

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

New Jersey Department of Human Services
Docket Nos. A-12-58, A-13-2, A-13-5
Decision No. 2508
April 19, 2013

DECISION

The New Jersey Department of Human Services (New Jersey) appeals three determinations by the Administration for Children and Families (ACF) disallowing a total of \$1,176,683 in adjusted claims for federal financial participation (FFP) under the Child Support Enforcement Program at title IV-D of the Social Security Act (Act). New Jersey claimed the costs as adjustments to prior claims for data processing services provided to the IV-D program. ACF disallowed New Jersey's claims on the basis that they were filed beyond the two-year period for claiming FFP provided by statute and regulation.

New Jersey asserts that its claims qualify for the exception to the two-year time limit for adjustments to prior year costs. As explained below, we conclude that we are unable to decide whether the claims do qualify for this exception because of inadequacies in the record and apparent misunderstandings in both parties' briefs on this common legal issue. We also conclude that the fairest and most expeditious way to proceed is to consolidate the cases and remand them to ACF to reevaluate New Jersey's claims consistent with our analysis and instructions below. If ACF determines upon reevaluation to disallow any of New Jersey's claims, New Jersey may appeal that determination to the Board.

Applicable Authority

Section 1132(a) of the Act (42 U.S.C. § 1320b-2(a)) requires that a state's claims for expenditures under titles of the Act, including title IV-D, be filed "within the two-year period which begins on the first day of the calendar quarter immediately following such calendar quarter" during which the expenditures were made. Section 1132(a) also prohibits payment "on account of any such expenditure if claim therefor is not made within such two-year period; **except that this subsection shall not be applied so as to deny payment with respect to any expenditure involving court-ordered retroactive payments or audit exceptions, or adjustments to prior year costs.**" (Emphasis added.)

Department of Health and Human Services (HHS) regulations implement this two-year claim limit at 45 C.F.R. § 95.7 and the exceptions at 45 C.F.R. § 95.19, including, at section 95.19(a), the exception for “[a]ny claim for an adjustment to prior year costs.” Section 95.4 defines “adjustment to prior year costs” as “an adjustment in the amount of a particular cost item that was previously claimed under an interim rate concept and for which it is later determined that the cost is greater or less than that originally claimed.” In the preamble to the final rule adopting the claim limit and the exceptions, the HHS Secretary stated:

An “adjustment to prior year’s costs” is limited to claims for services or medical assistance based on interim rates that subsequently are determined to be higher or lower than originally claimed. It has been our experience that in these areas subsequent adjustments are unforeseen and unavoidable. Consequently, we believe they should not be subject to the time limits. We believe that a broader exception would render the statutory provision a nullity.

46 Fed. Reg. 3527, 3528 (Jan. 15, 1981).

The cost principles for state and local governments in Office of Management and Budget Circular A-87, codified at Part 225 of 2 C.F.R., permit states to allocate costs of “central services” provided by one state agency to other state agencies using a billing rate based on the estimated costs of a providing particular service that is then adjusted to a final rate based on the actual costs of providing the service. 2 C.F.R. Part 225, App. C. Such allocation must be pursuant to a cost allocation plan approved by the “cognizant agency.” *Id.*; 2 C.F.R. Part 225, App. A, ¶ B.6. HHS is the cognizant agency for the New Jersey Department of Human Services. 51 Fed. Reg. 552 (Jan. 6, 1986).

Background and arguments

The following background information is largely taken from New Jersey’s briefs and exhibits and does not appear to be disputed by ACF.

The disallowance concerns what New Jersey asserts are increasing administrative claims for costs of data processing services provided to its IV-D program by New Jersey’s Office of Information Technology (OIT) between July 1, 2007 and September 30, 2009. New Jersey Brs. at 1. New Jersey asserts it allocated those costs to the IV-D program pursuant to yearly Cost Allocation Agreements with the HHS Division of Cost Allocation (DCA) for the state fiscal years ending June 30, 2008 through June 30, 2010 (SFYs 2009 – 2010). New Jersey Exs. 2. Each agreement provided that charges for “billed costs,” including “OTIS-Data Processing” (A-12-58, A-13-5) and “Information Technology” (A-13-2), would be billed “in accordance with rates established . . . based on the estimated costs of providing the services,” and that “[a]djustments for variances between

billed costs and the actual allowable costs of providing the services . . . will be made in accordance with procedures agreed to between the State/locality and the Cognizant Agency.” *Id.* at Aa6-Aa8. The record does not indicate what those agreed-upon procedures are. New Jersey states, and ACF does not deny, that “the original submission of data processing costs calculated based upon the . . . OIT initial/interim billing rates for [the relevant state fiscal year were] timely claimed within the two-year period mandated by applicable statutes and regulations.” New Jersey Brs. at 4-5.

