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**STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
OFFICE OF HEARINGS AND APPEALS**

In the Matter of)
)
 [REDACTED],) OHA Case No. 09-FH-188
)
 Claimant.) DPA Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) was a recipient of the Denali Kid Care (DKC) Program (Ex. 3.0). She prepared, signed and submitted a DKC renewal application on or about February 25, 2009 (Exs. 2.1 – 2.3). The renewal application was received by the Division of Public Assistance (DPA or Division) on March 2, 2009 (Ex. 2.1). On March 5, 2009 DPA processed the Claimant’s application and determined that one (1) of the Claimant’s children ([REDACTED]) was eligible for DKC benefits, but that the other two (2) of the Claimant’s children ([REDACTED] and [REDACTED]) were not (Exs. 3.0 – 3.7) On March 6, 2009 DPA mailed the Claimant a notice stating that her DKC case had been closed as to [REDACTED] and [REDACTED] (i.e. that her DKC renewal application had been denied as to [REDACTED] and [REDACTED]) based on excess income (Exs. 4, 5.1). The Claimant requested a hearing on March 24, 2009 (Ex. 5.2). This office has jurisdiction pursuant to 7 AAC 49.010.

A hearing was held on May 13, 2009. The Claimant and her husband and representative [REDACTED] attended in person. The Claimant and her husband both argued and testified on the Claimant’s behalf. [REDACTED], Public Assistance Analyst with the Division, attended in person to represent and testify on behalf of the Division. All of the parties’ proposed exhibits were admitted; both parties rested their cases; the record was closed; and the case was submitted for decision.

ISSUE

Was the Division correct to deny the Claimant’s March 2, 2009 application for renewal of Denali Kid Care Program benefits for [REDACTED] and [REDACTED] based on the allegation that the Claimant’s household’s countable monthly income exceeded the Denali Kid Care Program’s monthly income limit for a household of five (5) persons?

FINDINGS OF FACT

The following facts are established by a preponderance of the evidence:

1. The Claimant has a five person household (Ex. 3.0). The household consists of the Claimant, her husband [REDACTED], and their three minor children: [REDACTED], [REDACTED], and [REDACTED]. *Id.*

2. Prior to February 25, 2009 the Claimant’s three children were recipients of the Denali Kid Care (DKC) Program (Ex. 3.0; Ex. 2.1).

3. On February 25, 2009 the Claimant prepared, signed and submitted a DKC renewal application for her three children (Exs. 2.1 – 2.3). The renewal application was received by the Division of Public Assistance (DPA or Division) on March 2, 2009 (Ex. 2.1).

4. On March 5, 2009 DPA processed the Claimant’s application and determined that one (1) of the Claimant’s children ([REDACTED]) was eligible for DKC benefits, but that the other two (2) of the Claimant’s children ([REDACTED] and [REDACTED]) were not (Exs. 3.0 – 3.7).

5. The Claimant’s application for DKC benefits was approved as to [REDACTED] for reasons not relevant to this decision (Ex. 3.0). The Claimant’s application for DKC benefits was denied as to [REDACTED] and [REDACTED] based on excess income. *Id.*

6. The DPA’s written notice of denial of DKC benefits dated March 6, 2009 (Ex. 4, Ex. 5.1) states in relevant part as follows:

Your [DKC] renewal form was received on 3/2/09. Your [DKC] case is closed because

* * * * *

Your income exceeds the limit for the [DKC] Program. \$4,189.98 is your monthly income. \$4,032.00 is the Medicaid income limit for a household size of 5

* * * * *

We counted the following income: (1) [REDACTED]’s monthly child support income of \$324. We allowed \$50 pass through (deduction). The countable child support income is \$274. (2) [REDACTED]’s gross retirement income from Alaska Laborers Employer’s Retirement Fund of \$579.22. (3) [REDACTED]’s gross retirement income from State of Alaska of \$3,336.76. The total income is \$4,189.98 Coverage for [REDACTED] and [REDACTED] ends 03/31/09. The income limit is based on children with other health insurance.

7. A letter dated January 2009 from [REDACTED], Chief Financial Officer with the State of Alaska, Department of Administration, Division of Retirement and Benefits, to “To Whom It May Concern,” (referenced in the Claimant’s memorandum as quoted above), states in relevant part as follows (Ex. 2.6; Ex. 5.7):

This letter is regarding your [Mr. ██████]’s] PERS voluntary savings plan (VSP) election to receive a five-year payout of the principal and interest earned.

* * * * *

. . . . During your employment, you chose to participate in the VSP and *deposited after tax contributions to a “savings account”* held by the PERS. This savings account earned interest based on PERS regulation . . . [at 4.5%]. So, just like a bank savings account, your *post tax* voluntary contribution VSP earned interest that posted to your account on June 30 and December 31 of each year.

Since you retired, you were required to select a payout option [for] your VSP. You selected to receive your VSP over a five year level payout meaning that you would receive a monthly payment of your *post tax contribution* and the interest earned while you were under PERS employment. Based on your election, each month you will receive your *post tax employee savings account principle of \$195.00 and the interest earned of \$152.74, which should be separately identified on each monthly retirement warrant. The amounts are not part of your monthly retirement payment, just returning what you previously deposited and those associated earnings. The VSP is not additional retirement income to you. As required by the Internal Revenue Service, the interest earnings you earned while still employed in a PERS position that are now being paid out over five years is taxable to you, but again, is not associated with your retirement income.* [Emphasis added].

