

DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: California Department of Health DATE: March 31, 1981
 Services
 Docket No. 79-105-CA-HC
 Decision No. 159

DECISION

The California Department of Health Services (State) appealed a decision by the Director, Medicaid Bureau, Health Care Financing Administration (HCFA), disallowing \$215,602 claimed under Title XIX (Medicaid) of the Social Security Act for certain payments to Los Angeles County (County).

Based on the parties' submissions and briefing, and on arguments made by the parties at an informal conference with the Panel Chair, we have concluded that there is an insufficient basis in the record to support a finding that the payments to the County represent unallowable costs. Accordingly, we reverse the disallowance.

Background

Los Angeles County is a provider of services under the Medicaid Program (called Medi-Cal) in the State of California. Under an agreement with the County, the State performed a series of audits for the primary purpose of determining whether payments to the County were for eligible services and individuals. The HEW (now HHS) Audit Agency then conducted an audit to determine whether the State was making timely adjustments for the Federal share of payments questioned by the State auditors. The HEW auditors specifically stated that their audit did not include an evaluation of the State audits (HEW Audit Report ACN 80222-09, p. 3).*

*HCFA also concedes that it did not subject the State audits to any testing for reliability (Transcript of Informal Conference, p. 45). Federal Management Circular (FMC) 73-2 sets forth policies to be followed in the audit of Federal programs by executive departments, and sets forth certain conditions for use of a non-Federal audit in lieu of a Federal audit. HCFA argued that FMC 73-2 does not apply to the circumstances here and does not set a standard for use by program agencies of non-Federal audits. We do not find it necessary to reach this issue here since we base our decision on other grounds.

HCFA's decision to disallow was based on its determination that the State had not refunded \$215,602 of the \$16,565,668 which HCFA considered to be the Federal share of the "[t]otal overpayment identified by the [HEW] audit." (Disallowance letter p. 1.) HCFA computed the disallowance by subtracting amounts which the State had refunded on its expenditure statements from the "total overpayment." The State had explained that it had not refunded the \$215,602 since the County was disputing that amount through the State's provider appeal procedures and had not repaid the State. HCFA did not inquire as to the basis for the County's appeal. Nowhere in the HEW Audit Report or in the State audits is the \$215,602 separately identified or related to specific audit exceptions.

In applying to this Board for review of HCFA's disallowance, the State submitted the County's letter appealing the State audit findings. That appeal letter indicates that at least a significant part of the dispute is over which rate of reimbursement applies to certain services provided in County hospitals.

The Issue

Section 1903(d)(2) (first sentence) of the Social Security Act (the Act) provides that Title XIX payments to the states, based on estimated quarterly expenditures, shall be reduced "to the extent of any overpayment ... which the Secretary determines was made" The State originally contended that there could be no "overpayment" determination here until the State actually recovered funds from the County. The State now concedes that, reading Section 1903(d)(2) together with the disallowance provision at Section 1116(d) of the Act, the Secretary may make adjustments prior to recovery from the County if there has been a final disallowance determination. (State's Pre-conference Brief, pp. 2-3; Transcript, pp. 5-6; 94.) The parties further agree that, if the State recovered Medi-Cal payments from the County, the Federal Government's pro rata share would be an "overpayment" under Section 1903(d)(2), whether or not the Secretary had made a determination that the payments were unallowable. (See Section 1903(d)(3) of the Act; State's Pre-Conference Brief, p. 3; Transcript, pp. 6; 96-97.) Since the State has not recovered the payments here, the issue in this case, as developed during Board proceedings, is whether there has been a supportable Federal disallowance determination so that there should be an adjustment for an "overpayment" under Section 1903(d)(2).

Discussion

There are several factors which lead us to conclude that the disallowance determination here is not adequately supported by the record.

The State audits cover \$32 million in questioned costs and do not separately identify the amount disputed by the County, and therefore do not provide a basis for determining on what legal grounds the auditors questioned these particular payments. The HEW Audit Report lists general grounds which one of the State audits showed as a basis for questioning some of the payments. (HEW Audit Report, p. 7.) These include grounds such as ineligibility of recipients and lack of medical necessity for the services, which would indicate that FFP was not available in the payments. The HEW Audit Report does not, however, separately identify the amount disputed by the County, nor relate it to the listed grounds. HCFA merely relied on the audits, adjusted for refunds by the State subsequent to the HEW audit, as a basis for identification of the \$215,602 as the Federal share of an "overpayment" to the County. HCFA determined that the amount unrefunded related to unallowable costs based on the grounds listed by the HEW auditors, but never examined how the \$215,602 relates to specific findings in the State audits, nor evaluated the legal basis for those findings.

This failure, by itself, might not mean that the disallowance should be overturned. If State auditors, using reliable accounting methods, had identified overpayments, all of which were questioned on the ground that specified Federal or State plan requirements were not met, HCFA might be justified in calculating a disallowance by subtracting refunded amounts from the total amount questioned. Here, however, the County's letter appealing the State audit findings raises serious doubt as to whether the amount in dispute relates to payments in violation of Federal program requirements or solely to the rate which should apply to certain services, where various rates might be allowable. According to the State, "The extended care rate issue appears to have been picked up by the state auditors as part of their review of whether the level of care billed was in fact provided," but does not relate to the original Federal purposes for performing the audits. (State's Pre-conference Brief, p. 11.) This position is supported by an examination of the State's amended audit report which indicates that in addition to questioning payments for reasons such as those listed in the HEW Audit Report, the State auditors made certain "billing rate adjustments." (Exhibit C to State's Application for Review.) HCFA has presented no evidence to show that the \$215,602 disallowed relates to the grounds listed in the HEW Audit Report rather than to this rate issue.

HCFA contends that the Board should uphold this disallowance unless the State shows that its auditors were incorrect and that no overpayments were made. The State argues that to require this showing would put the State in the untenable position of jeopardizing its litigation with, and possible recovery from, the County. While we

understand the difficulties of the State's position when litigating with a provider as well as HCFA, the fact that the State is litigating an issue would not alone provide a basis for overturning a disallowance. We think, however, that we may legitimately consider this factor in determining the burden we will place on the State to come forward with evidence as to the specific nature and scope of its provider dispute. Here, the State has come forward with evidence sufficient to question the legal basis stated for the disallowance and HCFA has provided no evidence to the contrary.

In view of the lack of specificity in HCFA's findings, the uncertainty as to whether these payments violated Federal or State plan requirements, and the fact that the State auditors' findings are disputed by the County, we cannot say, based on the record before us, that the State claimed \$215,602 in FFP for payments to the County for unallowable costs.

Conclusion

For the reasons stated above, we reverse the disallowance. This decision does not preclude HCFA from disallowing these payments to the County if HCFA does make a factually and legally supportable determination that the payments were for unallowable costs. Further, if the State recovers these payments, it must return the Federal share.

/s/ Cecilia Sparks Ford

/s/ Norval D. (John) Settle

/s/ Donald F. Garrett, Panel Chair