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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-451
)
 Claimant.) Division Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) was a Food Stamp recipient in July 2009. (Ex. 1) On July 27, 2009, the Claimant requested that she receive an income deduction, for Food Stamp benefit calculation purposes, for her cat care expenses, on the grounds that her cat was a service animal. (Exs. 2.0 – 2.8) On August 3, 2009, the Division of Public Assistance (Division) sent the Claimant written notification her request was denied. (Ex. 4) Claimant requested a fair hearing on August 10, 2009. (Ex. 5.1) This office has jurisdiction pursuant to 7 AAC 49.010 and 7 CFR 273.15.

Pursuant to the Claimant's request, a hearing was held on October 29 and November 5, 2009.¹

The Claimant attended the hearing telephonically and testified on her own behalf. The Claimant was represented by [REDACTED] Esq., with the Disability Law Center, who appeared in person for the October 29, 2009 portion of the hearing and telephonically for the November 5, 2009 portion of the hearing.

The Division was represented by [REDACTED], Esq., Assistant Attorney General, who appeared in person for the October 29, 2009 portion of the hearing and telephonically for the November 5, 2009 portion of the hearing.

¹ Pursuant to 7 CFR 273.15, this Office (the Office of Hearings and Appeals) is required to issue a decision in Food Stamp cases no later than 60 days after the date that the Division receives a claimant or recipient's request for a hearing. This Office cannot prepare its decision until after the hearing is actually held. In this case, because the Division scheduled the initial hearing only one day before the decision was due (the hearing was originally scheduled for October 8, when the Decision was due on October 9), this Decision was actually due on November 6, 2009, the day after the hearing was completed. At the November 5, 2009 hearing, the Claimant verbally waived the 60 day decision issuance deadline.

STATEMENT OF ISSUES

Was the Division correct to deny the Claimant's request that she receive an income deduction, for Food Stamp benefit calculation purposes, for her cat care expenses?

FINDINGS OF FACT

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

1. The Claimant was receiving Food Stamp benefits in July 2009. (Ex. 1) The Claimant is disabled. *Id.*
2. On December 15, 2008, Dr. [REDACTED], M.D., wrote a letter on the Claimant's behalf stating that the Claimant's cat had "been trained to signal [the Claimant] to take her medication." (Ex. 2.1) That letter pertained to the Claimant's cat, [REDACTED], who died in July 2009. (Claimant testimony)
3. The Claimant replaced [REDACTED] with another cat, [REDACTED], on July 17, 2009. (Claimant testimony; Ex. 2.8) [REDACTED] is an [REDACTED] cat; the Claimant said that this cat breed was well suited to being a service animal due to its high intelligence. *Id.*
4. On July 27, 2009, the Claimant requested that she receive an income deduction, for Food Stamp benefit calculation purposes, for her service animal.² (Ex. 2.0) The cat, [REDACTED], is that service animal.
5. The Claimant has trained [REDACTED] to remind her to take her morning medications, because she sometimes forgets to take her medications. (Claimant testimony) [REDACTED] also alerts the Claimant, who is hard of hearing, if there is someone outside her apartment. *Id.*
6. Dr. [REDACTED], M.D., wrote the Claimant a prescription on August 18, 2009 for a "service animal." (Ex. B) The prescription does not state the species of service animal, i.e. cat or dog, nor does the prescription state what particular function the service animal serves, i.e. seeing, hearing, etc. *Id.* On August 18, 2009, Dr. [REDACTED] handwrote on a copy of Dr. [REDACTED]'s December 15, 2008 letter (Ex. 2.1), the following: "Please allow Ms. [REDACTED] to keep replacement cat as service animal." (Ex. A)
7. On August 3, 2009, the Division denied the Claimant's income deduction request on the grounds that the Food Stamp program only allowed income deductions for dogs, and "not any other type of service animal like a cat." (Ex. 4)

PRINCIPLES OF LAW

² The Claimant did not request a specific amount at hearing, nor did she submit any expense documentation other than the receipt showing she spent \$700 to acquire Daisy. (Ex. 2.8) Her attorney explained that she was not requesting a specific amount, but would submit proof of her monthly expenses as they were incurred.

