Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Minnesota Department of Human Services
Docket No. A-08-36
Reconsideration of Decision No. 2122
Ruling No. 2008-3

DATE: February 15, 2008

Ruling on Request for Reconsideration

The Centers for Medicare & Medicaid Services (CMS) requested reconsideration of the Board's decision in Minnesota Dept. of Human Services, DAB No. 2122 (2007). In that decision, the Board reversed several CMS determinations disallowing claims by the Minnesota Department of Human Services (Minnesota) for Medicaid funding for capitation payments Minnesota made to the Metropolitan Health Plan (MHP), a managed care organization.

Under the Board's procedures that apply here, 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.

CMS's reconsideration request fails to meet this standard. As discussed below, CMS attempts to withdraw a factual concession it made in its original brief, but does not allege any error in the factual finding the Board made based on the evidence. Instead, CMS simply reasserts its position that the fact is irrelevant, a position inconsistent with applicable law and policy, as well as with the grounds on which CMS had based its determination in the first place. The other assertions in CMS's request misrepresent or distort statements in the Board's decision and, for the most part, concern points that were not even necessary to the decision. Finally, CMS objects to the outcome of the decision based on general public policy concerns, but does not explain how such concerns could override the legal result compelled based on the facts as actually found in this particular case.

CMS attempts to withdraw its concession, but does not allege any error in the factual finding the Board made.

CMS asserts in its request that the Board erroneously stated that CMS conceded that the funds transferred from Hennepin County Medical Center (HCMC) to the State were derived from local property taxes. CMS acknowledges that the Board correctly quoted

CMS's statement that it is "irrelevant that, under State law, Hennepin County's return payments to the State are derived from local property taxes" but states that CMS's position would have been "described more precisely" if CMS had said it is irrelevant "whether" the payments are so derived. RR at 4-5, n. 2 (emphasis added). CMS argues, however, that the context indicated that CMS was not conceding the payments were derived from local taxes since the full sentence read: "Contrary to Minnesota's assertion, it is irrelevant that, under State law, Hennepin County's return payments to the State are derived from local property taxes." RR at 3. CMS argues that the words "it is irrelevant" indicate that CMS was not conceding that the funds were derived from local property taxes since the term "irrelevant" means "having no probative value; not tending to prove or disprove a matter at issue." RR at 3, citing Black's Law Dictionary (7th ed., 1999).

The Board reasonably read the phrase "[c]ontrary to Minnesota's assertion" as modifying the clause "it is irrelevant," and as meaning that CMS disagreed with Minnesota about the relevance of the source of the payments, not with Minnesota's factual assertion about the source of the funds. The meaning CMS now quotes for the term "irrelevant" only reinforces the plain meaning of the sentence – i.e., that the claim that payments were derived from local property taxes does not tend to prove or disprove (is not relevant to) the basis for the disallowance, not that the claim is untrue.

CMS may intend by its retroactive rewriting to suggest that its concession was unintentional or unwise, so that we should permit CMS to withdraw it. Granting such a request would make no difference here, however. The Board's finding regarding the source of the funds was based not only on CMS's concession, but on the evidence in the record, which was fully analyzed in the decision, and on State law. CMS does not allege that the finding is not supported by the record or proffer any new evidence to show a factual error.

CMS asserts that its determination was supported based on its view of the circumstances, but that is not the issue. The Board determines the facts de novo, based on the entire record before it, including evidence from both parties. The Board had identified several flaws in the evidence from which CMS had inferred that the funds paid to MHP were simply being "recycled" back to the State. CMS now tries to dismiss these flaws as irrelevant, but they are not.

In sum, CMS's request does not allege, much less show, a clear error of fact regarding the source of the transfers from HCMC to

the State.

CMS's arguments in its reconsideration request misrepresent or distort the Board's decision.

To warrant reconsideration, allegations must assert an error in findings of fact or conclusions of law the Board in fact made. Many of CMS's assertions in its request misrepresent the Board's decision or its effect or misstate the law. They merely set up and then strike down a "straw man," and thus cannot serve as a basis for us to find an error of fact or law in the decision as written.

