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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. 10-FH-2324
)
 Claimant.) DSDS Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) was and is a recipient of benefits pursuant to the Adults with Physical Disabilities (APD) category of the Medicaid Home and Community-Based Waiver Services (Choice Waiver) program (Ex. F-1; undisputed hearing testimony). On or about July 15, 2010 the Claimant requested Medicaid authorization for installation of a wheelchair ramp at the rear entrance to her residence (Ex. D-1; undisputed hearing testimony). The State of Alaska Division of Senior and Disabilities Services (DSDS or Division) denied the Claimant’s environmental modification request on August 2, 2010 (Exs. D1 – D2). The Claimant’s representative requested a fair hearing on this issue on August 21, 2010 (Ex. C1).

This Office has jurisdiction to resolve this case pursuant to 7 AAC 49.010.

The Claimant’s hearing was held on November 4, 2010 before Hearing Examiner Patricia Huna.¹ The Claimant herself did not appear for, participate in, or testify at the hearing. However, the Claimant was represented at the hearing by [REDACTED], Esq. of Alaska Legal Services Corporation.² Ms. [REDACTED] attended the hearing in person, represented the Claimant, and testified on behalf of the Claimant. [REDACTED], Esq. of the State of Alaska Department of Law,

¹ Following the hearing this case was reassigned to Hearing Examiner Jay Durych. He reviewed the entire record in this case, (both the hardcopy case file and the digital recording of the hearing), prior to preparing and issuing this decision.

² Ms. [REDACTED] is authorized to practice law in the State of Alaska, on behalf of Alaska Legal Services Corporation, pursuant to Rule 43 of the Alaska Bar Rules.

Attorney General's Office, attended the hearing in person and represented the Division. Health Program Manager I [REDACTED] attended the hearing in person and testified on behalf of the Division.

All testimony and exhibits offered by the parties were admitted into evidence. At the end of the hearing the record was closed and the case was submitted for decision.

ISSUE

Was the Division correct when, on August 2, 2010, it notified the Claimant that her proposed Plan of Care amendment (to authorize the installation of a wheelchair ramp at the rear door of the Claimant's residence) was denied, pursuant to 7 AAC 130.300(d)(4), on the basis that the requested wheelchair ramp was duplicative of another previously installed wheelchair ramp?

SUMMARY OF DECISION

State Medicaid Regulation 7 AAC 130.300(d)(4) expressly prohibits the Division from paying for environmental modifications which "duplicate accessibility modifications to the same residence." Installation of a wheelchair ramp at the rear entrance to the Claimant's residence would duplicate the existing wheelchair ramp located at the front entrance to the Claimant's residence. Accordingly, the Division was correct when, on August 2, 2010, it notified the Claimant that her proposed Plan of Care amendment (to authorize the installation of a wheelchair ramp at the rear door of the Claimant's residence) was denied, pursuant to 7 AAC 130.300(d)(4), on the basis that the requested wheelchair ramp was duplicative of another previously installed wheelchair ramp.

FINDINGS OF FACT

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

1. The Claimant was and is a recipient of benefits pursuant to the Adults with Physical Disabilities (APD) category of the Medicaid Home and Community-Based Waiver Services (Choice Waiver) program (Ex. F-1; undisputed hearing testimony).
2. The Claimant requires significant levels of assistance in performing her Activities of Daily Living and Instrumental Activities of Daily Living (Exs. E-7 – E-9).
3. The Claimant rents a home (Ex. E-6) located in [REDACTED], Alaska (Ex. D-1).
4. In or about November 2008 a wheelchair ramp and handrail were installed outside the front entrance to the Claimant's home pursuant to the Medicaid environmental modifications program (Exs. F-11 – F-13).
5. On or about July 15, 2010 the Claimant requested Medicaid authorization for installation of a wheelchair ramp at the rear entrance to her residence (Ex. D-1; undisputed hearing testimony).
6. The Division denied the Claimant's environmental modification request on August 2, 2010 (Exs. D1 – D2). The Division's denial letter (Exs. D1 – D2) stated in relevant part as follows:

The Division denies the following item under authority of 7 AAC 130.300(d)(4):

1. Environmental Modification – Second ramp in back of home.

. . . . The modification requested includes installing a second ramp to provide an emergency exit. According to our records a ramp with a cover was completed in November 2008 to provide access to your home. From the documentation provided with this amendment, it does not appear the requested emergency exit is necessary to prevent institutionalization and appears to be duplication of accessibility. Therefore, the request for the environmental modification is denied.

