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

In the Matter of)
)
 [REDACTED] [REDACTED],) OHA Case No. 11-FH-2344
)
 Claimant.) Agency Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] [REDACTED] (Claimant) receives Medicaid coverage under the Adults with Physical Disabilities Home and Community-Based Waiver (Waiver) category. (Ex. D, p. 1) On July 28, 2011, the Claimant requested that his Medicaid Waiver Plan of Care be amended to add an Acuity Add-on rate. (Exs. F, L) On August 29, 2011, the Division of Senior and Disabilities Services (“Division”) notified the Claimant in writing that his request for an Acuity Add-on rate was denied. (Ex. D) The Claimant requested a Fair Hearing on September 26, 2011. (Ex. C)

This Office has jurisdiction pursuant to 7 AAC 49.010.

The Claimant’s hearing was held on November 10, 2011. The Claimant was represented by [REDACTED], Esq., of the Alaska Disability Law Center, who appeared in person. The Claimant did not participate in the hearing. [REDACTED] [REDACTED], the Claimant’s wife, and [REDACTED] [REDACTED], the owner of the Assisted Living Home (ALH) where the Claimant resides, both attended telephonically and testified on the Claimant’s behalf.

[REDACTED], Esq., Assistant Attorney General, appeared in person and represented the Division. [REDACTED] and [REDACTED], both of whom are Health Program Managers employed by the Division, attended in person and testified on behalf of the Division.

The record was left open after the hearing for post-hearing briefing, which was completed on December 15, 2011.

ISSUES

1. Does the Division's denial notice satisfy minimum procedural due process requirements?
2. Was the Division correct to deny the Claimant's request for an Acuity Add-on rate?

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)
2. The Claimant resides, as he has since March 2007, in an assisted living home (ALH). (██████ testimony, Ex. L, p. 1)
3. The ALH is licensed for five residents. It, as of the date of hearing, had four residents, which included the Claimant, who is 55 years old, and two elderly residents, each of whom is over 80 years old. (██████ testimony)
4. The Claimant's approved Medicaid Waiver Plan of Care for the time period from June 17, 2010 through June 16, 2011 states that the Claimant experiences dementia, and "requires twenty-four hour oversight due to short-term memory impairment and the tendency to wander placing himself in danger." (Ex. P, p. 5)
5. The Claimant's Medicaid Waiver Plan of Care for the time period from May 23, 2011 through May 22, 2012 was approved on June 7, 2011. (Ex. E, p. 15) It states that the Claimant "requires twenty-four hour oversight due to short-term memory impairment and the tendency to wander placing himself in danger" and that he requires prompting to eat. (Ex. E, pp. 4 – 5)
6. The Claimant's behavior has changed in the past year. He exhibits a number of unpredictable and aggressive behaviors, which require ALH staff intervention:
 - a. He is verbally aggressive to the ALH staff and other residents.
 - b. He is particularly verbally aggressive to his former roommate, which resulted in the roommate moving out of the Claimant's room. The Claimant has also been physically aggressive to his former roommate on at least one occasion, where he grabbed the former roommate's wheelchair.
 - c. The Claimant cusses loudly. He cusses at staff, residents, and just cusses by himself.
 - d. The Claimant paces in a manic manner.
 - e. He wanders around the ALH and out of the ALH into the yard regardless of the weather and regardless of whether he's wearing shoes. He tries to leave the ALH yard, which has

a locked gate.¹ He has entered other resident's rooms. He has entered the women's restroom.

- f. At nighttime, he used to only get up once or twice. Now he wakes repeatedly. He then is up for a period of time; he paces, and cusses loudly.²
- g. He paces back and forth to the front door.³
- h. He engages in a running narrative all day long. He asks where his wife is. He asks about his parents. He mentions killing himself and other people. He says he has cancer and is dying.
- i. Obsessive masturbation to the point where he has caused skin damage, which requires medical care.

(██████████ testimony; Exs. G – J, L)

7. The ALH staff deal with the Claimant's behavior by redirecting him by voice alone. He cannot be touched. Any attempt to physically block him results in him becoming more agitated. (██████████ testimony)

8. The ALH has put alarms on the residents' doors and the outside door to alert staff when someone enters or leaves. In addition, the ALH has cameras in the living room, the hallways, the kitchen, the Claimant's room, the Claimant's former roommate's room, and outside the building. (██████████ testimony, Ex. L, p. 1)

9. The ALH staff monitor the Claimant and are available to intervene when necessary. (██████████ testimony)

10. The ALH staff do not intervene for the most part when the Claimant is cussing, unless the cussing escalates or becomes too loud. (██████████ testimony)

11. The last time the Claimant's wife took him into the community, he was talking to strangers, telling them that he had cancer and was going to die, and was cussing at her. (██████████ testimony)

