Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Puerto Rico Department of Health.
Ruling No. 2011-5
September 30, 2011

Ruling on Request for Reconsideration

The Puerto Rico Department of Health (PRDH) requested reconsideration of the Board's decision in *Puerto Rico Department of Health,* DAB No. 2385 (2011) (Board Docket No. A-10-54). The Board has the authority to reconsider its own decision where a party "promptly alleges a clear error of fact or law." 45 C.F.R. § 16.13.

As explained below, PRDH has not alleged a clear error of fact or law, and we deny the request. Additionally, we reject PRDH's request for alternative remedies involving Board-ordered settlement negotiations or alternative dispute resolution or reopening the record to allow PRDH to present expert testimony about the statistical methodology used by the Office of the Inspector General (OIG) to calculate the disallowance. The Board has no authority to order settlement negotiations or alternative dispute resolution or to reopen a decision to consider evidence a party elected not to procure and submit during the appeal.

DAB No. 2385

In DAB No. 2385, the Board upheld the determination of the Health Resources and Services Administration (HRSA) disallowing $24,340,789 in federal reimbursement paid to PRDH under the Ryan White Comprehensive AIDS Resources Emergency Act of 1990 (the Ryan White CARE Act or Act). The Act funds a range of programs for people with Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS). The funds at issue involved reimbursement under the Act's "AIDS Drug Assistance Program" or ADAP. ADAP funds medications for low-income people with HIV/AIDS where payments for such medications cannot "reasonably be expected to be made . . . under any State compensation program, under an insurance policy, or under any Federal or State health benefits program." 42 U.S.C. § 300ff-27(b)(7)(F)(i). This provision is referred to as the payer of last resort requirement.

In 2008, the OIG audited PRDH's ADAP program's compliance with the payer of last resort requirement for the grant years 2003 and 2004. The resulting disallowance was based on a review of randomly selected ADAP prescriptions and the projection (alternatively referred to as extrapolation) of errors in sampled prescriptions to the universe of prescriptions. The Board upheld the disallowance in full on the ground that PRDH failed to show that it used this ADAP reimbursement to make payments for medications that could not reasonably be expected to be made under other federal or state programs or private insurance policies. We concluded that: HRSA reasonably relied on statistical sampling in calculating this disallowance; PRDH failed to show that the statistical methodology on which HRSA relied was unsound or prejudicial; PRDH failed to show that any of the disallowed sampled prescriptions were eligible for funding under ADAP; and PRDH's other arguments were without merit.

Board review and standards for reconsideration

The Board's regulations at 45 C.F.R. Part 16, a copy of which was provided by the Board to PRDH upon receipt of its appeal, put appellants on notice of an "appellant's responsibility" to submit to the Board an "appeal file containing the documents supporting the claim," i.e., "those documents which are important to the Board's decision on the issues in the case." 45 C.F.R. § 16.8(a). Additionally, after the briefing process set out in Part 16 was completed, the Board informed PRDH that its "position in its appeal briefs as to which prescriptions . . . it continues to dispute is not clear" and allowed it to submit additional evidence. Order to Develop the Record at 1.

Based on grants administration requirements, the Board has long held that a grantee has the burden of documenting the allowability of its claims for federal funds. *See Massachusetts Executive Office of Health and Human Services*, DAB No. 2218, at 11 (2008), *aff'd, Commonwealth of Massachusetts v. Sebelius*, 701 F.Supp.2d 182 (D. Mass. 2010); *Maryland Dept. of Health and Mental Hygiene*, DAB No. 2090, at 4 (2007); *New York State Dept. of Social Services, DAB No. 433*, at 9 (1983).