New Jersey states in each case that following the end of a fiscal year on June 30, its OIT prepared a document that “contained the finalized . . . data processing billing rates and constituted the required A-87 reconciliation of OIT’s projected to actual billing rates” for that fiscal year, and that “[a]fter review and approval of this document by the State’s OMB, OIT [submitted] the . . . Federal Year-End CAP” for the fiscal year containing this information to DCA. New Jersey Brs. at 4-5. OIT then provided “the final SFY [] data processing billing rate data” to New Jersey’s Division of Family Development (DFD), which administers the IV-D program in New Jersey. *Id.* at 5-6. DFD “used the final billing rates in [DFD]’s Federally approved Cost Allocation Plan to compute adjusted, final administrative claims for data processing costs” for the relevant quarters, “compared the results to the original, estimated administrative claims calculated” for those quarters “based upon use of the initial, interim rates; and calculated the difference between the actual allowable cost and the costs initially billed.” *Id.* DFD then claimed the differences as increasing adjustments on expenditure reports submitted for later quarters.¹ *Id.*

ACF denied the adjusted claims as ineligible for FFP on the grounds that they were untimely and either that ACF was “unable to determine that the claims are allowable pursuant to 45 CFR 95.19,” which implements the exceptions to the two-year claims limitation (A-12-58), or that “the state has not indicated that [any] of [the] exceptions is applicable to these claims” (A-13-2, A-13-5).

¹ The amount, date and applicable period in quarters ending (QE) of the disallowed claims, submitted as increasing adjustments on quarterly expenditure reports for later periods, are as follows:

Docket	Amount	Period (QEs)	Claim submitted
A-12-58	\$117,576	September 30 & December 31, 2008	July 28, 2011
A-13-2	\$130,397	September 30, 2009	December 29, 2011
A-13-5	\$928,710	September 30, 2007–June 30, 2008	April 8 & September 29, 2011

(The claims were submitted twice in Docket No. A-13-5 because, New Jersey states, ACF refused to accept the expenditure report submitted April 8, 2011 “because it included adjustments for the four quarters of SFY 2008,” and accepted the September 29, 2011 expenditure report after New Jersey complained to regional ACF staff. New Jersey Br. A-13-5, at 5-6.)

On appeal, New Jersey argues that the regulatory definition of “adjustment to prior year costs” eligible for the exception to the two-year claiming limit “clearly encompasses the disallowed costs since they represent increasing adjustments in the amount of data processing costs that had previously (and timely) been claimed under interim or estimated rates” for which the actual costs were “later determined, after the calculation of final billing rates [to be] greater than that originally claimed.” New Jersey Br. A-12-58, at 9; 45 C.F.R. § 95.4 (defining adjustment to prior year costs).

ACF “agrees that the claims at issue are adjustments to prior year costs” but argues that New Jersey’s claims “do not meet the timely filing exceptions as interpreted by the Board under a long line of DAB decisions,” because they were not “unforeseen or unavoidable” as those terms are used in the preamble to the timely claims regulation to describe the exception for adjustments to prior year costs. ACF Brs. at 2-3, citing 46 Fed. Reg. at 3528. ACF argues that OIT’s failure (in two of the appeals) to provide the final rate data to DFD within the two-year deadline was caused “solely by staffing deficiencies and programming problems” or “formatting problems and technological glitches experienced on the part of the State’s OIT.” ACF Brs. A-12-58, A-13-5, at 5.² In the remaining appeal, ACF argues that New Jersey “does not even attempt to explain the delay that caused” its claim to be filed more than two years after the end of the quarter for which New Jersey claimed costs. ACF Br. A-13-2, at 4. ACF cites *New York State Dept. of Social Services*, DAB No. 521 (1984), where the Board stated that the exceptions were “intended to cover only extreme situations [and] not . . . a routine situation where a state simply did not get around to getting its data together in time to file a claim within the statutory requirements,” and “are to take care of those cases where it would be patently unfair to a state to outlaw its claim merely because of the passage of time.” DAB No. 521, at 8. ACF also argues that in *New Jersey Dep’t of Human Services*, DAB No. 1773 (2001) (*reconsideration denied, Ruling on Request for Reconsideration of DAB No. 1773* (June 13, 2001)), the Board rejected New Jersey’s argument that the exception applies to all claims for adjustments to prior costs claimed through interim rates and upheld the disallowance where delays “between the date the State became aware of the actual costs and the date the claim was submitted” were “not substantially different in kind from . . . the . . . delay[s] here[.]” ACF Brs. at 5.

