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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-2174
)
 Claimant.) DSDS Case No. [REDACTED]
)
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) is a recipient of the Medicaid Home and Community-Based Waiver Services Program (Ex. D p. 1; undisputed testimony). On October 5, 2009 the Claimant submitted a Plan of Care renewal to the State of Alaska Department of Health and Social Services, Division of Senior and Disabilities Services (DSDS or Division) (Ex. D p. 1). On November 27, 2009 the Division mailed a notice to the Claimant advising her that her Plan of Care renewal had been approved in part and denied in part (Ex. D). On January 21, 2010 the Claimant requested a fair hearing to contest the Division's denial of 2,760 units of Supported Employment Services (Ex. C p. 1).

This Office has jurisdiction to resolve this dispute pursuant to 7 AAC 49.010.

A hearing began as scheduled on February 16, 2010 before Hearing Examiner Jay Durych. The Claimant was represented by her Care Coordinator, [REDACTED] of Mat-Su Services for Children and Adults, Inc. (MSSCA), who appeared by telephone. [REDACTED] and [REDACTED] of MSSCA also participated by telephone on the Claimant's behalf.

[REDACTED], a Medical Assistance Administrator III with the Division of Health Care Services, attended the hearing in person to represent and testify on behalf of DSDS. [REDACTED], a Health Program Manager I with DSDS, also attended the hearing in person to testify on behalf of DSDS. [REDACTED], a Health Program Manager II with DSDS, participated in the hearing by telephone to testify on behalf of DSDS.

It became apparent that the Claimant's parents and legal representatives, [REDACTED] and [REDACTED], would not be able to participate in the hearing by telephone. Accordingly, the hearing was postponed to allow the Claimant and her parents to participate.

The hearing reconvened on March 16, 2010. The same persons participated (and in the same capacities) as at the prior hearing, except that the Claimant and her parents also participated in the hearing by telephone. The Claimant's father, [REDACTED], testified on behalf of his daughter.

The witnesses' testimonies were received and all exhibits submitted were admitted into evidence. At the end of the hearing the record was closed except for submission of certain post-hearing filings. The Claimant's post-hearing brief and/or any additional documentary evidence were to be filed by March 26, 2010. The Division's post-hearing brief and/or any additional documentary evidence were to be filed by April 9, 2010. No post-hearing filings (either briefs or documentary evidence) were received from either the Claimant or the Division.

ISSUE

Was the Division correct when, on November 27, 2009, it denied that portion of the Claimant's proposed renewed Plan of Care involving 2,760 units of Supported Employment Services, on the basis that the units denied represent time spent traveling to and from the Claimant's place of employment, rather than time during which the Claimant is actually working at her work site?

FINDINGS OF FACT

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

1. The Claimant has, at all times relevant hereto, been a recipient of the Medicaid Home and Community-Based Waiver Services Program ("Waiver Services") (Ex. D p. 1; undisputed hearing testimony).
2. Prior to October 5, 2009 the Claimant received Supported Employment Services pursuant to the Waiver Services Program (Ex. D p. 1; undisputed hearing testimony).
3. On October 5, 2009 the Claimant submitted a proposed Plan of Care renewal to the Division (Ex. D p. 1). That Plan of Care requested approval of the following Waiver Services in the following amounts (Ex. D p. 1; undisputed hearing testimony):
 - a. Supported Living Services (7 AAC 43.1044) – 8,736 units (6 hours per day, 7 days per week, for one year (52 weeks)).
 - b. Day Habilitation Services (7 AAC 43.1045) – 2,496 units (4 hours per day, 3 days per week, for one year (52 weeks)).
 - c. Supported Employment Services (7 AAC 43.1047) (at job site) – 3,680 units (4 hours per day, 5 days per week, for 46 weeks).
 - d. Supported Employment Services (7 AAC 43.1047) (transportation to and from job site) – 2,760 units (3 hours per day, 5 days per week, for 46 weeks).