CMS suggests that the Board should have reached a different result because "Minnesota has not provided a scintilla of evidence that the disputed payments were used to cover above-average medical education costs under MHP's managed care plan or any other form of covered medical assistance for Medicaid recipients." RR at 16. The Board's decision, however, discussed the evidence of record showing that the adjustments for such costs were made pursuant federal regulation, that the adjustments were approved by CMS as actuarially sound, that HCMC in fact incurred higher than usual medical education costs, and that HCMC did not merely recycle the funds it received from MHP to cover those costs back to the State, as CMS had found. CMS suggests that the Board ignored the definition of "medical assistance" in section 1905(a) of the Act. The Board's decision pointed out, however, that section 1903(m) of the Act provides that capitation payments such as those at issue here are to be treated as "medical assistance" for purposes of federal funding and that graduate medical education is a recognized cost of providing inpatient hospital services. Thus, it is CMS that is ignoring relevant law, not the Board.

CMS alleges that the Board erred because it did not defer to the definition of "expend" cited in CMS's brief, instead citing definitions in the State Medicaid Manual and Department regulations. CMS accuses the Board of "deviat[ing] from the corpus of judicial precedent sustaining the Secretary's longstanding use of case-specific review and adjudication for purposes of enforcement of the Medicaid statute." RR at 22. The Board's decision did note that CMS's proposed definition arguably conflicts with the Manual and regulations. We went on to say, however, that, even accepting the dictionary definition of "expend" CMS cited ("to make use of for a specific purpose"), we would not find persuasive CMS's argument that Minnesota did not expend funds for medical assistance.

CMS asserts that the Board erred in concluding that section 1903(w)(6)(A) of the Act is relevant here. CMS has not, it says, tried "to prevent or restrict Minnesota, Hennepin County, MHP, and HCMC from exchanging funds among one another." RR at 13. The issue under section 1903(w)(6)(A), however, is whether CMS is improperly restricting a state from using a protected intergovernmental transfer as the non-federal share of Medicaid expenditures. Accepting CMS's arguments would restrict use of such transfers as non-federal share by treating them as applicable credits whenever the timing and amount of a transfer is similar to the timing and amount of a Medicaid payment to the transferring unit of government. CMS does not deny that CMS has in the past recognized that protected intergovernmental transfers are not "applicable credits," or deny that section 1903(w)(6)(B) of the Act specifically precludes the Secretary from treating protected intergovernmental transfers as donations. CMS simply misstates the issue under the statute.

CMS further suggests that the decision would require CMS to "demonstrate in the disallowance notices that the agency could literally trace the very same dollar bills (i.e., dollar bills with the same serial numbers) as they moved in the small circle from the State to MHP to HCMC and then back to the state" and that "it is inconceivable" that Congress would have imposed any such requirement. RR at 10, n.10 (emphasis in original). The plain language of the statute, however, protects transfers "derived from" local property taxes. CMS points to nothing in the Board's decision that even vaguely suggests that, in order to show the source of funds, a party would have to trace dollar bills by serial number.

Many of CMS's other assertions not only misrepresent what the Board said or what the record shows, but go to matters that the Board merely addressed in passing but which were not material to its decision. For example, the Board noted that "[v]ariations in the numbers and types of enrollees in any month would thus affect how much MHP actually received each month" and that this undercut CMS's assumption that the amount MHP received each month for graduate medical education adjustments was equal to the $566,000 paid each month from MHP to HCMC. DAB No. 2122, at 17, n.10, and 9, n.5. CMS says that this finding is inconsistent with State law and the record. RR at 9, n.7. But the State law CMS cites relates only to the approximate amount of the total expected payments for graduate medical education on a yearly basis, not to the amount of the monthly payments. As CMS's own description indicates, moreover, the records CMS cites show amounts paid by MHP to HCMC, not amounts MHP received from Minnesota.

CMS errs in now suggesting that the Board may rely on public policy concerns to reverse a decision, even if that decision is legally and factually correct.

CMS's reconsideration request argues that the interests of sound public policy demand reversal of the decision. CMS suggests that we should reverse the decision because of concerns about the integrity of the Medicaid program, even if we do not adopt the "legal and evidentiary" reasons for reversal CMS advances in the reconsideration request. RR at 23-24.

The Board does not, however, choose outcomes in adjudication based solely on policy considerations. It is the role of the agency to make policy choices and to issue guidance consistent with the statute and regulations. If the currently applicable statute, regulations, and policy issuances lead to a result different than the one the agency now considers preferable, the agency may take action to change them. The Board, however, has no such authority and must be bound by applicable law and the policy choices embodied in that law.

We note, moreover, that CMS's stated policy concern is based on the facts as CMS found them, not on the facts as shown by the record before the Board. The Board's decision explained why the result is not inconsistent with the concern that CMS raised.

/s/
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/s/
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/s/
Judith A. Ballard
Presiding Board Member