* * * * *

8. State of Alaska Treasury Warrants payable to ██████ dated January 23, 2009 and February 25, 2009 (Exs. 2.5 and 5.6) indicate that they constitute Mr. ██████’s retirement benefits for the months of January 2009 and February 2009, respectively. The “Monthly Benefit Summaries” attached to the warrants indicates that the total amount of each warrant was \$3,176.76. *Id.* Of that sum, \$195.00 is from Voluntary Savings Account (VSP) principal, and \$152.74 is for interest earned on that principal. *Id.*

9. At the hearing of May 13, 2009 ██████ testified in relevant part as follows:
- a. His family first applied for, and was approved for, DKC benefits in or about September 2008.
 - b. His family has health insurance, but the health insurance provides no preventive care.
 - c. Mr. ██████’s VSP account is a rarity because not many State employees took advantage of the program at the time it was offered.

- d. When Mr. ██████ retired, the State of Alaska Department of Revenue (DOR) was not sure about how to characterize or disburse the account because the VSP account was so rare that no one at DOR had much experience with it.
- e. It took DOR several months to determine how the VSP money should be disbursed and how the principal and interest portions of the account should be treated.
- f. DOR gave Mr. ██████ the option of withdrawing all of the VSP money at once, or having the VSP money disbursed in installments. Mr. ██████ chose to have the VSP money disbursed in monthly installments.

10. At the hearing of May 13, 2009 DPA representative ██████ testified that, pursuant to Ex. 3.4, the total amount of income which DPA has attributed to the Claimant for purposes of the DKC program is \$4,189.98.

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

This case involves the Division's denial of an application for renewal of DKC benefits. The Division is attempting to change the pre-existing status quo by terminating the Claimant's previously-existing DKC benefits. Accordingly, the Division bears the burden of proof¹ in this case.

The regulations applicable to this case do not specify any particular standard of proof. Therefore, the "preponderance of the evidence" standard is the standard of proof applicable to this case.² This standard is met when the evidence, taken as a whole, shows that the fact sought to be proved is more probable than not or more likely than not.³

II. Over-View of the Denali Kid Care Program.

Congress enacted the State Children's Health Insurance Program (SCHIP) as part of the Balanced Budget Act of 1997 (Public Law 105-33, 111 Stat. 251).⁴ Alaska's Denali Kid Care (DKC) Program constitutes Alaska's implementation of this federal program. Its regulations are located at 7 AAC 100.300 – 7 AAC 100.316.

¹ Ordinarily, the party seeking a change in the status quo has the burden of proof. *State of Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

² A party in an administrative proceeding can assume that preponderance of the evidence is the applicable standard of proof unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission*, 711 P.2d 1170 (Alaska 1986).

³ *Black's Law Dictionary* at page 1064 (West Publishing, 5th Edition, 1979).

⁴ The law was codified under Title XXI of the Social Security Act at 42 U.S.C. §§ 1397aa, *et seq.*, and at 42 C.F.R. § 457 *et seq.* The purpose of the law was to "enable [states] to initiate and expand the provision of child health assistance to uninsured low-income children in an effective and efficient manner." 42 U.S.C. § 1397aa(a).

The federal regulations implementing the State Children’s Health Insurance Program (42 CFR Sections 457.1 – 457.1190) do not include any substantive provisions regarding financial eligibility, leaving that to the individual states. See 42 CFR 457.320(a). Accordingly, financial eligibility for Alaska’s Denali Kid Care Program is determined under Alaska’s Family Medicaid regulations (7 AAC 100.100 - 7 AAC 100.199).

Alaska’s Denali Kid Care Program has two sub-programs. The sub-program involved in this case provides coverage for poverty level children (7 AAC 100.310 – 7 AAC 100.316).

Under the Denali Kid Care Program, as of March 1, 2009, the maximum qualifying monthly income level, for a household of five (5) persons who have health insurance, is \$4,032.00. See DHSS’ Family Medicaid and Denali Kid Care Manual, Addendum 1 (Ex. 12).

III. Denali Kid Care Program Regulations Relevant to the “Resource vs. Income” Issue.

7 AAC 100.312 provides in relevant part as follows:

- (a) To be eligible under one of the poverty-level eligibility categories listed in 7 AAC 100.310(a) , a child must have monthly household income that does not exceed (1) 150 percent of the federal poverty guidelines for this state, adopted by reference under 7 AAC 100.980, for the size of the child's household; or (2) the appropriate income level in AS 47.07.020 (b)(13)

* * * * *

7 AAC 100.152, titled “income period”, provides in relevant part as follows:

The department will determine, on a monthly basis, eligibility for Family Medicaid benefits and when income is considered available to the applicant or recipient. The department will consider all income that is received or may be reasonably anticipated to be received in a month to actually be available to the applicant or recipient in that month.