Section 16.13 of 45 C.F.R. provides that the Board may reconsider its own decision where a party "promptly alleges a clear error of fact or law." Arguments, representations, and evidence that were not previously submitted are not considered to be allegations of an error of fact or law justifying reconsideration of a decision. *See, e.g., Ruling on Reconsideration of Philadelphia Parent Child Center, Inc.*, DAB No. 2297 (2009), Board Ruling No. 2010-3 (April 13, 2010) (it is not a basis to grant reconsideration that, "[due to] copying error, [the grantee] may have failed to include in its prior submissions the

documents submitted with its request for reconsideration"); *Ruling on Request for Reconsideration of Recovery Resource Center, Inc.*, DAB No. 2063 (2007), Board Ruling No. 2007-2, at 4 (May 16, 2007) (grantee's "failure . . . to work with its chosen counsel to provide documentation and argument that could support its position raises no allegation of error in the Board Decision"); *Ruling on Request for Reconsideration of Peoples Involvement Corporation*, DAB No. 1967 (2005), Board Ruling No. 2005-2, at 2 (Apr. 29, 2005) (a "motion for reconsideration is far too belated a context in which to undertake to present [additional] documentation" where the grantee "made no claim that this documentation was not available to it earlier in this process").

In its motion, PRDH repeatedly makes new arguments and relies on documents that it provided for the first time with its motion. PRDH does not explain why it did not make these arguments or provide these documents earlier; does not allege that they were unavailable to it earlier; and does not allege that it did not have ample notice that it was required, during the appeal, to make all arguments and submit all documents that, in its view, established that HRSA's disallowance determination was incorrect. As discussed subsequently in this ruling, we reject these arguments and documents as a basis for reconsideration because they were not made or submitted during the appeal.

Analysis

PRDH filed a lengthy Motion Requesting Reconsideration (Motion), a Supplemental Motion, and over seven hundred pages of supporting documentation.[1] Below we address each section of PRDH's motion.

1. PRDH's "Historical Background" is essentially another request for equitable relief that the Board is not authorized to provide.

The initial section of PRDH's Motion Requesting Reconsideration, titled "Historical Background," describes at considerable length the "grave fiscal emergency" (Motion at 5) faced by the present administration of Puerto Rico in 2009 as a result of prior administrations' "irresponsible fiscal policies" (*id.* at 14) and the sweeping measures that a new administration has taken to address the "dire economic situation" that resulted from these policies (*id.* at *9)*. According to PRDH, these efforts have "stabilized the fiscal situation" (*id.*) and prevented a potentially "disastrous downgrade" (*id.* at 4) of its bond rating to "junk status" (*id.* at 5). PRDH concludes by stating that "the current administration . . . is forced to deal with [this disallowance,] a situation not of its own creation, which could potentially drag or delay this recovery process, and which may severely impact essential health care services." *Id.* at 14.

[1] The Board did not require HRSA to file a response to PRDH's motion, and HRSA elected not to do so.

These circumstances do not provide a legal basis for granting PRDH's motion for reconsideration. As the Board pointed out in DAB No. 2385 in response to similar allegations and arguments made by PRDH –

> the Board lacks authority to grant PRDH's request for what is essentially equitable relief. *West Virginia Dept. of Health and Human Resources,* DAB No. 2185, at 20 (2008); *Utah Dept. of Health,* DAB No. 2131, at 23 (2007). The Board must uphold a disallowance if it is supported by the evidence of record and is consistent with the applicable statutes and regulations. *West Virginia*, DAB No. 2185, at 20, citing 45 C.F.R. §§ 16.14, 16.21.

DAB No. 2385, at 29. The "Historical Background," now presented by PRDH, is essentially another request for equitable relief that the Board is not authorized to provide.

2. PRDH's arguments and allegations of error related to an OIG audit policy do not provide a basis for reconsidering the decision.[2]

In its appeal to the Board, PRDH argued that its right to due process was violated because it did not have notice of an OIG statistical sampling audit policy that, PRDH alleged, provides for projecting sample errors to the universe of claims only when the OIG finds six or more errors in a sample of 100 units. DAB No. 2385, at 12. Neither party submitted a copy of this alleged policy; however, HRSA stated that "'in situations where 100 sample units result in fewer than six errors, OIG policy does not authorize statistical projection.'" *Id.*, citing HRSA Response Br. at 11.

In the decision, the Board rejected PRDH's due process argument, and PRDH has now expressly abandoned it.[3] DAB No. 2385, at 14; Motion at 16 n.43. Instead, and for the

[2] As we explained in DAB No. 2385, we use the term "policy" here (as we did in our decision) because the parties both used that term to refer to the OIG sampling extrapolation practice at issue. However, as we explained in our decision, "[o]ur use of the term . . . is not meant to indicate that we have concluded that the OIG's projection practice . . . is a 'policy' as that term is used in other authorities, such as the Administrative Procedure Act . . . ." DAB No. 2385, at 13.

