

Office of Hearings and Appeals  
3601 C Street, Suite 1322  
P. O. Box 240249  
Anchorage, AK 99524-0249  
Ph: (907)-334-2239  
Fax: (907)-334-2285

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

In the Matter of )  
 )  
 [REDACTED], ) OHA Case No. 10-FH-2214  
 )  
 Claimant. ) Div. Case No. [REDACTED]  
 )  
 \_\_\_\_\_ )

**FAIR HEARING DECISION**

**STATEMENT OF THE CASE**

[REDACTED] (Claimant) is a Medicaid recipient. On May 28, 2010, the Division of Senior and Disabilities Services denied a portion of her proposed renewed Plan of Care for 2010 – 2011 (April 1, 2010 through March 21, 2011), specifically her requested Intensive Active Treatment nursing services. (Ex. D) The Claimant requested a Fair Hearing on June 16, 2010.

This office has jurisdiction pursuant to 7 AAC 49.010.

The hearing was held on July 19 and August 5, 2010. The Claimant did not appear. [REDACTED], the Claimant's guardian, appeared telephonically and represented the Claimant. [REDACTED] and [REDACTED] appeared telephonically and testified on the Claimant's behalf. Both Ms. [REDACTED] and Ms. [REDACTED] are employed by [REDACTED], the Claimant's service provider.

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

**ISSUE**

On May 28, 2010, the Division denied the Claimant a portion of the Claimant's 2010 – 2011 Plan of Care that provided for Intensive Active Treatment services (nursing oversight, development of a training plan, and to provide staff training). The Division

argued these Intensive Active Treatment Services duplicated services already funded as part of the Claimant's Health, Safety, or Welfare rate.<sup>1</sup>

The Claimant argued the Health, Safety, or Welfare rate funding was specific to the position specifically provided for by that funding and that the Intensive Active Treatment services did not duplicate that funding.

The resulting issue is:

Was the Division correct to deny that portion of the Claimant's 2010 – 2011 Plan of Care which provided for Intensive Active Treatment services (nursing oversight, development of a training plan, and to provide staff training) because these Intensive Active Treatment Services duplicated services already funded as part of the Claimant's Health, Safety, or Welfare (HSW) rate?

### **SUMMARY OF DECISION**

The Division had the burden of proof by a preponderance of the evidence in this case. It did not meet it. It was therefore not correct when it denied, on May 28, 2010, that portion of the Claimant's 2010 – 2011 Plan of Care which provided for Intensive Active Treatment services (nursing oversight, development of a training plan, and to provide staff training). The funding provided for the Claimant's Health, Safety, or Welfare rate was specific to the Health, Safety, or Welfare authorized caregiver hours. Consequently, the Intensive Active Treatment services did not duplicate the Health, Safety, or Welfare services.

### **FINDINGS OF FACT**

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

1. The Claimant is a Medicaid recipient with extensive care needs due to a variety of complex medical and psychological disorders. (Ex. E, pp. 4 – 6) The Claimant receives a variety of services. She has residential care providers, day habilitation care providers, and respite care providers. (██████████ and ██████████ testimony)
2. On June 11, 2009, the Division approved a 2009 – 2010 (April 1, 2009 through March 31, 2010) Plan of Care for the Claimant, which authorized Intensive Active Treatment services for nursing oversight, plan development and training for care providers. (Ex. H, pp. 13, 24) The services were to occur 4 times per year and included an annual evaluation. *Id.*

---

<sup>1</sup> 7 AAC 145.520(o) allows an increase to the daily Medicaid payment rate made to habilitation service providers for health, safety, or welfare reasons. For ease of reference, this decision shall refer to this increase as the Health, Safety or Welfare (HSW) rate.

3. On February 18, 2009, the Claimant's residential habilitation services provider (██████████) requested the Claimant receive additional residential habilitation services for HSW reasons.<sup>2</sup> (Ex. E, p. 43) The purpose of that request was to provide additional residential caregiver hours for "relief care for [the Claimant's] primary caregiver." *Id.* The Division approved that request on April 28, 2009, albeit for 25 hours per week, less than the 80 hours per week that ██████████ requested. (Ex. E, pp. 43 – 44)

4. On July 15, 2009, ██████████ filed an appeal with the Commissioner of the Alaska Department of Health and Social Services (Commissioner) challenging the amount the Division allowed ██████████ for the hourly compensation rate for the 25 weekly hours of residential caregiver HSW approved services. (Ex. E, p. 41) ██████████ requested \$1.71 per hour, for those 25 weekly hours, to provide "Nursing/supervision/QA/Training/Orientation" to the residential care provider. ██████████ explained the specific purpose was to provide "nursing oversight and proactive/ongoing training by the nurse to the care providers." (Ex. E, p. 45) The Division's (in that case the Office of Rate Review) only objection to that cost component was that it was an administrative cost, which is not allowed as part of a HSW rate. (Ex. E, p. 45)

