DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Wisconsin Department of Health and Social Services DATE: August 14, 1980
Docket No. 80-36-WI-SS
Decision No. 116

DECISION

The Wisconsin Department of Health and Social Services (the State) requested reconsideration pursuant to 45 CFR Part 16, Subpart C, of a disallowance of Federal financial participation (FFP) claimed under Title IV-A of the Social Security Act (the Act) for emergency assistance expenditures. The sole issue presented is whether the State's claim of $163,616 FFP for the period of January 1, 1976 through June 30, 1978 was properly disallowed on grounds that the State's approved plan for this period did not provide for emergency assistance. There are no material facts in dispute and an informal conference would not be helpful. Accordingly, we have determined to proceed to decision based on the State's application for review and the State's response to the Order to Show Cause issued by the Chairman of the Board on March 26, 1980. For the reasons stated below, we conclude that the disallowance should be upheld.

Background

Section 403(a)(5) of the Act authorizes reimbursement of 50 percent of the total amounts expended by a state under its state plan for emergency assistance to needy families with children. Section 406(e)(1) of the Act provides that:

> "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 ... (A) money payments, payments in kind... but only with respect to a State whose State plan approved under Section 402 includes provision for such assistance.

This section limits Federal reimbursement for emergency assistance expenditures to states whose approved state plans specifically provide for such emergency assistance. The emergency assistance program was added to Title IV as part of the Social Security Amendments of 1967, Public Law 90-248, Section 206. This program was described in the Senate Finance Committee report as "a new program

optional with the States [to] authorize dollar-for-dollar Federal matching to provide temporary assistance to meet the great variety of situations faced by needy families with emergencies." Senate Report No. 744, 90th Congress, 1st Session, 4 (1967). Justice Stewart, speaking for the Court, noted in Quern v. Mandley, 436 U.S. 725, 729 (1978), that in order for a state to participate in the emergency assistance program under Title IV, "a State must include a provision for EA [Emergency Assistance] in its §402 state plan...."

States are given the option of electing to participate in an emergency assistance program by filing an amendment to their state plan providing for such a program. Pursuant to 45 CFR §233.120(b), FFP is then available for emergency assistance expenditures "[b]eginning with the effective date of approval of the amendment to the State plan for AFDC which provides for emergency assistance to needy families with children pursuant to Section 406(e) of the Act."

Under Section 1102 of the Act, the Secretary has the authority to promulgate rules and regulations, not inconsistent with the Act, which provide for the efficient administration of the functions of the Secretary under the Act. Section 201.3(g) of Title 45 of the Code of Federal Regulations provides for the effective date of a state plan or state plan amendment under Title IV-A. This section states:

> The effective date of a new plan may not be earlier than the first day of the calendar quarter in which an approvable plan is submitted, and with respect to expenditures for assistance under such plan, may not be earlier than the first day on which the plan is in operation on a statewide basis. The same applies with respect to plan amendments that provide additional assistance or services to persons eligible under the approved plan or that make new groups eligible for assistance or services provided under the approved plan.

Facts

Prior to December, 1975, Wisconsin opted to elect an emergency assistance program by filing a plan amendment specifically providing for such a program. The State decided to withdraw its claim for FFP in the emergency assistance program due to the Federal court order in Kozinski v. Schmidt, 409 F. Supp. 215 (E.D. Wis. 1975). That order enjoined the State from limiting emergency assistance to cases of fire, flood or natural disaster and from failing to provide emergency assistance to otherwise eligible needy families with children who need such assistance to avoid eviction

from homes or to maintain or restore utilities. The court stated that nothing in the order shall restrict the defendant's ability to modify or rescind its participation in the Federal emergency assistance program and that the order is applicable only to emergency assistance given by defendants for which FFP is received pursuant to Section 406(e)(1) of the Social Security Act. The State then filed State Plan Amendment 75-94, dated December 18, 1975, which withdrew the provision for emergency assistance and made the State ineligible for FFP during the period in question.