4. On November 27, 2009 the Division mailed a notice to the Claimant advising her that her proposed Plan of Care renewal had been approved in part and denied in part (Ex. D). The Division approved the services referenced in Paragraph 3, subparagraphs (a), (b), and (c), above. *Id.* However, the Division denied the services referenced in Paragraph 3, subparagraph (d), above. *Id.* The Division's notice stated in relevant part as follows (Ex. D):

[DSDS] recognizes that [the Claimant] requires "supports and assistance in maintaining her position (job)" . . . and approved Supported Employment Services to cover the period she is working. The three hours of daily transportation time, however, is not Supported Employment.

5. On January 21, 2010 the Claimant requested a fair hearing to contest the Division's denial of those 2,760 units of Supported Employment Services representing travel time to and from the Claimant's work site or place of employment (Ex. C p. 1).

6. The Claimant works four (4) hours per day, five (5) days per week, at her work site or place of employment ([REDACTED] testimony).

7. During the time that the Claimant is being driven to and from her work site or place of employment, the Claimant discusses, and thus learns, a lot about her employment (work policies, safety procedures, etc.) ([REDACTED] testimony).

8. DSDS has never previously paid for transportation for the Claimant to and from her job site or place of employment under the Supported Employment Services Program ([REDACTED] testimony).

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

This case involves the Claimant's request for additional Medicaid Supported Employment Services benefits. The party seeking a change in the status quo or existing state of affairs normally bears the burden of proof.¹ Accordingly, the Claimant bears the burden of proof 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 facts sought to be proved are more probable than not or more likely than not.³

¹ *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 1064 (West Publishing, 5th Edition, 1979); *see also Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495-496 (Alaska 2003) ("Where one has the burden of proving asserted facts by a preponderance of the evidence, he must induce a belief in the minds of the triers of fact that the asserted facts are probably true").

II. The Medicaid Program – In General.

Medicaid was established by Title XIX of the Social Security Act in 1965 to provide medical assistance to certain low-income needy individuals and families. 42 USC § 1396 et. seq. Medicaid is a cooperative federal-state program that is jointly financed with federal and state funds. *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 501, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). Medicaid, in the words of Judge Friendly, is “a statute of unparalleled complexity.” *DeJesus v. Perales*, 770 F.2d 316, 321 (2nd Cir. 1985).

On the federal level, the Secretary of the U.S. Department of Health and Human Services (“HHS”) administers the program through the Health Care Financing Administration (“HCFA”). In Alaska, the Department of Health and Social Services administers the Medicaid program in accordance with applicable federal and state statutes and regulations.

Because Medicaid is a federal program, many of its requirements are contained in the Code of Federal Regulations (CFRs) at Title 42, Part 435 and Title 45, Part 233. The Medicaid program’s general eligibility requirements are set forth at 42 CFR Sections 435.2 – 435.1102.

The State of Alaska’s statutes implementing the federal Medicaid program are set forth at A.S. 47.07.010 – A.S.47.07.900. The State of Alaska’s regulations implementing the Medicaid program are set forth in the Alaska Administrative Code at Title 7, Chapters 43 and 100.

III. Medicaid Regulations Governing Supported Employment Services.

7 AAC 43.1047 (effective May 15, 2004 – January 31, 2010),⁴ titled “Supported Employment Services,” provides in relevant part as follows:

* * * * *

(b) The department will consider services to be supported employment services if (1) they are provided *at a work site* in which individuals without disabilities are employed; (2) they include only the adaptations, supervision, and training required by individuals receiving home and community-based waiver services as a result of their disabilities; and (3) the recipient is unlikely to obtain competitive employment at or above the minimum wage and, because of the recipient's disability, needs intensive ongoing support, including supervision and training, to perform in a work setting. [Emphasis added].

⁴ 7 AAC 43.1047(b) is applicable here because it was the regulation in effect at the time the Division issued its partial denial of services on November 27, 2009. However, 7 AAC 130.270(b), which replaced 7 AAC 43.1047(b) effective February 1, 2010, is essentially identical, and provides in relevant part as follows:

(b) The department will consider services to be supported-employment services if (1) they are provided *at a work site* in which individuals without disabilities are employed; (2) they include only the adaptations, supervision, and training required by individuals receiving home and community-based waiver services as a result of their disabilities; and (3) the recipient is unlikely to obtain competitive employment at or above the minimum wage and, because of the recipient's disability, needs intensive ongoing support, including supervision and training, to perform in a work setting. [Emphasis added].

