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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-215
)
 Claimant.) Div. Case No. [REDACTED]
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) is a Medicaid recipient. She requested the Medicaid program reimburse her \$539 for airplane costs she paid traveling from Anchorage to [REDACTED] on December 22, 2008. The Division of Health Care Services (Division) denied her reimbursement request on March 3, 2009. (Ex. D) The Claimant requested a fair hearing contesting the denial on April 7, 2009. (Ex. C) This office has jurisdiction pursuant to 7 AAC 49.010.

Pursuant to the Claimant's request, a hearing was held on May 18, 2009. The Claimant did not attend the hearing. The Claimant's daughter, [REDACTED], and son-in-law, [REDACTED], attended the hearing telephonically. They represented the Claimant and testified on her behalf.

[REDACTED], a Health Program Manager III employed with the Division of Health Care Services, appeared in person. Mr. [REDACTED] represented the Division and testified on its behalf.

After the hearing concluded, the Claimant was provided the opportunity to require the Division to provide a new denial notice. The Claimant was given a deadline of July 30, 2009 to notify this Office that she wished a new denial notice and to request a new hearing if she disagreed with the new denial notice. The Claimant did not opt to require the Division to issue a new notice and for a new hearing. *See July 16, 2009 Order Regarding Defective Notice.*

ISSUE

Was the Division correct to deny the Claimant's request that Medicaid reimburse her for her December 22, 2008 airplane ticket?

FINDINGS OF FACT

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

1. The Claimant is a Medicaid recipient who lives in [REDACTED]. (Ex. J, p. 14)
2. The Claimant was transported from [REDACTED]¹ to Anchorage at the end of October 2008 due to cough, possible pneumonia, and abdominal pain. (Ex. J, p. 14) She was admitted to Providence Alaska Medical Center, diagnosed with a perforated sigmoid colon, and a colostomy was performed on October 31, 2008. (Ex. J, p. 16)
3. The Medicaid program did not preauthorize payment for the Claimant's travel from [REDACTED] to Anchorage. ([REDACTED] testimony) It authorized payment for her one way travel from [REDACTED] to Anchorage, after the fact, because the Claimant was experiencing a medical emergency. ([REDACTED] testimony)
4. After her colostomy, the Claimant was then released to an assisted living home in Anchorage to recover. (Ex. H, p. 2)
5. The Claimant was subsequently released to return to her home between December 19 and 22, 2008. (Ex. H, p. 2)
6. The Claimant's daughter made a number of attempts to have the Medicaid program authorize travel payment for her mother to return home to [REDACTED]. The staff at ACS² told the Claimant's daughter she would need to get authorization from the doctor's office for the Claimant to be released and return home. ([REDACTED] testimony) The Claimant's daughter made numerous phone calls to the doctors' offices, and a visit to one doctor's office to try and explain the situation, and obtain authorization. ([REDACTED] and [REDACTED] testimony)
7. The Claimant was unable to get her mother's return travel home authorized by the Medicaid program. The reason was that both of her mother's medical care providers, Dr. [REDACTED] and Dr. [REDACTED], were on vacation and could not be reached to authorize the return travel. (Ex. H, p.2; Ex. G, p. 2) The nurses in the doctors' offices would not authorize the travel. ([REDACTED] and [REDACTED] testimony)

¹ [REDACTED] contains the airport that services [REDACTED].

² ACS is Affiliated Computer Services, which is a private company that is contracted to the Division to handle financial authorization for Medicaid travel scheduling. See Ex. D.

8. The Claimant's daughter made the decision to remove her mother from the assisted living home and return her mother home to [REDACTED], without waiting for the Medicaid program to preauthorize her travel. ([REDACTED] and [REDACTED] testimony) She made the decision to return her mother without travel authorization for several reasons: the price of the airline ticket would have increased substantially if the Claimant did not return on December 22, 2009; given the timing of the commercial fishing season, the Claimant would have had her return substantially delayed due to a lack of available airline seats to [REDACTED]; and they wanted to be home for the holidays. ([REDACTED] testimony) The Claimant flew from Anchorage to [REDACTED] on December 22, 2008. (Ex. E, p. 1) The cost of the travel was \$539. *Id.*

9. The Claimant applied to have the Division reimburse her for the \$539 airfare.³ (Ex. D, p. 1) The Division denied the Claimant's request for reimbursement on March 3, 2009. (Ex. D) The Division's denial notice states "[l]odging must be approved before the travel takes place." (Ex. D, p. 1) It further refers to taxi, transportation, lodging, hotel, lodging at a hospital, meals, room service, tips, phone calls, movies, and approved escorts. (Ex. D, pp. 1 – 2) The second page of the denial notice states, in boldface underlined type: "**You are responsible to pay the hotel or the taxi for services that you request that are not covered by Medicaid and were no** (sic) **approved by Medicaid through your Health Care Provider.**" (Ex. D, p. 2) The denial notice does not explicitly mention airfare nor does it state that air travel must be preapproved. (Ex. D)

