DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Montana Department of Social and Rehabilitation Services
Docket Nos. 78-25-MT-HC
80-119-MT-HC
Decision No. 171

DATE: April 30, 1981

DECISION

INTRODUCTION

These two appeals by the Montana Department of Social and Rehabilitation Services are being considered together because they involve common questions of law and fact. The State appeals from determinations by the Health Care Financing Administration (HCFA) disallowing Federal financial participation (FFP) for payments the State made to hospitals for inpatient hospital care in excess of "reasonable costs" under Title XIX of the Social Security Act (Medicaid), and the regulation at 45 CFR 250.30(d) (1969), recodified at 42 CFR 447.252(c) (1979). The State admits that it made, and claimed FFP for payments in excess of the allowable "reasonable costs," but argues that these appeals should be granted on the theory of equitable estoppel.

This decision is based on the appeals filed by the State, the Agency's responses, the parties' briefs and responses to the Board's Order to Show Cause, the Agency Reconsideration Record (SRS Docket No. ME-MT7401), and telephone conferences with the parties.

BACKGROUND

Beginning in 1967, the State's contracts with hospitals participating in the Medicaid program provided that reimbursement of inpatient hospital services would be on the basis of "reasonable costs," and that "in addition, the hospital will have the opportunity to negotiate with the State Department of Public Welfare for a supplemental allowance over and above the allowable costs permitted under Title XVIII and Title XIX ..." The contracts were entered into on a year-to-year basis until 1970, when a provision was added making each contract effective until June 30, 1971 or "until such time as a new contract agreement is signed by both parties." See Agency's brief, dated July 14, 1980, Exhibits A-D.

In 1972, State and Agency representatives corresponded on the issue of whether federal law prohibited payments in excess of reasonable costs and whether FFP was available for such payments. The Agency's position as stated in a December 21, 1970 memorandum by the Regional Attorney, Region VIII, (Reconsideration Record, No. 17) was that:

> Under applicable Federal law, regulation and interpretation, there is no authority for a hospital to claim or for a State agency to pay more than the amount allowed under the applicable formulas established pursuant to Title XVIII and Title XIX of the Social Security Act.

(See also: January 11, 1972, October 11, 1972, and May 18, 1973 letters of the Associate Regional Commissioner, and June 24, 1974 letter of the Acting Regional Commissioner, Reconsideration Record, Nos. 12, 14, 24, and 25, respectively.)

In a suit brought against the State by Montana hospitals to determine the State's obligations under these contracts, the State argued that enforcement of the clause allowing payments in excess of reasonable costs would violate the Federal regulation at 45 CFR 250.30. The Montana Supreme Court held, however, that the contracts with the hospitals were binding on the State through fiscal year 1975, and required the State to pay amounts in excess of reasonable costs as required by its contracts with the hospitals. Montana Deaconess Hospital v. Department of [Montana] SRS, 538 P.2d 1021 (1975). The contracts between the State and the hospitals were terminated at the end of the fiscal year 1976.

By letter dated June 24, 1974, the Regional Commissioner, Region VIII, disallowed $444,132 in FFP for the period from July 1, 1967 through December 31, 1972. The Administrator of HCFA affirmed that decision by letter dated August 31, 1977, stating that FFP was not available for State expenditures in excess of reasonable costs, and that the Montana Supreme Court's Order does not bind the Agency to participate in such expenditures. By letter dated March 24, 1978, the Administrator notified the State that a clerical error had been made in a recomputation, and the Agency was amending its August 31, 1977 letter by revising the amount of the disallowance to $498,020. The State's appeal of this determination, dated May 4, 1978, is docketed as 78-25-MT-HC. By letter dated June 17, 1980, the Agency issued a disallowance when a review disclosed that the State claimed $904,393 in FFP for payments in excess of reasonable costs allowed under 45 CFR 250.30 during fiscal years 1972-1976. The State's appeal of that disallowance, dated July 17, 1980, is docketed as 80-119-MT-HC.

The case docketed 78-25-MT-HC raised a question of the Board's jurisdiction in a case where, prior to the March 6, 1978 amendment to 45 CFR Part 16, the Administrator of HCFA had issued a decision on the substantive issues which he labeled as the final administrative action in the matter, but which instructed the Regional Commissioner to review the computation of the amount to be disallowed. The computation of that amount by the Regional Office was not completed until after March 6, 1978. The Board Chair ruled that the Board had jurisdiction to review the substantive issues raised in the appeal, as well as the amount of the recomputation, based on the Chair's interpretation of the March 6, 1978 amendments to Part 16 and Section 201.14, and the preambles which accompany those amendments. For an analysis of this issue, see Ruling on Jurisdiction, dated April 24, 1980.