7 AAC 100.158, titled “Types of Income,” provides in relevant part as follows:

- (a) For the purpose of determining Family Medicaid eligibility, the department will review all household income that is not exempt income under 7 AAC 100.160 and 7 AAC 100.162 to determine if that income is earned income, self-employment income, or unearned income.

- (b) *Earned income is gross income* paid in cash or in kind as wages, salary, or commissions, and that is earned by an employee in exchange for the performance of services by the employee, before any deductions are made for the cost of earning that income, including taxes, child care, or transportation expenses. An employee's earned income includes (1) all payments made at one time to that employee by the employer for services performed by the employee [Emphasis added].

* * * * *

(d) Unearned income is *gross income* that is not earned income under (b) of this section or self-employment income under (c) of this section. Unearned income includes (1) retirement benefits (3) dividends and interest [Emphasis added].

* * * * *

7 AAC 100.990(46) defines “resource” in relevant part as follows:

“[R]esource” means cash, or an asset that can be converted to cash; “resource” includes . . . (B) cash on hand; cash on deposit; and other liquid resources such as a promissory note, stock, bond, or security that is readily convertible to cash

7 AAC 100.156, titled “Separating Income From Resources,” provides in relevant part as follows:

(a) *Except as otherwise provided in this chapter*, the department will consider money received by an individual included in the household to be *income in the month it was received*. If any of that money remains available to the household in the next month, the department will consider the remaining money a resource of the household. [Emphasis added].

ANALYSIS

I. Introduction.

At the hearing, both parties agreed that this case does not involve any material factual issues, and that the only issues are legal issues related to the proper interpretation of the applicable regulations.

A. The Claimant’s Arguments.

Attached to the Claimant’s Fair Hearing Request dated March 24, 2009 (Ex. 5.2) was a memorandum explaining why the Claimant felt that the DPA’s renewal denial of DKC benefits was in error (Exs. 5.3 – 5.5). That memorandum states in relevant part as follows:

This decision is based on a faulty income calculation. The [REDACTED] family income calculation wrongfully included funds that are from a resource, namely Mr. [REDACTED]’s PERS Voluntary Savings Account, from which he has elected to take monthly withdrawals that are added to his monthly state retirement check.

The ruling erroneously treats this payment from a resource as income, in violation of the Medicaid regulations. Without the inclusion of this monthly withdrawal from [Mr. [REDACTED]’s VSP of \$347.74] or even just the principal portion of this amount (\$195.00), the [REDACTED] family is eligible for Denali KidCare.

* * * * *

. . . . The funds that make up the [monthly VSP account disbursements] are not income as they consist of after tax dollars that were earned over many prior years of employment with the state and deposited in a savings account. These funds are now being withdrawn and are not earned or unearned income as explained in the January 2009 Department of Administration letter. These funds are simply not income of any kind.

The funds in [the VSP account] became immediately available to Mr. [REDACTED] upon his retirement in August 2008. He has simply elected to withdraw them over time instead of all at once. At the very most, only the interest portion of these payments could possibly be considered income because it is taxable, [however] it is still not income . . . [because it is] a partial withdrawal of interest earned in prior years that will now be taxable as withdrawn. This “interest” was already earned and immediately available for withdrawal when Mr. [REDACTED] retired in August 2008. Even if the total interest portion of [the monthly VSP withdrawal - \$152.74] is included in the eligibility calculation the [Claimant] still qualifies for benefits. (\$3,842.24 (other income) + \$152.74 [interest portion of VSP] = \$3,994.98 which is \$37.02 under the income limit of \$4,032.000.

* * * * *

At the hearing of May 13, 2009 Mr. [REDACTED] expanded upon the foregoing memorandum and argued in relevant part as follows:

- a. The fundamental issue here is how income and resources are defined under the Denali KidCare Program (DKC) regulations.
- b. DKC does not consider the resources of the applicant / recipient.
- c. DKC defines bank accounts as resources.
- d. Mr. [REDACTED]'s PERS Voluntary Savings Account (“VSP account”) is a savings (bank) account which for Medicaid purposes is properly categorized as a “resource” rather than as income.
- e. The monthly withdrawals from the VSP account are equivalent to withdrawals from an ordinary savings account, and as such constitute the use of a resource rather than a receipt of income.
- f. The regulatory definition of income must be construed together with the regulatory definition of resources.
- g. One of the applicable regulations, 7 AAC 100.158(b), presents a timing issue as to when money which is received as wages or salary is considered to be income.

- h. The \$347.74 per month received by Claimant's husband from his Voluntary Savings Account (VSP) is a resource and therefore does not constitute income for purposes of DKC program eligibility. If the entire monthly VSP account disbursement of \$347.74 is excluded from income (i.e. is considered a resource rather than income), then [REDACTED] and [REDACTED] qualify for DKC.
- i. However, even if the *entire* monthly VSP account disbursement of \$347.74 is not excluded from income for DKC eligibility purposes (even if the "interest" or pre-tax portion of the monthly Voluntary Savings Account disbursement (\$152.74) constitutes income for purposes of DKC program eligibility), then *at least* that \$195.00 portion of the VSP account upon which taxes have already been paid (that portion which could be characterized as principal rather than interest) should be considered to be a resource rather than income. In this event [REDACTED] and [REDACTED] still qualify for DKC.