In 1978, the Supreme Court announced its decision in Quern v. Mandly, supra. The Supreme Court decided, among other issues, whether a state that adopts an emergency assistance program under §403(a)(5) and §406(e) must define eligibility for this assistance no more narrowly than §406(e). The Court held that §406(e) defines the permissible scope of an emergency assistance program for which FFP is available but §406(e) does not impose mandatory eligibility standards on those states that elect to participate in the emergency assistance program. The State believed that the decision in Quern indicated that the Federal District Court erred in the Kozinski case regarding the eligibility of Wisconsin's emergency assistance program for FFP. (Application for review, page 3.) On September 19, 1978, therefore, the State submitted a new state plan amendment to the Social Security Administration providing emergency assistance for needy families.

By letter dated January 24, 1980, the Commissioner of Social Security disallowed $163,616 in FFP in emergency assistance for the period January 1, 1976 through June 30, 1978 on the basis that that amount represents claims for emergency assistance expenditures not covered under the state plan and therefore not allowable pursuant to Sections 403(a)(5) and 406(e)(1) of the Social Security Act. Citing 45 CFR §201.3(g), the Agency stated that inasmuch as the state plan amendment providing for an emergency assistance program was filed on September 14, 1978, the earliest date this approved amendment could be effective was July 1, 1978--the first day of the calendar quarter in which the plan was submitted.

State's Position

The State in its application for review admits that its state plan did not provide for emergency assistance expenditures for the period in question and admits that State Plan Amendment 75-94, submitted December 18, 1975, by deleting the provisions for emergency assistance, waived the State's claim for FFP for the expenditures during the period in question. The State acknowledges that the effective date of an amended provision of a state plan is the first day of the calendar quarter in which an approvable amendment is submitted. *

* The State asserts that the effective date provision in the regulations should not be construed so as to mandate a disallowance under the facts of this case. The State cites 45 CFR §205.5 for this proposition even though the Board specifically brought to the State's attention the fact that the disallowance was based on 45 CFR §201.3(g). Since the State has offered no explanation for the substitution of 45 CFR §205.5 for 45 CFR §201.3(g), the Board will consider the provision as it appears in 45 CFR 201.3(g). The Board considers this section applicable in this case inasmuch as it applies to plan amendments that provide additional assistance or services to eligible persons.

The State contends that 45 CFR §205.5 and the requirement for filing state plan amendments are not part of the Social Security Act, but are the means for an efficient administration of the Act. The State also contends that these requirements must be balanced on the one hand by a need for fulfilling the efficient administration of the Act and on the other with a regard to achieving equity in fulfilling the purposes of the Act. The State argues that the disallowance has been based solely on grounds of administrative efficiency without consideration of the circumstances that resulted in termination of FFP in the state program for a temporary period of time.

The State explains that it amended its plan, deleting the provisions for emergency assistance, as a result of the Federal court order in Kozinski. The State points out that it did not appeal the court order for fear that an unsuccessful appeal might establish far reaching and expanded concepts of assistance which would have impaired the State's ability to secure from its legislature continued financing for the emergency assistance program.

The State believes that the U.S Supreme Court decision in Quern, supra, indicates that the Federal District Court erred in its opinion regarding the eligibility of the Wisconsin emergency assistance program for FFP. Moreover, the State asserts that, throughout the life of the Wisconsin emergency assistance program, eligibility conditions and benefits available to individuals were identical to those required by Federal regulation, and that the Wisconsin program was administered in accordance with the broad purposes of the Social Security Act. The State further asserts that the program complied with all the specific requirements of the Federal agency administering the Act with the exception that Wisconsin did not, during the period, have an approved state plan. Therefore, the State is seeking FFP for the program during the years in question.

Discussion

Although Wisconsin states that it continued to comply with all requirements for an emergency assistance program after it withdrew its election, the fact that it did not provide for an emergency assistance program in its state plan precluded FFP for such expenditures. The Social Security Act requires a state which wishes to participate in the emergency assistance program to specifically make provision for such a program in its state plan.

