA sends a redetermination form to the beneficiary.

The redetermination form is always sent in the last five months of the year, regardless of when SSA first learns of the change. The beneficiary must complete and return the form within 30 days. Although SSA regulations provide that if the form is not returned, the

⁵⁷ SSA POMS HI 03050.005(B). States have the option to mandate that beneficiaries who received LIS through the state application process report changes in status within 10 working days. LIS Guidance at 90. It is not clear what sanctions states could or would impose for an individual's failure to make a report.

⁵⁸ 42 U.S.C. §1395w-114(a)(3)(B)(ii); 42 CFR §423.774. Redeterminations of eligibility originally made by state Medicaid agencies are made in accordance with timetables and procedures set forth in the state plan. 42 U.S.C. §1395w-114(a)(3)(B)(iii); 42 CFR §423.774.

⁵⁹ The regulations do not set out a specific process for redetermination. SSA is using a passive process but has stated that the agency may alter its procedures based on experience. 70 Fed. Reg. at 77,669.

⁶⁰ 20 CFR §418.3125.

subsidy will be terminated as of January of the following year,⁶¹ SSA extended the process in 2007 and plans to terminating benefits for such individuals in March 2007.⁶² SSA regulations also provide that any change in subsidy based on change in income or resources should be effective as of January of the following year.⁶³ For 2007, this schedule also changed, with reductions and terminations effective as of February 1, 2007.⁶⁴

NOTE: If a negative change in circumstances qualifies an individual for any program that would put the individual in the “deemed” population, then that person can immediately receive LIS by deeming and would not need to wait until the following January (See I.A above). If a beneficiary receiving a partial subsidy experiences a drop in income that does not put him or her into “deemed” status but would raise the level of subsidy, the beneficiary should file a new application for the LIS and not wait for the redetermination process.

ADVOCACY TIP: This redetermination process raises the potential for confusion and loss of all subsidies. Beneficiaries who conscientiously notify SSA of a change in circumstances are particularly vulnerable. Notifying SSA of a change triggers the sending of a redetermination form sometime in the last few months of the year, often months after the beneficiary first contacts SSA. If the beneficiary fails to complete and return the form, perhaps believing that the initial contact with SSA was adequate, he or she will be dropped entirely from the LIS program. Thus someone who, in fact, qualifies for a greater subsidy than in the previous year, could lose all LIS coverage. It is critical for advocates to impress on LIS recipients the need to return all SSA redetermination forms, even if they have already told SSA of a change of circumstances.

If a subsidy is denied based on failure to return a redetermination form, the denial is appealable but, unless the individual can show that the form had been filed and lost, the appeal would be difficult. The individual could re-apply for LIS, though new coverage would only be effective as of the month of the filing date of the new application.

3. Special Enrollment Period for beneficiaries who lose LIS

CMS established a Special Enrollment Period (SEP) that offers one enrollment opportunity for beneficiaries who lose LIS eligibility during the redeeming and redetermination process. The SEP extends from January 1 through March 31 OR, if the

⁶¹ 20 CFR §418.3123(d).

⁶² See Memorandum from Abby Block, “Redetermination of Low-Income Subsidy (LIS) Eligibility for 2007” (Jan. 31, 2007) (not yet posted on the CMS website as of 2/6/07)(“Block Redetermination Memo”)

⁶³ 20 CFR §418.3123(b).

⁶⁴ Block Redetermination Memo.

denial is after January, starts the month in which the beneficiary is notified of termination of LIS status and extends for two months thereafter.⁶⁵

For more information on Medicare Part D, please contact NSCLC's Oakland Office at 510-663-1055, Jeanne Finberg ext. 305, Katharine Hsiao ext. 306, Kevin Prindiville ext. 307, Georgia Burke ext. 304, Anna Rich ext. 303 or Gburke@nsclc.org.

⁶⁵ A more limited version of this SEP was announced in "Part D Special Enrollment Periods" (CMS, Jan. 2007) at <http://www.cms.hhs.gov/partnerships/downloads/PartDSEPs.pdf>. The Block Redetermination Memo reported that the SEP was expanded and extended beyond 2007.

Appendix A

LOW INCOME SUBSIDY LEVEL COMPARISON							
	LIS ELIGIBILITY	ENROLLMENT	PREMIUM*	DEDUCTIBLE	CO- PAYMENTS	SPECIAL ENROLLMENT PERIODS	ELIGIBILITY REVIEW
DUAL ELIGIBLES							
Full benefit dual; Income: ≤ 100% FPL	Deemed	Auto-enrolled	\$0	\$0	\$1/\$3.10**	One enrollment election/month	Redeeming
Full benefit dual; Income: > 100% FPL	Deemed	Auto-enrolled	\$0	\$0	\$2.15/\$5.35**	One enrollment election/month	Redeeming
Partial dual	Deemed	Facilitated	\$0	\$0	\$2.15/\$5.35	One enrollment election/month	Redeeming

* Beneficiaries eligible for the full premium subsidy can enroll in plans with premiums less than \$2.00 above the regional benchmark and pay no premium. If they enroll in a plan with a premium that is \$2.00 or more over the benchmark they will be liable for the difference between the plan's premium and the benchmark amount. Beneficiaries eligible for a partial premium subsidy will receive a subsidy equal to 75%, 50% or 25% of the plan's premium if the premium is at or below the regional benchmark. They will be liable for 100% of the amount that the premium exceeds the benchmark.

** A beneficiary in this category residing in a nursing home pays no co-payments.

NON-DUAL ELIGIBLES							
SSI-Only	Deemed	Facilitated	\$0	\$0	\$2.15/\$5.35	One enrollment election/year	Redeeming
Income: ≤ 135% FPL Resources:*** < \$7620/\$12190	Must apply	Facilitated	\$0	\$0	\$2.15/\$5.35	One enrollment election/year	Redetermination
Income: >135 to ≤140% FPL Resources:*** ≤ \$11,710/\$23,410	Must apply	Facilitated	75% subsidy	\$53	15% (after deductible)	One enrollment election/year	Redetermination
Income: >140 to ≤145% FPL Resources:*** ≤ \$11,710/\$23,410	Must apply	Facilitated	50% subsidy	\$53	15% (after deductible)	One enrollment election/year	Redetermination
Income: >145 to <150% FPL Resources:*** ≤ \$11,710/\$23,410	Must apply	Facilitated	25% subsidy	\$53	15% (after deductible)	One enrollment election/year	Redetermination

*** The lower resource limit is for single applicants. The higher limit is for applicants who are married and living with their spouse. The limits shown include the allowable \$1,500 burial expense deduction per person.