DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Texas Department of Human Resources
Docket Nos. 80-176-TX-HC
81-15-TX-HC
Decision No. 213

DATE: September 22, 1981

DECISION

The Texas Department of Human Resources (State, TDHR) appealed two determinations by the Acting Director, Bureau of Program Operations, Health Care Financing Administration (Agency, HCFA), disallowing a total of $1,325,785 in Federal financial participation (FFP) claimed by the State under Title XIX of the Social Security Act. Based on expenditure reports submitted by the State for the quarters ending December 31, 1979 and June 30, 1980, the Agency determined that the State had recovered overpayments, made to a health insurance contractor, but had returned the Federal share at the wrong rate of FFP. The disallowance amounts, $924,000 in Docket No. 80-176-TX-HC and $401,785 in Docket No. 81-15-TX-HC, represent the difference between the rate of FFP in effect when payments were made to the contractor and the lesser rate in effect when the "recoveries" were reported. The appeals have been considered together without objection by the parties.

For reasons stated below, we uphold the disallowances. This decision is based on the applications for review; the State's response to an Order to Show Cause issued by the Board on December 17, 1980 in Docket No. 80-176-TX-HC; pre-conference briefs submitted by the parties; the transcript of an informal conference held on July 23, 1981; and the State's post-conference submission.

Background

In administering a Medicaid program under Title XIX, a State may enter into contracts with entities called "health insuring organizations," which, in exchange for a premium or subscription charge paid by the State, pay for services provided to eligible Medicaid recipients. (See 42 CFR §§431.502, 431.512 (1979).) TDHR, which administers the Medicaid program in Texas, has such a contract with the National Heritage Insurance Co. (NHIC). Under this contract, the State pays monthly premiums to NHIC on behalf of eligible recipients and these premiums constitute full payment by the State for certain types of services to those recipients.

The premiums differ in amount for various groups of recipients. The amounts are determined using actuarial methods and consist of several elements: the "pure premium" -- based on expected claims experience; an administrative premium, which primarily covers claims processing activities; a risk charge which is paid into an "incurred liability reserve" fund; and a risk charge which is paid into a "risk stabilization reserve" (RSR) fund, established by Article V, Paragraph E, of the NHIC contract.

The amount in the RSR fund was initially limited to a maximum of one-eighth of the previous year's incurred pure premium. Contract Amendment No. 7, dated June 29, 1979, changed the maximum amount to one-tenth of the incurred pure premium for each preceding respective State Fiscal Year and provided: "Amounts in excess of these ceilings shall be credited to the gross premiums due from State Agency to Contractor during subsequent State Fiscal Years...."

Based on a review of the State's Quarterly Statement of Expenditures (Form HCFA-64) for the quarter ended December 31, 1979, the Acting Director, Bureau of Program Operations, HCFA, determined that the State had credited $40,000,000 in excess funds from the NHIC risk stabilization reserve against subsequent premium payments. The Acting Director further determined that the State had calculated the Federal share of that $40,000,000 credit at a Federal Medical Assistance Percentage (FMAP) rate of 58.35%, the State's FMAP for fiscal year (FY) 80 and FY 81, and had returned $23,340,000 based on this calculation. 1/ According to the Acting Director, the excess funds credited came from premium payments made in FY 78 and FY 79, when the State's FMAP was 60.66%, and, therefore, the State had received FFP of $24,264,000. Based on this factual determination, the Acting Director disallowed $924,000, the difference in FFP calculated at the 60.66% and the 58.35% rates.

1/ The Agency determination that the State had "returned" part of the Federal share of the premium credits from NHIC was not based on actual payment of funds from the State to the Federal government. The State merely reported as premium expenditures in the later quarters a reduced amount (i.e., the difference in total premiums due to NHIC and the amount credited from the RSR). Absent the credit, the State could have claimed additional expenditures in the credited amount, and would have been entitled to FFP at the rate in effect for those quarters. Thus, the net result of the State claiming reduced expenditures in the later quarters is equivalent to a decreasing adjustment for the premium credits at the rate in effect for those quarters, 58.35%. The Agency determined that there should have been an adjustment at the 60.66% rate.

In support of the disallowance, the Acting Director cited Section 1903(d)(3) of the Social Security Act (the Act) and 45 CFR 201.5(a)(3). The Acting Director concluded that $924,000 FFP in "premium overpayments" by the State to NHIC was not "returned" on the quarterly statement of expenditures and should be disallowed. (Notification of disallowance, Docket No. 80-176-TX-HC, p. 2.)

Based on review of the State's Form HCFA-64 for the quarter ended June 30, 1980, the Acting Director determined that an additional $17,393,269 in premium overpayments by TDHR to NHIC during FY 79 had been recouped and subsequently refunded to the Federal government but at the wrong FMAP rate. An additional $401,785 was disallowed on the same basis as the previous disallowance.

