

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

New York State Office of Temporary and Disability Assistance
Docket No. A-17-3
Ruling No. 2017-2
February 7, 2017

RULING ON REQUEST FOR RECONSIDERATION

On September 2, 2016, the Departmental Appeals Board (Board) upheld the February 1, 2016 determination of the Social Security Administration (SSA) to disallow \$645,618 in costs related to Deficit Reduction Leave (DRL) payments the New York State Office of Temporary and Disability Assistance (State) made to its Division of Disability Determinations (DDD) employees during the period from January 18, 2012 to November 5, 2014. *New York State Office of Temporary and Disability Assistance*, DAB No. 2732 (2016). On October 7, 2016, the State requested reconsideration of DAB No. 2732. On November 8, 2016, the SSA filed a response, opposing the request. As we explain below, we conclude that the State has not identified any error of law or fact and accordingly deny the request for reconsideration.

Case Background and the Board's Decision¹

The SSA reimburses states, including New York, the costs of administering the SSA's Disability Insurance (DI) program and Supplemental Security Income (SSI) program established, respectively, under Titles II and XVI of the Social Security Act. In New York, the State's DDD performs disability determinations pursuant to the DI and SSI programs. DAB No. 2732, at 1. The dispute between the State and the SSA concerns the SSA's disallowance of (i.e., the denial of reimbursement for) \$645,618 the State paid, during the period from January 18, 2012 to November 5, 2014, to reimburse over 200 employees of the State's DDD, upon their separation, for the value of "Deficit Reduction Leave" or DRL² they had accrued pursuant to a statewide Deficit Reduction Plan (DRP).

¹ This section is intended only to be an abbreviated summary of the case background and DAB No. 2732 and is provided for the convenience of the reader.

² The total of \$645,618 included \$418,379 in DRL payments and \$227,239 in related fringe benefits. DAB No. 2732, at 6. We refer to the DRL payments and related fringe benefits costs in the aggregate as "DRL payments."

Id. at 5-6. The DRP refers to a 2011 New York State budget program designed to save \$450 million in anticipated, recurring statewide payroll expenditures. Pursuant to the DRP, the State reduced the salaries of DDD employees (most of whom belonged to one of two public employee unions) in fiscal years (FYs) 2011-2012 and 2012-2013 in consideration for the promise of repayment of the value of the accrued DRL after FY 2012-2013 or, as applicable, upon the affected employees' separation from employment. For those DDD employees covered by one of two unions, the State renegotiated the terms of the collective bargaining agreements with the two unions to effectuate the DRP. *Id.* at 5.

The State claimed SSA reimbursement for the DRL payments as necessary costs of administering the disability determination function for the DI program in New York. *Id.* at 6. The SSA disallowed the DRL payments essentially on the ground that the State made DRL payments to its DDD employees for the time they were out of the office, on leave, and not providing services in furtherance of the DDD's disability determination function. *Id.* at 7. The State appealed the SSA's determination to the Board.

The Board upheld the SSA's disallowance of the \$645,618 in full, finding that the SSA reasonably interpreted and applied the governing authorities, cost principles, and agency interpretive guidance. The Board first rejected the State's chief argument for reversal of the disallowance, which was that the DRL payments were necessary for DDD's performance of disability determinations because, but for the DRL policy implementing the DRP, New York would have been forced to reduce its DDD staffing, which would have had a significant adverse impact on DDD's ability to administer the DI program for which the SSA reimburses the State. DAB No. 2732, at 8-9. The Board determined that the DRL payments were not necessary for DDD to administer the DI program, but rather were incurred in furtherance of a statewide budget balancing initiative. *Id.* at 9-10. Moreover, the Board found, that since the SSA already reimburses the State in full for expenditures incurred for administering the DI program, which includes DDD employee compensation, there would be, and should be, no need for DDD employee downsizing attributable to insufficient funds to pay the employees' compensation. *Id.* The Board also rejected the State's argument that the DRL payments were reasonable as unsubstantiated based on the evidence the State proffered as proof of their reasonableness and stated that whether the payments were reasonable is ultimately irrelevant since the State has not shown that the DRL payments were necessary to fulfill its disability determination function. *Id.* at 11-13. The Board also found unconvincing the State's argument that the costs of administering the DI program in New York included the DRL payments, i.e., the DRL payments are "allowable" as fringe benefits that the applicable cost principles recognize as being included within employee compensation that is

reimbursable if they otherwise are shown to have been reasonable. *Id.* at 13. Regarding this argument, the Board stated that leave is in the nature of a fringe benefit that may be allowable if it meets other applicable cost principles. The Board concluded, however, that the leave for which the DRL payments were made was not compensation for services rendered in accordance with the applicable cost principles; the SSA already reimbursed the State in full for its DDD employees' salaries, which included compensation for fringe benefits like authorized leave.³ *Id.* at 13-14. Lastly, the Board found that the State, contrary to applicable regulations, continued to incur, and seek reimbursement for, the DRL payments despite the SSA's notice to the State in October 2012 that the SSA would not reimburse the State for them. *Id.* at 15-17.

