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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. 12-FH-2010
)	
Claimant.)	Div. Case No. ██████████
_____)	

FAIR HEARING DECISION

STATEMENT OF THE CASE

██████████, the mother of ██████████, a minor child (Claimant), applied for Medicaid benefits on his behalf under the TEFRA¹ category of the Medicaid program (TEFRA Medicaid). On January 12, 2012 the Division of Public Assistance (Division) sent the Claimant notice his application was denied. (Ex. D) The Claimant requested a fair hearing contesting the denial on January 13, 2012. (Ex. C)

This Office has jurisdiction pursuant to 7 AAC 49.010.

The Claimant's hearing was held on March 15, 2012. ██████████ appeared telephonically; she represented the Claimant and testified on his behalf. ██████████, a Medical Assistance Administrator III employed by the Department of Health and Social Services (Department), appeared telephonically; he represented the Division and testified on its behalf. ██████████, a Healthcare Program Manager I employed by the Department, participated telephonically and testified on behalf of the Division.

ISSUE

Was the Division correct to deny the Claimant's TEFRA Medicaid application on January 12, 2012, because he did not have a qualifying diagnosis?

¹ TEFRA is the acronym for the legislation that authorized this category of Medicaid coverage, section 134 of the Tax Equity and Fiscal Responsibility Act of 1982 (PL 97-248); 42 USC 1396a.

FINDINGS OF FACT

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

1. Claimant is currently five years old. (Ex. E, p. 3) His mother applied for TEFRA Medicaid coverage for him on October 28, 2011. (Ex. E, pp. 1 – 2).
2. In November 2008, when the Claimant was 1 year and 7 months old, he was evaluated for autism at the Oregon Health and Science University. (Exs. E, pp. 40 – 43) The evaluation diagnosed him with Pervasive Developmental Disorder, Not Otherwise Specified, with an explanation as follows:

Results from standardized autism specific instruments suggest that [Claimant] displays behavior typically seen in children on the autism spectrum. In addition, informal observation of [Claimant] in clinic today also suggest that he engages in behaviors consistent with a diagnosis on the autism spectrum. However, it was noted today that [Claimant] has a developmentally significant, bilateral, conductive hearing loss. It is unclear how long he has had the hearing loss, but it clearly could be interfering with his language and social development. Therefore, a definitive diagnosis of Autistic Disorder is deferred at present. However, overall consensus of the evaluation team was that [Claimant] did demonstrate many behaviors typical of a child on the autism spectrum including disengagement, lack of social initiation and social response, difficulty with nonverbal communication, and stereotyped behavior such as his spinning and visually-regarding of toys. While there is a possibility that [Claimant] will meet criteria for Autistic Disorder in the future, the diagnosis of Pervasive Developmental Disorder, Not Otherwise Specified (another diagnosis on the autism spectrum) is more appropriate. Taken together, it was the consensus of our Interdisciplinary team that [Claimant] best qualifies for a diagnosis of Pervasive Developmental Disorder, Not Otherwise Specified. However, it is recommended that he be re-evaluated in another year to assess his developmental progress and rule in or out Autistic Disorder.

(Ex. E, p. 42)

3. On September 28, 2011, Dr. [REDACTED], M. D., completed a “Qualifying Diagnosis Certification” form indicating that the Claimant met the diagnostic criteria for “**Autistic Disorder 299.00** (according to the DSM-IV-TR), and has been diagnosed by a clinical psychologist, child psychiatrist, or developmental pediatrician.”² (Ex. E, p. 10, emphasis in original) Dr. [REDACTED] is the Claimant’s primary care physician. ([REDACTED] testimony)

² “DSM-IV-TR” is an abbreviation for the *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, Fourth Edition, Text Revision, 2000).

4. On January 3, 2012, Dr. [REDACTED], M.D., with the Developmental Behavioral Pediatric Clinic, examined the Claimant. (Ex. E, pp. 44 – 45) Dr. [REDACTED]' report of that examination diagnosed the Claimant with "Autism spectrum disorder (ASD), with pervasive developmental differences, particularly in communication, and significant delays/deficits in social interactive skills; failed hearing screen." (Ex. E, p. 45) The diagnosis did not contain a specific DSM-IV-TR diagnostic code. *Id.*

5. On February 7, 2012, Dr. [REDACTED], M. D., completed a "Qualifying Diagnosis Certification" form indicating that the Claimant met the diagnostic criteria for "**Autistic Disorder 299.00** (according to the DSM-IV-TR), and has been diagnosed by a clinical psychologist, child psychiatrist, or developmental pediatrician." (Ex. G, p. 2, emphasis in original)

