

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of:)
)
D K. B) OAH No. 14-0035-MDE
) DPA Case No.

DECISION AND ORDER OF DISMISSAL

I. Introduction

The issue in this case is whether D B's representative requested a hearing regarding Ms. B's cost-of-care within the time required by the applicable regulations. The Division of Public Assistance (DPA or Division) asserts that it provided proper notice of its determination of the amount of Ms. B's cost-of-care;¹ that Ms. B failed to timely request a hearing; and that Ms. B thereby waived her right to a hearing on that issue. Ms. B's representative asserts that she never received the Division's cost-of-care notice; that the time period for requesting a hearing therefore never began to run; and that her hearing request is therefore not late.

This decision concludes, based on the preponderance of the evidence in the record, that Ms. B's representative received notice of the Division's cost-of-care determination, but subsequently failed to request a hearing on a timely basis. Accordingly, Ms. B is not entitled to a hearing on the merits of the Division's cost-of-care determination of July 23, 2013. The Division's decision finding Ms. B's hearing request to be untimely is affirmed, and this case is dismissed.

II. Facts

Ms. B is 89 years old.² She applied for Medicaid on July 24, 2013.³ Ms. B was admitted to a nursing facility known as "No Name," operated in No Name by Providence Health & Services Alaska (Providence), on July 31, 2013.⁴ In the days leading up to Ms. B's admission, her daughter, E N C, assisted in making the necessary arrangements.⁵ On July 22, 2013 a DPA eligibility technician (ET) e-mailed Ms. C and advised her that her mother's Medicaid application had been

¹ A Medicaid recipient's "cost of care" is basically that portion of the Medicaid recipient's facility charges which are not covered by Long Term Medicaid and which must be borne by the recipient.

² Ex. 1.

³ Ex. 3.1.

⁴ Ex. 12.

⁵ Undisputed hearing testimony.

approved.⁶ In a subsequent e-mail exchange with the ET on that date, Ms. C confirmed that notices regarding her mother's Medicaid benefits should be sent to her (Ms. C) at P.O. Box 1217 in No Name.⁷

On July 23, 2013 the Division mailed a notice to Ms. C at her No Name P.O. Box which stated that Ms. B had no cost-of-care obligation at that time, but that such an obligation could arise in the future, and that, if it did, "we will send you another notice telling you the amount you need to pay."⁸ A copy of this notice was also sent to Providence.⁹

On the same date (July 23, 2013), the Division also mailed *two additional notices* to Ms. C, again at her No Name P.O. Box address.¹⁰ The first of these notices, titled "Cost of Care Change," advised that "the amount you pay toward your monthly cost of long term care is changing," and that, "[b]eginning July 2013, your new monthly cost of care amount is \$1,821.00."¹¹ A copy of this first notice was also sent to Providence.¹² The second of these notices, also titled "Cost of Care Change," was identical to the first except for minor differences in wording in the last two or three lines.¹³ A copy of this second notice was also sent to Providence.¹⁴

On December 11, 2013 Barbara Sterling of Providence contacted the Division and advised that Providence had never received a copy of the Division's Medicaid cost-of-care notice of July 23, 2013.¹⁵ However, the record does not indicate how Ms. Sterling would have become aware of the cost-of-care notice, so as to prompt a call to the Division, if Providence had not in fact received it.

On December 27, 2013 Ms. C telephoned the Division.¹⁶ She stated she had never received the Division's cost-of-care notice, and requested a hearing.¹⁷ As of December 31, 2013 the Division's electronic information system (EIS) correctly showed Ms. B's physical address as being in No Name, correctly showed her mailing address as the No Name P.O. Box, and correctly showed Ms. C as her authorized representative.¹⁸

⁶ Ex. 10.1. Copies of the Medicaid approval notice indicate that the notice was mailed to Ms. C's No Name P.O. Box on July 22, 2013 (Exs. 3.1, 10.2), and to Providence on July 23, 2013 (Ex. 4.2).

⁷ Ex. 10.

⁸ Ex. 3.

⁹ Ex. 4.

¹⁰ Exs. 3.2, 3.3

¹¹ Ex. 3.2.

¹² Ex. 4.1

¹³ Ex. 3.3.

¹⁴ Ex. 4.3.

¹⁵ Exs. 13, 16.

