Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Colorado Department of Health Care Policy and Financing
Request for Reconsideration of Decision No. 2558
Ruling No. 2014-3
May 27, 2014

RULING ON REQUEST FOR RECONSIDERATION

The Colorado Department of Health Care Policy and Financing (Colorado) requested reconsideration of the Board's Decision in *Colorado Department of Health Care Policy and Financing*, DAB No. 2558 (2014). In that decision, the Board upheld a determination by the Centers for Medicare & Medicaid Services (CMS) to disallow Colorado's claims for $7,392,657 of federal financial participation (FFP) in expenditures Colorado made for prenatal coverage for uninsured pregnant women. Colorado submitted the claims under a Children's Health Insurance Program (CHIP) demonstration project for expenditures incurred from May 1, 2010 to July 30, 2012. CMS determined that the women in question had family incomes above 200% of the federal poverty level (FPL) and that the approved demonstration project (or "waiver program"), as in effect prior to July 30, 2012, covered women with incomes up to 200% of the FPL, but not above that level.

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, we conclude that Colorado's request for reconsideration does not allege any clear error of fact or law. We therefore deny the request.

The Board's decision

In its decision, the Board found that the applicable Special Terms and Conditions (STCs) of Colorado's demonstration project (funded under section 1115 of the Social Security Act) provided that—

- changes related to eligibility had to be submitted to CMS as amendments to the project;
- Colorado should not implement such changes without "prior approval by CMS";
- amendments to the project "are not retroactive";

- amendment requests "must be submitted to CMS for approval no later than 120 days prior to the date of implementation and may not be implemented until approved"; and
- "FFP may not be available for changes to the Demonstration that have not been approved through the amendment process" set forth in the STCs.

DAB No. 2558, at 2-3, citing CMS Ex. 2. Colorado first transmitted to CMS an addendum to its demonstration project to expand eligibility to uninsured pregnant women with incomes up to 250% of the FPL by email on May 3, 2010.

During its appeal, Colorado acknowledged that CMS did not formally approve Colorado's proposal to expand the eligible population until 2012, with an effective date of July 30, 2012. Colorado argued, however, that CMS's guidance on statutory changes made in 2009 altered the process for amending the demonstration project and that Colorado reasonably thought it had informal approval to claim FFP as of May 1, 2010 for women with incomes up to 250% of the FPL based on emails between Colorado and CMS.

The Board rejected these arguments, noting first that Colorado had presented no documentation or testimony from any state official to show that he or she, in fact, thought that the formal approval process would not apply and that CMS had given informal approval to Colorado to claim FFP for an expanded population under the demonstration project starting May 1, 2010. Even if state officials did in fact think they had informal approval and that formal approval was not required, the Board concluded, it would still reject Colorado's arguments. In light of the STCs in the demonstration project as approved and other statements by CMS, the Board concluded that Colorado could not **reasonably** think that FFP would be available for the costs at issue here prior to formal, written CMS approval of the expanded demonstration project.

The Board's reasons for rejecting Colorado's arguments also included the following:

- Colorado's reliance on a letter from CMS to a State Senator dated September 13, 2011 (more than a year after Colorado had submitted the addendum) was misplaced because:
    - Nothing in that letter changed the formal approval process set out in the STCs.
    - That letter clearly indicated that approval of the amendment was pending and was contingent on CMS waiving certain statutory provisions added by the 2009 amendments to the CHIP statute.

    - That letter implied that CMS had already communicated to Colorado that the statutory changes raised substantive issues that prevented CMS from simply approving the amendment as proposed, without considering whether Colorado first needed to expand coverage under Medicaid and what rate of FFP would be available for the expanded population.
- CMS ultimately approved the amendment only after the parties had agreed to additional changes to the project STCs to address those issues.
- Colorado could not reasonably think that CMS's failure to object to a statement about effective date in the email transmitting the amendment to CMS authorized Colorado to claim FFP for costs of the expanded population as of May 1, 2010 (especially given that the attached letter referred to the effective date of state law, not to the effective date of the "proposed" amendment being transmitted to CMS).
- Statements in a June 1, 2011 letter from CMS to Colorado, considered in context, could not reasonably be read as evidencing approval of the amendment (especially given that the letter referred to the amendment as "pending" and to the "currently approved coverage level of above 133 through 200 percent of the FPL").

DAB No. 2558, at 5-11.