[3] PRDH alleges in its motion that the Board erred by stating that PRDH had argued that its right to due process was violated because it did not have timely notice of the policy. Motion at 15. PRDH asserts that it had argued that it had had no notice of the policy, not that it did not have timely notice. Since PRDH has abandoned its due process argument, we do not need to address this allegation of error. However, we note that Board discussed the issue as one of timely or prior notice because those are aspects of adequate notice under due process. Moreover, section 552(a)(1) of the APA, on which PRDH now relies, looks expressly to whether a party has had "actual and timely notice."

first time, PRDH raises a notice argument under 5 U.S.C § 552(a)(1)(D), a provision of the Administrative Procedure Act (APA).[4]

PRDH's APA argument relates to a footnote in which the Board, when discussing PRDH's due process notice arguments, noted that --

> PRDH does not cite the APA. We conclude, in any case, that the APA would not protect PRDH here. . . . . [Section 5 U.S.C. 552(a)(1) requires agencies] to publish certain information in the *Federal Register*, including "statements of general policy or interpretations of general applicability formulated and adopted by the agency." That section provides further that "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be . . . adversely affected by [] a matter required to be published in the Federal Register and not so published." However, even if section 552(a)(1) applies to the cited OIG "policy" (and we are not deciding that it does), this protection would not apply here because (as discussed above), PRDH has not shown that it was adversely affected by the "policy."

DAB No. 2385, at 13 n.4.

PRDH now argues for the first time that --

> 1) OIG was required to publish their policy of extrapolation upon a finding of 6 or more errors in the Federal Register pursuant to 5 U.S.C. § 552(a)(1)(D) and did not do so; and, 2) there is no evidence on the record that actual and timely notice was provided [under APA section 552(a)(1)]. Therefore, OIG's policy of extrapolation and projection cannot adversely affect the PRDH.

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[4] Section 552(a)(1) of 5 U.S.C. provides in pertinent part:

> (a) Each agency shall make available to the public information as follows:
>
> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public -
>
> * * *
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency;
>
> * * *
>
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be . . . adversely affected by [] a matter required to be published in the Federal Register and not so published.

Motion at 24.

As stated above, arguments not raised during the appeal to the Board are not a basis for reconsideration. Since these arguments are not properly before the Board on this motion, we need not address them. Nor do we need to address PRDH's arguments about alleged Board error related to the APA, i.e., that the Board erred in stating that PRDH had not shown that it was adversely affected by the policy (Motion at 20) and that the Board erred in not ruling that the OIG policy was a "policy" and describing it instead as a "practice" (*id.* at 16-19).[5] While we are not required to address such arguments, we make the following observations.

While the disallowance taken on the basis of the audit undoubtedly has had a financial impact on PRDH, that impact was not an adverse effect of this challenged audit policy. As we explained in DAB No. 2385, the OIG policy merely establishes "an exception to the practice, which is standard in audits based on statistical sampling, of projecting error findings." DAB No. 2385, at 14 (emphasis added). In other words, even if this exception had not existed, the OIG, following standard statistical sampling practice, would have had a sound basis for projecting the error findings in this case. Thus, PRDH was not adversely affected by an OIG audit policy. Rather, because of the extent of its noncompliance, PRDH did not receive the benefit of the OIG's exception to the standard statistical sampling practice of projecting error findings. The OIG applies the exception only where it determines that a grantee has achieved a specified level of compliance with federal requirements.