7. At the hearing of November 4, 2010 the Claimant's counsel credibly testified as follows:³

a. The Claimant suffers from multiple sclerosis (MS). On some days the Claimant is able to walk with the assistance of a cane and/or handrails. However, she is generally confined to a motorized wheelchair.

b. The Claimant's home is heated by a wood stove (*see also* Ex. 4). Although the Claimant also has some sort of baseboard radiated heat, her wood stove is her primary source of heat.

c. The Claimant's home has both a front entrance and a rear entrance.

d. In 2008 a wheelchair ramp was installed at the front door of the Claimant's home. The front door opens into or next to the Claimant's living room (*see also* Ex. 2).

e. There is currently no way for the Claimant to exit the home through her back door because, although there is a back porch, there are two stairs connecting the porch to the sidewalk / ground level (*see also* Exs. 6, 7). The Claimant cannot negotiate these stairs in her wheelchair.

f. Installation of a ramp at the rear of the Claimant's home would allow her to exit her home through the back door. This is important in case of a fire because the Claimant's bed is located close to the wood stove, a likely source of ignition (*see also* Ex. 5).

g. The wood stove is located next to the Claimant's bedroom toward the back of her home, and is between the Claimant's bedroom and the front door (*see also* Exs. 2, 5). The Claimant's bedroom is closer to the rear door than to the front door (*see also* Ex. 3).

³ The Claimant's counsel identified two persons in her witness list dated November 1, 2010 whom she intended to call as witnesses at the hearing. However, neither of these individuals attended or participated in the hearing. This placed the Claimant's counsel in a somewhat difficult position.

Attorneys are generally forbidden from testifying on behalf of their clients as to the merits of a case in a court proceeding. *See* Rule 46(e), Alaska Rules of Civil Procedure, and Rule 3.7, Alaska Rules of Professional Conduct. However, this is an administrative proceeding rather than a court proceeding. Also, the Division's counsel did not object to the Claimant's attorney giving testimony under the circumstances. Accordingly, in this case, the Claimant's counsel's testimony was considered, and was weighed against the other evidence in the record, as would be the case with any other witness.

- h. Because she is wheelchair-bound, the Claimant would not be able to exit her home through a window in the event of a fire.
8. At the hearing of November 4, 2010 the Division's witness, Health Program Manager I [REDACTED], credibly testified in relevant part as follows:
- a. She is familiar with Medicaid Program requests for environmental modifications.
- b. She presented the Claimant's current request for environmental modifications before a committee composed of three (3) DSDS Health Program Managers.
- c. The Committee denied the Claimant's current environmental modification request on the basis that the proposed back door ramp was duplicative of a ramp which DSDS had paid to have installed outside the front door of the Claimant's residence in 2008.⁴

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

This case involves the Division's denial of a claimant's proposed amendment to her Plan of Care (POC). The party seeking a change in the status quo or existing state of affairs normally bears the burden of proof.⁵ In this case, the Claimant is attempting to change the existing state of affairs by obtaining additional Medicaid environmental modification benefits. Accordingly, the Claimant bears the burden of proof in this case.

The regulations applicable to this case do not specify any particular standard of proof. Therefore, the "preponderance of the evidence" standard is the standard of proof applicable to this case.⁶ This standard is met when the evidence, taken as a whole, shows that the facts sought to be proved are more probable than not or more likely than not.⁷

II. The Medicaid Program – In General.

The Medicaid program was enacted in 1965, creating a cooperative federal/state program in which the federal government reimburses states for a portion of the cost of medical care for persons in need. Title XIX of the Social Security Act of 1965, 42 U.S.C. § 1396, et seq.; *Schweiker v. Gray*

⁴ DSDS also provided a portable ramp to the Claimant, in 2007, through the same Medicaid environmental modification program. However, the existence of this portable ramp was not properly noticed by DSDS as a basis for its denial (Ex. D-1). Accordingly, the portable ramp cannot be considered as supporting the Division's position in this case. See generally *Allen v. State of Alaska Department of Health and Social Services*, 203 P.3d 1155 (Alaska 2009).

⁵ *State of Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

⁶ A party in an administrative proceeding can assume that preponderance of the evidence is the applicable standard of proof unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission*, 711 P.2d 1170 (Alaska 1986).

⁷ *Black's Law Dictionary* at 1064 (West Publishing, 5th Edition, 1979).

Panthers, 453 U.S. 34, 36, 101 S.Ct. 2633, 69 L.Ed.2d 460 (1981). The purpose of the program is to provide medical assistance to those whose resources are insufficient to meet the costs of necessary medical care. *Atkins v. Rivera*, 477 U.S. 154, 106 S.Ct. 2456, 91 L.Ed.2d 131 (1986). Broadly speaking, Medicaid is available to low-income people who are blind, disabled, aged 65 and older, members of families with dependent children, or qualified pregnant women or children. 42 USC Section 1396a(a)(10); 42 CFR Sections 430.0 and 435.4.

