

STATE OF ALASKA

DEPT. OF HEALTH & SOCIAL SERVICES

OFFICE OF HEARINGS AND APPEALS

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December 19, 2011

TO: Recipients of OHA decision for [REDACTED] (11-FH-2299):

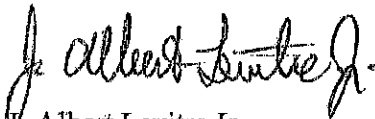
[REDACTED] Disability Law Center, for Claimant
[REDACTED] Assistant Attorney General, for DSDS
[REDACTED] DSDS Division Director
[REDACTED] Policy & Program Development
[REDACTED] Staff Development & Training

Dear Recipients:

Only after I mailed and e-mailed the above-noted decision earlier today, I realized that page 1 of the decision had the wrong case number. I am again e-mailing the decision with this letter, with the case number corrected.

I apologize for not catching the mistake before sending the decision out initially.

Sincerely,



J. Albert Levitre Jr.
Law Office Assistant I

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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. 11-FH-2239
)
 Claimant.) Agency Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) applied for personal care assistance (PCA) services on June 17, 2011. (Ex. D) On June 28, 2011, the Division of Senior and Disabilities Services ("Division") notified the Claimant in writing that his application for PCA services was denied. (Ex. D) The Claimant requested a Fair Hearing on July 28, 2011. (Ex. C)

This Office has jurisdiction pursuant to 7 AAC 49.010.

The Claimant's hearing was held on October 13, 2011. The Claimant did not participate. [REDACTED], Esq., with the Disability Law Center, appeared in person and represented the Claimant. [REDACTED], the Claimant's guardian, appeared telephonically. [REDACTED], the Claimant's care coordinator, who is employed by [REDACTED], attended telephonically and testified on the Claimant's behalf. [REDACTED], who is both the Claimant's niece and the operator of the assisted living home (ALH) where the Claimant resides, attended telephonically and testified on the Claimant's behalf.

[REDACTED], Esq., Assistant Attorney General, appeared in person and represented the Division. [REDACTED], a Health Program Manager III employed by the Division, attended in person and testified on the Division's behalf.

The record was left open after the hearing for post-hearing briefing, which was completed on October 28, 2011.

ISSUE

Was the Division of Senior and Disabilities Services correct when it denied the Claimant's June 17, 2011 application for PCA services?

FINDINGS OF FACT

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

1. The Claimant is an elderly man who receives Medicaid Home and Community Based Waiver Services ("Waiver"). (Ex. G, p. 5)
2. The Claimant lives with his niece and her three children in their home, which is licensed as an ALH operated and administered by his niece. (Ex. F; Ex. G, pp. 5, 8, 15, 20; [REDACTED] testimony) The licensure period is from November 30, 2010 through November 30, 2012. (Ex. F) The ALH is licensed for two residents; however, the Claimant is the only ALH resident. (Ex. F; Stipulated Facts) The niece is the only person who provides care for the Claimant other than scheduled respite care. ([REDACTED] testimony)
3. The Claimant's Waiver Plan of Care, for the time period from December 1, 2010 through November 22, 2011, categorizes the Claimant's residency in the ALH as "Residential Habilitation" which is classified as "Family Habilitation -adult" services. (Ex. G, pp. 2, 4, 15) The Claimant's Waiver Plan of Care specifically states that the Claimant "will receive **Family Habilitation** Services from a Family Habilitation Provider in a Licensed Assisted Living Home." (Ex G, p. 15, emphasis in original)
4. The Claimant's niece, his legal guardian, and [REDACTED] all signed the Claimant's Waiver Plan of Care, for the time period from December 1, 2010 through November 22, 2011, as members of his care planning team on January 18, 2011. (Ex G., p. 26) The Division approved the Claimant's Waiver Plan of Care on February 22, 2011. (Ex. G, p. 1)
5. On January 18, 2011 and February 14, 2011, the Claimant's legal guardian, his niece, and [REDACTED] all signed a "Foster Care Placement Agreement" where the niece agreed to serve as the Claimant's foster parent and to provide him with a foster home, including 24 hour adult supervision, food, and lodging. (Ex. 1) That same "Foster Care Placement Agreement" provides that foster parent (niece) is licensed as a foster home, that she agrees to follow State Assisted Living regulations, that [REDACTED] agrees to assist her with ALH licensure, and that all parties are required to comply with State Assisted Living regulations. (Ex. 1, pp. 1, 4, 6, 8).
6. The Claimant's niece is paid \$1,302.23 every two weeks from [REDACTED] for the Claimant's lodging/care. ([REDACTED] testimony) She does not receive a separate ALH home payment from the State. ([REDACTED] testimony)
7. The Claimant's niece does not own or operate a licensed foster home. ([REDACTED] testimony)