² New Jersey states in those two appeals that OIT “was unable to provide final billing rate data in a format that was viewable or usable by DFD and other State agencies” any earlier “due to staffing deficiencies, changes in State budgeting procedures, and the failure to address important areas of programming needed for the Cost Allocation Recovery (CAR) billing system.” New Jersey Brs. A-12-58, A-13-5, at 5.

Discussion

Both parties' briefs reflect misunderstandings of the law relating to the exception for adjustments to prior year costs. Contrary to New Jersey's position in each case, as we understand it, the exception does not automatically apply simply because a state has an interim rate-setting system that anticipates the need to make a final rate adjustment once the state knows the actual costs of particular cost items and does, in fact, adjust its rates and claims the adjustment after the two-year claiming deadline. As Board decisions have made clear over the years, the exception is available to a state only in the strictly limited situation in which the state has defined its interim rate concept in a state plan and/or cost allocation plan, follows the plan(s), later makes final rate adjustments based on actual cost data and develops those adjustments in accordance with the applicable methodology and requirements, including any timing requirements, and the adjustments reflect the final reconciled rate. *See, e.g., Tex. Health & Human Servs. Comm'n*, DAB No. 2404, at 12 (2011) (citations omitted) (Board has "reiterated that the adjustment-to-prior-year-costs exception does not apply unless the state shows that 'a subsequent adjustment to an interim rate is consistent with and contemplated by its state plan and methodology'"); *N.Y. State Dep't of Health*, DAB No. 1867, at 8, 21 (2003) ("adjustment in the amount . . . previously claimed under an interim rate concept . . . must be consistent with the state plan reimbursement methodology"). These strict limitations are consistent with the purpose of section 1132(a), which is to ensure some fiscal certainty for federal agencies when developing their budgets. *See Kan. Dep't of Soc. & Rehab. Servs.*, DAB No. 2014, at 16 (2006) ("Congress's intent in legislating the two-year limitation in section 1132(a) of the Act was 'to prevent the states from coming in many years after expenditures were made and claiming FFP . . . Such delayed claiming made it difficult for [HHS] to plan its budget.'"). If an adjustment does not meet this test, it is not an "adjustment to prior year costs" within the narrow meaning of the statute and regulations, regardless of whether the claim in fact makes some adjustment to the amount of costs claimed in a prior year.

As examples of how the Board has applied this narrow exception, we note the Board's rejection of state attempts to make additional adjustments after an adjusted rate was finalized in accordance with the state plan. *Tex. Health & Human Servs. Comm'n*. Similarly, the Board has rejected state attempts to change retrospectively the method that the state chose to use when developing the interim rate by adding new cost components. *S.C. State Health & Human Servs. Fin. Comm'n*, DAB No. 943 (1988), *aff'd*, *S.C. Health & Human Servs. Fin. Comm'n v. Sullivan*, No. 88-1313-16 (D.S.C. July 17, 1989), *aff'd*, 915 F.2d 129 (4th Cir. 1990); *Kan. Dep't of Soc. & Rehab. Servs.*