10. At hearing, the Division representative testified the reason the Claimant was denied her request for airfare reimbursement was because she did not receive preauthorization for the travel. ([REDACTED] testimony) This was the first indication contained in the record that the Claimant's request for airfare reimbursement was denied due to a lack of preauthorization. The Division's Hearing Position Statement provided to the Claimant and the Hearing Office before the hearing does not contain specific notice of the reason for the denial, stating:

Issues in Dispute: Affiliated Computer Services, Inc. denied reimbursement of \$539 for an Alaska Airlines ticket.

FACTS

- 1) Affiliated Computer Services, Inc. received a travel reimbursement request in the amount of \$539 for [Claimant]. [Claimant] traveled from Anchorage, AK to [REDACTED], AK on December 22, 2009.
- 2) On March 3, 2009 [Claimant's daughter] on behalf of [Claimant] was notified that the reimbursement request was denied. Previous approved travel was for November 4, 2008 for [Claimant] from Anchorage, AK to [REDACTED], AK.

³ The record does not contain a copy of the reimbursement request or when it was made.

(Ex. A, p. 2)

PRINCIPLES OF LAW

This case involves the denial of an application for benefits. When an application is denied, the applicant has the burden of proof⁴ by a preponderance of the evidence.⁵

In *Allen v. State, Dept. of Health and Social Services, Division of Public Assistance*, 203 P.3d 1155 (Alaska 2009), the Alaska Supreme Court stated that public assistance benefit recipients are entitled to adequate notice “detailing the reasons” for the agency action. *Allen* at 1167.

If a major purpose served by benefit change or denial notices is protecting recipients from agency mistakes, then it stands to reason that such notices should provide sufficient information to allow recipients to detect and challenge mistakes.

Id. at 1168. A defective notice cannot be cured by the Claimant going through the hearing process and obtaining the information the initial notice should have contained. *Id.* fn. 68 at 1169.

The Medicaid program pays for transportation services for Medicaid recipients when the transportation is:

- (1) medically necessary; [and]
- (2) authorized by the department;

7 AAC 43.502(a). The “Medicaid recipient’s health care provider shall request authorization for medically necessary transportation and accommodations for the recipient.” 7 AAC 43.502(b). The Division must approve non-emergency medical transportation before the travel occurs. 7 AAC 43.503(a). The Alaska Medicaid regulations only allow a variance to preapproved travel when “a recipient is forced to change authorized travel plans for reasons beyond the recipient’s control.” 7 AAC 43.503(b)(1).

⁴ “Ordinarily the party seeking a change in the status quo has the burden of proof.” *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985)

⁵ Preponderance of the evidence is defined as follows:

Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

Black’s Law Dictionary 1064 (5th Ed. 1979)

The Medicaid program will pay for travel that is not preapproved in the case of a medical emergency. 7 AAC 43.505. “[E]mergency transportation means the transportation necessary immediately when a sudden, unexpected occurrence creates a medical emergency.” 7 AAC 43.530(2).

A regulation is “binding on the agency that issues it.” Pierce, *Administrative Law Treatise*, § 6.6 (4th Ed. 2002).

ANALYSIS

The issue in this case is whether Division was correct when it denied the Claimant’s request that Medicaid reimburse her for her December 22, 2009 airplane ticket. Because this case involves an application for benefits, the Claimant has the burden of proof by a preponderance of the evidence.

A. Denial Notice

The Division’s denial notice sent to the Claimant does not meet minimal due process standards, as required by *Allen*. The Division’s March 3, 2009 denial notice nowhere tells the Claimant she should have gotten her mother’s airplane travel preapproved. Instead, the boldface underlined language on the notice’s second page, tells the Claimant her hotel or taxi costs were not approved by Medicaid. *See* Finding of Fact 9 above. The Division’s lack of proper notice is compounded by the fact that its Hearing Position Statement also lacks a statement that the Claimant’s failure to obtain preauthorization justified a denial of her request for reimbursement of her airline travel. *See* Finding of Fact 10 above.

The parties went through the hearing in this case, and the Claimant’s representatives were aware of the actual issues involved. However, this did not excuse the defective notice sent by the Division. A defective notice cannot be cured by the Claimant going through the hearing process and obtaining the information the initial notice should have contained. *Allen*, fn. 68 at 1169. The Alaska Supreme Court in *Allen* did not find in favor of the Claimant because of the defective notice. Instead, it allowed the State to correct a defective notice by completely reissuing it. *Allen* at 1169. Similarly, in this case, the State was entitled to issue a proper denial notice to the Claimant.