The circumstances here are completely different from those in the cases cited by PRDH in which courts relied on section 552(a)(1)(D): *Morton v. Ruiz*, 415 U.S. 199 (1974) and *Anderson v. Butz*, 550 F.2d 459 (9th Cir. 1977). Both of those cases involved situations in which the application of unpublished eligibility standards adversely affected the beneficiaries of federal programs by eliminating or reducing their government benefits (general assistance benefits from the Bureau of Indian Affairs in *Morton* and food stamp benefits from the Department of Agriculture in *Anderson*). While disallowing federal funds to states or territories based on their failure to comply with federal statutes or

[5] Properly, PRDH does not cite or rely on section 553 of the APA, which requires publication, by notice and comment rulemaking, of agency rules that are legislative or substantive. Courts (and the Board) have rejected the argument that agency audit methodologies are not binding under 5 U.S.C. § 533 unless they are promulgated using notice and comment rulemaking. *See, e.g., Chaves County Home Health Services*, 931 F.2d at 923 (holding that an agency sampling methodology policy was not subject to notice and comment rulemaking); *see also Pennsylvania Dept. of Public Welfare*, DAB No. 1508 (1995); *Ohio Dept. of Human Services*, DAB No. 1202 (1990), *aff'd, State of Ohio, Dep't of Human Services v. Sullivan*, 789 F. Supp. 1395 (S.D. Ohio 1992).

regulations can cause an unwanted loss of federal grant funds, that loss is neither the loss of a benefit nor an adverse effect of the challenged policy within the meaning of the cited cases. *See Tennessee Dept. of Health and Environment*, DAB No. 898, at 7 (1987) (holding that the state was "not adversely affected by the mere use of a sampling audit technique" within the meaning of section 552(a)(1); "[t]he sampling [was] simply a means of establishing the amount of payments violating state plan provisions"; and "lack of actual or constructive notice to the State [did not preclude] application of the use of sampling under the APA").

Moreover, in considering whether a party has been adversely affected under section 552(a)(1), the Board has looked to whether any claimed adverse effects resulted from lack of notice of a policy, not simply whether the policy had the claimed detrimental impact. Thus, the Board has stated that "[t]o obtain relief under section 552(a)(1), a person must show that he 'was adversely affected by a lack of publication or that he would have been able to pursue an alternative course of conduct had the information been published.'" *Connecticut Dept. of Social Services*, DAB No. 1982, at 21 (2005), quoting *Alliance for Cannabis Therapeutics v. Drug Enforcement Admin.*, 15 F.3d 1131, at 1136 (D.C. Cir. 1994) quoting *Zaharakis v. Heckler*, 744 F.2d 711, at 714 (9th Cir. 1984).

Although PRDH alleges it had no notice of the OIG policy, PRDH, as discussed in DAB No. 2385, did not "assert that it was unaware that federal grants generally, or ADAP funds in particular, could be subject to disallowances based on sampling and extrapolation. *See* PRDH Response Br. at ¶¶ 4-6." DAB No. 2385, at 13. Nor has PRDH alleged or provided any basis for concluding that it would have pursued an alternative course of conduct had it had notice of the extrapolation policy. As we stated in DAB No. 2385, "PRDH cannot reasonably (or, with its 57 errors, credibly) argue that, if it had only known about the policy, it would have administered its ADAP program with more care so as to comply with requirements with which it was already obligated to comply." *Id*. at 14.

As to PRDH's allegation that the Board erred in not reaching the issue of whether the OIG practice was a "policy" within the meaning of the APA section on which it now relies (PRDH Motion at 16-19), we note again that we need not reach this allegation of error because PRDH did not raise the APA argument in its appeal. Moreover, PRDH has not shown that it was adversely affected within the meaning of section 552(a)(1). Thus, it is immaterial whether the OIG policy is a policy within the meaning of that section.

3. PRDH's arguments related to the eligibility of specific sample prescriptions do not show any error of fact or law in the Board's Decision.

In its motion, PRDH discusses, by category, sample prescriptions it contends were eligible for ADAP coverage and improperly disallowed in the audit process. *Id.* at 29-43.

As background, we note that it is undisputed that PRDH's Government Health Insurance Plan (GHIP) includes Medicaid and a program for medical care for indigent individuals who do not qualify for Medicaid known as Reforma. Motion at 25. GHIP operates under a "managed care model administered by managed care organizations (MCOs) on a capitated basis." *Id.* GHIP is centrally administered by ASES, "an independent public corporation" under a memorandum of understanding with PRDH, which is the single state agency for Medicaid, and ASES "is responsible for contracting with the MCOs to actually provide Medicaid and Reforma services to individuals eligible for the GHIP." *Id. at 25-26.*

Below we discuss the disputed sample prescriptions by the categories identified by PRDH.