B. The Division's Arguments.

At the hearing of May 13, 2009 the DPA representative asserted that:

- a. The Denali KidCare sub-program involved in this case is the one which provides coverage for poverty level children (7 AAC 100.310 – 7 AAC 100.316).
- b. For purposes of DKC program eligibility, savings are considered a resource when they are contained in a savings account. However, once some or all of the savings are withdrawn or disbursed from a savings account, the portion that is withdrawn or disbursed is considered to be income.
- c. The total amount of income which DPA has attributed to the Claimant for purposes of the DKC program is \$4,189.98 (Ex. 3.4)
- d. The DKC maximum income eligibility level for the Claimant's household is \$4,032.00, so the Claimant is over-income.

C. Relevant Facts Which Are Not Disputed.

The following relevant facts were either not disputed, or are ascertainable with certainty as a matter of pure mathematics:

- 1. The Denali KidCare (DKC) Program's income limit for a household of five (5) persons is \$4,032.00. A household of five persons that exceeds this income limit is not eligible for DKC benefits.
- 2. DPA denied the Claimant's DKC renewal application on the sole basis that the Claimant's "income exceeds the limit for the Denali KidCare Program" (Ex. 5.1).

3. In determining eligibility for the DKC program, DPA calculated that the Claimant's monthly household income was \$4,189.98. Included in this figure was a monthly disbursement of \$347.74 from Mr. ██████'s Voluntary Savings Program Account (VSP).

4. Based on DPA's calculations, when Mr. ██████'s monthly VSP account disbursement of \$347.74 is attributed as income, the Claimant is \$157.98 over-income for the DKC program.

5. Of the total monthly VSP disbursement of \$347.74, \$195.00 is attributable to salary previously earned by Mr. ██████ prior to his retirement, which was deposited into the VSP prior to the Claimant's husband's retirement, *on which income taxes have already been paid*. For ease of reference this \$195.00 will be referred to as the "principal" or post-tax component of the monthly VSP account disbursement.

6. Of the total monthly VSP disbursement of \$347.74, the remaining \$152.74 is attributable to interest, previously accrued on the "principal" (net salary) originally placed into the VSP by the Claimant's husband, *on which income taxes have not yet been paid*. For ease of reference this \$152.74 will be referred to as the "interest" or pre-tax component of the monthly VSP account disbursement.

7. *If only the \$195.00 "principal" or post-tax component of Mr. ██████'s monthly VSP account disbursement is considered income* (i.e. if the \$152.74 "interest" or pre-tax component is considered a resource), then the Claimant's total monthly income for DKC purposes would be \$4,037.24, and the Claimant would be \$5.24 *over* the DKC Program's \$4,032.00 maximum monthly income limit for a family of five (5) persons with health insurance.

8. *If only the \$152.74 "interest" or pre-tax component of Mr. ██████'s monthly VSP account disbursement is considered income* (i.e. if the "principal" or post-tax component is considered a resource), then the Claimant's total monthly income for DKC purposes would be \$3,994.98, and the Claimant would be \$37.02 *under* the DKC Program's \$4,032.00 maximum monthly income limit for a family of five (5) persons with health insurance.

9. *If neither the \$195.00 "principal" (post-tax) component or the \$152.74 "interest" (pre-tax) component of Mr. ██████'s monthly VSP account disbursement of \$347.74 is considered income* (i.e. if the entire \$347.74 is considered a resource), then the Claimant's total monthly income for DKC purposes would be \$3,842.24, and the Claimant would be \$189.76 *under* the DKC Program's \$4,032.00 maximum monthly income limit for a family of five (5) persons with health insurance.

D. Definition of the Issues.

Based on the parties assertions (outlined above), the precise legal issues to be determined are:

1. Does the entire \$347.74 per month received by Mr. ██████ from his Voluntary Savings Program Account constitute income for purposes of DKC program eligibility?

2. Even if the *entire* \$347.74 monthly VSP Account disbursement does not constitute income, does the “interest” or pre-tax portion of the VSP Account disbursement (\$152.74) constitute income for purposes of DKC program eligibility?

3. Even if the *entire* \$347.74 monthly VSP Account disbursement does not constitute income, does the “principal” or post-tax portion of the VSP Account disbursement (\$195.00) constitute income for purposes of DKC program eligibility?

These three issues will be addressed below in the order stated. Because the Division is attempting to change the existing status quo by terminating the Claimant’s previously-existing DKC benefits, the Division bears the burden of proving, by a preponderance of the evidence,⁵ that the VSP Account disbursements are properly defined as “income.”

II. Can The Entire \$347.74 Monthly VSP Account Disbursement Properly Be Analyzed As a Whole, Or Must The “Principal” and “Interest” Components Be Analyzed Separately?

The Claimant’s initial argument is that the entire \$347.74 monthly VSP disbursement (i.e. both the “principal” and “interest” portions) is a resource and therefore does not constitute income for purposes of DKC program eligibility. Only income is considered in determining DKC eligibility.