APPLICABLE PROVISIONS

In May of 1967, the Department of Social and Rehabilitation Services (SRS), issued Section D-5362 of Supplement D to the Handbook of Public Assistance Administration. This section states:

> ... a State plan for medical assistance must provide that: The State agency will pay the reasonable cost of inpatient hospital services provided under the plan.

This provision was subsequently issued in 1969 as 45 CFR 250.30, which provides that inpatient hospital services under Title XIX be reimbursed on a reasonable cost basis.

Section 250.30(d) limits FFP as follows:

> Federal financial participation is available for payments, within the upper limits described in paragraph (b) of this section, in accordance with the provisions of the State plan.

Section 250.30(b) sets out:

> Upper limits...such payments may be made up to the reasonable charge under Title XVIII [Medicare].

(34 F.R. 1244, January 25, 1969, as amended at 35 F.R. 10013, June 18, 1970; 36 F.R. 12621, July 2, 1971; 36 F.R. 21591, November 11, 1971).

Reasonable cost provisions were also incorporated into the State's Medicaid plan (Section IV (C)(4)) on June 2, 1967 and remained a part of the state plan for the periods in question.

In 1972, the Social Security Act § 1902(a)(13)(D) was amended to permit the States to depart from the Medicare formula, but the amended provision stated that Medicaid reimbursement for inpatient hospital services could not exceed the Medicare-established "reasonable cost." Public Law 92-603, § 232, amending § 1902(a)(13)(D) of the Social Security Act.

STATEMENT OF THE CASE

The State does not dispute that it made payments to hospitals in excess of reasonable costs for inpatient services and that the applicable federal statute, regulations, and manual provisions do not allow FFP for such costs. The State argues instead that the Agency should be estopped from making these disallowances because the State detrimentally relied on representations by Department of Health, Education, and Welfare (HEW - now HHS) officials that the State could make payments in excess of reasonable costs, and that the State would receive FFP for such payments.

The State relies upon a statement by HEW representatives at a 1967 public meeting in Helena, Montana to substantiate its position that Agency officials represented that payments above reasonable costs were permissible. According to the State, the Chief, Medical Assistance Methods Branch, Bureau of Family Services, said at the meeting that "if the State decided to reimburse the hospitals above and beyond reasonable costs, there was nothing in the Federal law that would prohibit such payment." State's brief, dated July 14,1980, p. 2. The State also relies on a September 20, 1967, letter by the Deputy Administrator, HCFA, stating that federal law does not prohibit payments to participating hospitals in excess of reasonable costs. The State further argues that approval for these costs can be implied because the Agency paid the State's claims during the years prior to making these disallowances. Id. The State argues that "no supplemental payments of any amount would have been made to the participating hospitals were it not for the HEW's representations." Id., at p. 6. The State asserts that HEW induced these contracts and should therefore be equitably estopped from disallowing FFP.

The Agency responds that equitable estoppel cannot be claimed against the Government when it acts in its sovereign capacity, citing Hicks v. Harris, 606 F.2d 65, 68 (5th Cir. 1979); Air-Sea Brokers, Inc. v. United States, 596 F.2d 1008, 1011 (C.C.P.A. 1979), and maintains:

> when the Agency administers the Medicaid program, disbursing public funds on a non-profit basis to benefit the general public, it acts in sovereign capacity. Therefore, the doctrine of equitable estoppel may not be applied to the Agency in this proceeding.

Agency brief, dated July 14, 1980, p.5.

The Agency denies that HEW officials represented that the State could receive FFP and argues that the State could not have reasonably relied upon any promises of FFP, when the regulations make clear that FFP was unavailable beyond reasonable costs. See Agency's July 14, 1980 brief, p. 7. The Agency maintains that "the statute, the Agency's guidelines in manuals and regulations, and Montana's own Medicaid plan are all to the same effect: Medicaid payments for inpatient hospital services cannot exceed Medicare limits." See Agency's July 14, 1980 brief, p. 4. With respect to the case docketed 80-119-MT-HC, the Agency argues that, as evidenced by correspondence with Agency officials on the subject, the State had actual knowledge of the reimbursement rules and the power to cease the excess payments to the hospitals, but that the State failed to take the necessary actions to prevent further unallowable payments for the periods 1972-1976. See Agency's response to appeal in 80-119-MT-HC.

DISCUSSION

The Board finds that the record does not support the State's claim that the Agency should be estopped from enforcing the clear language in the applicable laws, regulations, and manual provisions prohibiting FFP for payments in excess of reasonable costs, because of representations allegedly made by HEW officials.

We do not here reach the issue of whether equitable estoppel can be asserted against the Agency in the administration of the Medicaid program. Even if equitable estoppel could be asserted against the Agency, the State has the burden to satisfy each of the following criteria for the application of the doctrine:

> Four elements must be present to establish the defense of estoppel: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Hampton v. Paramount Pictures, Corp., 279 F.2d 100, 104 (9th Cir. 1960), United States v. Georgia Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970), and see, Choat v. Rome Industries, Inc., 462 F. Supp. 728, 730 (N.D. Ga. 1978).