Colorado's reconsideration request

Colorado's submitted its request for reconsideration on April 17, 2014. Subsequently, on April 28, 2014, Colorado supplemented its request.

In its initial request, Colorado describes the "crux of the dispute" as when its May 2010 request to amend its waiver program to expand coverage was approved. Request for Reconsideration (RR) at 4. Colorado acknowledges that "the STCs do require prior approval." RR at 2.[1] Colorado requests, however, that the Board reconsider its conclusion that Colorado could not reasonably think that it had such approval prior to July 30, 2012. Colorado says that the Board seemed to conclude that approval for a demonstration project can never come in any form other than a formal approval letter. *Id.* at 2. According to Colorado, "[u]nder the applicable federal regulation, and even the STCs, prior approval is not limited to a written approval letter," but "comes as soon as CMS documents its consent to [Colorado's] claims for FFP." *Id.* In support of this argument, Colorado cites to the definition of "prior approval" from section 92.3 of the HHS grant administrative requirements in 45 C.F.R. Part 92. Colorado argues that nothing in the regulations or the STCs limits prior approval to the specific type of approval letter issued by CMS. *Id.* at 3-4.

[1] Colorado says that it "maintains its argument that the normal approval process did not apply," but alleges no error in the Board's analysis of that argument. RR at 2.

Colorado argues that "the record shows that CMS approved [Colorado's] amendment request much earlier than the belated July 30, 2012 approval letter, even if the STC's controlled the approval process." *Id.* at 2. In support of this argument, Colorado does not point to any exhibit in the record before the Board when it issued its decision. Instead, Colorado asserts that "CMS has never claimed that the [project amendment] was ever disapproved." *Id.* at 4. Colorado contends that the proper inquiry under section 92.3 is not whether the amendment was "pending" during the two-year period between the request and formal approval; rather, Colorado asserts, under that section "approval was granted as soon as CMS consented to [Colorado's] claims for FFP." *Id.* The documents that Colorado now says "show that CMS's consent was early and ongoing" consist of two sets of documents -- one set related to Colorado's CHIP claims to CMS and another set related to a grant award that Colorado received from another agency of the federal Department of Health and Human Services (HHS). Colorado also submitted affidavits authenticating the documents.

Analysis

1. Colorado's reliance on the definition of "prior approval" in 42 C.F.R. Part 92 as showing an error in the Board's decision is misplaced.

Colorado did not cite to or rely on the definition of "prior approval" from Part 92 in its earlier briefs. Instead, the Board decision cited that definition in a footnote to illustrate that the term "prior approval" is a term of art in HHS grant programs with two elements, namely, the approval must be evidenced by written documentation and must be obtained in advance. DAB No. 2558, at 3 n.2. Colorado's request for reconsideration does not allege that we should have directly applied the Part 92 definition of prior approval here, but applying that definition would not, in any event, change our analysis.[2] Nothing in that definition precluded CMS from requiring, in the STCs for the demonstration project, that prior approval of the amendment be obtained using the process specified in the STCs. While Colorado argues that the Board erred in distinguishing the "formal approval" given in CMS's July 2012 letter from the "informal approval" that Colorado says it obtained, Colorado does not explain how any of the other alleged sources of approval

[2] Part 92 establishes administrative requirements for grants to governmental entities, not programmatic requirements, and it refers to "documentation evidencing consent prior to incurring specific cost." 45 C.F.R. §§ 92.1 (scope of part) and 92.3 (definitions of "administrative requirements" and "prior approval"). Section 92.3 describes programmatic requirements as including "kinds of activities that can be supported by grants under a particular program" and distinguishes them from "matters common to grants in general," such as financial management and retention of records. Here, the approval was required for any change in the population eligible for services under the demonstration project, and thus required CMS to apply its programmatic expertise. This is not the type of administrative matter common to grants in general.

constitute approval by CMS under the process set out in the demonstration project STCs. That process included advance submission of the request to particular CMS officials, requirements for the contents of the request, and a requirement for review of the request by a "Federal Review Team." CMS Ex. 2, at 6, 9.

Moreover, Colorado's request for reconsideration does not allege that the Board's analysis of the documents Colorado previously submitted is inconsistent with the Part 92 definition of prior approval. Instead, Colorado asserts that the Board should reconsider those documents in light of documents Colorado had not previously submitted. The Board has consistently stated that it will not reconsider one of its decisions based on new evidence that a party could have previously submitted, but did not. *See, e.g.*, *Ruling on Request for Reconsideration of Philadelphia Parent Child Ctr., 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 Peoples Involvement Corp.*, 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"). Here, Colorado does not assert any reason why it did not previously submit the documents that it now says show that it could reasonably think it had informal approval for the program expansion at issue here.