7 AAC 100.990(46) defines “resource” in relevant part as “cash, or an asset that can be converted to cash; “resource” includes . . . (B) cash on hand; cash on deposit; and other liquid resources such as a promissory note, stock, bond, or security that is readily convertible to cash

The Medicaid regulations define three (3) different forms of income. “Earned income” is “nonexempt gross income earned as an employee” (7 AAC 100.199(3)). “Self-employment income” is “the amount received from the production or sale of goods or services, less the allowable nonpersonal costs of doing business” (7 AAC 100.199(6)). “Unearned income” is “income that is not earned income or self-employment income” (7 AAC 100.199(8)).

Mr. ██████’s monthly VSP account disbursements consist of two components: “post tax employee savings account principle of \$195.00”, and “the interest earned of \$152.74” (Exs. 2.6 and 5.7) These two components are separately identified on Mr. ██████’s monthly state warrants (Exs. 2.5 and 5.6).

Based on the evidence (Mr. ██████’s letter and the state warrants), it is apparent that the distinction between the “principal” and “interest” components of the monthly VSP disbursements is real and not just an artificial construct asserted by the Claimant. Accordingly, it is not appropriate to analyze the \$347.74 monthly VSP account disbursement, in its entirety or as a whole, as being either income or a resource. Rather, it is appropriate to separately analyze the “principal” and “interest” components of the monthly VSP disbursement.

⁵ The party seeking a change in the status quo ordinarily has the burden of proof. *State of Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

III. Does The \$152.74 “Interest” Or Pre-Tax Component Of Mr. ██████’s Monthly VSP Account Disbursement Constitute Income or a Resource?

7 AAC 100.158(d) specifically categorizes “dividends and interest” as unearned income. The \$152.74 of the monthly VSP Account disbursement is interest (Exs. 2.6 and 5.7) and therefore constitutes unearned income pursuant to 7 AAC 100.158(d). Accordingly, the \$152.74 must be included when determining monthly income for purposes of DKC program eligibility. The Division’s determination was thus correct in this regard.

When this \$152.74 is added to the Claimant’s other household income, the Claimant’s total monthly income for DKC purposes totals \$3,994.98. This is \$37.02 *under* the maximum monthly income limit for a family of five (5) persons with health insurance. Accordingly, the determining question in this case is whether the \$195.00 “principal” or post-tax component of Mr. ██████’s monthly VSP account disbursement is properly categorized as income or as a resource. If the \$195.00 constitutes income, then the Claimant’s total monthly income for DKC purposes would be \$4,189.98, and the Claimant would be \$157.98 *over-income* for the DKC program. If, however, the \$195.00 constitutes a resource, the Claimant’s total monthly income for DKC purposes would be \$3,994.98, and the Claimant would be \$37.02 *under* the DKC Program’s \$4,032.00 maximum monthly income limit for a family of five (5) persons with health insurance.

IV. Does The \$195.00 “Principal” Or Post-Tax Component Of Mr. ██████’s Monthly VSP Account Disbursement Constitute Income or a Resource?

The next issue is whether the \$195.00 “principal” or post-tax component of Mr. ██████’s monthly VSP account disbursement is properly categorized as income (earned or unearned) or as a resource. If the “principal” portion constitutes income (earned or unearned), the Claimant does not qualify for DKC benefits. If the “principal” portion constitutes a resource, the Claimant qualifies for DKC benefits.

The Medicaid regulations define three (3) different forms of income: (1) self-employment income (7 AAC 100.199(6)), (2) earned income (7 AAC 100.199(3)), and unearned income (7 AAC 100.199(8)). The \$195.00 “principal” or post-tax component of Mr. ██████’s monthly VSP account disbursement must be analyzed under each of these categories to determine whether it constitutes income, as defined by the state Medicaid regulations.

A. Does The \$195.00 “Principal” Or Post-Tax Component Constitute Self-Employment Income?

It was not disputed that Mr. ██████’s VSP account was created because of Mr. ██████’s past employment with the State of Alaska, not through self-employment. Accordingly, no portion of the VSP Account consists of “self-employment income” under 7 AAC 100.199(6). Thus, the next question to be answered is whether the monthly disbursement from the VSP account constitutes “earned income” or “unearned income.”

B. Does The \$195.00 “Principal” Or Post-Tax monthly disbursement Constitute Earned Income?

Preface – Importance of Distinction Between Gross Income and Net Income.

There are several regulations which bear on the issue of whether the \$195.00 “principal” or post-tax component of the VSP disbursement constitutes earned income. Central to this analysis is the difference between *gross income* and *net income*. However, the state regulations do not explicitly define these two types of income (gross income and net income).

Black’s Law Dictionary defines *gross income* as all income from whatever source derived. See United States Internal Revenue Code, Section 61(a); Black’s Law Dictionary (West Publishing, 5th Edition, 1979) at 632. *Net income* is “what remains out of gross income after subtracting ordinary and necessary expenses incurred in efforts to obtain or keep it.” Black’s Law Dictionary (West Publishing, 5th Edition, 1979) at 938.

1. 7 AAC 100.158(b) and 7 AAC 100.199(3).