¹⁶ Ex. 5.

¹⁷ E N C's hearing testimony.

¹⁸ Ex. 1.

On January 2, 2014 the Division mailed Ms. C a notice advising that it was not granting her a hearing on the cost-of-care issue because her hearing request on that issue was late.¹⁹ On January 7, 2014 Ms. C requested a hearing on the Division's timeliness determination, stating that she had never received the July notices regarding the Division's cost-of-care determination.²⁰

Ms. B's hearing was held as scheduled on January 24, 2014. Ms. B was represented by Ms. C, who participated in the hearing by phone and testified on her mother's behalf. K Q F also testified briefly for Ms. B. DPA Public Assistance Analyst Jeff Miller participated in the hearing by phone, represented the Division, and testified on its behalf.

At hearing, Ms. C testified in relevant part as follows:

1. She holds a power-of-attorney from her mother, and in her e-mail of July 22, 2013 she asked the Division to send mail which would otherwise be sent to her mother, to her (Ms. C).
2. Her mailing address has been P.O. Box 1217, No Name, Alaska from before July 2013 to the present. She has been present in No Name continuously from before July 2013 to the present. She checks her post office box at least every other day.
3. She received a copy of the notice approving her mother for Medicaid long-term care, via e-mail, on July 22, 2013.²¹ She received no other notices from the Division.
4. No Name residents who use post office boxes sometimes receive their mail very late.
5. On December 11, 2013²² Ms. C received a phone call from Barbara, the financial director of the No Name nursing facility, advising that Providence had received a notice from the Division setting Ms. B's cost of care obligation.
6. Ms. C did not know anything about the cost of care issue until she spoke to Barbara in December 2013. She has received nothing from the Division or nursing home stating what the cost of care obligation is for (what the money is going toward).
7. Her mother's income consists of monthly Social Security payments of \$486.00 and monthly pension payments of \$1,097.00. She cannot afford to pay a cost of care obligation of \$1,821.00 per month.

¹⁹ Notice of Non-Referral (Ex. 7).

²⁰ Ex. 8.

²¹ The body of the Division's e-mail to Ms. C is marked as Exs. 10 and 10.1; the notice attached to the e-mail is marked as Exs. 10.2 - 10.3.

²² At one point Ms. C stated that she received the phone call from Barbara on December 11, 2013; at another point she stated that the phone call was on December 22, 2013. However, this 11 day discrepancy is not material on the facts of this case.

Ms. C argued at hearing that she had never received the Division's July 23, 2013 cost-of-care notices, that the time period for requesting a hearing had therefore never begun, and that her hearing request of December 27, 2013 was therefore timely. The Division argued that it had mailed its notices to Ms. C at her proper address, and that Ms. C had presented no credible evidence that she had *not* received the notices.²³ Following the hearing, the record was left open for post-hearing filings through March 3, 2014, at which time the record closed.

III. Discussion

A. *The Medicaid Cost-of-Care Concept*

The Medicaid program will not reimburse a state for an institutionalized Medicaid patient's care to the extent that the patient can contribute to the cost of his or her care.²⁴ Accordingly, under the Medicaid program a patient must contribute his or her income, minus certain allowances and deductions, toward his or her cost-of-care.²⁵

A Medicaid provider who renders long-term care services to a recipient residing in a nursing facility is responsible for collecting from the recipient the amount identified by the department as the recipient's cost-of-care liability.²⁶ The Division will reduce its payment to a Medicaid provider by the amount of the recipient's cost-of-care liability, even if the recipient does not pay the cost-of-care liability to the Medicaid provider.²⁷ A recipient with a cost-of-care liability who does not pay the Medicaid provider is liable to that medical institution or home and community-based waiver services provider for the unpaid amount.²⁸

B. *The Threshold Timeliness Issue*

The timeliness of hearing requests in public assistance cases of this type is governed by Alaska "Fair Hearing" regulation 7 AAC 49.030. Pursuant to 7 AAC 49.030, a request for hearing must ordinarily be made "not later than 30 days after the date of the notice." The Department of Health and Social Services' regulation allows the consideration of a hearing request made *after* this

²³ The proper mailing of a document creates a presumption of delivery. *See Hagner v. United States*, 285 U.S. 427, 430 (1932) ("The rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed"); *see also Jefferson v. Spenard Builder's Supply, Inc.*, 366 P. 2d 714, 717 (Alaska 1961) and *Martens v. Metzgar*, 524 P.2d 666 (Alaska 1974) (when properly addressed and properly stamped mail is deposited in the United States mail, it is presumed that this mail has been delivered).

