

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Kansas Health Policy DATE: December 29, 2008
 Authority
 Docket No. A-08-127
 Decision No. 2216

DECISION

By letter dated August 18, 2008, the Kansas Health Policy Authority (Kansas) appealed a \$854,859 disallowance by the Centers for Medicare & Medicaid Services (CMS) of federal financial participation (FFP) in claims for nursing facility services provided in quarters ending December 31, 2003 through June 30, 2005. The expenditures were not claimed until Kansas's quarterly expenditure report (Form CMS-64) for the quarter ending March 31, 2008. CMS disallowed the claims as untimely under a statutory two-year timely filing limitation. Kansas does not dispute that the claims were filed beyond the time limit but argues that an exception to the timely filing limit for expenditures involving audit exceptions applies.

For the reasons explained below, we conclude that the claims submitted by Kansas are untimely filed and do not qualify for the audit exception. We therefore uphold the disallowance in full.

Applicable legal authority

Section 1132(a) of the Social Security Act (Act)(emphasis added) provides in relevant part that -

[A]ny claim by a State for payment with respect to an expenditure made during any calendar quarter by the State -

* * *

[in carrying out a Medicaid state plan] shall be filed (in such form and manner as the Secretary shall by regulation prescribe) within the two-year period which begins on the first day of the calendar quarter immediately following such

calendar quarter; and **payment shall not be made under this chapter 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.

Regulations implementing the timely claims limits appear at 45 C.F.R. Part 95, Subpart A. Section 95.1(a) establishes a two year time limit for claims for FFP under the Medicaid program. Section 95.19(b) provides that this time limit does not apply to any "claim resulting from an audit exception."

"Audit exception" is defined as "a proposed adjustment by the responsible Federal agency to any expenditure claimed by a State by virtue of an audit." 42 C.F.R. § 95.4.

Background information

The parties do not dispute the material facts relating to the development and filing of the claims at issue, focusing instead on the question of whether the audit exception language applies under the circumstances. We summarize here the undisputed factual background.

Kansas participated in a pilot project in federal fiscal year 2005 conducted by CMS as part of the Payment Error Rate Measurement (PERM) program. Kansas Br. at 2, citing Kansas Exs. 1 and 2. CMS intended the PERM pilot program to develop a methodology to determine state-specific error rates for improper Medicaid payments through annual state estimates. 69 Fed. Reg. 52,620 (August 27, 2004).¹

¹ The Improper Payment Information Act of 2002, Pub. L. No. 107-300, enacted on November 26, 2002 imposed a requirement that federal agencies review programs susceptible to significant erroneous payments to estimate the amount of improper payments. The Office of Management and Budget (OMB) identified Medicaid as one of the susceptible programs. CMS therefore undertook efforts to determine such estimates through, inter alia, the PERM pilots. Based on the results of the pilots and analysis of relevant issues, CMS ultimately adopted a revised approach using contractors to conduct reviews. CMS Br. at 2-3, citing 70 Fed. Reg. 58,260 (October 5, 2005)(interim final rule) and 72 Fed. Reg. 50,490 (August 31, 2006)(final rule).

The PERM review involved a random sample of 150 claims per program per state drawn from the quarter ending December 31, 2004. CMS Br. at 6. Each participating state, assisted by federal contractors, reviewed the sample for processing and medical necessity errors and performed statistical computations to derive a state-specific improper payment error rate estimate. Id. at 5-6.

The Final Report on the PERM pilot project noted that the "150-claim sample was not intended to produce state-level estimates at a high level of precision." CMS Ex. 1, at 4. Indeed, although each participating state was able to calculate an error rate estimate to be used in the process of refining further a payment error rate methodology, the "small sample sizes often resulted in very large confidence intervals" Id.

Kansas reports that, "[d]uring the PERM pilot," it identified "certain adjustments" to nursing facility payments.² Kansas Br. at 2. Kansas then submitted on March 31, 2008 the claims at issue here, which as noted cover quarters ending on December 31, 2003 through June 30, 2005.

Analysis

Kansas's main contention is that PERM pilot process in Kansas amounted to an "audit" even though CMS described it as an "internal review" in the disallowance letter. Compare Kansas Br. at 3-4 with Kansas Ex. 1, at 1. Thus, Kansas argues that "actions taken by Kansas in the PERM pilot for FY 2005 meet the definition for a compliance audit as used in 'generally accepted government auditing standards'" Kansas Br. at 3. For example, according to Kansas, the PERM process involved review of specific claims by Kansas "against pre-existing program, regulatory and statutory standards," including their "quality, timeliness and accuracy." Id. at 4. Kansas analogizes these approaches to governmental compliance audits of states which may be performed under OMB Circular A-133, and references various other federal accounting standards and manuals as well which prescribe similar measures to assess compliance. Id. at 3-4. On this basis, Kansas contends that the additional nursing facility

² Kansas does not explain in the record before us the nature or basis of the claimed upward adjustments in nursing facility payments, nor does Kansas describe the statistical process, if any, involved in its calculations. Neither party suggests that the claims qualify for any other exception to the timely claims limits.

claims, which it asserts that it discovered as a result of the PERM process, should "qualify for the 'audit exception' which would allow a filing beyond 2 years.'" Id. at 5.