5. On April 1, 2010 after proceeding through an administrative hearing, the Commissioner adopted this Office's proposed decision that provided an hourly HSW rate, which included \$1.71 per hour for "Nursing/supervision/QA/Training/Orientation" costs. (*In the Matter of: Job Ready, Inc. dba Ready Care.*, Case No. 2009-OHA-09; Ex. E, pp. 63 – 65) The yearly amount attributable to the HSW "Nursing/supervision/QA/Training/Orientation" costs is \$2,223.00.<sup>3</sup>

6. On April 23, 2010, the Division received the proposed 2010 – 2011 (April 1, 2010 through March 21, 2011) Plan of Care for the Claimant. (Ex. D, p. 1; Ex. 3, pp. 3 – 35) That Plan of Care contained a request for Intensive Active Treatment services identical to the previously approved 2009 – 2010 Plan of Care, for nursing oversight, plan development and training for her care providers. (Ex. E, p. 19; Ex. H, p. 13) The service frequency was again identical to the 2009 – 2010 Plan of Care, 4 times per year and an annual evaluation. *Id.* The annual cost for the Intensive Active Treatment services was \$4,037.50. (Ex. F, p. 1)

7. When Division staff (Ms. ██████████) reviewed the Commissioner's *Job Ready* decision, she thought that the nursing training provided for in the HSW rate replaced the nursing training funded in the Plan of Care as Intensive Active Treatment services. (██████████ testimony) In the instant case, the Division did not provide specific factual

---

<sup>2</sup> On February 18, 2009, the applicable regulation authorizing an increase to habilitation service pay rates for Health, Safety, or Welfare reasons was 7 AAC 43.1058(r). Its current version, effective February 1, 2010, is located at 7 AAC 145.520(o). The February 18, 2009 residential habilitation regulation was 7 AAC 43.1046. Its current version, effective February 1, 2010, is located at 7 AAC 130.265.

<sup>3</sup> \$1.71 per hour multiplied by 25 hours per week multiplied by 52 weeks per year amounts to \$2,223.00 per year.

evidence of what exact training was supplied under either the HSW rate or the Intensive Active Treatment services.

8. On May 28, 2010, the Division denied the Claimant's request for Intensive Active Treatment services. (Ex. D) The written reason it provided for the denial was:

4 units of [Intensive Active Treatment] nursing services are denied as being a duplicate request of services included in the set augmented HSW rate of reimbursement for services under 7 AAC 130.265 Residential Habilitation

(Ex. D, p. 2)

9. [REDACTED], who is employed by [REDACTED], testified the nursing component of the HSW rate was focused training specific to the residential habilitation service provider. She said the Intensive Active Treatment services were more global services, including training for day habilitation providers and respite providers.

### **PRINCIPLES OF LAW**

A party who is seeking a change in the status quo has the burden of proof by a preponderance of the evidence. *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985); *Amerada Hess Pipeline v. Alaska Public Utilities Comm'n*, 711 P.2d 1170, n. 14 at 1179 (Alaska 1986). "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." *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495 (Alaska 2003).

The Alaska Medicaid regulation that authorizes payment for Intensive Active Treatment services requires them to be provided by "specially trained professionals . . . whose services are not covered under Medicaid or as habilitation services under 7 AAC 130.260 – 7 AAC 130.265."<sup>4</sup> 7 AAC 130.275(b)(2).

The Alaska Medicaid regulation that authorizes a HSW rate states:

a provider of residential support-living services under 7 AAC 130.255 or residential habilitation services under 7 AAC 130.265 may request an increase in cost per unit of service, as a change to a recipient's plan of care, . . . to protect the health, safety, or welfare of the recipient.

---

<sup>4</sup> 7 AAC 130.275 references 7 AAC 130.260 – 7 AAC 130.265 (day and residential habilitation services). Those are the current Medicaid regulations effective February 1, 2010. The previous version of the regulations, which were in effect at the time of the *Job Ready* case, were 7 AAC 43.1044 (now 7 AAC 130.255) and 7 AAC 43.1046 (now 7 AAC 130.265).

### ANALYSIS

The issue in this case is whether the Division was correct to deny that portion of the Claimant's 2010 – 2011 Plan of Care which provided for Intensive Active Treatment services (nursing oversight, development of a training plan, and to provide staff training) because these services duplicated services already funded as part of the Claimant's HSW rate.

It should first be noted that the 2010 – 2011 Plan of Care contains the same request for Intensive Active Treatment services that the Division had approved in the previous 2009 – 2010 Plan of Care. The Division is therefore the party seeking to change the status quo; it has the burden of proof by a preponderance of the evidence.

