

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: South Carolina Department of Social Services
Docket No. 79-219-SC-HC
Decision No. 149

DATE: February 3, 1981

DECISION

The South Carolina Department of Social Services (State) appealed an October 23, 1979 decision by the Administrator, Health Care Financing Administration (HCFA - Agency), disallowing \$221,218 in federal financial participation (FFP) claimed for payments the State made to Skilled Nursing Facilities (SNFs) in its Title XIX Medicaid program.

In its application for review the State argued that the Board did not have jurisdiction over this case because the Agency's determination raised conformity and compliance questions under 42 USC 1316(a) and (b), and 1396(c). The Board Chair ruled that this matter is a disallowance under 42 USC 1316(d), subject to the Board's jurisdiction under 45 CFR Part 16, Subpart C, (43 FR 9264, March 6, 1978). For an analysis of this issue, see Ruling on Jurisdiction, May 22, 1980.

This decision is based on the parties' submissions and the Conference held on December 11, 1980.

Background

In 1978 State auditors and Blue Shield auditors under contract with the State conducted reviews of payments made to individual SNFs from October 1, 1971 through January 31, 1977. Overpayments of \$800,000 were initially identified. In subsequent audits additional overpayments of approximately \$600,000 were identified. Conference Transcript (Tr.) at p. 146. A tally of the figures from all the auditors' workpapers disclosed that the State may have overpaid the SNFs a total of \$1,490,526 (\$1,086,731 FFP). The Agency maintains that \$1,490,526 is a final amount for overpayments to the SNFs; the State maintains that this was only a preliminary determination, and, therefore, the Agency can not rely on it as a basis for the disallowance. Although the State does not provide a precise figure, it claims that the maximum overpaid totals \$1,268,305, the federal share of which the State has refunded. Affidavit of Commissioner, State Department of Social Services, at p. 2.

By letter dated September 20, 1978, the State advised the Agency of agreements to settle with the SNFs for 35 percent of the preliminary figures for overpayments, and requested that the Agency participate in the settlements. The Agency, in its disallowance letter, said that the federal government could not agree to a percentage reduction in the amount of the alleged overpayments and, therefore, the State must refund the entire federal share of the amounts identified as overpayments.

Of the \$221,218 disallowed, only \$164,340 remains at issue; the State has returned the other \$56,879 to the federal government.

The Issue

The Agency argues that the issue in this case is whether the State can enter into settlement agreements which are binding on the federal government. The Agency maintains that a state does not have such authority and, therefore, this disallowance should be upheld. Tr. at p. 19. Even if the Board were to accept the Agency's argument that a state may not settle the federal share of Medicaid funds unless specifically authorized, such a determination would not dispose of this case.

In order to uphold the disallowance, the Board must find that the record supports the Agency's determination that the State made unallowable overpayments to providers totalling \$1,490,526. The Board concludes, however, that there is insufficient evidence in the record to support this position. Accordingly, we do not sustain the disallowance.

Discussion

Two related factors underlie the Board's decision: (1) the insufficient basis for the Agency's determination of the amount which it claims the State overpaid, and, (2) the fact that neither the State nor the Agency believes that \$1,490,526 is actually the amount overpaid.

The Agency maintains that its determination of the amount overpaid is based on representations by the State identifying overpayments totalling \$1,490,526. The Agency does not claim that its determination that the State had overpaid SNFs is a result of any Agency audits or comprehensive reviews of the State's audits. The parties agree that there is no single audit report or discrete document that identifies all the overpayments at issue. The State's determination that overpayments were made is based on information contained in a variety

of audit workpapers and SNF cost reports. The Agency auditors only reviewed some of the cost reports submitted by the SNFs and verified the computations made by the State. The Agency explains that it does not ordinarily question a state's audits. Agency's Pre-Conference Brief at p. 2; and, Tr. at pp. 26, 60-66, and 94.

At the Conference, the Director of Management Operations for the HCFA Medicaid Bureau, Region IV, explained that the Agency's determinations are typically based on a state's certification of the amount overpaid. The Director said that the Agency considered the September 20, 1978 letter from the Commissioner of the State's Department of Social Services to be the certification of a final determination that overpayments to the SNFs totalled \$1,490,526. The Director also said that the Commissioner had previously told him that this was the amount overpaid. Tr. at p. 67.

The State denies that it certified overpayments in that amount, and challenges the Agency's reliance on the Commissioner's September 20 letter, noting that the letter specifically states that "these audits are not yet final." Tr. at p. 66. The State explains that it did not finalize its audit determinations in order to maximize the State's bargaining position in negotiations with the SNFs. The State maintains that the \$1,490,526 figure was used as the initial negotiating point and included "100 percent of any kind of allegation we could have against them in terms of overpayments...prior to making any kind of adjustments... to those audits...adjustments which would normally be made." Tr. at p. 148.

The Agency agrees that the audit process can involve adjustments to original audit figures based on objections and appeals by providers (Tr. at p. 113), and that the Agency can accept a reduction in audit findings if the audit findings are invalid or unsustainable. Tr. at p. 70. The Agency also says several times that because of the magnitude of the audits involved in this case "it would be impossible to support all the figures in the audits." Tr. at pp. 78, 85, 99, and 153. The Agency also admits that it does not know the \$1,490,526 figure to be correct, but used it as the basis for the disallowance because it lacked a substitute amount. Tr. at p. 171.

The Agency argues that if the State does not consider \$1,490,526 a final or correct figure, the State should come forward with information showing the actual overpayment. The State, in an affidavit from the Commissioner, responds that the maximum amount overpaid is \$1,268,305. The Agency rejects this assertion because \$1,268,305 is the amount of the settlement with the SNFs, and argues that the State settled for 85 percent of the identified overpayments because of the high costs of pursuing the claims against the SNFs through formal legal channels.

The Board's decision in this case is limited to the question of whether this disallowance should be upheld on grounds that the record shows that the State made overpayments to nursing homes totalling \$1,490,526. The Board has not considered and does not decide whether a state may settle the federal share of an amount determined to be overpaid. This decision does not preclude the Agency from relying on a state audit or certification of an amount overpaid when such reliance would be justified under the circumstances of the case. Nor does this decision provide that the Agency must wait to make a disallowance determination where a state unreasonably delays in finalizing an audit. We do hold, however, that the Agency has not supported its determination that the State made unallowable overpayments totalling \$1,490,526. Without such support, the Board cannot uphold this disallowance.

The controlling factors in our decision are that the disallowance is based on an overpayment amount which has not been shown to be final and which the Agency admits is not sustainable. If the State had certified an amount clearly related to unallowable overpayments, that certification might have served as an adequate basis for an Agency determination. The Board is not persuaded by the Agency's claim that the Commissioner's September 20 letter is the State's certification inasmuch as that letter specifically states "the audits are not final," and does not even mention the \$1,490,526 figure alleged as overpaid. The Agency has not provided any additional evidence of certification even though the Panel Chair presiding at the Conference requested complete identification of all documents the Agency considers to be the State's certification of the amount overpaid. Tr. at pp. 118 and 199.

Conclusion

There is insufficient information in the record to support a determination that the State's overpayments totalled \$1,490,526. Accordingly, this appeal is granted. This decision does not preclude the Agency from issuing a new disallowance if it can support a determination that the State made unallowable overpayments.

/s/ Donald F. Garrett

/s/ Norval D. (John) Settle

/s/ Cecilia Sparks Ford, Panel Chair