On the federal level, the Secretary of the U.S. Department of Health and Human Services (“HHS”) administers the program through the Health Care Financing Administration (“HCFA”). The Medicaid program is authorized under Title XIX and Title XXI of the Social Security Act and under Title 42, Part 435 and Title 45, Part 233 of the Code of Federal Regulations.

On the state level, the Alaska Department of Health and Social Services administers the Medicaid program in accordance with federal and state laws and regulations. The Medicaid program in Alaska is authorized under Alaska Statutes 47.07.010 - 47.07.900 and under the Alaska Administrative Code at Title 7, Chapter 43 and Chapter 100 *et. seq.*

III. Medicaid Environmental Modification Services.

The Alaska state Medicaid regulation governing environmental modification services is 7 AAC 130.300. That regulation provides in relevant part as follows:

(a) The department will pay for environmental modification services that (1) are approved under 7 AAC 130.230 as part of the recipient's plan of care; and (2) receive prior authorization.

(b) The department will consider services to be environmental modification services if they make physical adaptations to the recipient's home, as identified in the recipient's plan of care, and are necessary to ensure the health, welfare, and safety of the recipient.

* * * * *

(d) The department will not pay under this section for:

* * * * *

(3) adaptations, modifications, or improvements to the exterior of the dwelling, including outbuildings, yards, driveways, and fences, except for adaptations, modifications, or improvements to doors, exterior stairs, and porches necessary for egress for the recipient;

(4) duplicate accessibility modifications to the same residence;

* * * * *

ANALYSIS

Introduction: Contentions of the Parties; Definition of Issues.

The Division's assertion in this case is that the Claimant is not eligible for installation of a wheelchair ramp at the rear door of her residence under the Medicaid Program because she already has a wheelchair ramp at the front door of her residence, and 7 AAC 130.300(d)(4) expressly states that "[t]he department will not pay under this section for . . . (4) duplicate accessibility modifications to the same residence . . . ". *See* Ex. D-1.

The Claimant's assertion in this case is essentially that installation of a ramp at the rear of the Claimant's residence would not be duplicative under 7 AAC 130.300(d)(4) because the front entrance to the home would not be a suitable emergency exit in the event of a fire. *See* argument of Claimant's counsel at hearing. The Claimant also argues that installation of a ramp at the rear of the Claimant's residence is required pursuant to Sections R310 and R311 of the International Building Code. *Id.*; *see also* Ex 1.

The parties' contentions will be analyzed below in the order stated. The Claimant bears the burden of proof on all factual issues by a preponderance of the evidence (*see* Principles of Law at page 4, above).

I. On its Face, 7 AAC 130.300(d)(4) Prohibits Medicaid Payment for Duplicate Accessibility Modifications to the Same Residence.

The regulation at issue, 7 AAC 130.300(d)(4), expressly states that "[t]he department will not pay under this section for . . . (4) duplicate accessibility modifications to the same residence. . . ."

The wheelchair ramp requested by the Claimant is clearly an 'accessibility modification,' and it would be installed at "the same residence" as the front wheelchair ramp. Accordingly, based on the text of 7 AAC 130.300(d)(4), the only remaining issue is whether installation of a ramp at the rear of the Claimant's residence would be "duplicative."

Neither 7 AAC 130.300, nor the definitional section of the same chapter (7 AAC 130.319), define "duplicate." Accordingly, it is appropriate to examine other sources which define this term:

Webster's New World Dictionary of the American Language (2nd College Edition, World Publishing Company, 1972) defines "duplicate" in relevant part as "to make double or twofold," "to make, do, or cause to happen again". *Id.* at 434.

The American Heritage Dictionary of the English Language (Houghton Mifflin Company 1978) defines "duplicate" in relevant part as "reproduce . . . double; make twofold . . . to make or perform again; repeat." *Id.* at 405.

Black's Law Dictionary (West Publishing, 5th Edition, 1979) defines "duplicate" in relevant part as "[t]o double, repeat, copy, make, or add a thing exactly like a preceding one . . .". *Id.* at 451.

Webster's II New Riverside University Dictionary (Riverside Publishing Company, 1984) defines "duplicate" in relevant part as "to make twofold; double," "to make or execute again; repeat." *Id.* at 410-411.