Applicable Laws and Regulations

Section 1903(d)(2) of the Social Security Act provides that, after the Secretary estimates the amount of Title XIX funds to which a state will be entitled for any quarter,

> The Secretary shall then pay to the State ... the amounts so estimated, reduced or increased to the extent of any overpayment or underpayment which the Secretary determines was made to such State for any prior quarter and with respect to which adjustment has not already been made under this subsection ....

Section 1903(d)(3) provides:

> The pro rata share to which the United States is equitably entitled as determined by the Secretary, of the net amount recovered during any quarter by the State ... with respect to medical assistance furnished under the State plan shall be considered an overpayment to be adjusted under this subsection.

The cited regulation, 45 CFR 201.5(a)(3), as in effect during the relevant time period, deals with requirements for quarterly statements of expenditures for public assistance programs. It describes the quarterly statement as an accounting of the disposition of Federal funds granted for past periods, including adjustment for the difference between estimated and actual expenditures, and provides in part:

> The statement of expenditures also shows the share of the Federal Government in any recoupment, from whatever source, of expenditures claimed in any prior period ....

Based on the quarterly statement of expenditures, the Agency determines any adjustments for prior periods which need to be made and these adjustments are used to increase or decrease the amounts estimated for an ensuing quarter in computing the grant award for that quarter. (45 CFR 201.5(b) and (c).) Thus, the regulation parallels the statutory provisions on payments to the states.

Statement of the Case

The State does not deny that first $40,000,000 and then $17,393,269 in excess funds from the RSR was credited to the State by NHIC. Moreover, the State concedes that the amounts were derived from premium payments in which the Federal government participated at the 60.66% FMAP rate. (Transcript, pp. 72-73.) 2/ The Agency has stated that its general policy when adjusting for "medical assistance" overpayments is to calculate the adjustment at the FMAP rate in effect at the time the payments were made. This policy is consistent with Section 1903(a) which requires a particular FMAP to be applied to "medical assistance" expended during specific quarters.

The State's argument is based primarily on its interpretation of the statute and regulation and on its characterization of the nature of the premium credits from NHIC. The State argues that at the time the amounts credited were paid to NHIC they were "properly due and payable in accordance with the terms of the contract and all applicable federal regulations." (State's Pre-Conference Brief, p. 2.) Since no money was "erroneously" paid to NHIC, the State argues, there was no overpayment to NHIC.

The State also argues that amounts credited by NHIC to the gross premium payable by the State are not an "amount recovered" by the State within the meaning of Section 1903(d)(3) of the Act. In its Pre-Conference Brief, the State cites the Black's Law Dictionary definition of "recover" as meaning "to obtain again, to get renewed possession of, to regain," and states:

2/ At the informal conference, a HCFA participant made a statement in order to trace for the Board the calculation of these amounts since the precise figures are not reflected on the HCFA-64 forms. The State objected that it had not had a chance prior to the conference to examine the worksheets provided by the participant (although they were based on documents already in the record) and also questioned the relevancy of the presentation. In its post-conference submission, the State also contended that the HCFA participant's analysis distorted the nature of its transaction with NHIC. Since the State does not dispute the final amounts resulting from the calculations, we do not rely on the participant's presentation for our conclusion.

> In this instance, the amounts credited are not available to TDHR, but are applied to the premiums in a manner previously agreed under the terms of the contract. The premium credits are interim accounting transactions to maintain the RSR at a mutually agreed level.
> (State's Pre-Conference Brief, p. 2.)

In addition, the State points to Agency approval of Amendment No. 7 of the NHIC contract and claims that the disallowance is, in effect, a "totally inequitable" withdrawal of that approval. (Pre-Conference Brief, p. 3.) The State also argues that the disallowance is inconsistent with the position taken by the Regional Medicaid Director prior to the disallowance that, on termination of a health insurance contract, the Federal share of amounts repaid to the State by the contractor should be returned at the matching rate in effect on the date the contract is terminated.

The Agency responds that, to be allowable as medical assistance under Section 1903(a)(1), expenditures must have been for covered services provided to eligible recipients, and the return of the "excess" premium by NHIC to the State represents premium payments which were not used for such services. According to the Agency, the excess constitutes an "amount recovered" by the State because, but for the credit, the State "would have been otherwise obligated to pay NHIC" for the subsequent years' premiums. (Agency's Pre-Conference Brief, p. 7.) The Agency also provides explanations, discussed below, to show that the disallowance is not inconsistent with its previous positions.