* * * * *

IV. Medicaid Regulations Governing Transportation Services.

7 AAC 43.1052 (effective May 15, 2004 – January 31, 2010),⁵ titled “Transportation Services,” provides in relevant part as follows:

(a) The department will reimburse for transportation services that (1) are approved under 7 AAC 43.1030 as part of the recipient's plan of care; and (2) receive prior authorization.

(b) The department will consider services to be transportation services if they enable a recipient, and any necessary escort that receives prior authorization under (a)(2) of this section, to gain access to home and community-based waiver services or other community services and resources.

* * * * *

V. Relevant Rules of Statutory / Regulatory Interpretation.

When a regulation is legislative in character, rules of interpretation applicable to statutes should be used in determining its meaning. 1A C. Sands, *Sutherland Statutory Construction*, § 31.06, at 362 (4th Ed. 1972); *State of Alaska Department of Highways v. Green*, 586 P.2d 595, 603 at n.24 (Alaska 1978); 1A N. Singer, *Sutherland Statutory Construction and Statutory Interpretation*, § 31:6 at 723-24 (6th Ed. 2002).

The Alaska Supreme Court has rejected a strict application of the so-called “plain meaning” rule of statutory and regulatory interpretation. *North Slope Borough v. Sohio Petroleum Corporation*, 585 P.2d 534 (Alaska 1978). Even where the language of a statute or regulation appears clear on its face, it is still appropriate to consider the legislative history of the provision or other established rules of statutory / regulatory interpretation. *Id.*

No portion of a statute or regulation shall be construed as inoperative or superfluous, void, or insignificant if an interpretation can be found which will give effect to and preserve all of the words of the regulation. *See City of St. Mary’s v. St. Mary’s Native Corp.*, 9 P.3d 1002, 1008 (Alaska 2000), *Alascom Inc., v. North Slope Borough Board of Equalization*, 659 P.2d 1175, 1178 n.5 (Alaska 1983), 2A C. Sands,

⁵ 7 AAC 43.1052 was the regulation in effect at the time the Division issued its partial denial of services on November 27, 2009. However, 7 AAC 130.290, which replaced 7 AAC 43.1052 effective February 1, 2010, is essentially identical, and provides in relevant part as follows:

(a) The department will pay for transportation services that (1) are approved under 7 AAC 130.230 as part of the recipient's plan of care; and (2) receive prior authorization.

(b) The department will consider services to be transportation services if they enable a recipient, and any necessary escort that receives prior authorization under (a)(2) of this section, to gain access to home and community-based waiver services or other community services and resources

This regulation may be of future assistance to the Claimant.

Statutes and Statutory Construction, § 46.06 (4th Ed. 1973), and 2A N. Singer, *Sutherland Statutory Construction and Statutory Interpretation*, § 46:6 at 244-47(6th Ed. 2002).

ANALYSIS

During the hearing, the parties stipulated that there are no disputed factual issues in this case, and that the real issue is the purely legal question of the proper interpretation of the Supported Employment Services regulation, 7 AAC 43.1047.

At the hearing of March 16, 2010, [REDACTED] of Mat-Su Services for Children and Adults, Inc. (MSSCA) asserted that the Claimant needs transportation services from her home in Palmer to her job site or place of employment in Anchorage. She further argued that the Supported Employment Services regulation does not expressly state that transportation services *are not* within the scope of the services provided pursuant to that regulation.

At the hearing of March 16, 2010, the Division's Hearing Representative asserted that the Claimant is clearly entitled to Supported Employment Services. He argued, however, that compensation for time used to travel to and from a work site or place of employment is not a service covered by the Supported Employment Services Program. [REDACTED], a Health Program Manager II with DSDS, similarly asserted that transportation to and from the worksite is not provided within the scope of the Supported Employment Services regulation. She stated that transportation to and from the worksite is within the scope of the Transportation Services regulation,⁶ but that, in this case, the Claimant requested services through the Supported Employment Services Program rather than through the Transportation Services Program.