Standard for Reopening

As set out in DAB No. 2732, the procedural regulations in 20 C.F.R. Part 404, subpart Q govern the Board's review of the State's appeal of the SSA's "monetary disallowance" determination denying reimbursement of costs the State incurred in administering the DI program in New York. Within Part 404, subpart Q is section 404.1683, which states, in part, "The rules for hearings and appeals before the Board are provided in 45 CFR part 16." Relevant here, 45 C.F.R. § 16.13 empowers the Board "to reconsider a Board decision where a party promptly alleges a clear error of fact or law."

Discussion

The State asserts that the Board "acted arbitrarily, capriciously and in violation of controlling legal principles" and "made clear errors of fact and law" in upholding the disallowance. Request for Reconsideration (RR) at 1-2.⁴ According to the State, the Board did not consider "several relevant factors" and "fail[ed] to explain its decision." *Id.* at 2, 3. Having carefully considered the arguments in the State's request for

³ Under the cost principles in Office of Management and Budget (OMB) Circular A-87, the term "compensation for personal services" encompasses all remuneration, paid currently or accrued, for services rendered during the relevant performance period under the federal award, including, specifically, fringe benefits, which include the costs of leave. OMB Circular A-87 (codified at 2 C.F.R. Part 225), Appendix B, ¶¶ 8.a, d. Therefore, leave is a fringe benefit included within the larger category of "compensation for personal services" that may be reimbursed, so long as other applicable requirements are met. *See* DAB No. 2732, at 14. Under the circumstances of this case, however, even accepting that DRL is leave encompassed within the category of "fringe benefits" consistent with the cost principles, DRL payments are not reimbursable for a fundamental reason – they are not allowable as costs necessary for services rendered by staff in performance of the DDD's disability determination function.

⁴ In asserting that the Board "acted arbitrarily, capriciously and in violation of controlling legal principles," the State relies on section 706 of the Administrative Procedure Act (APA). RR at 2, citing 5 U.S.C. § 706. The APA standard on which the State relies is inapplicable here; it applies to court review of final agency actions.

reconsideration (detailed below) and the SSA’s response to that request, the Board concludes that the State’s arguments are largely those the Board already considered and rejected in DAB No. 2732, and the State has not identified any clear error of fact or law in DAB No. 2732.

1. *The State’s reassertion of an argument that the DRL payments were necessary for fulfilling DDD’s disability determination function – fully addressed and rejected in DAB No. 2732 – does not amount to articulation of clear error of fact or law.*

The State asserts that the Board’s determination that the DRL payments were not necessary for performing disability determinations “cannot be reconciled with the clear language and intent of” 20 C.F.R. § 404.1626(a), which obligates the SSA to pay the State for costs necessary for continued effective administration of the disability determination function, and the applicable cost principles, which require the SSA to pay the State for all costs “‘*necessary* and reasonable for [the] proper and efficient performance and administration’” of the federal award. *Id.* at 2-3 (State’s emphasis), quoting OMB Circular A-87, Appendix A, ¶ C.1.a. While the State acknowledges that the Board’s decision “address[ed]” its argument that the DRL payments were necessary, it nonetheless takes issue with the Board’s analysis, asserting that the Board “summarily” rejected the argument and wrongly concluded that the State “‘assumes an SSA obligation to help a state balance its budget.’” *Id.* at 3, quoting DAB No. 2732, at 10. The State says it “has *never* advocated” the position that SSA had an obligation to balance the state’s budget. *Id.* (emphasis in original). According to the State, the DRL payments were “incontrovertibly necessary to perform the DDD’s disability determination function for which [the] SSA pays [the State]” because, in the absence of the DRL policy, “New York State would have been forced to begin statewide layoffs of its employees, including [its] DDD employees, *regardless* of the source of DDD’s funding[,]” which would have “significantly influenced DDD’s ability to run its program properly and efficiently.” *Id.* at 3 (emphasis in original).

The State thus repeats its argument that the DRL policy pursuant to which the DRL payments were made was necessary for fulfilling the DDD’s disability determination function because in the absence of the DRL policy New York would have been forced to downsize the state’s workforce that includes DDD employees, which would have adversely affected the DDD’s ability to fulfill its function. The Board fully considered this argument, and rejected it. DAB No. 2732, at 8-11. We appreciate that in re-emphasizing its central argument the State is expressing its strong disagreement with the Board’s rationale below, but repetition of an argument already addressed does not

amount to identification of legal or factual error in DAB No. 2732. *Pennsylvania Dep't of Public Welfare*, Ruling on Request for Reconsideration of DAB No. 2653, Ruling No. 2016-2, at 1 (2016) (repetition of arguments the Board has already rejected does not meet the standard of review for reconsideration). Accordingly, we find no basis for reconsidering our conclusion that the DRL payments were not necessary for DDD to fulfill its function.

Moreover, as we said in DAB No. 2732, the State itself acknowledged that it ultimately did not have to downsize the DDD's workforce. DAB No. 2732, at 9. We also found that even if the downsizing had occurred, it should not have adversely affected the DDD program because SSA paid the salaries of the employees working in that program. *Id.* What the State is now arguing amounts to nothing more than a repackaging of arguments we have already rejected, which is not a basis for reconsideration.