a. PRDH did not argue in its appeal and, therefore, may not argue on reconsideration that some of the sample prescriptions were correctly paid under ADAP because they were for drugs that were not covered by GHIP. (Sample Prescription Nos. 13, 18, 27, 42, 55, 64, 65, 66, 74, and 87) (Motion at 33-34)

In DAB No. 2385, we upheld HRSA's error findings for all of the sample prescriptions challenged in the appeal by PRDH. We did so after a thorough examination of the record and a detailed discussion of each prescription, including PRDH's arguments for why we should reverse HRSA's error findings. PRDH now asserts, for the first time, that GHIP did not cover some antiretroviral (ARV) drugs, and, therefore, these drugs were eligible for coverage under ADAP. Motion at 33-34. It also files documents not previously submitted and asserts for the first time that "available evidence shows that the cost[s] of these drugs were not excluded from the $28,560.00 allegedly paid" and, therefore, the disallowance overstated the amount of improper ADAP payments. *Id.* at 34. Based on these assertions, PRDH challenges the disallowance of the costs of such drugs in sample prescription numbers 13, 18, 27, 42, 55, 64, 65, 66, 74, and 87. *Id.*

These belated arguments and evidence provide no basis for reconsideration. In its Order to Develop the Record, the Board expressly informed PRDH that it "should identify with specificity which prescriptions it continues to assert were allowable charges to [ADAP] and why . . . and the specific evidence of record that relates to those prescriptions and explain how this evidence supports its claims . . . ." Order at 1. In its response to the Order, PRDH identified prescriptions that it disputed by sample prescription numbers and filed evidence in support of arguments about those prescriptions. PRDH did not identify the prescription numbers listed above or even argue generally that the OIG had mistakenly disallowed costs of drugs that were not covered by GHIP. *See* PRDH Informative Motion; PRDH Motion in Compliance to Second Order to File Response to Develop the Record in Docket No. A-10-54. PRDH says the analysis presented in its Motion "is the result of a thorough examination . . . ." Motion at 34. However, that

thorough examination should have been conducted when PRDH was arguing its appeal. A Motion for Reconsideration is not an opportunity to make new arguments or present new evidence but to assert any errors of law or fact the appellant claims were committed by the Board in its decision. In asking the Board to consider these new arguments and evidence, PRDH is asking the Board to allow PRDH to correct PRDH's litigation lapses, not Board errors.

b. PRDH has shown no error in the Board's conclusion that PRDH failed to show that prescriptions provided to individuals characterized as "not active in any insurance companies contracted by ASES" could not reasonably be expected to be paid by GHIP. (Sample Prescription Nos. 62, 95) (Motion at 32-33)

One category of prescriptions PRDH disputed in the appeal (and continues to dispute) involves people PRDH characterized previously as "not active in any insurance companies contracted by ASES." *See, e.g.*, DAB No. 2385, at 24-25 discussing Sample Prescription Nos. 62, 95. In Decision No. 2385, the Board found that, in characterizing these people as "not active," PRDH was merely asserting that the people had failed to complete some "administrative process of establishing eligibility [for GHIP] over which it appears ASES had control," not that the people were ineligible for GHIP. *Id.* at 24-25.

In its motion for reconsideration, PRDH confirms that these people had been certified by PRDH (which is responsible for determining eligibility for Medicaid and Reforma (Motion at 26)) as eligible for GHIP although they had not "complete[d] the enrollment process with its assigned MCO . . . ." Motion at 32-33. However, PRDH asserts that the Board erred because, "until the patient actually completes the process with its MCO, he or she cannot start receiving services, including pharmaceuticals, under the GHIP." *Id.* at 33. PRDH asserts that --

> ASES has no control over the diligence with which eligible beneficiaries completed their enrollment process in the GHIP program. Accordingly, *ADAP* funds were properly used to dispense medications to *GHIP* eligible yet inactive patients.

Id. at 33 (emphasis in original).