In summary:

The *Claimant* basically asserts that transportation to and from the work site or place of employment should be a covered service because it is an integral part of the Claimant's employment; she cannot be employed if she cannot get to her work site.

The *Division* asserts that transportation to and from the work site or place of employment is not a covered service under 7 AAC 43.1047 because, pursuant to subsection (b)(1) of that regulation, a service does not qualify as a Supported Employment Service unless it is provided at the work site.

Accordingly, the issue presented is: which interpretation is correct?

Looking solely at the plain language of the regulation, (based on what is referred to by the courts as the "plain meaning" legal rule of regulatory interpretation), the Division's interpretation would appear to be correct. Pursuant to 7 AAC 43.1047(b)(1) (effective May 15, 2004 – January 31, 2010), services are only considered to be Supported Employment Services if "they are provided *at a work site* in which individuals without disabilities are employed". Transportation *to and from the work site* is clearly

⁶ The regulation which *expressly* provides transportation services to Waiver Services clients, (formerly 7 AAC 43.1052, now 7 AAC 130.290), may be of future assistance to the Claimant.

not a service provided *at* the work site. Accordingly, the Division’s position is supported by the plain language of 7 AAC 43.1047(b)(1).⁷

The Alaska Supreme Court has, however, rejected a strict application of the so-called “plain meaning” rule of statutory and regulatory interpretation. *North Slope Borough v. Sohio Petroleum Corporation*, 585 P.2d 534 (Alaska 1978). Even where the language of a statute or regulation appears clear on its face, it is still appropriate to consider the legislative history of the provision or other established rules of statutory / regulatory interpretation. *Id.*

The legislative history of 7 AAC 43.1047 is not available. However, it is important to consider that the Supported Employment Services regulation (7 AAC 43.1047) is *part of a larger regulatory scheme*. It is only one of the approximately 27 separate regulations which collectively make up the Home and Community-Based Waiver Services Program. See 7 AAC 43.1000 – 7 AAC 43.1110.⁸

The Waiver Services program comprises a number of sub-programs, including care coordination services, chore services, adult day services, residential supported living services, day habilitation services, residential habilitation services, supported employment services, intensive active treatment services, respite care services, specialized private duty nursing services, transportation services, meal services, and environmental modification services. Each of these 13 sub-programs has *its own criteria*, which are set forth in 13 separate regulations.

The courts have adopted rules to aid in the interpretation of statutory and regulatory⁹ schemes such as the Waiver Services Program. One well-settled rule of statutory interpretation, (which has been adopted by the Alaska Supreme Court), is that no portion of a statute or regulation shall be construed as inoperative or superfluous, void, or insignificant if an interpretation can be found which will give effect to and preserve all of the words of the regulation.¹⁰ See *City of St. Mary’s v. St. Mary’s Native Corp.*, 9 P.3d 1002, 1008 (Alaska 2000), *Alascom Inc., v. North Slope Borough Board of Equalization*, 659 P.2d 1175, 1178 n.5 (Alaska 1983), 2A C. Sands, *Statutes and Statutory Construction*, § 46.06 (4th Ed. 1973), and 2A

⁷ As discussed below, there *is* a regulation which *expressly* provides transportation services to Waiver Services clients. That regulation, (formerly 7 AAC 43.1052, now 7 AAC 130.290), may be of future assistance to the Claimant.

⁸ Most of Title 7, Chapter 43 of the Alaska Administrative Code was repealed effective February 1, 2010 (per Register 193) and re-enacted as 7 AAC 105.100 – 7 AAC 160.190. Because the Division’s partial denial of the Claimant’s proposed Plan of Care amendment occurred on November 27, 2009, the “old” (pre-February 1, 2010) version of the regulations applies.

⁹ When a regulation is legislative in character, rules of interpretation applicable to statutes should be used in determining its meaning. 1A N. Singer, *Sutherland Statutory Construction and Statutory Interpretation*, § 31:6 at 723-24 (6th Ed. 2002). This principle has been adopted by the Alaska Supreme Court. In *State, Dept. of Highways v. Green*, 586 P.2d 595, 603 at n.24 (Alaska 1978) the Court stated: “[a]dministrative regulations which are legislative in character are interpreted using the same principles applicable to statutes.” The court then cited 1A C. Sands, *Sutherland Statutory Construction*, § 31.06, at 362 (4th ed. 1972).

