

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Pennsylvania Department of Public Welfare
Docket No. A-16-8
Ruling No. 2016-2
March 24, 2016

RULING ON REQUEST FOR RECONSIDERATION

The Pennsylvania Department of Public Welfare (Pennsylvania or State) asks us reopen and reconsider our decision in *Pennsylvania Department of Public Welfare*, DAB No. 2653 (2015). In that decision, we concluded that Pennsylvania had failed to show that it had a methodology for properly allocating administrative costs incurred by county-level area aging agencies (AAAs) in relation to the State’s home and community based waiver program for the period from July 1, 2008 through June 30, 2009. We also concluded that Pennsylvania had not demonstrated that the costs were claimed in accordance with an approved public assistance cost allocation plan (PACAP).

Standard of review

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.

Analysis

Pennsylvania raises three issues which it seeks to characterize as “clear errors of fact and law” in the Board’s decision. Request for Reconsideration (RR) at 1. First, Pennsylvania asserts that it was unaware that “it was being asked to explain the county methodology for cost allocation.” *Id.* Second, Pennsylvania alleges that the Board erroneously held that the State was required to provide “detailed information on county-level costs in its PACAP.” *Id.* at 4. Third, Pennsylvania reiterates its contention that the “disallowance is inconsistent with prior agency practice or guidance.” *Id.* at 6. We find that none of these claims identifies any clear error in the Board’s decision and, indeed, each merely presents arguments already rejected in that decision. For that reason, we decline to reconsider our decision.

1. *Pennsylvania should have known it was responsible for disclosing its allocation methodology.*

Pennsylvania's claim of surprise about the need to explain what methodology it used to allocate the county-level costs at issue to the Medicaid program is based on reading the disallowance letter narrowly and ignoring the extensive briefing and record development throughout the proceeding.

Pennsylvania now asserts that the rationale for the disallowance dispute surrounding the disallowance was "only" whether the State needed to amend its PACAP. RR at 1-2. However, as the Board decision made clear, the scope of the disallowance letter itself was broader than this issue. The disallowance letter explained that administrative costs may only be claimed –

when "directly related to the administration of the Medicaid program," and must be included in an approved PACAP and **“supported by a system which has the capability to isolate the costs which are directly related to the support of the Medicaid program** from all other costs incurred by the agency.” [Disallowance letter in Docket No. A-14-105, *quoting* State Medicaid Directors Letter #122094 (Dec. 1994)]

DAB No. 2653, at 8 (emphasis added). The disallowance letter specifically cited requirements for PACAPs to describe the methodology for allocating administrative costs and to explain how costs are measured and allocated, as well as to include CAPs for local government agencies administering a Medicaid program. *Id.*, *citing* Disallowance letter at 2-3. Finally, the Board noted that the disallowance letter found that, even after submitting a PACAP amendment, the State has “still failed to identify the AAAs’ administrative costs, show all the programs which they serviced, or describe an allocation methodology.” *Id.* at 9. The disallowance letter did not solely focus on whether the PACAP required additional amendment or required inclusion of the counties’ own CAPs but also on whether Pennsylvania had identified or explained an allocation method by which it claimed administrative costs of the AAAs under Medicaid. Pennsylvania thus had notice from the beginning that it was called upon to explain how the costs were allocated, as well as how it disclosed the allocation methodology or methodologies in its PACAP.

Pennsylvania next contends that the Board erred in concluding CMS’s brief provided notice. The relevant language from the Board decision is as follows:

CMS's position is that, even if Pennsylvania could have understood the IG audit report and the disallowance letter as focusing on the failure to include these costs in the PACAP, Pennsylvania had ample notice and opportunity during these proceedings to at least provide an explanation of what procedures and methodology, if any, were employed to ensure that only those AAA administrative costs that were properly allocable to Medicaid were included in its claims. CMS argues that the disallowance should be upheld now because Pennsylvania has made no such showing. [CMS Br. in Docket No. A-14-105] at 3, 19-21.

CMS is correct. Nowhere in the record before us can we discern an explanation of how Pennsylvania determines what share of the case management and other administrative costs that the AAAs incur are properly allocated to the Aging Waiver. . . .