This case involves the question of whether or not the Division was correct to deny the Claimant's July 27, 2009 request that she receive an income deduction, for Food Stamp benefit calculation purposes, for her cat on the grounds that her cat is a service animal. Because this case involves a request by the Claimant to modify her Food Stamp benefits, the Claimant has the burden of proof³ by a preponderance of the evidence.⁴

Food Stamps is a federal program administered by the State. 7 CFR 271.4(a). The Code of Federal Regulations (CFR) contains the rules for determining how Food Stamp benefits are calculated. The State of Alaska has adopted the Federal Food Stamp regulations by reference. 7 AAC 46.010.

A recipient's monthly Food Stamp benefit is determined based upon her income after allowable expenses are deducted from that income. A disabled person is allowed a Food Stamp deduction from her income for "medical expenses in excess of \$35 per month." 7 CFR 273.9(d)(3). The regulation reads as follows:

(d) *Income deductions.* Deductions shall be allowed only for the following household expenses:

* * *

(3) *Excess medical deduction.* That portion of medical expenses in excess of \$35 per month, excluding special diets, incurred by any household member who is elder or disabled as defined in § 271.2. . . . Allowable medical costs are:

(i) Medical and dental care including psychotherapy and rehabilitation services provided by a licensed practitioner services provided by a licensed practitioner authorized by State law or other qualified health professional.

(ii) Hospitalization or outpatient treatment, nursing care, and nursing home care including payments by the household for an individual who was a household member immediately prior to entering a hospital or nursing home provided by a facility recognized by the State.

(iii) Prescription drugs when prescribed by a licensed practitioner authorized under State law and other over-the-counter medication (including insulin) when approved by a licensed practitioner or other qualified health care professional; in addition, costs of medical supplies, sick-room equipment (including rental) or other prescribed equipment are deductible;

(iv) Health and hospitalization insurance policy premiums. The costs of health and accident policies such as those payable in lump sum settlements for death or dismemberment or income maintenance policies such as those that continue mortgage or loan payments while the beneficiary is disabled are not deductible;

³ "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)

⁴ Preponderance of the evidence is the normal standard of proof in an administrative proceeding. *Amerada Hess Pipeline v. Alaska Public Utilities Comm'n*, 711 P.2d 1170, n. 14 at 1179 (Alaska 1986). Preponderance of the evidence is defined as "[e]vidence 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)

(v) Medicare premiums related to coverage under Title XVIII of the Social Security Act; any costs-sharing or spend down expenses incurred by Medicaid recipients;

(vi) Dentures, hearing aids, and prosthetics;

(vii) *Securing and maintaining a seeing eye or hearing dog including the cost of dog food and veterinarian bills;*

(viii) Eye glasses prescribed by a physician skilled in eye disease or by an optometrist;

(ix) Reasonable cost of transportation and lodging to obtain medical treatment or services;

(x) Maintaining an attendant, homemaker, home health aide, or child care services, housekeeper, necessary due to age, infirmity, or illness. In addition, an amount equal to the one person coupon allotment shall be deducted if the household furnishes the majority of the attendant's meals. The allotment for this meal related deduction shall be that in effect at the time of initial certification. The State agency is only required to update the allotment amount at the next scheduled recertification; however, at their option, the State agency may do so earlier. If a household incurs attendant care costs that could qualify under both the medical deduction and dependent care deduction, the State agency shall treat the cost as a medical expense.

7 CFR 273.9(d)(3). (Emphasis added)

The *Alaska Food Stamp Manual* allows a medical expense deduction for the “[c]ost of securing and maintaining a service dog.” *Alaska Food Stamp Manual* § 602-4 D(1)(f).

