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

In the Matter of	)	
	)	
██████████,	)	OHA Case No. 11-FH-2231
	)	
Claimant.	)	Agency Case No. ██████████
_____	)	

**FAIR HEARING DECISION**

**STATEMENT OF THE CASE**

██████████ (Claimant) receives Medicaid coverage under the Adults with Physical Disabilities Home and Community-Based Waiver category. (Ex. D) The Claimant submitted her Medicaid Waiver Plan of Care renewal on June 3, 2011. (Ex. F, p. 1) On June 8, 2011, the Division of Senior and Disabilities Services (“Division”) notified the Claimant in writing that her request for Chore Services, contained in her Plan of Care, was denied. (Ex. D) The Claimant requested a Fair Hearing on June 9, 2011. (Ex. C)

This Office has jurisdiction pursuant to 7 AAC 49.010.

The Claimant’s hearing was held on August 11, 2011. The Claimant did not participate. ██████████, her husband/ Power of Attorney, participated telephonically; he represented the Claimant and testified on her behalf. ██████████, a Medical Assistance Administrator III employed by the Department of Health and Social Services, participated in person; he represented the Division and testified on its behalf. ██████████, a Health Program Manager I employed by the Division, participated telephonically and testified on behalf of the Division.

The record was left open after the hearing for the Division to provide its legal position regarding the application of the settlement in *Quirarte v. Hogan, et. al.*, Superior Court Case No. 3AN-08-8122 Civil, to the present case. The Attorney General’s Office filed its brief regarding *Quirarte* on August 19, 2011. The Claimant opted to not file a response.

## ISSUE

Was the Division of Senior and Disabilities Services correct, when it notified the Claimant on June 8, 2011, that her request for Chore Services, contained in her proposed 2011 – 2012 Medicaid Waiver Plan of Care, was denied?

## FINDINGS OF FACT

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

1. The Claimant receives Medicaid coverage under the Adults with Physical Disabilities Home and Community-Based Waiver category (“Medicaid Waiver”). (Ex. D) The Division reassessed her to determine her continuing eligibility for Medicaid Waiver services on May 31, 2011 and determined that she continued to be eligible for Medicaid Waiver services. (Ex. E, p. 30)
2. The Claimant is married and resides with her husband and two young (both 8 years old) children. (Ex. F, p. 5; ██████ testimony) She is severely physically disabled due to a February 2007 stroke. (Ex. F, pp. 4 – 5; ██████ testimony) Her husband helps care for her, including doing laundry and other household duties, and feeding her. (██████ testimony)
3. Ms. ██████, who is a Health Program Manager I employed by the Division, approved the Claimant’s 2010 – 2011 Medicaid Waiver Plan of Care. (██████ testimony) The Claimant’s approved 2010 – 2011 Medicaid Waiver Plan of Care contained 2080 units (ten hours per week) of chore services for that year. (██████ testimony) Ms. ██████ testified she made a mistake when she approved the chore services. She stated that she should not have allowed the chore services for 2010 – 2011 because the Claimant’s husband lived in the home.
4. The Claimant submitted her proposed Waiver Plan of Care renewal for her 2011 – 2012 Medicaid Waiver Plan year on June 3, 2011. (Ex. F, p. 1) Her proposed 2011 – 2012 Medicaid Waiver Plan of Care contained 2080 units of chore services, the same amount that had been approved of as part of her 2010 – 2011 Medicaid Waiver Plan of Care. (Ex. F, pp. 2, 6)
5. On June 8, 2011, the Division sent the Claimant notice that it had approved the Claimant’s proposed 2011 – 2012 Medicaid Waiver Plan of Care with the exception of the requested 2080 units of chore services. (Ex. D) The Division’s June 8, 2011 notice reads:

The Division denies the following items under the authority of 7 AAC 130.245(c):

1. Chore: 2080 units

**7 AAC 130.245(c):** The department will not authorize chores services if (1) the recipient or anyone else in the household is capable of performing or financially providing for them: Pn Page 2 and 4 of the POC, ██████ ██████ is indicated as the recipient’s spouse, considered as a member of the household. Furthermore, on

page 4 of the POC, it stated “ [REDACTED] works outside the home....” Therefore, 2080 units of Chore is denied.