DAB No. 2653, at 10. CMS's brief at page three expressly pointed out that, if Pennsylvania knew "how the disallowed costs were allocated, it has not provided the information in its appeal file," but Pennsylvania says that this is only in the introductory paragraph to the brief. RR at 3. Pennsylvania dismisses the other cited pages as merely dealing "with salary costs that the State conceded on appeal." *Id.* Pennsylvania contends that neither reference suffices to revise the disallowance when the table of contents of the brief does not list "how the counties developed their local CAPs" as an issue. *Id.* at 3-4.

There was no need to revise the disallowance since, as we have explained, it already notified Pennsylvania that it had not adequately disclosed an allocation methodology for the costs it was claiming for the AAAs. The Board pointed to the language in CMS's brief at page three merely to highlight that Pennsylvania was explicitly reminded, at a point when it could still remedy the situation, that it had yet to explain the methodology by which its costs were allocated to ensure that Medicaid was only charged with the appropriate share of costs that benefitted multiple programs. On page 19, CMS stated that "the issue here" is not whether Pennsylvania provided "sufficient detail" in its PACAP about the AAAs costs, but "the complete lack of any mention of the disallowed costs or **any method of allocating them.**" CMS Br. in Docket No. A-14-105, at 19 (emphasis added). On pages 20-21, CMS discussed costs relating to state employees who worked on multiple programs and noted that, even though their costs clearly also needed to be allocated, Pennsylvania had no methodology to perform the allocation. *Id.* at 20-21 (Pennsylvania's CAP "lacked any methodology for allocating these costs," and disallowance is appropriate because Pennsylvania "provided no information on how these salary costs were allocated to the Medicaid program"). That Pennsylvania later withdrew

its appeal of the state salary disallowance in its reply brief does not change the fact that CMS in its briefing gave multiple reminders to the State that claiming for any costs that benefit multiple programs must be supported by an allocation methodology and that the State had failed to identify such a methodology in or out of its PACAP as to the disallowed costs.

Moreover, Pennsylvania's reconsideration itself demonstrates either a continuing failure to understand what constitutes an allocation methodology, or a continuing effort to obfuscate the issue. For example, disclosing "how the counties developed their local CAPs" (RR at 4) was not at issue and would not have responded to the requirement to explain the methodology used to allocate the costs at issue (neither the state employee costs that Pennsylvania conceded on other grounds nor the AAA administrative costs).

An allocation methodology involves specifying an approach to distributing a defined set of costs that benefit multiple programs when each cost cannot be directly identified with a particular cost objective. The total base of costs must be distributed to the various benefitting programs using a formula or procedures that can be expected to reasonably capture the relative benefits. The Board explained the basic concept that --

[a] ratio may be used to distribute a pool of costs if the pool of costs bears a rational relationship to a quantifiable distribution base. For a ratio to equitably allocate a group of costs, the numerator of the ratio (total costs of a particular type) must bear at least roughly the same relationship to the denominator (or distribution base) as the unknown subset of the costs bears to the part of the distribution base that is identifiable to that specific cost objective. Stated differently, the distribution base must be a suitable one for assigning the pool of costs to a particular cost objective according to the relative benefits accrued, a traceable cause and effect relationship, or a logical and reasonable connection. *See, e.g.*, 45 C.F.R. Part 74, App. E, ¶ V.B.3.b. Thus, for example, square footage is a commonly accepted distribution base for space-related costs.

N.H. Dept. of Health & Human Servs., DAB No. 2399, at 6-7 (2011). Similarly, a methodology to allocate salary costs may be based on performing a random moment time study, using criteria to assign the sampled activities, and then extrapolating the results across appropriate employee groups. *Me. Dept. of Health & Human Servs.*, DAB No. 2292, at 11 n.8 (2009). In short, explaining how counties develop CAPs would not amount to adequately explaining how a particular set of costs is to be identified, measured and distributed in relation to the benefits received. *Cf. W. Va. Dept. of Health & Human Resources*, DAB No. 2529, at 5 (2013).

From the outset, Pennsylvania has sought to focus this case entirely on the question of **where, i.e., in what documents**, the relevant allocation methodology had to be described. Certainly, it is true that Pennsylvania and CMS were in dispute on this point. CMS plainly argued that not only must a proper allocation methodology be shown to have existed, to have been disclosed and to have been applied, but also that, if the methodology was contained in county-level CAPs, those CAPs should have been included with the State PACAP. Nevertheless, we find it clear that CMS throughout this proceeding also asserted that Pennsylvania had failed to explain its methodology at all. Therefore, Pennsylvania should have known that, at a minimum, the explanation of its allocation methodology should have been presented to the Board.