6. The Division initially denied the Claimant's TEFRA Medicaid application on January 12, 2012 for the reason that he has "a diagnosis of Autism Spectrum Disorder with Pervasive Development Differences and does not meet the criteria for DSM-IV diagnostic code 299.00 Autism." (Ex. D, p. 1) The Division's denial also stated that the Claimant did not qualify for TEFRA Medicaid with a qualifying diagnosis of a condition "closely related to Mental Retardation." *Id.*

7. On February 9, 2012, the Division reevaluated the Claimant's TEFRA Medicaid application in light of Dr. [REDACTED]'s report of his January 3, 2012 examination and his February 7, 2012 "Qualifying Diagnosis Certification" form. (Ex. H, p. 1) After reevaluation, the Division again concluded that the Claimant did not qualify for TEFRA Medicaid because he did not have a diagnosis of Autism (DSM-IV-TR diagnostic code 299.00). *Id.* This conclusion was based upon the November 2008 diagnosis of Pervasive Developmental Disorder and Dr. [REDACTED]'s January 3, 2012 report stating the Claimant had "Autism spectrum disorder (ASD), with pervasive developmental differences, particularly in communication, and significant delays/deficits in social interactive skills; failed hearing screen." (Ex. H, p. 1) As a result, the Division determined the Claimant had a diagnosis of Pervasive Developmental Disorder, Not Otherwise Specified, which fell under the category of "Other Mental Retardation Related Condition" but that the Claimant's impairments were not similar enough to Mental Retardation to qualify him for TEFRA Medicaid. *Id.*

8. [REDACTED] is a Qualified Mental Retardation Professional employed by the Department. She has a bachelor's degree in psychology, worked in direct care at a group home with autistic children for a "couple years", worked as a care coordinator for people with developmental disabilities for two years, and has been working for the Developmental Disability program since October 2010. ([REDACTED] testimony) Ms. [REDACTED] stated that while the Claimant had a general diagnosis of Autism Spectrum Disorder, that Autism Spectrum Disorder category contained several specific types of diagnoses, and that the medical documentation showed that the Claimant actually had a diagnosis of Pervasive Development Disorder (DSM-IV-TR diagnostic code 299.80), whereas in order to qualify for TEFRA Medicaid the Claimant would require a diagnosis of Autism (DSM-IV-TR diagnostic code 299.00). *Id.*

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. TEFRA Medicaid is a category of Medicaid coverage supplied to children under the age of 19, when the child does not qualify for federal Supplemental Security Income benefits “because of parental income or resources.” 7 AAC 100.002(d)(5); 7 AAC 100.424(a). The Alaska Medicaid regulations require that a TEFRA child experience a disability, and reside at the child’s parents’ or legal guardian’s home. 7 AAC 100.424(a)(2), (4). In addition, the child must “need[s] a level of care offered in . . . (B) an intermediate care facility for the mentally retarded, as determined under 7 AAC 140.600.” 7 AAC 100.424(a)(5)(B).³

State Medicaid regulation 7 AAC 140.600⁴ sets out the requirements for determining whether a child “needs a level of care offered in . . . (B) an intermediate care facility for the mentally retarded”:

(c) In determining whether a recipient qualifies under this section for ICF/MR services, the department will base its decision on the determination of a qualified mental retardation professional within the department that the recipient meets the functional criteria in (d) of this section and that the recipient has at least one of the following criteria:

* * *

(2) a condition that is

(A) one other than mental illness, psychiatric impairment, or a serious emotional or behavioral disturbance; and

(B) found to be closely related to mental retardation because that condition results in impairment of general intellectual functioning and adaptive behavior similar to that of individuals with mental retardation; the condition must be diagnosed by a licensed physician and require

³ While there are other requirements for TEFRA Medicaid coverage, they are not at issue in this case.

⁴ Individuals with cerebral palsy, mental retardation, or seizure disorders are also potentially eligible for Medicaid coverage under the TEFRA category. 7 AAC 140.600(c)(1), (3), (4).

treatment or services similar to those required for individuals with mental retardation;

* * *

(5) autism that has been diagnosed by a mental health professional clinician and that meets the diagnostic criteria for code 299.00, as set out in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, adopted by reference in 7 AAC 160.900.