In any event, Colorado ignores a key part of the Board's analysis – Colorado's failure to present any documentation or testimony from any state official to show that he or she, in fact, thought that the formal approval process would not apply and that Colorado had informal approval to claim FFP for an expanded population under the demonstration project starting May 1, 2010. Colorado still has not presented any such evidence.

Colorado points out that CMS did not formally disapprove the amendment during the two years it was pending. CMS did, however, act formally to extend the existing demonstration project on a month-to-month basis, without any change in the STC defining the eligible population for purposes of demonstration project funding. In any event, Colorado does not claim that there is any legal consequence to the alleged lack of any formal disapproval within that period.[3]

Although the above reasons are a sufficient basis for denying Colorado's reconsideration request, we nonetheless briefly state below why the new evidence would not have made a difference in our conclusions even if it had been timely submitted (which it was not).

[3] We note that timeframes for CMS actions on waiver requests do not apply to the type of section 1115 demonstration project at issue here. 42 C.F.R. §§ 457.1001, 457.1003.

2. The new evidence about Colorado's claims for FFP does not show that Colorado had consent prior to incurring specific costs for the expanded population.

One set of documents on which Colorado now relies (submitted for the first time with Colorado's supplement to its reconsideration request) consists of spreadsheets supporting the quarterly expenditure reports (Forms CMS-21 and CMS-21P) that Colorado submitted to CMS for the quarters ending June 30, 2010 through June 30, 2012. With those documents, Colorado submitted an affidavit by Colorado's Controller, who certified the expenditure reports. He attested that the spreadsheets included prenatal expenditures for women with incomes between 205 and 250% of the FPL that then were included in the total amounts reported on Line 1C ("Premiums for Private Health Care Insurance Over 150% of Poverty Level – Gross Premiums Paid") of the report form. Controller Aff. at 1. According to the Controller, CMS regional staff must finalize their review and approve the report before the "corresponding grant can be finalized by the CMS Central Office." *Id.* Colorado asserts that "CMS's response was to pay those claims" and that the process of Colorado claiming FFP and CMS paying it repeated itself for over two years before CMS gave any indication that the claims were unallowable (as CMS did in its letter of June 29, 2012). RR at 5; CMS Ex. 6.

The submitted spreadsheets do not constitute documentation evidencing prior approval of the demonstration project amendment. The Board has held that "mere reimbursement" of claims for FFP does not suffice to show that the awarding agency approved the claims as allowable. *Oregon Dep't of Human Resources*, DAB No. 536 (1984), at 7. As the Board said in *New York State Dep't of Social Servs.*, DAB No. 449, at 26 (1983), the quarterly claiming process used in public assistance programs "does not lend itself to close examination of individual items included in the gross claims made each quarter." The Board also noted in that case that there is no particular time limit in which an awarding agency must disallow claims and that the applicable regulations provided that, even where an agency paid a claim it had previously questioned and deferred, the agency was not precluded from subsequently disallowing the claim. *Id.*; s*ee* 42 C.F.R. § 457.210(d) (similar provision for CHIP). Here, the STCs for the demonstration project required Colorado to use the same quarterly claiming process it used for its regular CHIP program. CMS Ex. 2, at 15-16.

In this case, there are additional reasons for rejecting Colorado's argument. The supporting spreadsheets listed some expenditures on a line with the description "Gross Prem 206-250 prntl 65%," which presumably is shorthand for the expanded population. RR Supp. Exs. 1-9. The amounts reported in this category were only a small part of the total premium expenditures listed on the spreadsheets, however. *Id.* Moreover, the title of Line 1C on the report form itself refers only to poverty levels "[o]ver 150%," and

Colorado already had approval to cover pregnant women with incomes up to 200% of the FPL. In addition, nothing in the evidence submitted rules out the possibility that CMS paid the claims while also noting that there was a question about the allowability of the costs that had not yet been resolved.

Finally, we note that such expenditure reports are submitted after the end of the calendar quarter in which the expenditures were incurred and review may take a few months. *Id.* Colorado does not explain how payment of the claims first submitted after June 30, 2010 could be considered "documentation evidencing consent prior to incurring the specific cost" with respect to costs Colorado started incurring as early as May 1, 2010.