(Ex. D, p. 1, emphasis in original)

6. The Claimant’s husband works outside the home and has several jobs. On Monday through Friday, he is gone from the home for work from 7:30 a.m. through 4:30 p.m. and from 6:30 p.m. through 11:30 p.m. (Ex. G) On Saturday, he works 5 hours. ([REDACTED] testimony) On Sunday, he works 2.5 hours. *Id.*

### 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, Alcoholic 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 Medicaid program has a number of coverage categories. *See* 7 AAC 100.002. One of those coverage categories is the Home and Community-Based Waiver program (“Medicaid Waiver”). 7 AAC 100.002(d)(8); 7 AAC 100.502(d).

AS 47.07.045, the Alaska statute that authorizes Medicaid Waiver services reads, in pertinent part, as follows:

**Sec. 47.07.045. Home and community-based services.** (a) The department may provide home and community-based services under a waiver in accordance with 42 U.S.C. 1396 – 1396p (Title XIX Social Security Act), this chapter, and regulations adopted under this chapter, if the department has received approval from the federal government and the department has appropriations allocated for the purpose. To supplement the standards in (b) of this section, the department shall establish in regulation additional standards for eligibility and payment for the services.

(b) Before the department may terminate payment for services provided under (a) of this section,

(1) the recipient must have had an annual assessment to determine whether the recipient continues to meet the standards under (a) of this section;

\* \* \*

(3) the annual assessment must find that the recipient’s condition has materially improved since the previous assessment; for purposes of this paragraph, “materially improved” means that a recipient who has previously qualified for a waiver for

\* \* \*

(C) an older Alaskan or adult with a physical disability, no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for waiver services.

The Medicaid program pays for specified individual services to Waiver recipients. 7 AAC 130.230(c). The Division must approve each specific service as part of the Waiver recipient's plan of care. 7 AAC 130.230(f). A Waiver recipient's plan of care is subject to review on a yearly basis. 7 AAC 130.230(g).

Chore services<sup>1</sup> are among the specific individual services available to Waiver recipients. 7 AAC 130.245. However, the department "will not authorize chore services if (1) the recipient or anyone else in the household is capable of performing or financially providing for them." 7 AAC 130.245(c)(1).

In 2008, a class action lawsuit was filed that, in part, challenged the Medicaid regulations that denied chore services for Waiver recipients if they lived with someone else who was capable of performing the chores. *Quirarte v. Hogan, et. al.*, Alaska Superior Court Case No. 3AN-08-8122 Civil. The parties settled that case and as a result, the Department of Health and Social Services agreed that it would furnish chore services to Waiver recipients, unless the Waiver recipient lived with their spouse or fell into another exception to the chore service requirement. *See Ex. 1 to Division Response to Hearing Officer's Request for Supplemental Briefing Regarding Application of the Quiarte (sic) Settlement*, filed on August 19, 2011.

### ANALYSIS

The issue in this case is whether the Division was correct when it notified the Claimant on June 8, 2011, that her request for chore services, contained in her 2011 – 2012 Medicaid Waiver Plan of Care, was denied. The Claimant had received chore services as part of her 2010 – 2011 Medicaid Waiver Plan of Care. The Division therefore has the burden of proof in this case by a preponderance of the evidence, because it is changing the status quo by denying chore services, which it had previously approved.

The pertinent facts are:

1. The Claimant is severely disabled. *See* Finding of Fact 2 above.
2. She resides with her husband and their two young children. *See* Finding of Fact 2 above. Her husband helps care for her, including doing laundry and other household duties, and feeding her. *Id.*

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<sup>1</sup> Chores services include cleaning the Claimant's residence, moving furniture, snow shoveling, food preparation, and "other services that the department determines necessary to maintain a clean, sanitary and safe environment" for the recipient. 7 AAC 130.245(b).

3. The Claimant's husband works several jobs which keep him away from home a great deal of the time. *See* Finding of Fact 6 above.
4. The Division approved the Claimant's receipt of chore services in her 2010 – 2011 Medicaid Waiver plan of care. *See* Finding of Fact 3 above.
5. The Claimant was reassessed to determine her continuing eligibility for Medicaid Waiver services on May 31, 2011 and found to be eligible. *See* Finding of Fact 1 above.
6. The Division denied the Claimant's receipt of chore services in her 2011 – 2012 Medicaid Waiver plan of care. *See* Finding of Fact 5 above.