²⁴ See discussion in *Torner by Torner v. State*, 399 N.W.2d 381 (Iowa 1987).

²⁵ See 42 CFR 435.725, 42 CFR 435.733, and 42 CFR 435.832.

²⁶ 7 AAC 100.552(a).

²⁷ 7 AAC 100.552(a).

²⁸ 7 AAC 100.552(c).

time limit “only if the administrative law judge finds . . . that the request for a hearing *could not be filed* within the time limit” (emphasis added).²⁹ By its terms, this is a very narrow exception.

In this case, the preponderance of the evidence indicates that the Division mailed two separate "Cost of Care Change" notices to Ms. C, at her correct No Name P.O. Box address, on July 23, 2013. Thirty days from that date was August 22, 2013. Ms. B's hearing request was clearly not made until December 27, 2013, 127 days later. Accordingly, under the language of the regulation, Ms. B's hearing request was untimely unless it *could not have been filed* by August 22, 2013.

One set of circumstances which would prevent a Medicaid recipient from timely filing a hearing request is the scenario, asserted here, in which the recipient never receives the Division's notice. The question in this case is thus whether Ms. C, as Ms. B's agent, received the Division's "Cost of Care Change" notices.

The preponderance of the evidence in this case indicates that the Division's notices were properly mailed to Ms. C's No Name P.O. Box. The proper mailing of a document creates a legal presumption that the document was actually delivered.³⁰ In addition, there is no evidence in this case that the Division's notices were returned as undeliverable or unclaimed. The fact that the United States Postal Service fails to return a piece of first class mail to the sender creates a rebuttable presumption that the mail was received by the addressee.³¹

Ms. C denies having received either of the Division's "Cost of Care Change" notices. However, denial of receipt merely creates a question of fact and does not rebut the presumption.³²

In resolving this purely factual issue, the undersigned does not doubt that the holders of post office boxes in No Name may have occasional problems receiving their mail. Likewise, the undersigned does not doubt, given the typical large volume of mail in the modern world, that Ms. C may not have been consciously *aware* of receiving the two notices at issue. However, it is highly unlikely that *neither* of two notices mailed by the Division would not have either been *delivered* to Ms. C's No Name P.O. Box, *or returned* to the Division, within the six months following the Division's mailing of the notices. Based on the totality of the evidence, the undersigned simply

²⁹ 7 AAC 49.030(a) (italics added).

³⁰ See *Hagner v. United States*, 285 U.S. 427, 430 (1932) (“[t]he rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed;” see also *Jefferson v. Spenard Builder’s Supply, Inc.*, 366 P. 2d 714, 717 (Alaska 1961) and *Martens v. Metzgar*, 524 P.2d 666 (Alaska 1974) (stating that when properly addressed and properly stamped mail is deposited in the United States mail, it is presumed that this mail has been delivered).

³¹ See *N.L.R.B. v. J & W Drywall, Lather & Plastering Co., Inc.*, 19 F.3d 1433 (6th Cir. 1994); *Clarke v. Nicholson*, 21 Vet. App. 130 (Vet. App. 2007).

³² See generally *In re Farris*, 43 B.R. 726, 727-28 (Bankr.N.D.Ill.1984); *In re American Properties, Inc.*, 30 B.R. 239, 244 (Bankr.D.Kan.1983).

finds it more likely than not that the notices were received in No Name in the normal course of the mail but were inadvertently misplaced and subsequently forgotten.

IV. Conclusion and Order

In summary, the preponderance of the evidence indicates that Ms. B's agent received notice of the Division's cost-of-care determination, but failed to request a hearing as to the Division's determination within the 30 day period specified by 7 AAC 49.030. The Division's request to dismiss this case must therefore be granted, and this matter is therefore dismissed pursuant to 7 AAC 49.100(5). Ms. B is, of course, free to contest any future Medicaid cost-of-care determinations that she may disagree with as long as she requests a hearing on a timely basis.

Notice of Appeal Rights

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 5th day of May, 2014.

Signed

Jay Durych
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]