

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

New Jersey Department of Human Services
Ruling No. 2012-3
Request for Reconsideration of Decision No. 2415
January 5, 2012

RULING ON REQUEST FOR RECONSIDERATION

The New Jersey Department of Human Services (New Jersey) requests reconsideration of the Board's September 29, 2011 decision in *New Jersey Department of Human Services*, DAB No. 2415 (2011). The Board upheld in part and reversed in part a determination by the Centers for Medicare & Medicaid Services (CMS) disallowing \$50,500,277 in federal Medicaid funding claimed for school-based services for the period July 1, 1998 through June 30, 2001. CMS based the disallowance on an Office of the Inspector (OIG) audit of a sample of paid claims.

Under the applicable regulations, the Board may reconsider its own decision "where a party promptly alleges a clear error of fact or law." 45 C.F.R. § 16.13. In cases involving Medicaid disallowances, a party has 60 days from the date of the Board's decision to request reconsideration. Social Security Act § 1116(e)(2)(B). New Jersey timely requested reconsideration with respect to a claim for occupational therapy services provided in January 2000 for sample #3-20.

CMS disallowed the claim for these services on the ground that there was no documentation that the services were "prescribed by a physician or other licensed practitioner of the healing arts within the scope of his or her practice under State law," as required by 42 C.F.R. § 440.110(b)(1). New Jersey argued on appeal that the December 7, 1999 signature of a State-licensed occupational therapist on the individualized education program (IEP) of the student in sample #3-20 constituted a valid prescription for the occupational therapy services. After CMS took the position in its response to the appeal that only a licensed physician, registered physician assistant or licensed nurse practitioner could prescribe these services, New Jersey merely asserted that "this referral is proper under the law," without specifying any legal authority or other support for its assertion. CMS Response Br. at 41; NJ Reply Br. at 37. The Board found that New

Jersey presented no evidence to show that prescribing occupational therapy services “is within the scope of practice of a licensed occupational therapist under New Jersey law,” and, accordingly, upheld the disallowance. DAB No. 2415, at 35.

In its request for reconsideration, New Jersey alleges that the Board “made an error in law and fact by concluding that New Jersey licensed occupational therapists cannot prescribe occupational therapy services.” Request for reconsideration dated 11/28/11, at 3 (unnumbered). According to New Jersey, State law authorizes licensed occupational therapists to prescribe such services. *Id.* at 3-4, citing N.J.S.A. 45:9-37.53 and N.J.A.C. 13:4K-5.1.

We conclude that New Jersey has not shown that the Board made a “clear error of fact or law” within the meaning of section 16.13. As the Board noted in DAB No. 2415, a state has the burden of documenting the allowability of costs for which reimbursement is claimed. *See* DAB No. 2415, at 3, citing 45 C.F.R. §§ 74.50-74.53 (1999) and *Oklahoma Health Care Authority*, Ruling No. 2008-4, at 4 (2008). The Board’s regulations require an appellant to submit documentation in support of the written arguments in its initial brief and its brief replying to the federal agency’s response to the appeal. *See* 45 C.F.R. § 16.8. In addition, the Board’s letter setting out the briefing procedures in this case advised the parties that “[c]opies of materials such as the legislative history of a statute [or] preamble to the regulation . . . should be included where relevant.” Board letter dated 8/3/10, at 3. Nevertheless, although New Jersey asserted in the prior proceedings that sample #3-20 met the requirements of section 440.110(b)(1), New Jersey provided no support for its assertion even after CMS took the position that a licensed occupational therapist could not prescribe occupational therapy services. Thus, on the record before it, the Board did not err in upholding CMS’s disallowance for this sample case on the ground that New Jersey had not shown that prescribing occupational therapy services was within the scope of practice of a licensed occupational therapist under New Jersey law.

Even if the Board had considered the State statutory and regulatory provisions to which New Jersey now cites, these provisions do not clearly establish that prescribing occupational therapy services was within the scope of practice of a licensed occupational therapist under New Jersey law in effect during the relevant period. The cited statutory provision, N.J.S.A. 45:9-37.53, does not specifically address who must prescribe occupational therapy but merely defines the term “occupational therapy” to include actions such as “evaluation, planning and implementation of a program [.]” Even if such actions could be read to include the authority to prescribe occupational therapy services, New Jersey has not shown that it interpreted the provision in this manner in December

1999, when the occupational therapist signed the IEP, or in January 2000, when the services were provided. The State administrative code provision to which New Jersey cites defines the “scope of practice of a licensed occupational therapist” to include assessing a client and “determin[ing] the need for an intervention plan for the client,” but this provision was adopted in 2002, after the relevant time period. New Jersey does not assert that there was comparable language in the State regulations previously in effect. Moreover, in adopting this provision, New Jersey noted a comment that, in the past, a licensed occupational therapist needed a physician’s order to practice. 34 N.J.R. 2844(b) (Aug. 5, 2002). This raises the possibility that, prior to the adoption of the regulation, occupational therapy services had to be prescribed by a physician. New Jersey did not provide any other documentation, such as an affidavit from a State official, that could have clarified how the State statute was interpreted during the relevant time period.

New Jersey argues in its request for reconsideration that federal regulations at 42 C.F.R. §§ 409.17(c) and 410.61(c) permit occupational therapists to prescribe occupational therapy services “when a plan for care is developed which includes the diagnosis and the amount, duration and frequency of therapy.” Request for reconsideration dated 11/28/11, at 5. The regulations cited do not address whether a physician’s order or referral is a prerequisite for establishing such a plan. In addition, these regulations govern only services furnished under Medicare and are limited to inpatient services in a hospital setting (section 409.17) and outpatient rehabilitation services (section 410.61). Moreover, a general condition for any outpatient services provided by an occupational therapist in private practice is that the services be provided within the scope of his or her license. Section 410.59(c). Nothing in these regulations gives rise to an inference that all occupational therapists are authorized by state law to prescribe occupational therapy services, as required for Medicaid purposes by 42 C.F.R. § 440.110(b)(1). New Jersey also cites to “42 C.F.R. 414.92” for the proposition that “[u]nder federal law, occupational therapists are recognized by CMS as professionals who can have prescribing authority.” Request for reconsideration dated 11/28/11, at 5. There is no section 414.92 in 42 C.F.R.

Accordingly, we conclude that the Board made no error of fact or law in upholding the disallowance with respect to the claim for occupational therapy services in sample #3-20, and we deny New Jersey's request for reconsideration.*

/s/

Stephen M. Godek

/s/

Sheila Ann Hegy

/s/

Judith A. Ballard
Presiding Board Member

* In its response to the request for reconsideration, CMS states that it “may or [may] not be true” that New Jersey law authorizes licensed occupational therapists to prescribe occupational therapy services but asserts (without pointing to any support) that the occupational therapist who signed the IEP was not licensed by the State until March 14, 2000—after the services were provided. If CMS’s assertion is true, the claim for sample #3-20 would not be allowable even if State law authorized a licensed occupational therapist to prescribe occupational therapy services during the relevant period.