Even if PRDH could obtain reconsideration based on arguments and allegations not presented during its appeal, its argument here has no merit for reasons we discussed in DAB No. 2385. PRDH admits that it had determined that these people were eligible for GHIP. Motion at 32-33. ADAP only covers the cost of a prescription for which payment cannot "reasonably be expected to be made" from other sources, such as GHIP. 42 U.S.C. § 300ff-27(b)(7)(F)(i). HRSA expressly informed states that "[a]t the individual client level, [section 300ff-27(b)(7)(F)(i)] means that grantees and/or their subcontractors

are expected to make reasonable efforts to secure other funding instead of CARE Act funds whenever possible." Ryan White CARE Act Title II Manual (June 1, 2000), Section IV, HRSA Division of Service Systems Program Policy Guidance (Program Policy Guidance) No. 2, at 4 (emphasis added). As we stated in DAB No. 2385, PRDH "failed to document any basis on which we could conclude that it 'made reasonable efforts to secure' GHIP funding for these prescriptions" as instructed by Policy Guidance No. 2. DAB No. 2385, at 24-25. Moreover, in light of this express policy guidance, PRDH cannot simply rely, as it tries to in its motion, on the alleged inaction of individual recipients. During its appeal (and even in its motion) PRDH described nothing that would tend to show that it or ASES made the required reasonable efforts by, for example, establishing a means of tracking or following up with individuals who it had determined to be eligible for GHIP to see that they completed the MCO enrollment process.[6]

c. PRDH has shown no error in the Board's conclusion that PRDH failed to show that prescriptions provided to GHIP HIV/AIDS beneficiaries with basic, but not special, coverage were prescriptions that could not reasonably be expected to be paid by GHIP. (Sample Prescription Nos. 21, 31, 39, 40, 45, 52, 58, 59, 62, 67) (Motion at 31-32)

PRDH asserts here, as it did in its appeal, that only recipients with "special coverage" (as opposed to "basic coverage") were entitled to ARV drugs under GHIP. Motion at 31. It also asserts that "the patient must actually request Special Coverage from its insurer, through its primary physician, in order to be entitled to its benefits." *Id.* citing Motion Ex. 11. PRDH argues that the Board erred in rejecting its argument that ADAP could properly fund ARV drugs for GHIP recipients who had basic rather than special GHIP coverage. Motion at 31-32.

In DAB No. 2385, the Board stated:

> The fact that these recipients, who PRDH does not deny were eligible for special coverage under GHIP, had not been certified in the GHIP system for that coverage is not, in itself, a basis for treating these prescriptions as eligible for ADAP. Since PRDH does not explain why these recipients were not properly certified, the

[6] We note that PRDH cites PR ST T 24 § 7036c in support of its assertion that "in order to be included in GHIP, state law and relevant GHIP procedures provide that a patient with a certification of eligibility must complete the enrollment process with its assigned MCO and receive a member card from the same." Motion at 32-33 (emphasis added). This statute does not address coverage but sets forth required actions for beneficiaries and provides only that "[o]nce notified of being eligible for the program, [the beneficiaries] shall go to the location indicated by the insurer to complete the subscription process and receive their identification card as beneficiaries." This is a statement of process, not a coverage limitation.

> reasonable inference is that the lack of certification was the result of some administrative problem in ASES's operation of the GHIP program. PRDH does not assert that it took any steps (1) to address ASES's apparent failure to supervise the MCOs so that they administered the GHIP program in accordance with Puerto Rico's Medicaid state plan and other GHIP standards or (2) to obtain, through its ADAP program or otherwise, the required certification from patients' primary physicians. Therefore, we conclude that PRDH has failed to show why these payments were not ones that "[could] reasonably be expected to be made . . ." by sources other than ADAP, specifically Medicaid or other GHIP programs.

DAB No. 2385, at 22.

In its motion, PRDH argues that the Board's inference that the lack of special coverage reflected an administrative problem "is inaccurate insofar [as] the relevant procedures required the beneficiary to request Special Coverage. The beneficiary's failure to make such a request is not an administrative problem in ASES's operation of the GHIP, but rather a lack of diligence on behalf of the beneficiary." Motion at 31.