Kansas's misunderstanding arises in part from treating an audit as an exception to the timely claims limitations. The statutory and regulatory language both make clear that it is audit exceptions that form an exception to the two-year filing limit. Section 1132(a) of the Act; 45 C.F.R. § 95.19(b). The relevant question is not whether the PERM process was tantamount to an audit process but whether the claims constitute audit exceptions.

As long ago as 1984, and consistently since, the Board has made clear that the regulatory definition of "audit exception" excludes claims which do not originate in adjustments proposed by the federal agency based on an exception taken in an audit.

The regulation's definition of "audit exception" could on its face apply to an "audit" conducted by the State, as well as one by an Inspector General or by the General Accounting Office. However, the vital issue is not who does the audit, but who accepts it. The regulation requires a proposed adjustment "by the responsible federal agency."

The regulation makes it clear that a proposed adjustment to claims for prior year costs based on a state audit is not enough to constitute an "audit exception." The federal government - the responsible federal agency - must propose to make an adjustment in the claims for prior years. Only under those circumstances does the exception toll the statute of limitations for filing or amending such claims.

New York State Dept. of Social Services, DAB No. 521, at 7 (1984); see also Tennessee Dept. of Health and Environment, DAB No. 921, at 4 (1987)("critical element of the definition of 'audit exception'" absent where no "proposed adjustment by the Agency based on an audit"); New York State Dept. of Social Services, DAB No. 1382, at 5 (1993)("regulatory definition of audit exception has two primary elements: the adjustment of a claimed expenditure must result from an audit and the adjustment must be proposed by the responsible Federal agency").

The Board has held that exceptions to the timely claims limit, including the one for audit exceptions, are to be narrowly construed. The phrase "audit exception" is itself a term of art "employed by auditors to refer to an audit finding that takes exception with what the audited party has done and may propose an adjustment to costs based on what the auditors found." Florida

Dept. of Children and Families, DAB No. 1777, at 9 (2001). This construction of the phrase is entirely consistent with the regulatory definition.

In order to qualify for this exception to the timely claims limits, therefore, Kansas thus would need to demonstrate that an audit occurred, that the auditors made findings taking exception to Kansas's expenditures, and that the responsible federal agency proposed these adjustments as a result. Kansas merely asserts that PERM pilot could be viewed as a kind of audit process.³

Kansas has not shown how its claims were tied to the PERM review. Notably, the adjustments were claimed, as noted, for quarters ending October 1, 2003 through June 30, 2005. Yet, the PERM review period covered only October 1, 2004 through December 31, 2004. Kansas offers no response to CMS's argument that this discrepancy alone undercuts any assumption that the late claims resulted from an audit. See CMS Br. at 4.

Kansas also does not dispute CMS's assertion that PERM pilot did not make any recommendations with respect to the claims at issue and was, in fact, not designed to provide information to identify such claims. Id. Certainly, the record is clear that the responsible federal agency here is not proposing the adjustments on which Kansas seeks to base its claims.

We conclude that, as a matter of fact, as well as law, Kansas's claims here do not constitute audit exceptions exempt from timely claims filing limits. Kansas's position, that it need only demonstrate that the PERM pilot was an "audit" in order to make late claims, would lead to the absurd result that a state need only perform a review or audit of its own payments and identify opportunities to adjust its claims for FFP upward in order to avoid the timely claims limitations. Such a result would undercut the purposes of the timely claims provisions for federal agencies to able to resolve past liabilities within a reasonable

³ CMS disputes the assertion that the PERM process was an "audit" as contemplated in the audit exceptions provision, noting that it did not "involve the formal inspection of accounting or financial records." CMS Br. at 7, n.3. We need not resolve the questions of whether an audit for purposes of the timely claims limit exception must be a financial audit or may be a compliance audit, or whether the PERM review qualified as either, since we find that Kansas failed to show that its claims resulted from the review or that the adjustments were proposed by the responsible federal entity.

period of time and plan budgets responsibly. Tennessee, DAB No. 921, at 4.

Conclusion

Based on the foregoing rationale, we uphold the disallowance in full.

_____/s/_____
Sheila Ann Hegy

_____/s/_____
Constance B. Tobias

_____/s/_____
Leslie A. Sussan
Presiding Board Member