(d) Each condition identified in (c) of this section must

(1) have originated before the age of 22 years;

(2) be likely to continue indefinitely; and

(3) constitute a substantial disability to the individual's ability to function in society, as

(A) measured by the *Inventory for Client and Agency Planning (ICAP)*, adopted by reference in 7 AAC 160.900; and

(B) evidenced by a broad independence domain score equal to or less than the cutoff scores in the department's *Table of ICAP Scores by Age*, adopted by reference in 7 AAC 160.900.

The acronym "ICF/MR" means an intermediate care facility for the mentally retarded." 7 AAC 160.990(31).

In Medicaid cases, more weight is given to an examining physician's opinion than the opinions of a nonexamining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). An administrative law judge must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of an examining physician. *Id.* Even if an examining physician's opinion is contradicted by another physician, that opinion "can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record." *Id.* at 830 – 831. "The opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician." *Id.* at 831 (emphasis in original).

ANALYSIS

The Claimant's position is that the Division erred when it found the Claimant did not have a necessary diagnosis to qualify for the TEFRA Medicaid category. Because this case involves an application for benefits, the Claimant has the burden of proof by a preponderance of the evidence.

Autism Spectrum Disorder is a term commonly used to describe a variety of disorders also known as Pervasive Developmental Disorders.⁵ The DSM-IV-TR, which is adopted by reference in Alaska regulation 7 AAC 160.900(a)(4), uses term "Pervasive

⁵ *The Merck Manual of Diagnosis and Therapy*, p. 2486 (Merck & Co., Inc., 18th Edition, 2006).

Developmental Disorders” rather than “Autism Spectrum Disorder.”⁶ Pervasive Developmental Disorders include “Autistic Disorder, Rett’s Disorder, Childhood Disintegrative Disorder, Asperger’s Disorder, and Pervasive Developmental Disorder Not Otherwise Specified.” DSM-IV-TR, p. 69. Autistic Disorder has a specific diagnostic code of 299.00, whereas Pervasive Developmental Disorder Not Otherwise Specified has a specific diagnostic code of 299.80. DSM-IV-TR, pp. 70, 84.

The Claimant was initially diagnosed with Pervasive Developmental Disorder Not Otherwise Specified in November 2008, when he was one year and seven months old. That diagnosis, however, was not definitive; it indicated that the Claimant possibly qualified for an Autistic Disorder diagnosis and that he should be “re-evaluated in another year to assess his developmental progress and rule in or out Autistic Disorder.” (Ex. E, p. 42)

The record contains two completed “Qualifying Diagnosis Certification” forms stating the Claimant met the diagnostic criteria for “**Autistic Disorder 299.00** (according to the DSM-IV-TR), and has been diagnosed by a clinical psychologist, child psychiatrist, or developmental pediatrician.” (Exs. E, p. 10; G, p. 2) Dr. [REDACTED], who is the Claimant’s primary care physician, i.e. his treating physician, signed the “Qualifying Diagnosis Certification” form on September 28, 2011. (Ex. E, p. 10) Dr. [REDACTED], who examined the Claimant on January 3, 2012, signed the “Qualifying Diagnosis Certification” form on February 7, 2012. (Ex. G, p. 2)

The Division disagreed with Dr. [REDACTED] and Dr. [REDACTED]’s statements, as contained on the “Qualifying Diagnosis Certification” forms, that the Claimant had a diagnosis of “Autistic Disorder 299.00.” The Division concluded that the Claimant’s appropriate diagnosis was Pervasive Developmental Disorder Not Otherwise Specified, which has a DSM-IV-TR code of 299.80. The basis for the Division’s conclusion was the November 2008 diagnosis of Pervasive Developmental Disorder and Dr. [REDACTED]’s conclusion in his January 3, 2012 report that the Claimant had “Autism spectrum disorder (ASD), with pervasive developmental differences.”

The Division’s conclusion that the Claimant has a diagnosis of Pervasive Developmental Disorder Not Otherwise Specified (DSM-IV-TR diagnostic code 299.80) does not take the following into account:

1. The November 2008 diagnosis was a preliminary diagnosis that specifically stated that the Claimant should be reevaluated for Autistic Disorder.
2. Dr. [REDACTED] explicitly stated that the Claimant had an Autistic Disorder (DSM-IV-TR diagnostic code 299.00) on his September 28, 2011 “Qualifying Diagnosis Certification” form.

⁶ For a discussion of Pervasive Developmental Disorders, and the differentiation between the different types of these disorders, see the *Diagnostic and Statistical Manual of Mental Disorders* at pp. 69 – 84. (American Psychiatric Association, Fourth Edition, Text Revision, 2000), also commonly referred to as the DSM-IV-TR.