In other words, the new evidence does not suffice as documentation of prior approval of the claims, much less as documentation of prior approval of the amendment to the demonstration project.

3. The new evidence about a grant from a different HHS agency does not show that Colorado had consent prior to incurring specific costs for the pregnant women at issue here.

The second set of documents on which Colorado now relies (submitted for the first time with the reconsideration request) consists of documents related to a grant awarded to Colorado by the Health Resources and Services Administration (HRSA) for a State Health Access Program (SHAP). Colorado says that its request for SHAP funding specifically described and included the expanded population at issue – pregnant women with incomes up to 250% FPL, and that HRSA approved the request in September 2009. Colorado submitted documentation of its application and approval for SHAP funding, the award notices from HRSA, and Colorado's year two report on the HRSA grant, as well as an affidavit from an employee in Colorado's Grants Unit who is the custodian for the records submitted. Colorado argues that, since HRSA is an agency of HHS, HRSA's approval of the SHAP award should be considered consent from HHS as a whole to claim FFP for the expanded population from at least September 2009.

We note at the outset that the STCs for the demonstration project refer to "prior approval by CMS." CMS Ex. 2, at 9. Nothing in the documents submitted indicates that Colorado in fact thought that HRSA was authorized to give or to communicate approval for a change to its CHIP demonstration project. Nor is there anything in the documents indicating that HRSA would not have approved the SHAP funding unless it thought an amendment to the CHIP demonstration project had been approved by CMS.

Contrary to what Colorado argues, HRSA's approval of SHAP funds for the projects outlined in the application does not evidence even "HHS consent" for Colorado's amendment to its CHIP demonstration project. HRSA awarded the SHAP grant to

Colorado in response to a lengthy grant application seeking funds for seven interrelated projects, but Colorado's request for reconsideration does not point to any specific part of the documents to support its position. The affidavit of Colorado's records custodian cites to two pages of the Program Narrative in the grant application to support her assertion that HHS "approved the use of grant funds for the express purpose of performing outreach and enrollment of pregnant women in the 205% to 250% federal poverty level benchmark in the Children's Health Plan Plus program . . . .." Custodian Aff. ¶2, citing RR Ex. A at "3 of 34 and 4 of 34" (referring to the page numbers for the Program Narrative; the corresponding exhibit pages are 6 and 7). The first page she cites mentions "CHIP expansion to children and pregnant women from 205 to 250%" of the FPL on a list of "populations expansions of the State's public health insurance program" following a discussion of the state law that "provides expanded coverage." RR Ex. A , at 6. The second cited page refers to the "project process measures" for the proposed projects, including as part of the "outreach" goal, increasing "awareness of health care coverage programs for expansion populations" and higher penetration rates for the expansion populations, including pregnant women. Nothing on these pages, or elsewhere in the application, shows that Colorado even informed HRSA that Colorado intended to fund the program expansion to additional pregnant women through an amendment to its existing CHIP demonstration project.

The application mentions a need for a federal waiver only in connection with a project referred to as "Childless Adults and Buy-In for Individuals with Disabilities" -- a project addressing Medicaid expansions to populations different from the pregnant women at issue here. *Id.* at 5, 6-7, 10-11, 20, 27-28. This part of the application actually undercuts Colorado's position because it shows that Colorado was aware that any approval for funding under a section 1115 demonstration project had to come from CMS, after an application was submitted and reviewed, which could take time. Colorado explained that it needed funding to hire consultants "to assist with the 1115 waiver applications," that Colorado assumed the new adult expansion would require a waiver from CMS (subject to Office of Management and Budget and HHS approval), that CMS had no specific timeframe to approve or deny the request, and that "CMS usually develops terms and conditions that outline the operation of the demonstration project when it is approved." *Id.* at 27-28.

In any event, HRSA's approval of the SHAP award could not possibly have constituted or evidenced even informal approval of Colorado's request to amend its CHIP demonstration project. The HRSA award letter is dated September 4, 2009. *Id.* at 1. But Colorado did not even submit a request to amend the CHIP demonstration project to CMS until May 2010, many months later.

Conclusion

For the reasons stated above, we decline to reconsider our decision.

/s/
Leslie A. Sussan

/s/
Stephen M. Godek

/s/
Judith A. Ballard
Presiding Board Member