8. The Claimant was independent in his care needs (bathing, walking, using the bathroom) before May 19, 2011. (██████████ testimony) He experienced a stroke on May 19, 2011. *Id.* Since his stroke, his care needs have increased dramatically. He is now in a wheelchair and requires assistance in all of his activities of daily living (transfers, showering, toileting, dressing, eating, etc.) *Id.* In addition, he requires assistance two to three times per night when he needs to use the toilet. *Id.* The Claimant's niece is his sole care provider and needs help caring for the Claimant. *Id.*

9. The Claimant applied for PCA services on June 17, 2011. (Ex. D, p. 1) The Division performed an assessment of the Claimant's physical need for PCA services on June 27, 2011. (Ex. E) That assessment found that the Claimant was "functionally eligible" for PCA services. (Ex. E, p. 31)

10. On June 28, 2011, the Division sent the Claimant notice that his request for PCA services was denied. (Ex. D) The Division's June 28, 2011 notice reads, in pertinent part, as follows:

On 6/17/11 you submitted an application to [Senior and Disabilities Services] for PCA services. Under 7 AAC 125.050, PCA services can only be provided in an individual's personal residence and prohibits provision of PCA services in certain locations for the purposes of Medicaid reimbursement. These locations are:

* * *

an assisted living home licensed under AS 47.32 and 47.33

* * *

Since your application or assessment shows you are currently residing in the above checked location, per regulations [Senior and Disabilities Services] is not authorized to provide you with PCA services in that location at this time.

(Ex. D, p. 1)

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 provides a number of services to eligible Medicaid recipients. Personal Care Services (PCA services) are among those services. The PCA program is designed to assist Medicaid recipients with physical assistance with personal care and limited domestic chores in their homes, when the alternative would be "placement in a general acute care hospital or nursing facility" or loss of the Medicaid recipient's job. 7 AAC 125.010, 7 AAC 125.030.

Alaska Medicaid regulation 7 AAC 125.050 reads as follows:

7 AAC 125.050. Personal care place of service. (a) Personal care services may be provided only to a recipient who is living in the recipient's personal residence and meets the requirements of this section.

(b) The following living situations are specifically excluded as a recipient's personal residence for the purposes of Medicaid payment for personal care services:

- (1) a licensed skilled or intermediate care facility or hospital;
- (2) a licensed intermediate care facility for the mentally retarded;
- (3) a foster home licensed under AS 47.32, except for recipients in a licensed foster home who are receiving residential habilitation services under 7 AAC 130.200 – 7 AAC 130-319;
- (4) an assisted living home licensed under AS 47.32;
- (5) a residence where personal care services are already paid in a contractual agreement;
- (6) a general acute care hospital.

The Alaska statutes define a "foster home" as "a place where the adult head of household provides 24-hour care on a continuing basis to one or more children who are apart from their parents." AS 47.32.900(7).

"Administrative agencies are bound by their regulations just as the public is bound by them." *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 – 869 (Alaska 2010).

ANALYSIS

The issue in this case is whether the Division was correct it denied the Claimant's June 17, 2011 application for PCA services. The Claimant has the burden of proof in this case by a preponderance of the evidence, because he is the applicant, i.e. the party seeking to change the status quo. *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).

The pertinent facts are:

1. The Claimant is elderly and resides in a licensed ALH operated and administered by his niece. *See* Findings of Fact 1 and 2 above.
2. The Claimant had been relatively independent in his activities of daily living until May 19, 2011 when he suffered a stroke. That stroke resulted in him being wheelchair bound and requiring assistance with all of his activities of daily living, including at night. *See* Finding of Fact 8 above.

3. With the exception of respite care, the Claimant's niece is his sole caregiver. The Claimant's niece needs help caring for the Claimant. *See* Findings of Fact 2 and 8 above.
4. The Claimant's niece is his "foster parent" through a "Foster Care Placement Agreement" entered into between herself, [REDACTED], and the Claimant's legal guardian. [REDACTED] pays her biweekly for her foster care. She is not paid directly by the State as an ALH. The Claimant does not have a licensed foster home. *See* Findings of Fact 5 - 7 above.
5. After the Claimant's May 19, 2011 stroke, the Claimant applied for PCA services. The Division denied that request, even though the Claimant's assessment found that he was "functionally eligible" for PCA services. *See* Findings of Fact 9 and 10 above.