Based on the foregoing definitions, it is clear that the installation of a wheelchair ramp at the rear of the Claimant's residence would "duplicate" the existing wheelchair ramp at the front of the Claimant's residence. Accordingly, the use of Medicaid funds for installation of a wheelchair ramp at the rear of the Claimant's residence is facially prohibited by 7 AAC 130.300(d)(4). The next issue is whether the Claimant's assertions require a different interpretation of the regulation.

II. Does it Matter Under 7 AAC 130.300(d)(4) if Having an Additional Rear Entrance Wheelchair Ramp Would be Safer Than Having Only a Front Entrance Wheelchair Ramp?

The Claimant's counsel asserted that installation of a ramp at the rear of the Claimant's residence would not be duplicative under 7 AAC 130.300(d)(4) because the front entrance to the home would not be as suitable an emergency exit as would the rear entrance in the event of a fire.

If subsection (b) of 7 AAC 130.300 existed by itself, unmodified by other subsections of the regulation, the Claimant's argument might have merit. 7 AAC 130.300(b) provides in relevant part that [t]he department will consider services to be environmental modification services if they . . . *are necessary to ensure the health, welfare, and safety of the recipient* [emphasis added]. However, subsection (b) of 7 AAC 130.300 does not exist in a vacuum. Rather, it is modified by 7 AAC 130.300(d)(4), which circumscribes subsection (b) by expressly prohibiting duplicate accessibility modifications to the same residence. Accordingly, even assuming for the sake of argument that it would be *best* to have a wheelchair ramp at the rear of the Claimant's home, it was never-the-less proper to deny the amendment request pursuant to 7 AAC 130.300(d)(4).

III. Does the Uniform Building Code Require Installation of a Wheelchair Ramp at the Rear of the Claimant's Residence?

The Claimant also argues that installation of a ramp at the rear of the Claimant's residence is required pursuant to Sections R310 and R311 of the International Building Code (IBC). Those provisions state in relevant part as follows:

R310.1 Emergency Escape and Rescue Required. Basements and every sleeping room shall have at least one operable emergency and rescue opening. Such opening shall open directly into a public street, public alley, yard, or court."

* * * * *

R311.4.1 Exit Door Required. Not less than one exit door . . . shall be provided for each dwelling unit. The required exit door shall provide for direct access from the habitable portions of the dwelling to the exterior "

* * * * *

The Claimant's residence satisfies IBC Section R311 because it has two (2) exit doors which open directly to the Claimant's front and back yards. The Claimant's residence also satisfies IBC Section

R310 because the Claimant's bedroom has a door ("at least one operable emergency and rescue opening") opening to her back yard. Nothing in IBC Sections R310 or R311 requires the installation of a wheelchair ramp at either the front entrance or the rear entrance of the Claimant's home.

CONCLUSIONS OF LAW

1. State Medicaid Regulation 7 AAC 130.300(d)(4) expressly prohibits the Division from paying for environmental modifications which "duplicate accessibility modifications to the same residence."
2. The Claimant failed to carry her burden and did not prove, by a preponderance of the evidence, that the installation of a wheelchair ramp at the rear entrance to her residence would not duplicate the existing wheelchair ramp at the front entrance to her residence.
3. Accordingly, the Division was correct when on August 2, 2010 it notified the Claimant that her proposed Plan of Care amendment (to authorize the installation of a wheelchair ramp at the rear door of the Claimant's residence) was denied, pursuant to 7 AAC 130.300(d)(4), on the basis that the requested wheelchair ramp was duplicative of another previously installed wheelchair ramp.

DECISION

The Division was correct when on August 2, 2010 it notified the Claimant that her proposed Plan of Care amendment (to authorize the installation of a wheelchair ramp at the rear door of the Claimant's residence) was denied, pursuant to 7 AAC 130.300(d)(4), on the basis that the requested wheelchair ramp was duplicative of another previously installed wheelchair ramp.

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:

Acting Director, Division of Senior and Disabilities Services
State of Alaska Department of Health and Social Services
550 West 8th Avenue
Anchorage, Alaska 99501

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 6th day of December, 2010.

(signed)

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 6th day of December 2010 true and correct copies of this document were sent to the Claimant via U.S.P.S. Mail, and to the remainder of the service list by e-mail, as follows:

Claimant's Counsel:

██████████, Esq.,
Alaska Legal Services Corporation
– Certified Mail, Return Receipt Requested

Counsel for DSDS:

██████████, Esq.
Department of Law, Attorney General's Office

██████████, DHCS / DSDS Hearing Representative

██████████, Acting Director, DSDS
██████████, Policy & Program Development
██████████, Staff Development & Training
██████████, Eligibility Technician I

(signed)

Jay Durych