

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

City of Boston, Massachusetts
Docket No. A-12-106
Decision No. ER11
September 24, 2012

DECISION

The City of Boston, Massachusetts (Plan Sponsor) appeals a June 27, 2012 notice from the Centers for Medicare & Medicaid Services (CMS) of its determination that there has been an overpayment under the Early Retiree Reinsurance Program (ERRP). Specifically, CMS determined that a reimbursement request made by the Plan Sponsor for the plan year ending June 30, 2010 was \$57,459.24 less than the amount already paid by CMS for that plan year, resulting in an overpayment.

For the reasons discussed below, I uphold CMS's determination.

Applicable Regulations and Guidance

Established by section 1102 of the Patient Protection and Affordable Care Act, Pub. L. No. 11-148 (Act), ERRP is a temporary program that provides reimbursement to participating employment-based plans for a portion of the cost of health benefits for early retirees. The Act states that “[t]he term ‘health benefits’ means medical, surgical, hospital, prescription drug, and other benefits as shall be determined by the Secretary” Act, § 1102(a)(2)(A). The implementing regulations similarly state that “*Health benefits* means medical, surgical, hospital, prescription drug, and other benefits as specified by the Secretary[.]”¹ 45 C.F.R. § 149.2.

The implementing regulations further provide that a submission of claims for reimbursement “consists of a list of early retirees for whom claims are being submitted, and documentation of the actual costs of the items and services for claims being submitted, in a form and manner specified by the Secretary.” 45 C.F.R. § 149.335(a). Prior to April 2011, CMS permitted plan sponsors to submit requests for reimbursement

¹ The regulations except from this definition “benefits specified at 45 CFR 146.145(c)(2) through (4),” i.e., accident coverage, disability income coverage, liability coverage, and coverage issued as a supplement to liability insurance.

without the claim list required by section 149.335(a) on the condition that each plan sponsor would substantiate the reimbursement received at a later date.

CMS's guidance provides that CMS will review each claim list and generate a Claim List Response File that indicated whether errors were found on the Claim List and, if errors were found, identified the specific records with errors and the type of error(s) found. *See* Claim List Response File Reference Guide, available at http://www.errp.gov/download/ERRP_Claim_List_Response_File.pdf; *see also* Common Question H1000-45 (indicating that automated claim list review process was available beginning October 3, 2011). CMS uses a "reason code" to identify each type of error. *See id.* CMS notifies the plan sponsor by e-mail that the Claim List Response File is available and, if applicable, that the reason code constitutes an "adverse reimbursement determination" that may be appealed by the plan sponsor within 15 days of receipt of the e-mail. *See Explanation of the Appeals Process for the Early Retiree Reinsurance Program*, available at http://www.errp.gov/download/ERRP_Explanation_of_the_Appeals_Process.pdf;² *see also* 45 C.F.R. § 149.500(d), (e).

A plan sponsor that receives a Claim List Response File identifying errors must subsequently submit an error-free claim list. CMS then sends the plan sponsor–

a reimbursement determination email indicating the amount of CMS' reimbursement determination. To the extent the sponsor disagrees with the amount of the determination (for example, the sponsor believes CMS calculated the amount of the subsidy incorrectly), this would constitute an adverse reimbursement determination. Therefore, upon receiving this email, the sponsor may submit an appeal. (However, if the plan sponsor did not timely appeal any previous adverse reimbursement determination regarding early retirees or rejected claims or codes, the sponsor has no right to appeal the reimbursement determination calculation, to the extent the appeal seeks to indirectly challenge that previous determination).

Explanation of the Appeals Process for the Early Retiree Reinsurance Program at 3.³

² The version of this document on CMS's ERRP website is dated March 27, 2012. However, the provisions to which this decision refers are unchanged from the original version (dated October 3, 2011).

³ On August 30, 2011, the Secretary delegated her authority to review appeals of adverse reimbursement determinations to the Chair of the Departmental Appeals Board.

Case Background

By e-mail dated March 2, 2012, CMS notified the Plan Sponsor that its Claim List Response File for Application ID 1018700303 for the plan year ended June 30, 2010 (2010 plan year) was available. The e-mail also stated in pertinent part:

If you received Reason Code 013 . . . on your Claim List Response File for any claim line(s), each such Reason Code 013 constitutes an adverse reimbursement determination which the Plan Sponsor . . . may appeal, pursuant to ERRP regulations at 45 C.F.R. Part 149, subpart F. The Plan Sponsor has 15 calendar days from the date of this email, to submit its appeal. . . . Please reference the Explanation of the Appeals Process for the Early Retiree Reinsurance Program guidance document on www.errp.gov for an explanation of the appeals process, the information and documentation that must be submitted with a request for appeal, and deadlines for submitting a request for appeal and any additional supporting documentation.

The Plan Sponsor did not submit an appeal within 15 days of its receipt of this e-mail.