7 AAC 100.158(b) defines “earned income” in relevant part as “*gross income* paid in cash or in kind as wages, salary, or commissions, and that is earned by an employee in exchange for the performance of services by the employee, *before any deductions are made* for the cost of earning that income, *including taxes . . .*” (emphasis added). 7 AAC 100.199(3) defines “earned income” as “nonexempt *gross income* earned as an employee” (emphasis added).⁶ Thus, under both of these regulations, income must first be “gross income” in order to be considered “earned income” for Family Medicaid purposes.

The undisputed evidence here is that the VSP principal is *net income* – income which has already been taxed. Based on the definitions of “earned income” provided by 7 AAC 100.199(3) and 7 AAC 100.158(b), *the principal portion of the VSP account disbursement is not “earned income” because it is not “gross income.”*

The fact that the VSP principal is not earned income under 7 AAC 100.199(3) and 7 AAC 100.158(b) does not end the inquiry because (as noted above) there are several other Family Medicaid regulations which discuss income.

2. 7 AAC 100.150.

7 AAC 100.150, titled “availability of income”, provides in relevant part that “(a) In determining eligibility for Family Medicaid benefits, the only money the department will consider to be income

⁶ The definition of “earned income” in these two regulations (7 AAC 100.158(b) and 7 AAC 100.199(3)) is consistent with Black’s Law Dictionary, which defines *gross income* as all income from whatever source derived. See United States Internal Revenue Code, Section 61(a); Black’s Law Dictionary (West Publishing, 5th Edition, 1979) at 632.

to a Family Medicaid household is money that is . . . (1) received or anticipated to be received by an individual included in the household; or” The Division appears to interpret this regulation as meaning that all money actually received by a household individual is considered income. This could be a reasonable interpretation of this regulation when read *in isolation*. However, such an interpretation is contrary to both 7 AAC 100.199(3) and 7 AAC 100.158(b), which specifically define “earned income” as gross income. . . . The Alaska Supreme Court follows the well settled rule of construction that no portion of a regulation shall be construed as inoperative or superfluous if an interpretation can be found which will give effect to and preserve all of the portions of the regulation. *See Alascom Inc., v. North Slope Borough Board of Equalization*, 659 P.2d 1175, 1178 footnote 5 (Alaska 1983); *City of St. Mary’s v. St. Mary’s Native Corp.*, 9 P.3d 1002, 1008 (Alaska 2000); 2A C. Sands, *Statutes and Statutory Construction*, § 46.06 (4th Edition 1973); and 2A N. Singer, *Sutherland Statutory Construction and Statutory Interpretation*, § 46:6 at 244-47(6th Edition 2002).

In light of the above rule of construction, a more workable interpretation of 7 AAC 100.150 is that it speaks to *when* money will be considered to be income (i.e. when the money is “available,” when it is “received or anticipated to be received”) rather than *whether the money is income as opposed to a resource*. This interpretation is superior because (1) it is consistent with the plain language of the regulation; and (2) it satisfies the rule of statutory and regulatory construction (discussed above) that different statutes and regulations within a single scheme be interpreted in such a way as to give effect to each individual provision and to harmonize the statutory or regulatory scheme as a whole.

Another accepted principle of statutory construction (also applicable to regulations) is that, when it is not clear which of two statutes applies, the more specific statute prevails over the more general. *See, for example, Virginia National Bank v. Harris*, 257 S.E.2d 867 (Va. 1979). Here, 7 AAC 100.199(3) and 7 AAC 100.158(b)) contain much more specific definitions than does 7 AAC 100.156. Accordingly, in the event of a conflict, 7 AAC 100.199(3) and 7 AAC 100.158(b)) prevail over 7 AAC 100.156.

3. 7 AAC 100.152.

7 AAC 100.152, titled “income period”, provides in relevant part as follows:

The department will determine, on a monthly basis, eligibility for Family Medicaid benefits and when income is considered available to the applicant or recipient. The department will consider all income that is received or may be reasonably anticipated to be received in a month to actually be available to the applicant or recipient in that month.

The Division also appears to interpret this regulation as meaning that all money actually received in a month by a household individual is considered income. Again, this is a reasonable interpretation of this regulation when read *in isolation*. However, this interpretation is again contrary to both 7 AAC 100.199(3) and 7 AAC 100.158(b), which specifically define what constitutes income.

A better interpretation of 7 AAC 100.152 is suggested by its title: “income period.” The regulation reiterates what is previously stated by 7 AAC 100.150 (discussed above), but adds a timing restriction: income eligibility will be determined on a *monthly basis* based on income received or

anticipated to be received “in that month.” This interpretation is superior because (1) it is consistent with both the title and the language of the regulation; and (2) it satisfies the rule of statutory and regulatory construction (discussed above) that different statutes and regulations within a single scheme be interpreted in such a way as to give effect to each individual provision and to harmonize the statutory or regulatory scheme as a whole.

4. 7 AAC 100.156.

7 AAC 100.156 is titled “Separating Income From Resources.” Subsection (a) of the regulation provides in relevant part that, “except as otherwise provided in this chapter, the department will consider money received by an individual included in the household to be income in the month it was received.” Subsection (b) of the regulation provides in relevant part that “a cash payment becomes income on the first day it is available to an individual included in the household.”