The Division did not deny the Claimant's PCA services because he did not need them. Instead, the Division relied upon the regulation 7 AAC 125.050(b)(4), which does not allow PCA services for a Medicaid recipient who is residing in a licensed ALH. *See* Finding of Fact 10 above.

The Claimant argues that the Claimant does not reside in a "fully staffed assisted living facility" but instead "receives adult foster care assistance."¹ The facts of this case support the Claimant's argument that the Claimant does not reside in a "fully staffed assisted living facility." Indeed, the facts show that the Claimant's sole caregiver, his niece, is overburdened by the Claimant's extensive care needs. However, these facts cannot be used to ignore the fact that the Claimant resides in a licensed ALH. Because he resides in a licensed ALH, the express regulatory language contained in 7 AAC 125.050(b)(4), mandates that the Claimant cannot receive PCA services:

- b) The following living situations are specifically excluded as a recipient's personal residence for the purposes of Medicaid payment for personal care services:

* * *

- (4) an assisted living home licensed under AS 47.32;

The Division cannot ignore the express mandate contained in its regulation. "Administrative agencies are bound by their regulations just as the public is bound by them." *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 – 869 (Alaska 2010). On its face, as a matter of law, the Division's denial of the Claimant's PCA application was correct.

The Claimant makes the argument that the Claimant is really in an unlicensed foster home, and not an ALH. Again, there is no dispute that the Claimant resides in a licensed ALH and not a

¹*See* Claimant's October 21, 2011 Initial Post-Hearing Brief, pp. 4 – 5, and Claimant's October 28, 2011 Post-Hearing Response, p. 2. The Claimant also makes general references to the Americans With Disabilities Act. *See* Claimant's October 21, 2011 Initial Post-Hearing Brief, p. 5, and Claimant's October 28, 2011 Post-Hearing Response, p. 1.

foster home, whether licensed or unlicensed. It should be noted that the Claimant is elderly, i.e. not a child. The statutory definition states that a "foster home" is "a place where the adult head of household provides 24-hour care on a continuing basis to one or more children who are apart from their parents." AS 47.32.900(7). Because the Claimant is not a child, the niece's home is not a "foster home."

It should also be noted that the "Foster Care Placement Agreement" entered into between the Claimant's legal guardian, his niece, and [REDACTED] specifically provides that foster parent (niece) agrees to follow State Assisted Living regulations, that [REDACTED] agrees to assist her with ALH licensure, and that all parties are required to comply with State Assisted Living regulations. *See* Finding of Fact 5 above. It should further be noted that the Claimant's Waiver Plan of Care, for the time period from December 1, 2010 through November 22, 2011, which was also signed by the Claimant's legal guardian, his niece, and [REDACTED], specifically provides that the Claimant lives in a licensed ALH. *See* Findings of Fact 3 and 4 above. The fact that the Claimant experienced a stroke on May 19, 2011, after the execution of the "Foster Care Placement Agreement" and the Waiver Plan of Care, which dramatically increased his care needs, does not change these facts. The Claimant's argument that he does not reside in an ALH, or that he should be allowed a variance from the ALH regulatory requirements, fails in the face of these facts.

In summary, the Claimant has extensive care needs that functionally qualify him for PCA services. However, since he resides in a licensed ALH, he is legally barred from receiving PCA services by 7 AAC 125.050(b)(4). As a result, the Division was correct when it denied the Claimant's June 17, 2011 application for PCA services.

CONCLUSIONS OF LAW

1. The Claimant does not reside in a foster home. He resides in a licensed Assisted Living Home.
2. Because the Claimant resides in a licensed Assisted Living Home, he is not eligible to receive PCA services pursuant to 7 AAC 125.050(b)(4).

DECISION

The Division was correct when it denied the Claimant's June 17, 2011 application for PCA services.

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. 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. To appeal, send a written request directly to:

Director of the Division of Senior and Disabilities Services

550 W 8th Ave.
Anchorage, AK 99501

DATED this 19th day of December, 2011.

/Signed/
Larry Pederson
Hearing Authority

Certificate of Service

I certify that on this 19th day of December, 2011,
true and correct copies of the foregoing were sent to:

██████████, Esq., Disability Law Center, Attorney for the Claimant
by U.S.P.S First Class Certified Mail, Return Receipt Requested

and to the following by secure email:

██████████, Esq., Disability Law Center, Attorney for the Claimant
██████████, Esq., Assistant Attorney General
██████████, Division Director
██████████, Policy & Program Development
██████████, Staff Development & Training

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