The Division did not deny the Claimant chore services because she did not either require them or because her condition had improved to the point she was capable of performing the chore services herself. Instead, the Division relied upon the regulation 7 AAC 130.145(c)(1), which does not allow chore services if “the recipient or anyone else in the household is capable of performing or financially providing for them,” and denied the chores services because the Claimant's husband was capable of performing them. *See* Finding of Fact 5 above.

The Claimant did not argue that her husband was not capable of performing the chore services. In fact, the Claimant's husband testified that he did laundry and other household tasks, i.e. he is capable of performing chore services. *See* Finding of Fact 2 above.

Resolution of these cases hinges on the application of Alaska regulation 7 AAC 130.245(c)(1) and Alaska Statute 47.07.045(b)(3)(C).

On its face, regulation 7 AAC 130.245(c)(1), as interpreted by the settlement in *Quirarte*, does not allow a Medicaid Waiver recipient to receive chore services if that individual has a spouse residing with her who is capable of performing chore services. The Claimant's husband lives with the Claimant and their two young children. He clearly has to take time to help care for all three. He is also absent from the home a great deal of the time because he works several jobs. These obligations (spousal care, child care and work) obviously provide him with little time to perform chore services.

However, having little time to perform the chores services is not the same as being incapable of performing the chores services. The Claimant is therefore prohibited, by 7 AAC 130.245(c)(1), from receiving chore services as part of her Medicaid Waiver Plan of Care because the Claimant's husband, with whom she lives, is capable of performing those chore services. As Ms. ██████████ testified, the chore services should not have been approved as part of her 2010 – 2011 Medicaid Waiver Plan of Care.

The next question that must be resolved is whether the Division may terminate a specific Medicaid Waiver service when it was previously approved by the Division. Alaska Statute 47.07.045(b)(3)(C) prohibits the Division from terminating previously approved Waiver “services” unless the Waiver recipient's annual assessment finds that he or she “no longer has a

functional limitation or cognitive impairment that would result in the need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for waiver services.”

There are two possible interpretations of AS 47.07.045(b)(3)(C). One interpretation would require that a specific Medicaid Waiver service, once approved, be provided continuously unless a Medicaid Waiver recipient’s condition improved to the point that she no longer qualified for the Medicaid Waiver services as a whole. Such an interpretation would require that a specific service be continued even when it was initially approved in error.

The other way to interpret the statute is to read the prohibition against termination for payment of “services” as referring to “home and community-based services” as a whole, i.e., the Department cannot terminate a person’s eligibility for “home and community-based services” unless the new assessment demonstrates that she no longer qualifies for those “services.” Under this interpretation, the Department can terminate a specific service, but cannot terminate Medicaid Waiver services as a whole unless a Medicaid Waiver recipient, as measured by the annual assessment, is no longer eligible for Medicaid Waiver services in their entirety.

The second interpretation is most reasonable. The Division may terminate a specific “service” paid for by the Medicaid Waiver program, but not Medicaid Waiver “services” as a whole, unless a Medicaid Waiver recipient’s annual assessment demonstrates that she longer qualifies for the Medicaid Waiver services. This conclusion is reached at for the following reasons:

1. The statute, AS 47.07.045, only uses the plural term “services.” It says that an applicant will be approved for “home and community-based services.” AS 47.07.045(a). It says those “services” may only be terminated if the recipient’s annual assessment shows the recipient no longer has the need for “waiver services.” AS 47.07.045(b) and (b)(3)(C). If the statute meant to refer to a specific service, as compared to eligibility for Medicaid Waiver services as a whole, the statute would not have used the plural term “services.”
2. Construing the statute, AS 47.07.045, to prohibit termination of a specific approved service lead to the result that a service be continued when a Medicaid Waiver recipient should not have received that specific service to begin with, or no longer requires uses a specific service, as long as the Claimant qualified for Medicaid Waiver services. For example, a Medicaid Waiver recipient, who received private-duty nursing services (7 AAC 130.285), would continue to receive those services, even if her condition improved to the point she no longer required such services, as long as she remained eligible for the Medicaid Waiver program.

In summary, the Claimant’s husband is capable of providing chore services for the Claimant. Because he is capable of providing those services and lives with the Claimant, the Medicaid Waiver program, pursuant to 7 AAC 130.245(c)(1) will not provide payment for chore services for the Claimant. The fact that the Claimant had been previously approved for chore services as part of her 2010 – 2011 Medicaid Waiver Plan of Care does not require that it continue to approve those services. As a result, the Division was correct to deny that portion of the