The applicable regulation, 7 AAC 130.275(b)(2), does not allow compensation for Intensive Active Treatment services when those services are "covered . . . as habilitation services under . . . 7 AAC 130.265," (residential habilitation services).<sup>6</sup>

There is no dispute in this case as to the fact that the Claimant currently receives an HSW rate, as part of her habilitation service payment. That HSW rate authorizes an additional 25 hours per week of paid caregiver time; the hourly rate for those 25 hours per week contains a \$1.71 an hour (or a \$2,223.00 yearly total) charge built into it for providing "nursing oversight and proactive/ongoing training by the nurse to the care providers." (Ex. E, p. 45).

The reason the Division denied the Claimant's Intensive Active Treatment services as duplicative was because it thought those services had been replaced by the HSW services, as provided in the Commissioner's *Job Ready* decision. The Division argued that, since the Claimant has this "nursing oversight and proactive/ongoing training by the nurse to the care providers" payment of \$1.71 per hour built into the Claimant's HSW rate, funding the Claimant's Plan of Care for the requested Intensive Active Treatment (nursing oversight, plan development and training for her care providers) would duplicate payment. As a result, it would violate 7 AAC 130.275(b)(2), which does not allow compensation for Intensive Active Treatment services when those services are already paid for as habilitation services.

The Claimant's argument was that the nursing training funded by the HSW rate was specific to the HSW funded 25 hour per week position, and that because the Intensive Active Treatment nursing training was more comprehensive (i.e., it provided training to day habilitation and respite care providers), there was no duplication of services.

---

<sup>5</sup> The *Job Ready* case was decided under the previous regulation, 7 AAC 43.1058(r). The current version of that regulation, 7 AAC 145.520(o), is identical to its predecessor (with some citation changes).

<sup>6</sup> 7 AAC 130.265 is the current version (effective February 1, 2010) of 7 AAC 43.1046, which authorizes payment for habilitation services. 7 AAC 43.1046 was the applicable regulation in the *Job Ready* decision.

The undisputed facts of this case show the following:

- a. The Claimant's approved 2009 – 2010 Plan of Care provided for Intensive Active Treatment consisting of nursing oversight, plan development and training for the Claimant's care providers. This was approved on June 11, 2009. *See* Finding of Fact 2 above.
- b. On February 18, 2009, the Claimant's residential habilitation services provider ( [REDACTED] ) requested that the Claimant receive additional residential habilitation services, HSW services, which granted the Claimant additional care provider hours. The Claimant was allowed an HSW rate that funded 25 hours per week of residential care. The hourly rate compensating [REDACTED] for those additional care provider hours included a charge of \$1.71 per hour for "nursing oversight and proactive/ongoing training by the nurse to the care providers." The annual cost specific to that "nursing oversight and proactive/ongoing training by the nurse to the care providers" charge totals \$2,223.00. *See* Findings of Fact 4 and 5 above.
- c. The Division, in its final action on June 25, 2009 on the HSW request, did not object that the above charge duplicated the Intensive Active Treatment (nursing oversight, plan development and training) costs allowed for in the 2009 – 2010 Plan of Care on June 11, 2009. *See* Finding of Fact 4 above.
- d. The Claimant's 2010 – 2011 Plan of Care provides for the same Intensive Active Treatment services (nursing oversight, plan development and training) previously approved as part of the 2009 – 2010 Plan of Care. Those Intensive Active Treatment costs total \$4,037.50. *See* Findings of Fact 2 and 6 above.
- e. The Claimant has not only residential care providers, but also has day habilitation and respite care providers. *See* Finding of Fact 1 above.

As explained below, the Claimant's argument prevails. The Division did not meet its burden of proof by a preponderance of the evidence, and establish that the Claimant's Intensive Active Treatment services were a duplicate of the nursing training and oversight services provided for as part of the Claimant's HSW Rate, for the following reasons.

First, the Division is relying upon the *Job Ready* decision in its denial of the Claimant's Intensive Active Treatment services. This is a misinterpretation of the *Job Ready* decision. The history of the *Job Ready* (HSW rate) case shows that the \$1.71 hourly nursing oversight and training funding was specific to the HSW authorized caregiver hire, as demonstrated by the fact that it was paid as a component of hourly rate paid for the limited 25 hours per week authorized for the HSW funded caregiver. This was not

intended to pay for general nursing training and oversight to all of the Claimant's caregivers. The fact is that the Claimant has a number of caregivers, day habilitation and respite, in addition to the 25 hours per week authorized for the HSW funded caregiver.

Because the \$1.71 hourly nursing oversight and training charge was limited to and specifically included in the hourly charge for the HSW funded caregiver, it is clear the HSW nursing oversight and training funding was solely for the HSW funded caregiver and **was not intended** to supplant or replace the Intensive Active Treatment funded nursing training, which includes training for the Claimant's other caregivers and the development of a nursing plan.