We reject this argument. The Board was entitled to draw inferences based on the arguments and evidence presented during PRDH's appeal. As the Board said, PRDH presented no argument or evidence explaining why these HIV/AIDS GHIP recipients were uncertified for special coverage and did not assert, as it now does, that ASES had no responsibility for assuring certification was obtained. In the absence of any such explanation, the Board's inference was plainly justified. Moreover, we reject PRDH's attempt to now "explain" that the absence of special coverage certification was due to "lack of diligence" attributable to the beneficiary. PRDH and ASES had an obligation to make reasonable efforts to ensure that GHIP beneficiaries obtain special coverage so that ARV drugs would be covered by GHIP. Program Policy Guidance No. 2. In the appeal (and in this proceeding) PRDH described nothing that would tend to show that it or ASES made efforts, reasonable or otherwise, to see that HIV/AIDS GHIP recipients sought and qualified for special coverage and, thereby, GHIP payment for ARV drugs.

d. PRDH has shown no error in the Board's conclusion that PRDH failed to show that prescriptions filled prior to July 1, 2003 for individuals who were HIV positive but did not have AIDS were prescriptions that could not reasonably be expected to be paid by GHIP. (Sample Prescription Nos. 7, 30, 31, 40, 52, 69, and 94) (Motion at 29-30)

PRDH took the position during its appeal that ADAP properly paid for these prescriptions issued to HIV-only GHIP recipients prior to July 1, 2003, because, prior to that date, the MCOs incorrectly treated HIV-only recipients as ineligible for ARV drugs under GHIP and, therefore, ADAP was the only source for payment for ARV drugs for these recipients. The incorrect treatment, PRDH asserted, occurred because of "confusion" or "misunderstanding" caused by an ASES September 2002 letter that resulted in MCOs improperly denying ARV drug coverage to HIV-only GHIP recipients during this period. *See* DAB No. 2385, at 17, citing PRDH Appeal Br. at 2; PRDH Response to Order at 2-7. In its motion, PRDH now appears to argue that ADAP properly paid for these prescriptions because, prior to July 1, 2003, the MCOs correctly treated HIV-only recipients as ineligible for ARV drugs under GHIP, making ADAP the only source for payment. Motion at 29-30.

To the extent that PRDH is now asserting a new argument, this new argument, as previously stated, is not a basis for reconsideration. PRDH also has not shown any error in the Board's decision addressing the argument PRDH made below, a decision, we add, based not only on PRDH's argument as stated in its Notice of Appeal, but also on PRDH's responses to the Board Order seeking clarification of that argument. The Board upheld the disallowance for these sample prescriptions after concluding that "PRDH has not documented that the [ASES] . . . letter or any State plan provision or other authority provides a basis for concluding that any of the sample prescriptions listed above were ineligible for GHIP funding and, therefore, eligible for ADAP funding." DAB No. 2385, at 19-20. The Board also discussed the provisions of the Puerto Rico Medicaid State Plan that PRDH submitted for the record and explained why those provisions did not show that the plan "did not authorize coverage of ARV drugs for HIV-only recipients" prior to July 1, 2003. *Id*. at 20. The Board also cited the auditors' specific determination that "'HIV-only individuals were eligible for Medicaid under the State plan and that the Medicaid contractors were obligated to provide special coverage for ARV drugs to them during the entire audit period.'" *Id.* at 20, citing Audit at 4 n.6; HRSA Ex. 6 (OIG email of February 24, 2009; OIG email of March 13, 2009). Finally, the Board concluded that to the extent ASES's 2002 letter to the MCOs caused confusion resulting in their denial of ARV drugs to HIV-only GHIP recipients, PRDH had not shown that the alleged confusion "was not caused by ASES's misadministration of GHIP, which would not be a basis for shifting these costs to ADAP." *Id*. at 21.

In its Motion, PRDH points to no error in the Board's decision or its discussion of these important bases for that decision. Indeed, PRDH essentially ignores that discussion. PRDH asserts that it "could not reasonably be expected that the GHIP would cover the

cost of medications for persons excluded from coverage at the time, given the policies in place." Motion at 30. However, PRDH has not shown either that these persons were, in fact, not eligible for GHIP coverage or, as we stated in our decision, "that it worked with ASES to address ASES's apparent failure to supervise the MCOs so that they administered the GHIP program in accordance with the Medicaid state plan or the other GHIP program requirements." DAB No. 2385, at 21. In short, PRDH has shown no error of law or fact in the Board's conclusion that "the payments for these prescriptions are payments that could be fairly regarded as ones that could 'reasonably be expected to be made . . .' by sources other than ADAP." *Id*., citing 42 U.S.C. § 300ff-27(b)(7)(F).

e. PRDH failed to show that the Board erred in concluding that specific individuals were not covered under GHIP or other health insurance. (Sample Prescription Nos. 7, 10, 30, 62, 69, 85) (Motion at 32)

As to this group of prescriptions, PRDH asserts that the related individuals "did not have any GHIP coverage at all" and there was "no evidence in the record (or elsewhere) that [these patients] were covered by any private or public health insurance plan." Motion at 32.