The Board concludes that the State has not satisfied this burden of proof because the State has not shown that it relied on any representations or was ignorant of the true facts pertaining to the availability of FFP in excess of reasonable costs.

The State's argument that estoppel should be applied because HEW officials represented that FFP would be available for payments made in excess of reasonable costs is not supported by the record. The State presents as evidence of such representations the following statement in an affidavit by a State employee who was present at the public meeting in Montana:

> I remember that [the HEW officials] made representations to the effect that the state of Montana could make supplemental payments to hospitals in excess of reasonable costs I do not remember any representations that this supplement would have to be made from state dollars.

See Attachment to State's Letter of July 27, 1981.

This less than definite statement about whether the HEW officials did state that FFP would be available is not persuasive in light of the affidavits from the HEW officials and the admissions by the State in earlier proceedings that the HEW officials said payments in excess of reasonable costs would come from State funds.* The affidavit of an HEW official who attended the meeting states:

> During the course of the meeting I stated that Federal financial participation would not be available for Medicaid payments for hospital inpatient services in excess of the "reasonable cost" limits established under the Medicare program, but that the State of Montana could make payment in excess of those limits solely from State funds if it wished to do so.

See affidavit of the Director, Division of Program Operations, Medicaid Bureau, HCFA, submitted March 6, 1981, and see also, affidavit of the Acting Director, Office of Intergovernmental Affairs, HCFA, submitted March 9, 1981.

In addition, in a submission to the Acting Administrator of SRS, dated

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* The Board's Order to Show Cause referred to a statement by an HEW official, which appeared as a quote from a "transcript" of the meeting in Montana, to the effect that "there can be federal participation only to the extent of the calculation of reasonable costs under the Social Security formula under Title XVIII. If a state chooses to go beyond that, there is nothing in the federal law that would prohibit this, but of course, the state would be bearing 100% of the differential. . . . " In its response to the Order, the State said that it had not submitted the materials which contained the quote from the "transcript" as evidence of the truth of the statement. The State objected to reliance on this quote

June 23, 1976, the Special Assistant Attorney General for the State of Montana wrote:

> In ...1967, personnel from HEW appeared at a public meeting in Helena, Montana... and categorically stated that the hospitals could accept reasonable costs from the Federal government and, in addition, could negotiate with the State for additional costs purely out of State funds. (emphasis added.)

Agency Reconsideration Record, No. 38, p. 2.

The State originally argued that, despite this prohibition, estoppel should be applied against the Agency because the State was induced into entering into contracts which allowed the State to make payments in excess of reasonable costs because of HEW assertions that the State was not prohibited from making such payments, and argued that HEW helped write the contracts. See State's Response to Order to Show Cause, p. 2. The State has not shown, however, that

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* cont.
as evidence of the fact that HEW officials had said there would be no FFP for these costs because the entire "transcript" was not available and the statement was taken out of context. When a complete copy of the "transcript" was located, the State objected to its use, claiming it was not a verbatim transcript, and there is no indication of who authored the transcript. The Agency argues for the admission of the "transcript" into the record because previous submissions showed that it was the State, not the Agency, which had control over it. The Agency agrees that the "transcript" is not a verbatim transcript, but argues that fact does not necessarily diminish its substantive accuracy. Relative to its author, the Agency submitted affidavits of Agency officials to the effect that the Agency was not the author. The Agency maintains that, by process of elimination, the "transcript" must have been made by either the State or by representatives of the Montana hospital industry -- neither of which has an interest in editing it so as to favor the Agency and disadvantage the State. Therefore, the Agency argues, the lack of actual knowledge of the author's identity does not disqualify it as evidence in this proceeding. Moreover, the Agency notes that the "transcript" was considered by the Montana State courts to be admissible evidence, and argues that if its authenticity was sufficient for the State courts, it should not be excluded as evidence in this proceeding. We have admitted the "transcript" of the public meeting into the record of these proceedings because the Board has the ability to weigh and evaluate evidence before it. In any event, there is sufficient evidence of what transpired at the meeting to support our decision, even without this "transcript."

the Agency was a party to the contracts or that the Agency approved the terms of the contracts. To the contrary, in a letter dated June 27, 1974 the State writes that when its program was first implemented, the State requested assistance from the regional office on the terms and form of the proposed contracts, but none was provided. See Reconsideration Record, No. 26. Even the statements on which the State relies to show that it was induced into entering into these contracts with the hospitals inform the State that FFP would not be available for such payments.

CONCLUSION

For the reasons stated above, these appeals are denied.

/s/ Cecilia Sparks Ford

/s/ Alexander G. Teitz

/s/ Norval D. (John) Settle, Panel Chair