3. Dr. ██████'s January 3, 2012 report does not contain a diagnostic code for either Autistic Disorder (DSM-IV-TR diagnostic code 299.00) or Pervasive Developmental Disorder Not Otherwise Specified (DSM-IV-TR diagnostic code 299.80). It instead diagnoses the Claimant with "Autism spectrum disorder (ASD), with pervasive developmental differences." This is a somewhat ambiguous diagnosis, which could apply equally to either Autistic Disorder (DSM-IV-TR diagnostic code 299.00) or Pervasive Developmental Disorder Not Otherwise Specified (DSM-IV-TR diagnostic code 299.80), given that "Autism Spectrum" and "Pervasive Developmental Disorders" are synonymous terms that include both Autistic Disorder (DSM-IV-TR diagnostic code 299.00) and Pervasive Developmental Disorder Not Otherwise Specified (DSM-IV-TR diagnostic code 299.80).
4. Dr. ██████ clarified any ambiguity regarding his diagnosis in the January 3, 2012 report when he explicitly stated on his February 7, 2012 "Qualifying Diagnosis Certification" form that the Claimant had a diagnosis of Autistic Disorder (DSM-IV-TR diagnostic code 299.00).

There must be "clear and convincing" reasons for rejecting the uncontradicted opinion of a treating physician. *Lester* at 830. In this case, the treating physician is Dr. ██████. His opinion is not contradicted by another treating physician. Instead, it is corroborated by an examining physician, Dr. ██████. The only contradictory opinion was presented by the Division's Qualified Mental Retardation Professional, who is not a physician.

"The opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician *or* a treating physician." *Lester* at 831 (emphasis in original). Because the Division has not presented any physician's opinions, only the opinion of its Qualified Mental Retardation Professional, a non-physician, it has not provided a basis for rejecting the opinions of Dr. ██████ (treating physician) and Dr. ██████ (examining physician). As a result, the preponderance of the evidence demonstrates that the Claimant has a diagnosis of Autistic Disorder (DSM-IV-TR diagnostic code 299.00).

A diagnosis of Autistic Disorder (DSM-IV-TR diagnostic code 299.00), is a qualifying diagnosis for TEFRA Medicaid. *See* 7 AAC 140.600(c)(5). Because the Claimant has an appropriate qualifying diagnosis for TEFRA Medicaid, the Division was not correct to deny his application for TEFRA Medicaid coverage for the reason that he did not have an appropriate qualifying diagnosis.⁷

The Claimant, however, is cautioned that this Decision does not completely resolve the issue of whether the Claimant should be approved for TEFRA Medicaid coverage. A

⁷ Because this Decision finds that the Claimant has a TEFRA Medicaid qualifying diagnosis of Autistic Disorder (DSM-IV-TR diagnostic code 299.00), it is not necessary to address the issue of whether he has a TEFRA Medicaid qualifying diagnosis of an Other Mental Retardation Related Condition (7 AAC 140.600(c)(2)).

qualifying diagnosis is only the first step towards TEFRA Medicaid approval. A TEFRA Medicaid applicant must not only have a qualifying diagnosis, his qualifying condition (Autistic Disorder) must also:

(3) constitute a substantial disability to the individual's ability to function in society, as

(A) measured by the *Inventory for Client and Agency Planning (ICAP)*, adopted by reference in 7 AAC 160.900; and

(B) evidenced by a broad independence domain score equal to or less than the cutoff scores in the department's *Table of ICAP Scores by Age*, adopted by reference in 7 AAC 160.900.

7 AAC 140.600(d)(3). In other words, the Claimant must have an *ICAP* performed and have a qualifying score under the *ICAP*. If the Division determines, after review of the *ICAP*, that the Claimant does not have a qualifying score, the Claimant may request a new hearing to challenge that determination.

CONCLUSIONS OF LAW

1. The Claimant met his burden of proof in this case to establish that he has a qualifying diagnosis, Autistic Disorder (DSM-IV-TR diagnostic code 299.00) for the TEFRA category of Medicaid under 7 AAC 140.600(c)(5).

2. The Division was therefore not correct when it denied the Claimant's application for TEFRA Medicaid services on the grounds that the Claimant did not have a qualifying diagnosis.

DECISION

The Division was not correct to deny the Claimant's application for TEFRA Medicaid.

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 Public Assistance
Department of Health and Social Services
PO Box 110640
Juneau, AK 99811-0640