“[A] legislative rule is . . . binding on the agency that issues it.” Pierce, *Administrative Law Treatise*, § 6.6 (4th Ed. 2002). Legislative regulations “are laws in every meaningful sense and annulling any one of them effects a change in the law.” *State v. ALIVE*, 606 P.2d 769, 777 (Alaska 1980). Invalidation of a regulation is a judicial function: the Alaska Administrative Procedure Act specifically provides that “[a]n interested person may get a judicial declaration on the validity of a regulation by bringing an action for declaratory relief in the superior court.” AS 44.62.300. An administrative agency, even acting in a quasi-judicial status, does not have judicial powers. *Alaska Public Interest Research Group v. State*, 167 P.2d 27, 35 – 37 (Alaska 2007).

ANALYSIS

The Claimant argued that she was entitled to receive a deduction from her income, for Food Stamp benefit calculation purposes, for the cost of keeping her cat [REDACTED]. Because this case involved a request from the Claimant which, if granted, would change her Food Stamp benefit amount, she had the burden of proof by a preponderance of the evidence.

The uncontradicted evidence in this case shows that the Claimant is disabled, including being hard of hearing. She has trained her cat to remind her to take medications. In addition, her cat alerts her when there are people outside her apartment.

The federal Food Stamp regulations allow recipients to claim an income deduction, for Food Stamp benefit calculation purposes, for the cost of “security and maintaining” a seeing eye dog or hearing dog. 7 CFR 273.9(d)(3)(vii). The Food Stamp regulations do not allow an income deduction for “service animals” or a “service cat” or even for “service dogs” in general, merely for seeing eye dogs or hearing dogs.

The Claimant raised two arguments in support of her contention that she should receive a Food Stamp income deduction for her cat. Her first argument was that the specific Food Stamp regulatory listing that only provided for seeing eye dogs and hearing dogs violated the Americans With Disabilities Act, 42 USC §§ 12181 – 12189. Her second argument was that the applicable Food Stamp regulation, 7 CFR 273.9(d)(3), should be read to allow an income deduction for service animals (in this case, a cat) under the general category of “medical expenses.”

Each of these issues are addressed below.

- A. Does the Federal Food Stamp regulation, 7 CFR 273.8(d)(3)(vii), that allows a medical expense deduction for Food Stamp benefit calculation purposes only for seeing eye dogs and hearing dogs and not for other service animals, violate the American With Disabilities Act?

This issue was dealt with briefly at hearing. The Claimant was advised that this was a purely legal issue which is outside this Office’s jurisdiction. This is because resolution of the issue would require this quasi-judicial Office to rule on the validity of a federal regulation (7 CFR 273.8(d)(3)(vii)), which is also a state regulation, because it has been adopted by reference into Alaska regulations. *See* 7 AAC 46.010.

This Office does not have jurisdiction to ignore or rewrite a federal or state regulation for several reasons. First, an agency is required to follow its own regulations. *Pierce, Administrative Law Treatise*, § 6.6 (4th Ed. 2002). Second, annulling a regulation is a judicial function, restricted to the courts, which is not given to quasi-judicial agencies such as this Office. AS 44.62.300; *Alaska Public Interest Research Group v. State*, 167 P.2d 27, 35 – 37 (Alaska 2007).

The Claimant’s argument with regard to the Americans With Disabilities Act is therefore noted for the record. However, it is specifically not ruled upon, given this Office’s lack of jurisdiction.

- B. Does the Federal Food Stamp regulation, 7 CFR 273.8(d)(3), provide an income deduction for service animals under the general category of medical expenses?

This issue is one of regulatory interpretation. The federal regulation which governs Food Stamp income deductions, at the beginning of the section providing for income deductions states “[d]eductions shall be allowed only for the following household expenses.” 7 CFR 273.8(d). It is then followed by a subsection that pertains only toward medical expense deductions which reads “[a]llowable medical costs are” followed by a specific list of deductions. *See* 7 CFR 273.8(d)(3).