Despite claiming not to have known that it was being asked to explain how these costs were allocated, Pennsylvania now also asserts that it **did** explain its methodology to the Board. RR at 2. According to Pennsylvania, the Board erred in finding that no explanation appeared in the record of how Pennsylvania determined “what share of the case management and other administrative costs that the AAAs incur are properly allocated” to Medicaid. *Id.*, citing DAB No. 2653, at 10. The explanation, Pennsylvania says, appears on page five of its initial brief which states that each county agency “is required to have its own CAP or a similar document.” *Id.*, quoting PA Appeal Br. in Docket No. A-14-105, at 5. Elsewhere in its brief, Pennsylvania further points out, it explained that some large counties’ CAPs were subject to federal government approval requirements and that county agencies “kept documentation concerning indirect charges at the county level for audit” as they were required to do. *Id.* These statements are either disingenuous or again demonstrate a failure to comprehend what constitutes an allocation methodology. Neither quote proffered by Pennsylvania remotely explains how the AAAs’ administrative costs are to be allocated. That counties are required to develop CAPs and that some of those CAPs may be reviewed by federal government components says nothing about what costs incurred by the AAAs are charged to the Medicaid Aging Waiver or what procedures the counties or the State apply to ensure that discrete categories of costs are distributed according to some logical and reasonable proportion that captures the benefits received by Medicaid as opposed to other programs operated or beneficiaries served by the AAAs.

We conclude that Pennsylvania has not shown clear error in the Board’s determinations that Pennsylvania had notice of the need to explain its cost allocation methodology for the AAA costs at issue and that Pennsylvania never provided that explanation.

2. *The Board did not err in holding that Pennsylvania was required to provide sufficient information about the AAAs' costs and their allocation to Medicaid to comply with PACAP regulatory provisions.*

Pennsylvania asserts that the Board committed clear error by finding fault with the State's failure to comply with the requirements of 45 C.F.R. §95.507(b)(1)-(4). RR at 4-6. Those provisions require every PACAP to include the following:

- (1) An organizational chart showing the placement of each unit whose costs are charged to the programs operated by the State agency.
- (2) A listing of all Federal and all non-Federal programs performed, administered, or serviced by these organizational units.
- (3) A description of the activities performed by each organizational unit and, where not self-explanatory an explanation of the benefits provided to Federal programs.
- (4) The procedures used to identify, measure, and allocate all costs to each benefiting program and activity (including activities subject to different rates of FFP).

Pennsylvania did not, and does not now, deny that its PACAP did not identify what activities were being performed by the AAAs under the Aging Waiver, how those activities benefitted Federal programs, or (as explained in the last section) what procedures were used to allocate their costs.

Instead, the State says that it was "allowed . . . to omit detail on county-level cost allocation from its PACAP" based on its reading of section 95.507(b)(6). RR at 4.¹ Section 95.507(b)(6) requires every PACAP to include the following:

A statement stipulating that wherever costs are claimed for services provided by a governmental agency outside the State agency, that they will be supported by a written agreement that includes, at a minimum (i) the specific service(s) being purchased, (ii) the basis upon which the billing will be made by the provider agency (e.g. time reports, number of homes

¹ It is not clear what Pennsylvania actually means by "detailed information." RR at 4. The Board found that the PACAP gave virtually no information about what costs the AAAs would incur or how they would be charged to Medicaid, thus also violating the requirement at section 95.507(a)(4) that the PACAP contain enough information for the federal agencies "to make an informed judgment on the correctness and fairness of the State's procedures for identifying, measuring, and allocating all costs to each of the programs operated by the State agency." DAB No. 2653, at 11-12, *quoting* 45 C.F.R. §95.507(a)(4). But Pennsylvania now asserts that asking it to "provide more detailed county-level information" in effect "can only mean producing more than 60 county-level lengthy cost allocation plans." RR at 3. Pennsylvania has not provided any foundation for us to conclude that it was unable to describe the AAAs' costs at issue and explain their allocation without producing the entirety of every county CAP.

inspected, etc.) and (iii) a stipulation that the billing will be based on the actual cost incurred. This statement would not be required if the costs involved are specifically addressed in a State-wide cost allocation plan, local-wide cost allocation plan, or an umbrella/department cost allocation plan.