Discussion

I. Whether the premium credit represents an "overpayment" within the meaning of Section 1903(d)(2).

The State's argument that the premium credit is not an "overpayment" to be adjusted on its quarterly statement of expenditures is based on its position that the credits are derived from amounts which were not "erroneous payments." The State claims,

> The application of the ... credit does not reduce the total allowable expenditures for prior quarters for payments to NHIC since the prior quarter payments were for premiums due under the terms of the contract and they were allowable expenditures under all applicable federal regulations. TDHR has not been notified by anyone in HHS that FFP was not allowable for the premium payments made nor is there any basis for such a notification.
> (State's Pre-Conference Brief, p. 2.)

The Agency agrees that the payments were perfectly legal when made. (Transcript, pp. 41-42.) The Agency argues, however, that "that portion of the premium payment of NHIC which created the ... RSR excess is a payment for Medicaid services which were never rendered," and are therefore not payments for "medical assistance" under Section 1903(a)(1) of the Act. (Agency Pre-Conference Brief, p. 12.)

The State attempts to dispute this position by pointing to the uniqueness of its arrangement with its health insuring contractor, as contrasted with the relationship most states have with "fiscal agents." A fiscal agent is paid only for what it pays out in claims or incurs in administrative costs. Regarding this, the State says,

> We got a service. We paid the insurance premium ... That is what the service is.
> (Transcript, pp. 81-82.)

The State's view, however, is based on a misunderstanding of the term "overpayment" in Section 1903(d) of the Act. While the term "overpayment" is sometimes used in the Medicaid program to refer to payments erroneously made by the State (for instance, payments for services to an ineligible recipient or provider), the term as used in Section 1903(d) encompasses the total Federal/State fiscal relationship and applies whenever "the Secretary determines" that there should be a decreasing adjustment to the amount paid to the State. For example, under the implementing regulations at 45 CFR 201.5, an adjustment may be made for a difference between estimated and actual expenditures. While the premium payments here were not erroneous when made, this does not preclude a later determination that, once credited to amounts due in subsequent quarters, they are no longer to be considered actual allowable expenditures in the prior quarters.

We recognize that premium payments to an insurance contractor are different from payments to a fiscal agent in that premium payments may be considered to be "medical assistance" under the State plan whether or not they relate directly to the amount paid by the contractor for covered services. (See 42 CFR 431.594.) The premiums can include an amount paid to the contractor for assuming the risk that the costs of covered services will exceed the premium payments. Here, however, the risk charge paid into the RSR fund was subject to certain limitations under the contract.

The contractor only had a right to use RSR funds to pay for covered services if, in any payment cycle (every two weeks), the contractor did not have sufficient dollars in the unpaid claims liability reserve. (Transcript, p. 105.) Where the RSR funds accumulated, any excess over the ceiling amount could no longer be retained as a reserve but had to be credited to the State. Thus, these excess amounts could no

longer have been considered "paid" to the contractor since the contractor no longer had a right to use the funds for the originally designated period, either in providing covered services or for assuming the risk. Instead, the excess amounts were to be applied to premium payments for the subsequent period and thus became expenditures for "medical assistance" in that period.

Accordingly, we conclude that the premium credits cannot be considered to be amounts expended during FY 78 and FY 79 as medical assistance under the State plan, allowable under Section 1903(a)(1), and have been properly determined to constitute an "overpayment" under Section 1903(d)(2).

II. Whether the premium credits are an "amount recovered" within the meaning of Section 1903(d)(3) or a "recoupment" of expenditures under 45 CFR 201.5(a)(3).

Our reading of Section 1903(d)(2) is supported by the language in 1903(d)(3), which provides that "the pro rata share to which the United States is equitably entitled ... of the net amount recovered ... by the State with respect to medical assistance ... shall be considered an overpayment to be adjusted...." 3/ That is, whenever the State recovers an amount furnished as medical assistance, the Federal share is an "overpayment" under 1903(d)(2).

We do not agree with the State that the premium credits have not been recovered or recouped merely because the amounts were never "available" to the State but were required to be applied to future premiums in accordance with the contract. The substance of the transaction was a recovery or recoupment. This was stated well by Agency counsel at the conference:

> I agree with the State's position that no money was handed to them, or they did not receive a check in this amount; however, their obligation to pay premiums was reduced by the amounts of these credits, [and] that reduction in their

3/ The Order to Show Cause issued in Docket No. 80-176-TX-HC stated the preliminary conclusion that Section 1903(d)(2) was a sufficient basis on which to uphold the disallowance. The Order did not rely on Section 1903(d)(3) since, in another case, the Agency had argued that (d)(3) was to be read with the second sentence of (d)(2), which refers to "third party liability" payments which are recovered. In these Texas cases, however, the Agency based its disallowance on Section 1903(d)(3), and the State, although provided ample opportunity to challenge the applicability of the section, has not argued that it applies only to third party liability payments. Moreover, the language of the section itself indicates that it is not limited in this way.

> payment was tantamount to the receipt of funds ... while they did not control the dollars involved it did reduce their obligation and therefore constituted a recovery. (Transcript, p. 46.)