On June 27, 2012, CMS notified the Plan Sponsor by e-mail of its determination “that there has been an overpayment in the amount of (\$57,459.24) with regard to” the Plan Sponsor’s Application ID 1018700303 for the 2010 plan year. CMS stated specifically that the “sum of reimbursable costs . . . that was submitted with the reimbursement request referenced in this email [Application ID 1018700303] was less than the sum of such costs submitted with previous reimbursement requests for the same plan year. As a result, ERRP reimbursements received from prior reimbursement request(s) resulted in an overpayment that must be returned to CMS.” CMS also stated in pertinent part: “If you disagree with the reimbursement request amount specified in this email, such amount constitutes an adverse reimbursement determination, which the Plan Sponsor . . . may appeal, pursuant to ERRP regulations at 45 CFR Part 149, subpart F. The Plan Sponsor has 15 calendar days from the date of this email, to submit its appeal.” The e-mail also referred the Plan Sponsor to the *Explanation of the Appeals Process for the Early Retiree Reinsurance Program*.

By letter dated July 10, 2012, the Plan Sponsor stated that it was appealing “the Overpayment Request in the amount of \$57,459.24” (emphasis omitted). The full explanation of the basis for the appeal reads as follows:

The City of Boston received a reimbursement for the first plan year based on aggregate claims data submitted according to the initial HHS guidelines. In April 2011, HHS changed the reporting requirements from aggregate to a claims detail list, and also then included a list of exclusions that were not known at the time of the reporting of aggregate claims data for the first plan year. The result of this

change was that claims were rejected after the reimbursement was actually received by the City of Boston.

The City's approved application then required it to use the funds to support health benefits programs through lower rates. The City of Boston has budgeted for FY13 relying on using 1st year ERRP money to lower FY13 rates. Municipalities, including the City of Boston, do not have the flexibility that private sector companies have with regard to funding and cannot easily alter appropriations midyear.

We find this matter to be unfair. The ERRP program procedures were not fully thought out initially, and it was reasonable to change them; however, it is not reasonable to request refunds based on one set of rules for money that was paid out to employers under a very different set of rules.

(Emphasis in original.)

Discussion

The Plan Sponsor's principal argument on appeal appears to be that CMS did not provide adequate notice of what items and services would be reimbursable under ERRP because CMS identified excluded items and services on a "list of exclusions" after the Plan Sponsor submitted its initial reimbursement request. For the reasons discussed below, I conclude that this is not a valid basis for reversing CMS's overpayment determination and that the Plan Sponsor's other arguments have no merit.

In its response, CMS acknowledges that the Plan Sponsor received a response file that identified, by code numbers, claims for items and services that were "unacceptable." CMS Response at 4. However, the Plan Sponsor does not specifically identify any such claims in its appeal. Accordingly, there is no basis in the record on which to determine whether any of the claims were for items or services on lists of codes excluded from ERRP reimbursement that were not published until after the Plan Sponsor filed its first claim for reimbursement. Thus, the Plan Sponsor has not shown that it was adversely affected.⁴

Even if the Plan Sponsor had made a credible argument that CMS did not provide adequate notice under the circumstances of this case, that argument would not be a valid

⁴ In other appeals before me, CMS alleged that before any plan sponsor submitted its first reimbursement request, CMS published other guidance indicating that items and services not generally covered by Medicare would not be reimbursable under ERRP. See *Town of Auburn, Massachusetts*, DAB No. ER7, at 4 (Sept. 19, 2012); and *Town of Auburn, Massachusetts*, DAB No. ER8, at 4 (Sept. 19, 2012).

basis for reversing the overpayment determination. As noted above, CMS's *Explanation of the Appeals Process for the Early Retiree Reinsurance Program* states that "if the plan sponsor did not timely appeal any previous adverse reimbursement determination regarding early retirees or rejected claims or codes, the sponsor has no right to appeal the reimbursement determination calculation, to the extent the appeal seeks to indirectly challenge that previous determination[.]" Thus, a plan sponsor must appeal any determination by CMS that an item or service on a claim list is not reimbursable under ERRP within 15 days of receipt of notice that there are errors on the claim list. In the case now before me, errors on the claim list would have been identified in the ERRP Center's January 2, 2012 e-mail to the Plan Sponsor. However, as noted above, the Plan Sponsor did not appeal within 15 days of receipt of this e-mail. Accordingly, it is beyond the scope of the Board's authority to consider the argument in the Plan Sponsor's appeal of CMS's overpayment determination that it did not have adequate notice that the cost of items or services on its claim list was excluded from reimbursement under ERRP.

The Plan Sponsor also complains that the claims were rejected after it was reimbursed because CMS because "HHS changed the reporting requirements [for claims] from aggregate to a claims detail list[.]" Even if the Plan Sponsor was initially paid on the basis of an aggregate claim, however, the Plan Sponsor could not reasonably expect to retain federal funds for costs that it could not later substantiate.

The Plan Sponsor also alleges that it has used the ERRP reimbursement now identified as an overpayment to reduce rates for fiscal year 2013 and suggests that it is therefore not feasible to repay CMS. To the extent that the Plan Sponsor is suggesting that CMS should waive repayment, this constitutes a request for equitable relief. The Plan Sponsor does not point to anything in the ERRP regulations or in CMS's guidance that authorizes the Secretary or the Board Chair to reverse an overpayment determination by granting such relief.

Conclusion

For the foregoing reasons, I uphold CMS's June 27, 2012 determination of an overpayment in the amount of \$57,459.24.

/s/
Constance B. Tobias, Chair
Departmental Appeals Board