¹⁰ “It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.” 2A N. Singer, *Sutherland Statutory Construction and Statutory Interpretation*, § 46:6 at 230-31 (6th Ed. 2002).

N. Singer, *Sutherland Statutory Construction and Statutory Interpretation*, § 46:6 at 244-47(6th Ed. 2002).¹¹ How does this rule apply to this case?

The Waiver Services regulations contain one regulation (7 AAC 43.1052) which explicitly provides transportation services (see Principles of Law, above).¹² Likewise, the Waiver Services regulations contain another regulation (7 AAC 43.1047) which explicitly provides supported employment services. Were the supported employment services regulation (7 AAC 43.1047) interpreted so as to also provide transportation services, there would be no need for the transportation services regulation – it would be rendered completely superfluous. Accordingly, based on the above-stated rule of statutory / regulatory interpretation, 7 AAC 43.1047 must be interpreted as excluding transportation services from the scope of supported employment services.

In summary, both the plain language of the supported employment services regulation (7 AAC 43.1047), and established rules of statutory / regulatory interpretation, compel the conclusion that transportation services are not available under the Supported Employment Services Program. As ██████████ testified, transportation to and from the worksite *is* a service provided by the Choice Waiver Program *under the Transportation Services regulation* (formerly 7 AAC 43.1052, now 7 AAC 130.290). However, in this case the Claimant requested services through the Supported Employment Services Program rather than through the Transportation Services Program.

Accordingly, the Division was correct when, on November 27, 2009, it denied that portion of the Claimant’s proposed renewed Plan of Care involving 2,760 units of Supported Employment Services, on the basis that the units denied represent time spent traveling to and from the Claimant’s place of employment, rather than time during which the Claimant is actually working at the work site.

CONCLUSIONS OF LAW

1. Application of the “plain meaning” rule and other rules of statutory and regulatory interpretation mandate that 7 AAC 43.1047 be interpreted such that a service does not qualify as a Supported Employment Service unless it is provided *at the work site*.
2. Transportation to and from the job site or place of employment is not a covered service under 7 AAC 43.1047 because, pursuant to subsection (b)(1) of that regulation, a service does not qualify as a Supported Employment Service unless it is provided *at the work site*.
3. The Division was therefore correct when, on November 27, 2009, it denied that portion of the Claimant’s proposed renewed Plan of Care involving 2,760 units of Supported Employment Services, on the basis that these units were for time spent traveling to and from the Claimant’s place of employment, rather than time during which the Claimant is actually working *at the work site*.

¹¹ A regulation, like a statute, should be interpreted so that “effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant and so that one section will not destroy another...” (See 2A N. Singer, *Sutherland Statutory Construction and Statutory Interpretation*, § 46:6 at 244-47 (6th Ed. 2002).

¹² The regulation which *expressly* provides transportation services to Waiver Services clients, (formerly 7 AAC 43.1052, now 7 AAC 130.290), may be of future assistance to the Claimant.

DECISION

The Division was correct when, on November 27, 2009, it denied that portion of the Claimant's proposed renewed Plan of Care involving 2,760 units of Supported Employment Services, on the basis that the units denied are for time spent traveling to and from the Claimant's place of employment, rather than time during which the Claimant is actually working *at the work site*.

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:

Acting Director, Division of Senior and Disabilities Services
State of Alaska Department of Health and Social Services
550 West 8th Avenue
Anchorage, Alaska 99501

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 13th day of May, 2010.

/signed/

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 13th day of May 2010
true and correct copies of the foregoing document
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 (via Certified Mail, Return Receipt Requested)
██████████, DSDS Hearing Representative

██████████, Acting Director, DSDS
██████████, Policy & Program Development
██████████, Staff Development & Training
██████████, Eligibility Technician I

J. Albert Levitre, Jr.
Law Office Assistant I