Essentially, Pennsylvania's position was that, so long as its PACAP stated that any time it claimed costs for other agency's services, it would have the written agreement required by section 95.507(b)(6), the PACAP did not need to provide any information at all about any such costs.² The Board rejected this position because nothing in the text indicates that compliance with this subsection of the regulation is a substitute for compliance with the rest of section 95.507(b).

The only argument Pennsylvania puts forward to disregard the plain language of these requirements is reliance on a response in an internal memorandum by a CMS official to a 2007 report by the Office of the Inspector General (IG) which recommended that Pennsylvania amend its PACAP in relation to claiming county-level case management costs under a different waiver program. RR at 4-5. As Pennsylvania notes, it proffered the same memorandum to the Board in another case (Docket No. A-15-9) and made similar arguments about relying on it. RR at 5. The Board there concluded that, even if the document were admitted, it did not support Pennsylvania's claims:

. . . The attachment is a February 7, 2007 internal memorandum from an Acting Manager of the CMS Financial Review Branch in Region III to a Regional Director of the Office of the Inspector General (IG) concerning a draft audit report. The CMS manager disagrees with the draft IG audit report requiring submission of a PACAP amendment for county case management costs and says that requiring submission of all the county CAPs with the PACAP would be "administratively burdensome." CMS, by letter dated October 2, 2015, objected that document did not set out CMS policy but was merely a comment by a CMS employee concerning an audit of claims not at issue here. Our decision does not depend on whether Pennsylvania was required to include the county CAPs with the PACAP. We also do not see how an internal memorandum by an employee not

² Pennsylvania states that the Board "declined to address" its argument (RR at 4), but that is erroneous. The Board did not address an argument made by CMS that the PACAP violated section 95.507(b)(6) because some AAAs were not governmental entities and the agreements did not contain all the required terms. DAB No. 2653, at 14. The Board **did** expressly conclude that, even were it to find that Pennsylvania complied with section 95.507(b)(6), "we would still find that Pennsylvania did not comply with other content requirements for the PACAP in section 95.507(b)(1)-(4) on which CMS also relied." *Id.*

shown to have the authority to make policy which the State has located now, more than eight years after it was issued and more than three years after the costs at issue were claimed could serve to bind CMS or to demonstrate any reliance by the State.

Pa. Dept. of Public Welfare, DAB No. 2669, at 24 (2015).

Pennsylvania now suggests that CMS was “less than candid” because it did not explain that the PACAP amendment that followed the IG report, according to Pennsylvania, required only a “one paragraph” addition which did not include “any of the detail” required by the Board in the decision at issue here. RR at 5. We find nothing in this additional assertion by Pennsylvania that undercuts our conclusion that CMS could properly disallow claims for the costs in the present case where the State has not either identified the costs in its PACAP or provided any explanation of how they are allocated.

3. *Pennsylvania has not identified any prior policy or practice of CMS with which the Board’s decision is inconsistent.*

Pennsylvania’s final allegation of clear error again relies on the 2007 internal memorandum to the IG report which Pennsylvania claims shows that CMS “knew precisely what the State was doing with its county-level administrative costs and had no objection to it.” RR at 6. We see nothing in the cited memorandum that demonstrates that CMS “knew precisely” what costs were being allocated or how, and the State has still not provided that information to the Board, as we have explained.

Pennsylvania further alleges that the author of the 2007 memorandum was also the issuer of the disallowance here, and then asserts that somehow this fact “undeniably excuses the State from having to undertake burdensome efforts to include all 67 counties as part of the PACAP.” RR at 6-7. This assertion does not logically follow from the claim of common authorship. One could as well conclude that the individual in question, who at one time expressed some concern that reviewing all the county CAPs along with the PACAP would be an administrative burden for CMS, later concluded that the effort was nevertheless necessary to effectively review the State’s claiming practices.

In any case, Pennsylvania’s reiterated contention that CMS settled in 2007 for less extensive information in the PACAP about the county costs than at issue than it demanded in the present disallowance does not make out a case that CMS had in place some prior policy or practice but “silently changed its interpretation” without notice. RR at 7. Moreover, even had we accepted Pennsylvania’s claim that the requirement to have submitted county CAPs was novel (which we declined to reach), our decision was founded on Pennsylvania’s failure to meet the more basic requirements of the cost principles and the cost allocation regulations discussed above.

Conclusion

We find no clear error of fact or law and therefore decline to reconsider DAB No. 2653.

_____/s/
Sheila Ann Hegy

_____/s/
Constance B. Tobias

_____/s/
Leslie A. Sussan
Presiding Board Member