ACF's briefs also reflect a misunderstanding of the "adjustment to prior year costs" exception as the Board has addressed it over the years. Taken as a whole, Board decisions do not support ACF's position in these cases that the exception is available for final adjustments to interim rates that otherwise meet the test articulated above only if any delay in filing the claims based on a final adjustment of the interim rate is also "unforeseen and unavoidable." The statute and regulations on their face provide no such constraint on filing a claim that otherwise qualifies for the exception as an "adjustment to prior year costs." Nor do they provide a framework for evaluating how long a state has to prepare such adjusted claims for filing. The preamble language explains why the regulation limits the statutory exception for "adjustments to prior year costs" to adjustments of prior year costs that were "previously claimed under an interim rate concept" and later found to be greater or less than originally claimed under the interim rate. The preamble language does not further limit the regulatory exception to such qualifying adjustments that were *also* unforeseen and unavoidable. Act § 1132(a); 45 C.F.R. §§ 95.4, 95.19; 46 Fed. Reg. at 3528. Thus, contrary to what ACF states, the "unforeseen and unavoidable" language in the preamble does not speak to whether any delay in filing claims once the final rates are developed under a state's interim rate-setting system is unforeseen and unavoidable. Rather, that language addresses the Secretary's narrow view of the nature of the adjustments qualifying for the exception. Taken as a whole, the Board's decisions (or analyses) on the circumstances in which the exception applies are consistent with this narrow view. *See Kan. Dep't of Soc. & Rehab. Servs.* at 2 ("[t]he need for . . . adjustments [is] an integral facet or a necessary result of having a retrospective reimbursement system that makes rate adjustments beyond the two-year period unforeseen and unavoidable.").

As support for its position, ACF's briefs in these appeals rely heavily on the Board's decision in *New Jersey Dep't of Human Services*, DAB No. 1773. We recognize that taken out of context, certain language in that decision (and, more particularly, the ruling denying reconsideration) might be perceived as supporting ACF's position that any delay in filing final adjusted claims must be unforeseen and unavoidable in order to qualify for the exception. However, a closer look undercuts that reading. Strictly speaking, the methodology involved in DAB No. 1773 was not an interim rate-setting methodology but, instead, a fixed rate methodology under which rates for future years, not interim rates for past years, were adjusted based on actual costs. Thus, the case may not accurately be viewed as one involving the exception for "adjustments to prior year costs," even though the Board concluded that the over five-year delay in filing claims in that case was not unavoidable and stated "that, under the particular circumstances of this case, the adjustment to prior year costs exception to the two-year filing period is not applicable." DAB No. 1773, at 8. Putting it another way, *New Jersey* simply is not clearly aligned

with the long history of Board decisions addressing the “prior year costs” exception and should be viewed as limited to its facts. For these reasons, ACF’s reliance on DAB No. 1773 is misplaced, and on remand, ACF should instead apply the test articulated above when reconsidering whether a disallowance is warranted in each case.³

Our statement that the “unforeseen and unavoidable” language is not a basis for disallowing costs otherwise qualifying for the “adjustment to prior year costs” exception simply because the claims for those costs are filed outside the two-year limit does not mean that the circumstances surrounding any delayed filing are necessarily irrelevant to determining whether the exception applies. As stated above, the principle underlying the two-year filing limitation is to foster fiscal certainty with respect to the government’s budget processes, and the exceptions to that time limit must be construed and applied consistent with that principle. For that reason, we do not foreclose the possibility that in a given case, we might find the exception unavailable for an otherwise qualifying “adjustment to prior year costs” if the delay in filing the claim was so extreme or of such a nature that the delay could not reasonably be viewed as connected to the adjustment process set forth in the state’s methodology. Based on the records currently before us in these appeals, however, we could not make such a finding.

Actions on remand

On remand, ACF should reevaluate New Jersey’s claims and whether they qualify for the “adjustment to prior year costs” exception in light of our analysis of the applicable legal principles above. In conducting the reevaluation, ACF should consult with New Jersey to the extent necessary to obtain any needed information not currently in the record about the costs involved in each case. This might include, for example, the state’s interim rate-setting methodology and whether and how that methodology was followed in each case (for example, the “procedures agreed to between [New Jersey] and the Cognizant Agency” referred to in New Jersey’s Cost Allocation Agreements) and any other applicable agreements with New Jersey that address the timing or manner of New Jersey’s adjusted claims. ACF should also consult, as appropriate, with DCA and other HHS officials who have knowledge of New Jersey’s rate-setting system.

Upon completing its reevaluation ACF should determine whether to amend or withdraw the disallowances and should issue New Jersey a written notice of its determination in each case. To the extent that ACF continues to disallow all or part of New Jersey’s claims or makes any other determination appealable under 45 C.F.R. Part 16, Appendix A, New Jersey may appeal ACF’s written determination within 30 days after receiving it.

³ We note that ACF relied only on the decision in DAB No. 1773 and did not cite the ruling denying reconsideration.

Conclusion

For the reasons stated above, we remand the appeals to ACF for further action consistent with this decision.

_____/s/
Judith A. Ballard

_____/s/
Leslie A. Sussan

_____/s/
Sheila Ann Hegy
Presiding Board Member