The Division construes this regulation as requiring that the monthly VSP disbursements be considered income because the disbursements are “money received” and “cash payments available” every month. However, this interpretation of 7 AAC 100.156 is suspect for three reasons.

First, if the drafters of 7 AAC 100.156 had really intended to define income that broadly, there would have been no reason to enact the much narrower definitions contained in 7 AAC 100.199(3) and 7 AAC 100.158(b).

Second, both subsections (a) and (b) of 7 AAC 100.156 are prefaced by the phrase “except as otherwise provided in this chapter.” This qualifier can reasonably be interpreted as an express acknowledgement of other regulations (like 7 AAC 100.199(3) and 7 AAC 100.158(b)) which further narrow the definition of income.

Third, another accepted principle of statutory construction (also applicable to regulations) is that, when it is not clear which of two statutes applies, the more specific statute prevails over the more general. *See, for example, Virginia National Bank v. Harris*, 257 S.E.2d 867 (Va. 1979). Here, 7 AAC 100.199(3) and 7 AAC 100.158(b)) contain much more specific definitions than does 7 AAC 100.156. Accordingly, in the event of a conflict, 7 AAC 100.199(3) and 7 AAC 100.158(b)) prevail over 7 AAC 100.156.

5. 7 AAC 100.160.

7 AAC 100.160, titled “exempt income,” lists numerous types of payments which, although considered “income,” are not counted toward the income eligibility limits for Family Medicaid. The Claimant’s VSP disbursements are not on this list. The Division appears to assert that, because the VSP disbursements are not listed as “exempt income,” the VSP disbursements must necessarily constitute “nonexempt income” and should thus be included for purposes of determining DKC income eligibility.

However, the fact that something akin to the VSP principal is not on 7 AAC 100.160’s list of types of exempt income does not necessarily mean that the VSP principal is nonexempt income; it could just as easily mean that the VSP principal is not listed because it is not income at all.

In summary, 7 AAC 100.160 speaks only to the issue of whether various types of payments, which are definitely income, are exempt or non-exempt. However, the issue here is not whether the VSP principle constitutes exempt income or non-exempt income. Rather, the issue here is whether the VSP principle constitutes any form of income, or (on the other hand) whether it constitutes a resource. 7 AAC 100.160 simply does not address this more fundamental issue.

6. Summary.

The foregoing analysis shows that the regulations defining earned income for purposes of the DKC program are not a model of clarity. However, 7 AAC 100.158(b) and 7 AAC 100.199(3) each explicitly and specifically define *earned income* as *gross income*.⁷ The remainder of the Family Medicaid regulations on income do not necessarily conflict with, and can be construed in harmony, with 7 AAC 100.158(b) and 7 AAC 100.199(3). Accordingly, the entire regulatory scheme must be interpreting as *limiting earned income to gross income*. This is income before any deductions are made for the cost of earning that income, including taxes” (7 AAC 100.158(b)).

There is no dispute that the “principal” portion of Mr. ██████’s VSP disbursements is not “gross income” but rather *net income* on which taxes have previously been paid. Because the “principal” portion of Mr. ██████’s VSP disbursements is not gross income, it is excluded from the regulatory definition of “earned income.”

The Division has the burden of proof. The facts are undisputed, and the most persuasive interpretation of the regulations favors the Claimant. Accordingly, the Division has not met its burden of proving, by a preponderance of the evidence, that the VSP principal constitutes “earned income” under the regulations discussed above.

The final issue is whether the VSP principal constitutes *unearned* income. If it does, then the Claimant’s income exceeds the DKC program’s applicable maximum income limit. If it does not, then the Claimant’s income does not exceed the DKC program’s applicable maximum income limit and the Claimant qualifies for DKC benefits.

⁷ 7 AAC 100.158(b) provides in relevant part that:

(b) Earned income is gross income paid in cash or in kind as wages, salary, or commissions, and that is earned by an employee in exchange for the performance of services by the employee, *before any deductions are made for the cost of earning that income, including taxes, child care, or transportation expenses.*

The language of the regulation mirrors the commonly accepted definition of gross income - all income from whatever source derived. See United States Internal Revenue Code, Section 61(a); Black’s Law Dictionary (West Publishing, 5th Edition, 1979) at 632.

C. Does The \$195.00 “Principal” Or Post-Tax Component Constitute Unearned Income?

7 AAC 100.199(8) defines “unearned income” as “income that is not earned income or self-employment income.” 7 AAC 100.158(d) defines “unearned income” more specifically, stating in relevant part that unearned income is “*gross income* that is not earned income under (b) of this section or self-employment income under (c) of this section,” including “(1) retirement benefits [and] (3) dividends and interest” The principal portion of Mr. ██████’s VSP Account does not satisfy this definition.

First, because the money derives from Mr. ██████’s former State employment, the money is obviously not “self-employment income.” See discussion in Section IV(A) at page 11, above. Second, the principal portion of Mr. ██████’s VSP account is not “earned income” for the reasons previously discussed in Section IV(B) at pages 11-14, above. Therefore, the VSP account principal must necessarily be either “unearned income,” or a resource.