Ms. [REDACTED]'s testimony that the HSW funded nursing training and oversight was specific to the HSW funded caregiver, whereas the Intensive Active Treatment funded nursing training was more global and included training for the Claimant's other (i.e. non-HSW funded) caregivers,<sup>7</sup> is credible, consistent with the history of this case, and supports this conclusion. In contrast, the Division, which had the burden of proof, did not present any factual evidence on the actual nursing training provided by either the HSW funded services or the Intensive Active Treatment services this point, but rather presented opinion testimony that they were duplicate services. *See* Finding of Fact 7 above.

Second, a HSW rate is provided to “**increase** [the] cost per unit of service, as a change to a recipient's plan of care,” not replace it. *See* 7 AAC 145.520(o) (emphasis added). In other words, a HSW rate is a supplement to costs allowed in a Plan of Care, not a replacement for those costs.

Third, the annual payment for the nursing training and oversight for the HSW caregiver totals \$2,223.00, whereas the annual payment for the nursing training, plan development, and oversight under the Intensive Active Treatment category is \$4,037.50. This again demonstrates that the scope of the nursing training and oversight for the HSW caregiver is different from and substantially less than the nursing training and oversight provided under the Intensive Active Treatment category.

Fourth, the Division did not previously object, in the *Job Ready* case, to the inclusion of the nursing training and oversight charge in the HSW rate on the grounds that it duplicated nursing training provided for under Intensive Active Treatment services. Presumably, if the Division thought that there was already sufficient nursing training and oversight provided under the Intensive Active Treatment specified in the Claimant's 2009 – 2010 Plan of Care, it would have objected to the HSW rate on those grounds as part of the previous *Job Ready* case. It did not.

In summary, the nursing oversight and training funded for under the HSW rate is a limited charge specific to the HSW funded 25 hour per week residential caregiver, as demonstrated by the fact that it is explicitly included as part of the hourly cost for that HSW funded caregiver. It does not replace or supplant the Intensive Active Treatment

---

<sup>7</sup> *See* Finding of Fact 9 above.

services portion of the Claimant's 2010 – 2011 Plan of Care, which is for general nursing training and oversight for the Claimant's other caregivers.

Because the Intensive Active Treatment services are not replaced or supplanted by habilitation services (the HSW services), 7 AAC 130.275(b)(2) is not applicable in this case. The Division was therefore not correct to deny the Intensive Active Treatment services requested in the Claimant's 2010 – 2011 Plan of Care.

### **CONCLUSIONS OF LAW**

1. The Division had the burden of proof in this case. It was required to prove, by a preponderance of the evidence, the Intensive Active Treatment Services duplicated services already provided as habilitation services (the HSW funded services). It did not do so.

2. In the *Job Ready* case, the HSW rate funded 25 hours per week of a residential caregiver for the Claimant. This was a supplement to the Claimant's Plan of Care, not a replacement or substitution for the Claimant's Plan of Care. That HSW hourly rate included an hourly charge for nursing training and oversight to that HSW funded caregiver. That hourly charge was specific to the HSW funded caregiver and did not pay for nursing training, plan development, and oversight for the Claimant's other caregivers.

3. The Intensive Active Treatment services requested in the Claimant's 2010 - 2011 Plan of Care are to provide nursing oversight, plan development, and training to the Claimant's other non – HSW funded caregivers.

4. Consequently, the nursing training and oversight services provided to the HSW funded caregiver does not replace, supplant, or duplicate the nursing oversight, plan development, and training provided for as Intensive Active Treatment services in the Claimant's 2010 – 2011 Plan of Care.

5. 7 AAC 130.275(b)(2), which prohibits the Division from paying for Intensive Active Treatment services that are already provided as habilitation services (the HSW funded services), is therefore not applicable in this case.

6. The Division was therefore not correct when it denied, on May 28, 2010, the portion of the Claimant's 2010 – 2011 Plan of Care which provided for Intensive Active Treatment services (nursing oversight, development of a training plan, and to provide staff training).

### **DECISION**

The Division was not correct when it denied, on May 28, 2010, the portion of the Claimant's 2010 – 2011 Plan of Care which provided for Intensive Active Treatment services (nursing oversight, development of a training plan, and to provide staff training).

**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:

Kimberli Poppe-Smart  
Division of Senior and Disabilities 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 1<sup>st</sup> day of October 2010.

\_\_\_\_\_  
*/Signed/*  
Larry Pederson  
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 1st day of October 2010,  
true and correct copies of the foregoing were sent to:

Claimant's Guardian, by USPS First Class Certified Mail, Return Receipt Requested.  
[REDACTED], [REDACTED], by USPS First Class Mail

And to the following by email:

[REDACTED], Hearing Representative  
[REDACTED], Director  
[REDACTED], Policy & Program Development  
[REDACTED], Policy & Program Development  
[REDACTED], Staff Development & Training

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