Previous contract language provided for a "refund" of RSR excess amounts, rather than a "credit." While the State argues that it made a definite, knowing change in the wording of the contract (Transcript, p. 83.), we take the prior language as further evidence of the nature of the transaction involved. 4/

In its Pre-Conference Brief, the State argued for the first time as a reason why the premium credit did not constitute an "amount recovered," that it "was part of a prospective premium-setting process under the terms of the contract." (p. 2; see, also, Transcript, p. 7.) The plain terms of the contract, however, indicate otherwise. The contract, as amended by Amendment No. 7, states that amounts in excess of the RSR ceilings "shall be credited to the gross premiums due from the State Agency to the Contractor during subsequent State Fiscal Years ..." (Exhibit C to State's Application for Review. Emphasis supplied.) Thus, there was not a reduction in the amount due to NHIC in the subsequent period, only a credit to be applied to amounts due.

The State has presented no convincing argument or evidence that the Agency was incorrect in applying Section 1903(d)(3) and 45 CFR 201.5 to these amounts.

III. Whether this disallowance is inequitable as a retroactive disapproval of Amendment No. 7 to the NHIC contract.

The State points to Agency approval of Amendment No. 7 to the NHIC contract, providing for application of RSR excesses as premium credits, and argues that —

> It is totally inequitable to allow HCFA to, in effect, retroactively withdraw its approval of a contract or contract amendment that is clear as to its words and intent.
>
> (State's Pre-Conference Brief, p. 3.)

The State cites 42 CFR 431.593, which requires prior approval by the Regional Medicaid Director for any health insuring contract exceeding $100,000 as a condition for availability of FFP in payments under the contract. It follows, the State contends, that FFP is available for expenditures made under approved contracts.

4/ It is interesting to note, also, that the State's vouchers, billing NHIC, identified the credits as "premium refunds." (See Exhibits to Agency's Pre-Conference Brief.)

There are significant flaws to the State's argument. Amendment No. 7 may clearly state that excess RSR funds are to be credited to premiums due from the State in subsequent periods, but it does not speak to the issue of how those credits should be treated on the State's FFP claims. Thus, approval of the amendment cannot be read as approval for the State to fail to account for the Federal share at the proper rate.

Moreover, the Agency has not precluded the State from claiming FFP in payments made under the contract, nor precluded NHIC from accomplishing the return of excess RSR funds through a credit in accordance with the contract. The Agency has merely protected the Federal government's beneficial interest in amounts paid as the Federal share of premium payments amounts, subsequently refunded in accordance with the contract.

IV. Whether this disallowance is inconsistent with Agency treatment of refunds after contract termination.

The State has submitted several letters from the Regional Medicaid Director, one relating to the NHIC contract and one relating to a prior health insuring contract, which state that the Federal matching rate to be used for amounts recovered from the contractor after contract termination is the rate in effect on the date the contract is terminated. (See Exhibits to State's Response to Order.) The State argues that this is "directly contrary" to HCFA's disallowance and demonstrates the equity of the State's position. (State's Pre-Conference Brief, p. 3.)

The explanation given by the Agency at the conference for the seeming inconsistency in the treatment of funds returned at contract termination and premium credits from the RSR fund is as follows:

> The situations that prompted those letters were basically this: The prior contract, as does the current NHIC contract, calls for a [maximum] 96 month spend-down by the contractor. Some of the funds can be held up to the 96th month, and in the 97th month, the funds must be returned. We are talking about eight years.
>
> The letters were addressing that circumstance where the original term of the contract has run, ... and the import of the letters is that after termination ... the FMAP rate that the funds need to be returned at is the rate when the original contract ended by its own terms.

> What we are saying there is that since the contract per se has ended, there will be no more monthly premiums. So ... the rate in effect at the last time premium payments were made would be the applicable return rate also.
>
> (Transcript, pp. 51-52.)

The Agency argues that this is a logical approach since the rate in effect at contract termination is the rate for the premiums last paid in and it would be hard to calculate the Federal share if different rates were applied. The Agency points out that this benefits the State because historically the State's FMAP rate has been going down and, if anything, the State would be paying back at a lower FMAP rate than what it received.

While we do not think that this explanation completely negates the fact that there is some inconsistency here, we do not think that inconsistency is inequitable to the State. With respect to the RSR premium credits, the Agency is asking for return of its full share. Its right to do that under the applicable laws and regulations is not lost merely because in other circumstances it is willing to accept less than the full share for purposes of administrative convenience.

Conclusion

For reasons stated above, we uphold the Agency's disallowances in the amounts of $924,000 and $401,785, for a total disallowance of $1,325,785.

/s/ Cecilia Sparks Ford

/s/ Norval D. (John) Settle

/s/ Donald F. Garrett, Panel Chair