This argument states no basis for reconsidering the decision. First, while PRDH challenged the disallowance of Sample Prescription Nos. 7, 30, and 69 previously, it did not argue that they were not covered by GHIP or other insurance. Second, as to Sample Prescription Nos. 10, 62, and 85, the Board explained in DAB No. 2385 that it was upholding HRSA's error findings as to these prescriptions, in part, because PRDH's assertions of lack of coverage were inconsistent with its prior assertions to HRSA and other evidence in the record that indicated that the individuals who received these prescriptions were covered by GHIP at the time the prescriptions were dispensed. DAB No. 2385, at 23-26. In its Motion, PRDH does not address this evidence or the Board's reliance on it in upholding HRSA's error findings for these prescriptions. PRDH has not shown that the Board erred in concluding that PRDH failed to show that these prescriptions were eligible for ADAP funding.

4. The Board denies PRDH's alternative requests for relief because the Board has no authority to order settlement negotiations or alternative dispute resolution or to reopen a decision to consider evidence a party elected not to procure and submit during the appeal. (Motion at pages 43-45)

PRDH proposes that, should the Board deny its request for reconsideration, "this case justifies the concession of two other different remedies" involving negotiations or alternative dispute resolution or submission of expert evidence. Motion at 43.

First, PRDH states that it is "willing to submit to good faith settlement negotiations with HRSA." *Id.* It cites language from the Board's website stating that the Board's services include "empower[ing] parties to narrow and resolve issues on their own or with the help of mediation or other alternative dispute resolution." *Id.*, citing http://www.hhs.gov/dab/about/index.html. PRDH states that "[t]his alternative was never proposed . . . by the DAB." *Id.*

The Board informed the parties of the availability of its alternative dispute resolution services in its May 7, 2010 letter acknowledging PRDH's notice of appeal. PRDH did not seek to use these Board services prior to the issuance of the decision. Moreover, the Board has no authority to require the federal party to engage in negotiations or alternative dispute resolution.

Second, PRDH asserts that the "sampling methodology is a key issue which has not been properly addressed." Motion at 43. It cites Board regulations that authorize the Board to "suspend cases" and asserts that it has been making "serious efforts" to obtain a "recognized expert statistician to make the proper evaluation as to the sample and methodology." *Id.* at 45, citing 45 C.F.R. § 16.13. It requests that the Board allow a reasonable time for it to secure and present such expert witness evidence.

We reject this request. At the outset, we note that the Board's authority to "suspend cases" in section 16.13 relates to pending appeals that the Board determines are not ready for review, not to reconsiderations of previously issued decisions. Moreover, the Board correctly addressed the sampling methodology issues on the basis of the arguments and evidence presented by the parties during the appeal. While PRDH made some arguments related to sampling methodology, the Board found that they "demonstrate[d] a lack of understanding of statistical sampling principles and of the Board's prior decisions discussing the use of statistical sampling to produce reliable evidence of unallowable costs." DAB No. 2385, at 9. During the appeal, PRDH never asserted that it was trying to obtain an expert witness or expert review of the audit methodology and needed additional time to do so. Had PRDH needed such additional time, it could have requested a stay or extension of briefing deadlines. However, once a decision is issued, the Board has the authority to grant reconsideration only on the basis of clear error in that decision. It does not have authority to reopen a decision to allow a party to submit evidence it elected not to procure and submit prior to the issuance of the decision.

Conclusion

For the reasons discussed above, we deny PRDH's request for reconsideration.

/s/
Judith A. Ballard

/s/
Leslie A. Sussan

/s/
Sheila Ann Hegy
Presiding Board Member