For income to qualify as “unearned income” under 7 AAC 100.158(d), the income must be “*gross income*.” However, as discussed above, the VSP principal is *net, post-tax income, not gross income*. See January 2009 letter from ██████ (Ex. 2.6; Ex. 5.7); see also definitions of gross income and net income at page 11, above. Accordingly, the principal portion of the VSP account simply does not satisfy the “gross income” requirement of 7 AAC 100.158(d)’s definition of “unearned income.”

Because (as discussed above) the principal portion of Mr. ██████’s VSP account cannot be construed as self-employment income, earned income, or unearned income, it does not constitute income for purposes of the Denali KidCare Program.

V. Summary.

1. \$152.74 of the Claimant’s monthly VSP Account disbursement represents interest (Exs. 2.6 and 5.7). 7 AAC 100.158(d) specifically categorizes “dividends and interest” as unearned income. Accordingly, the \$152.74 “interest portion” of the Claimant’s monthly VSP Account disbursement constitutes unearned income pursuant to 7 AAC 100.158(d) and must be included when determining monthly income for purposes of DKC program eligibility.
2. Because the principal portion of Mr. ██████’s VSP Account was the product of his prior employment with the State of Alaska, it does not constitute *self-employment income* as defined in 7 AAC 100.158(c).
3. Because 7 AAC 100.158(b) and 7 AAC 100.199(3) explicitly define earned income as consisting of *gross income*, and because it was not disputed that the principal portion of Mr. ██████’s VSP Account consists of post-tax, *net income* rather than gross income, the *principal portion* of Mr. ██████’s VSP Account does not constitute *earned income*.
4. Because 7 AAC 100.158(d) explicitly defines unearned income as consisting of gross income, and because it was not disputed that the principal portion of Mr. ██████’s

VSP Account consists of post-tax, *net income* rather than gross income, the principal portion of Mr. ██████'s VSP Account does not constitute *unearned income*.

5. Because the principal portion of Mr. ██████'s VSP account cannot (as discussed above) be classified as self-employment income, earned income, or unearned income, it is not income for purposes of the Denali KidCare Program.

6. Because the \$195.00 "principal" or post-tax component of Mr. ██████'s monthly VSP account disbursement is not income,⁸ the Claimant's total monthly income for DKC purposes is \$3,994.98, which is \$37.02 under the DKC Program's maximum monthly income limit for a family of five (5) persons with health insurance (\$4,032.00).

7. Accordingly, the Division erred in denying the Claimant's March 2, 2009 DKC Program renewal application on or about March 6, 2009.

CONCLUSIONS OF LAW

1. The Division proved, by a preponderance of the evidence, that the \$152.74 interest portion of the Claimant's husband's monthly State of Alaska Voluntary Savings Program (VSP) account disbursement constitutes unearned income pursuant to 7 AAC 100.158(d).

2. The Division failed to prove, by a preponderance of the evidence, that the principal portion of the Claimant's husband's State of Alaska Voluntary Savings Program (VSP) account constitutes self-employment income, earned income, or unearned income.

3. The Division therefore erred when it denied the Claimant's March 2, 2009 application for renewal of Denali KidCare Program benefits based on the allegation that the Claimant's household's countable monthly income exceeded the Denali KidCare Program's monthly income limit for a household of five (5) persons with health insurance.

DECISION

The Division correctly determined that the \$152.74 interest portion of the Claimant's husband's monthly State of Alaska Voluntary Savings Program (VSP) account disbursement constitutes unearned income for purposes of the Denali KidCare Program. However, the Division erred when it determined that the principal portion of the Claimant's husband's State of Alaska Voluntary Savings Program (VSP) account constitutes income for purposes of the Denali KidCare Program. Accordingly, the Division erred when it denied the Claimant's March 2, 2009 application for renewal of Denali KidCare Program benefits based on the allegation that the Claimant's household's countable monthly income exceeded the Denali Kid Care Program's monthly income limit for a household of five (5) persons with health insurance.

⁸ It should be emphasized that this decision cannot be read as construing all retirement accounts and similar investment vehicles as "resources" for purposes of the Denali KidCare Program. Rather, the precedential reach of this decision is limited to those comparatively few cases involving retirement / investment accounts consisting of net income rather than gross income.

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. To do this, send a written request directly to:

Director of the Division of Public Assistance
Department of Health and Social Services
PO Box 110640
Juneau, AK 99811-0640

If the Claimant appeals, the request must be sent within 15 days from the date of receipt of this Decision. Filing an appeal with the Director could result in the reversal of this Decision.


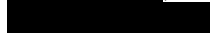
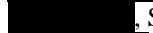
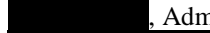
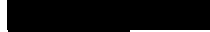
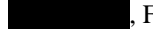
DATED this _____ day of August, 2009.

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this _____ day of August 2009 true and correct copies of the foregoing were sent to the Claimant via U.S.P.S. mail, and to the remainder of the service list by e-mail, as follows:

Claimant – Certified Mail, Return Receipt Requested

, Director
, Policy & Program Development
, Staff Development & Training
, Administrative Assistant II
, Eligibility Technician I
, Fair Hearing Representative

By _____

J. Albert Levitre, Jr.
Law Office Assistant I