2. *The Board's statements about the SSA not having an obligation to balance the State's budget raise no issue supporting reconsideration.*

The State contends that the Board's decision wrongly assumed that the State was advocating a position that the SSA is obligated to help New York balance its budget. In the statements at issue, however, the Board was not making an assumption as to what the State was advocating but merely discussing a conclusion that logically flowed from the positions the State did advocate and the evidence it presented to support those positions. The State, moreover, is selectively quoting the Board's words and invoking them to reassert an argument already addressed, without acknowledging the full context of the Board's analysis that preceded those words. In rejecting the State's argument that the DRL payments were necessary as "untenable because it assumes an SSA obligation to help a state balance its budget," the Board found that the evidence the State offered showed that the impetus behind, and the purpose served by, the DRL policy was to close a statewide budget shortfall in Fiscal Years 2011-2013 that affected governance of the entire State of New York, of which DDD is only a part. *Id.* at 10. In its appeal, the State represented that the DRL policy was implemented due to the state legislature's enactment of a budget plan that included \$450 million in recurring workforce savings to be achieved through negotiation of savings with employees or through layoffs, in response to a fiscal crisis in New York in 2011. *See id.*; *id.* at 14 ("The State did not show that it had any basis for negotiating changes to the terms of the employees' compensation other than its desire to avoid a statewide budget shortfall."). On this point, we agree with the SSA that the State "may not be openly asking SSA to balance New York's budget, but this is in effect what a ruling in [the State's] favor would accomplish." SSA's Response at 3 n.5.

3. *The Board's declining to resolve in DAB No. 2732 an issue that was unnecessary to its decision is not a basis for reconsideration.*

The State asserts that the Board erred in not providing a reasoned analysis of the State's argument on appeal that 20 C.F.R. § 404.1621(b) and POMS DI 39518.005.A.2⁵ compelled the State to apply the DRL policy to DDD employees, the result of which was the State's incurrence of the DRL payments. The State explains its understanding of the SSA's position below to have been that the State should have or could have exempted DDD employees from the DRL policy by negotiating with the employees or their unions, and reasserts that it could not simply "pick and choose" which contractually obligated benefits would be given to which employees. Doing so, the State says, would have been in contravention of section 404.1621(b) and POMS DI 39518.005. RR at 3-4.

In DAB No. 2732, the Board noted the State's argument, but declined to resolve the issue raised by the argument. DAB No. 2732, at 14-15. We said:

We need not resolve the issue of whether the State should have exempted DDD employees from the DRP. Whether or not the SSA is correct as to this position, it is for the State of New York to determine what is appropriate or necessary in furtherance of managing its own budget, which could entail, as was the case here, bargaining with state employees to curb state employee payroll costs. The relevant issue for purposes of the dispute here [is] not whether the DRP and DRL policy were necessary or appropriate for the State of New York to balance its budget; the issue, specifically, is whether the DRL payments comported with the applicable SSA authorities and cost principles such that the SSA is obligated to reimburse the State for them. We agree with the SSA that they are not reimbursable.

⁵ We quote section 404.1621(b) in full here. It provides:

(b) *Selection, tenure, and compensation.* The State agency will, except as may be inconsistent with paragraph (a) of this section, adhere to applicable State approved personnel standards in the selection, tenure, and compensation of any individual employed in the disability program.

The SSA's Program Operations Manual Systems (POMS) Disability Insurance (DI), 39518.005, "Staffing Requirement – DDS" includes language similar to that in the regulation. POMS DI 39518.005.A.2 states:

The State will, except as may be inconsistent with 20 CFR 404.1621(a) and 416.1621(a), adhere to applicable State approved personnel standards in the selection, tenure, and compensation of any individual employed in the disability program.

<https://secure.ssa.gov/apps10/poms.nsf/lnx/0439518005> (accessed on February 2, 2017).

Id. at 15 n.14. We also said, “[T]he SSA is not obligated to contribute toward the resolution of the State’s budget deficit problem by payment for negotiated avoidance of furloughs in addition to paying the full costs of the DDD salaries and benefits.” *Id.* at 15. We thus determined that we need not resolve the issue because we already found that the DRL payments were not necessary in that they were not incurred in furtherance of the DDD’s performance of disability determinations, but were instead incurred in furtherance of saving statewide payroll costs. In short, because we determined that the DRL payments did not comport with applicable authorities and were not reimbursable, we did not need to determine whether under section 404.1621(b) and POMS DI 39518.005 the State must have, should have, or could have exempted DDD employees from the DRL policy. The State has not articulated why the Board’s determination not to reach the issue is clear legal error. Stated differently, it has not explained why resolution of the issue is necessary.

Conclusion

Finding no clear error of fact or law, we reject the State’s request for reconsideration.

_____/s/
Sheila Ann Hegy

_____/s/
Leslie A. Sussan

_____/s/
Susan S. Yim
Presiding Board Member