12. On July 28, 2011, the Claimant requested that his Medicaid Waiver Plan of Care be amended to add an Acuity Add-on rate for "one on one client assistance" due to the Claimant's behaviors. (Exs. F, L)

¹ The ALH kept a log of the Claimant's behavior. (Ex. G) That log shows that the Claimant checked the front yard gate to see if it was locked four times on July 1, 2011. (Ex. G, pp. 5, 8)

² The ALH's July 1, 2011 log shows that the longest period the Claimant slept was 2 hours and 15 minutes and that he was awake 5 times between midnight and 7 a.m. (Ex. G, pp. 1 – 2) The Claimant cussed repeatedly and paced to the bathroom 56 times during those waking periods. *Id.*

³ The ALH's July 1, 2011 log shows that the Claimant stood at the front door 106 times between 9 a.m. and 10:00 p.m.

13. On August 29, 2011, the Division sent the Claimant notice that his request for an Acuity Add-on rate was denied “because the behaviors and actions of the recipient does not demonstrate a required one on one dedicated 24 hour staffing need.” (Ex D, p. 1) That August 29, 2011 notice did not specifically mention 7 AAC 145.520(m). *Id.* It referred to Policy 3-3 and to an “E-Alert” issued on August 1, 2011. *Id.* That E-Alert⁴, as corrected on August 5, 2011 indicated that Policy 3-3 had been suspended and that the Division would accept requests for an Acuity rate under 7 AAC 145.520(m). (Ex. O)

14. On November 2, 2011, the Division sent the Claimant a corrected notice that his request for an acuity Add-on rate was denied. (Ex. K) That notice explained:

- a. the August 29, 2011 denial letter referred to a Policy 3-3, which had been suspended;
- b. the applicable regulation, 7 AAC 145.520(m) requires ““dedicated one-on-one staffing 24 hours per day;”” and
- c. the documentation shows the Claimant has intermittent direct care during the day and his care needs during the remainder of the time consist of monitoring and supervision.

(Ex. K, pp. 1 – 2)

PRINCIPLES OF LAW

A party who is seeking a change in the status quo has the burden of proof. *State, Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985). The normal standard of proof in an administrative proceeding, unless otherwise stated, is the preponderance of the evidence standard. *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

⁴ *See* <http://list.state.ak.us/soalists/SDS-E-News/a/2011-08/00000188.htm> (date accessed January 31, 2012).

shall establish in regulation additional standards for eligibility and payment for the services.

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

A Medicaid Waiver recipient who receives group home habilitation services (residential habilitation services, which includes residence in an ALH)⁵ may receive an Acuity Add-on rate, which is paid to the provider. 7 AAC 145.520(m). In order to qualify for the Acuity Add-on rate, a recipient's Medicaid Waiver plan of care must "document[s] and require[s] that the recipient receive dedicated one-on-one staffing 24 hours per day." 7 AAC 145.520(m). The Alaska Medicaid regulations do not define the term "dedicated one-on-one staffing."

In *Allen v. State, Dept. of Health and Social Services, Division of Public Assistance*, 203 P.3d 1155 (Alaska 2009), the Alaska Supreme Court stated that public assistance benefit recipients are entitled to adequate notice "detailing the reasons" for the agency action. *Allen* at 1167. In its Decision, the Court stated:

If a major purpose served by benefit change or denial notices is protecting recipients from agency mistakes, then it stands to reason that such notices should provide sufficient information to allow recipients to detect and challenge mistakes.

Id. at 1168.

ANALYSIS

A. Burden of Proof.

The Claimant is the party who requested a change in the status quo, because he requested that his Medicaid Waiver Plan of Care be changed to add an Acuity Add-on rate. The Claimant therefore has the burden of proof by a preponderance of the evidence.

B. Notice.

On August 29, 2011, the Division sent the Claimant notice that his request for an Acuity Add-on rate was denied "because the behaviors and actions of the recipient does not demonstrate a required one on one dedicated 24 hour staffing need." (Ex. D) It did not explicitly mention the applicable regulation, 7 AAC 145.520(m). On November 2, 2011, the Division sent the Claimant a corrected notice that his request for an acuity Add-on rate was denied. (Ex. K) That notice explained:

⁵ See 7 AAC 130.255 and 265.

- a. the August 29, 2011 denial letter referred to a rescinded policy;
- b. the applicable regulation, 7 AAC 145.520(m), requires “dedicated one-on-one staffing 24 hours per day;” and
- c. the documentation shows the Claimant has intermittent direct care during the day and his care needs during the remainder of the time consist of monitoring and supervision.