This Office advised the Claimant she had the right to receive a new notice, and to request a new hearing if she disagreed with the new notice. She was advised that if she did not respond to this Office by the close of business July 30, 2009, and notify it that she wanted a new notice, that a decision would be issued based upon the record including the testimony and arguments presented at the May 18, 2009 hearing. *See* July 16, 2009 *Order Regarding Defective Notice*. This Office has not received a request for a new notice. The Claimant has therefore waived her right to have the Division send her a new denial notice and this Decision is therefore issued based upon the record and the testimony and arguments presented at the May 18, 2009 hearing.

B. Arguments

The Division's argument at hearing was that the Claimant did not get her travel home to ██████ preapproved as required by the Alaska Medicaid regulations. The Claimant's argument was that she tried to get the travel home preapproved but because her physicians were not available to authorize the travel, she could not get it preapproved.

C. Airfare Reimbursement

It is undisputed that the Claimant's return travel to ██████ was not authorized in advance by the Division. It is also undisputed the Claimant's return travel was not caused by a medical emergency. Instead she was returning home after medical treatment.

The record shows the Claimant's daughter made numerous unsuccessful attempts to have her mother's return travel home preauthorized, but was unable to obtain preauthorization through no fault of her own. This inability to obtain preauthorization was also not due to any action or inaction on the Division's part, but rather to the fact the Claimant's health care provider did not request preauthorization. Regardless, the Claimant's daughter, acting on the Claimant's behalf, made the conscious choice to return her mother to ██████ knowing that her mother's travel had not been preapproved.

The Medicaid regulations explicitly state that the "Medicaid recipient's health care provider shall request authorization for medically necessary transportation and accommodations for the recipient." 7 AAC 43.502(b). The travel then has to be preauthorized by the Division. 7 AAC 43.503(a). The only exceptions to the preauthorization requirement are for emergency travel or for when "a recipient is forced to change authorized travel plans for reasons beyond the recipient's control." 7 AAC 43.503(b)(1); 7 AAC 43.505. Neither of these exceptions apply in this case.

The Claimant would therefore have this Office create an exception to the regulations to allow unauthorized travel when a health care provider is not available to request the travel authorization. This Office is required to adhere to applicable regulations. It does not have the discretion to ignore or redraft regulations. A regulation is "binding on the agency that issues it." Pierce, *Administrative Law Treatise*, § 6.6 (4th Ed. 2002). The Medicaid regulations therefore compel a decision in this case that the Division was correct to deny the Claimant's request for reimbursement for her mother's travel home to ██████, despite the fact the Claimant was unable to obtain preauthorization through no fault of her own.⁶

In summary, the Division's action in denying the Claimant's request for reimbursement of her December 22, 2008 airfare to ██████ was correct.

⁶ It should be noted that the Claimant's action in returning home, despite a lack of travel authorization, undoubtedly saved the State of Alaska Medicaid expenses, since the Claimant was residing in an assisted living home in Anchorage while waiting to return home to ██████.

CONCLUSIONS OF LAW

1. The Division's March 3, 2009 notice informing the Claimant her request for airfare reimbursement in the amount of \$539 was legally inadequate. It did not satisfy minimal due process standards.
2. The Claimant, however, waived her right to have the Division issue a denial notice that complied with the minimal due process standards set out in *Allen*.
3. The Claimant's travel home to [REDACTED] does not fall within any of the exceptions to the travel preauthorization requirements, contained in the Alaska Medicaid regulations, which would allow Medicaid to reimburse her for travel that was not preapproved.
4. The Claimant did not meet her burden of proof and show by a preponderance of the evidence that the Division erred when it denied her request for reimbursement. The Division was therefore correct when it denied the Claimant's request for reimbursement of the \$539 airfare for her return home to [REDACTED].

DECISION

The Division was correct to deny the Claimant's request that Medicaid reimburse her \$539 for her December 22, 2008 airplane ticket from Anchorage to [REDACTED].

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 Deputy Commissioner. To do this, send a written request directly to:

William Streur, Deputy Commissioner
Division of Health Care Services
4501 Business Park Blvd., Suite 24
Anchorage, AK 99503-7167

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 4th day of August 2009.


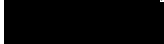
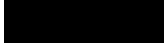
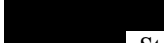

Larry Pederson
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 4th day of August
2009, true and correct copies of the
foregoing were sent to:

Claimant via USPS First Class Certified Mail, Return Receipt Requested.

And to the following by email:

, Hearing Representative
, Deputy Commissioner
, Policy & Program Development
, Policy & Program Development
, Staff Development & Training

J. Albert Levitre, Jr. Law Office Assistant I