If a state were to amend its state plan so as to remove existing provisions for emergency assistance, the state, in order to again be eligible for FFP, would have to submit a new state plan amendment providing for emergency assistance. Once a new plan amendment were filed, 45 CFR §233.120(b) would provide FFP for emergency assistance expenditures "[b]eginning with the

effective date of the approval of the amendment to the State plan for AFDC which provides for emergency assistance to needy families pursuant to section 406(e) of the Act." In accordance with the provisions of 45 CFR §201.3(g), the earliest possible effective date of the state plan amendment, once Wisconsin reinstituted the emergency assistance program, was July 1, 1978.

The State claims that it withdrew its claim for FFP in the emergency assistance program due to the Federal court order in Kozinski, supra, and cites the Supreme Court Decision in Quern, supra, as an indication that the Federal District Court erred in its opinion regarding the eligibility of Wisconsin's emergency assistance program for FFP. That the Federal District Court erred in Wisconsin's situation in light of the subsequent Supreme Court decision in Quern does not require this Board to reach a contrary conclusion. The issues before the Board are distinguishable from Quern. In Quern, the Supreme Court held that §406(e) defines the permissible scope of an emergency assistance program, but that section does not impose mandatory eligibility standards on those states electing to participate in that program. In the case before this Board, the Agency is disallowing FFP for a period during which the State did not include provisions in its state plan for emergency assistance as required by the Act. The Agency does not question the State's right to limit eligibility under an emergency assistance program, as was the case in Quern, but contends that if a state chooses not to include an emergency assistance program in its state plan, then, as a consequence FFP is not available for these costs.

The State contends that the effective date provision, 45 CFR §201.3(g), is a regulation of administrative efficiency which should not bar the state plan amendment from relating back to the period for which there was no state plan provision for an emergency assistance program. (Application for Review, page 2). The Board is not reviewing the question whether the Agency has authority to do what the State asks. The Agency has chosen not to act as the State requests, and we find no evidence in the record of any abuse of discretion. In Oregon State-wide Allocation Plan, DGAB Docket No. 75-7, Decision No. 22, this Board held that it will not substitute its discretion for that of the Agency where the Agency's decision is in accordance with the rules and the Agency's exercise of its discretion is reasonable. (See, e.g. Harrison County Community Action Agency, Inc., DGAB Docket Nos. 75-5 and 76-7, Decision Nos. 35 and 36, March 14, 1977.) The Board concludes that the Agency's decision in this instance was in accordance with the regulation and was reasonable in light of the fact that it would be difficult for the Agency to retroactively monitor compliance of the State plan.

Furthermore, the State has set forth the equitable argument that the Board, rather than being bound by regulation, should look to the purposes of the Act and the specific circumstances of this case so as to find for the State. The Board has upheld Agency determinations, despite equitable arguments advanced by grantees, where the Board has found that the statutory and regulatory authority for such determinations is clear and where a regulation on which the determinations are based has been validly promulgated and is consistent with the statute. (See, e.g., Board Decisions: Vermont State-Wide Cost Allocation Plan, DGAB Docket No. 79-198, Decision No. 84, February 26, 1980; American Foundation for Negro Affairs, DGAB Docket No. 79-4, Decision No. 73, December 28, 1979; New Mexico Department of Human Services, DGAB Docket Nos. 78-32-NM-HC, 78-33-NM-HC, 79-37-NM-HC, Decision No. 70, December 11, 1979; Oregon State-wide Cost Allocation Plan, DGAB Docket No. 75-7, Decision No. 22, June 25, 1976). Such a situation exists in this dispute.

Conclusion

For the foregoing reasons, we conclude that this disallowance should be upheld.

/s/ Clarence M. Coster

/s/ Norval D. (John) Settle

/s/ Donald G. Przybylinski, Panel Chairman