The specific list of deductions contains a deduction for seeing eye and hearing dogs. 7 CFR 273.8(d)(3)(vii).

The way the regulation is written shows that the intent of the regulation is to allow only the specified deductions. At the beginning it states “deductions shall be allowed only for the following.” 7 CFR 273.8(d). At the beginning of the subsection providing for medical expense deductions, it states “[a]llowable medical costs are.” 7 CFR 273.8(d)(3). Then the regulation specifically allows a deduction for seeing eye and hearing dogs. This deliberate crafting of the regulation with its exclusionary language, “allowed only” and “allowable medical costs are”, followed by the list of allowable medical deductions, makes it clear that “only” the specifically listed deductions are allowed.

There is no ambiguity in the regulation. There is no general language in the regulation, such as “the deductions include” or “among the deductions.” The regulation does not contain a general reference to “service animals.” Because the regulation contains explicit language limiting deductions to those listed, the regulation does not allow a general medical expense deduction for service animals, only for seeing eye and hearing dogs. Consequently, the Food Stamp regulations do not allow an income deduction for expenses incurred for a cat trained as a service animal.

As part of her argument that a service animal deduction should be included as a general medical expense, the Claimant argued that because the Alaska Food Stamp program, in its manual, allows a deduction for service dogs, the Division should allow a general deduction for service animals in general. *See Alaska Food Stamp Manual* § 602-4 D(1)(f). However, just because the Division has decided to adopt, via its manual, a more expansive deduction provision for service dogs, instead of the explicit limitation to seeing eye and hearing dogs contained in the federal Food Stamp regulations, does not mean that it is required to adopt a deduction for service animals as a whole. It should also be noted that the Division’s *Food Stamp Manual* is not adopted into regulation, and does not supersede the federal Food Stamp regulations. Additionally, the Alaska Food Stamp regulations do not contain any reference to service animals. *See* 7 AAC 46.010 *et. seq.*

In summary, the Division correctly found that the Claimant was not entitled to claim medical expense deduction for her cat [REDACTED]. The federal Food Stamp regulation explicitly limits medical expenses to seeing eye and hearing dogs. Despite the Division’s more expansive policy of allowing medical deductions to service dogs as a whole, neither the applicable Food Stamp regulation, 7 CFR 273.8(d)(3)(vii), nor the *Alaska Food Stamp Manual* § 602-4 D(1)(f), provide for a medical expense deduction for service animals other than dogs.

The Division was therefore correct when it denied the Claimant’s request that she receive a medical expense deduction for her cat [REDACTED].

CONCLUSIONS OF LAW

1. This Office does not have jurisdiction to address the issue of whether the federal Food Stamp regulation, 7 CFR 273.8(d)(3)(vii), which only allows a medical expense deduction for seeing eye and hearing dogs, violates the Americans With Disabilities Act.
2. The federal Food Stamp regulation, 7 CFR 273.8(d)(3)(vii), only allows a medical expense deduction for seeing eye and hearing dogs. It does not allow a medical expense deduction for other types of service animals.
3. The provision in the *Alaska Food Stamp Manual* allowing an income deduction for service dogs does not allow a medical expense deduction for service animals other than dogs.
4. The Division was correct to deny the Claimant's request that she receive an income deduction, for Food Stamp benefit calculation purposes, for her cat care expenses.

DECISION

The Division was correct to deny the Claimant's request that she receive an income deduction, for Food Stamp benefit calculation purposes, for her cat care expenses.

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, the Claimant must 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

An appeal 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 18th day of November, 2009.

/Signed/

Larry Pederson
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 18th day of November, 2009,
true and correct copies of the foregoing were sent to:

[REDACTED], Esq., DLC for Claimant – email
[REDACTED], Assistant Attorney General - email
[REDACTED], Director - email
[REDACTED], Director's Office - email
[REDACTED], Policy & Program Development - email
[REDACTED], Policy & Program Development - email
[REDACTED], Staff Development & Training - email

J. Albert Levitre, Jr., Law Office Assistant I