(Ex. K, pp. 1 – 2)

The Claimant argued that the Division’s notices were procedurally defective because they did not provide the Claimant with adequate detail. The Alaska Supreme Court has stated that public assistance benefit action notices “should provide sufficient information to allow recipients to detect and challenge mistakes.” *Allen* at 1168. In this case, the Division’s August 29, 2011 denial notice did not engage in a detailed analysis of the information or actually refer to the applicable regulation, 7 AAC 145.520(m), but stated that the Claimant did not require one-on-one dedicated 24 hour staffing. The Division’s November 2, 2011 corrected notice also did not engage in a detailed analysis, but it did specifically reference the applicable regulation, 7 AAC 145.520(m).

The Division’s August 29, 2011 denial notice arguably failed to comply with minimal notice standards. While it clearly and unambiguously stated the Claimant’s request for an Acuity Add-on rate was denied because he did not need dedicated one-on-one 24 hour staffing, it failed to reference the applicable regulation 7 AAC 145.520(m). The November 2, 2011 corrected notice also provided the same reasoning for the denial and provided the Claimant with the appropriate regulatory citation to 7 AAC 145.520(m). Both of these notices clearly identify the issue as whether the Claimant requires dedicated one-on-one 24 hour staffing. This is the essential issue in this case. Because the Claimant was advised of the exact reason why his request for an Acuity Add-on rate was denied, the Division’s notice, as corrected on November 2, 2011, was adequate.

C. Acuity Add-on Rate.

The critical issue here is whether the Claimant requires “dedicated one-on-one staffing 24 hours per day.” *See* 7 AAC 145.520(m). If he does, he is entitled to receive an Acuity Add-on rate.

The facts of this case demonstrate that the Claimant is a high needs resident of his ALH. The ALH staff need to be attentive, monitor his comings and goings, and his behaviors. This is for both his own safety and for the safety of the other residents. His unpredictability and erratic hours mean that the ALH staff must be attentive 24 hours a day.

The ALH has developed mechanisms for being attentive 24 hours a day. There are alarms on the residents’ doors. There is an alarm on the front door. The gate on the yard is locked. There are cameras throughout the home: in the living room, the hallways, the kitchen, the

Claimant's room, the Claimant's former roommate's room, and outside the home. In other words, when a resident, including the Claimant, goes in and out of a resident's room or the front door, their comings and goings are continuously monitored by the alarm system. In addition, there are cameras where the Claimant can be observed.

When the Claimant acts out to a degree that requires intervention, the ALH staff can then go to him and redirect him. The Claimant has established that the ALH staff must supervise and monitor him 24 hours per day. This is sometimes accomplished indirectly, i.e. by alarms and cameras, not by someone continuously staying with the Claimant.

However, in order to receive an Acuity Add-on rate, the Claimant must require "dedicated one-on-one staffing 24 hours per day." 7 AAC 145.520(m). The regulation, on its face, sets the standard: dedicated one-on-one staffing 24 hours per day. This means that the Claimant's needs must be intensive enough that he requires one staff person caring for him and him alone ("dedicated one-on-one"), 24 hours per day. The Claimant has not met this demanding standard. The facts certainly show that he requires continuous attention. However, the facts do not demonstrate this attention must be focused exclusively upon the Claimant and that the ALH staff cannot perform other functions at the same time.

In conclusion, the Claimant has not demonstrated that he requires "dedicated one-on-one staffing 24 hours per day," which is the standard set forth in the Acuity Add-on rate regulation, 7 AAC 145.520(m). He therefore has not met his burden of proof by a preponderance of the evidence and demonstrated that he is entitled to receive an Acuity Add-on rate. The Division was therefore correct when it denied the Claimant's request for an Acuity Add-on rate.

CONCLUSIONS OF LAW

1. The Division's November 2, 2011 corrected denial notice provided "sufficient information to allow [the Claimant] to detect and challenge mistakes." *Allen* at 1168. The Division's denial notice therefore provided adequate notice to the Claimant.
2. The Claimant had the burden of proof by a preponderance of the evidence in this case. He did not meet his burden of proof and establish that he required dedicated one-on-one 24 hour staffing, per 7 AAC 145.520(m). As a result, he was not entitled to receive an Acuity Add-on rate.

DECISION

The Division was correct when it notified the Claimant on August 29, 2011, that his request for an amendment to his 2011 - 2012 Medicaid Waiver Plan of Care adding an Acuity Add-on rate, was denied.

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 1st day of February, 2012.

/Signed/
Larry Pederson
Hearing Authority

Certificate of Service

I certify that on this 1st day of February 2012, true and correct copies of the foregoing were sent to:

██████████, Esq., Disability Law Center, by U.S.P.S First Class Certified Mail, Return Receipt Requested and to the following by secure e-mail:

██████████, Esq., Assistant Attorney General
██████████, Division Director
██████████, Agency Representative
██████████, Policy & Program Development
██████████, Staff Development & Training

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