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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-2360
)
 Claimant.) DHCS Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) has at all times relevant hereto been a recipient of Medicaid benefits (Claimant hearing testimony). At some time between September 13, 2010 and September 27, 2010 the Claimant requested Medicaid authorization for round-trip non-emergency medically-related travel¹ from [REDACTED], Alaska to Anchorage, Alaska during the period September 11-13, 2010 (Ex. D; Claimant hearing testimony).

On September 27, 2010 a contractor employed by the State of Alaska Division of Health Care Services (DHCS or Division) mailed to the Claimant a notice stating that the Claimant's authorization request for payment of travel expenses had been denied (Exs. D1-D3). The Claimant requested a fair hearing with regard to the Division's denial of her request for Medicaid travel authorization on October 7, 2010 (Ex. C1).

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

The Claimant's hearing was held as scheduled on November 23, 2010 before Hearing Examiner Jay Durych. The Claimant participated in the hearing by telephone, represented herself, and testified on her own behalf. Medical Assistance Administrator III [REDACTED] participated in the hearing by telephone, represented the Division, and testified on behalf of the Division. The

¹ The expenses for which Medicaid coverage was denied, and for which Medicaid coverage is once again being sought, includes round trip air fare and lodging (Claimant hearing testimony). However, for purposes of brevity, these two types of expenses will be referred to collectively in this decision as "travel expenses."

parties' testimonies were received and all exhibits offered by the parties were admitted into evidence. At the end of the hearing the Claimant asked that the record be held open until November 26, 2010 to allow her the opportunity to make a post-hearing filing. The Claimant's request was granted; however, no post-hearing filing was received by this Office. After November 26, 2010 the record was closed and the case became ripe for decision.

ISSUE

The Claimant testified at the hearing that her authorization/reimbursement request was for non-emergency lodging *and round-trip airfare*. She stated that she is not seeking reimbursement for meals because those were provided by Providence Hospital, in conjunction with her lodging, at no additional charge.

The Division asserted at the hearing that the Claimant's authorization request only sought reimbursement for her lodging and meals, not for her air fare. The Division also asserted that the Claimant's hearing request contested only the denial of reimbursement for lodging and meals.

However, the Division's denial notice (Ex. D1-D-3) lists the items denied as including both lodging and round-trip air fare. Accordingly, the issue to be determined is:

Was the Division correct when, on September 27, 2010, it mailed to the Claimant a notice denying her request for retroactive authorization (reimbursement) for non-emergency medically-related air fare and lodging expenses, based on the assertion that the applicable Medicaid regulations require prior authorization for non-emergency medically-related travel and lodging?²

FINDINGS OF FACT

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

1. The Claimant was, at all times relevant to this case, a recipient of Medicaid benefits residing in [REDACTED], Alaska (Claimant hearing testimony). The Claimant was 53 years of age at the time of the events at issue (Ex. E1).
2. Prior to September 12, 2010 the Claimant was very sick and needed to have her gall bladder removed (Claimant testimony). The Claimant had experienced difficulty in finding a doctor willing to remove her gall bladder in exchange for the payment available under the Medicaid Program. *Id.*
3. The Claimant's doctor (Dr. [REDACTED]) called the Claimant at 5:00 p.m. on Friday, September 10, 2010 and advised that a physician who would perform the Claimant's gall bladder surgery had been located, but that this physician would only be available to perform the Claimant's surgery that weekend (Claimant testimony). Dr. [REDACTED] told the Claimant that

² The Claimant did not assert that she required *emergency transportation services* as defined by 7 AAC 120.490(2) (see Principles of Law, below).

she needed to be in Anchorage the very next day (Saturday, September 11, 2010) so that her surgery could be performed on Sunday, September 12, 2010. *Id.*

4. The Claimant told Dr. [REDACTED] at this time that, because of the timing of his call (i.e. at the close of business on the last work day of the week), it was too late to obtain prior travel authorization from Alaska Medicaid (Claimant testimony). However, Dr. [REDACTED] told the Claimant in essence that it was “now or never” (i.e. that if the Claimant did not have the surgery that weekend, it would probably be a long time before another doctor could be found who would perform the surgery under the Medicaid Program). *Id.*

5. The Claimant’s doctor (Dr. [REDACTED]) did not call the Alaska Medicaid office to obtain prior authorization for the Claimant’s travel (Claimant testimony; DHCS Hearing Representative’s testimony).

6. The Claimant flew from [REDACTED] to Anchorage on Saturday, September 11, 2010 and checked into Providence Hospital later that day (Claimant testimony). The Claimant’s surgery was performed on the morning of Sunday, September 12, 2010. *Id.*

7. The airline ticket which the Claimant’s father had purchased for her provided for her return to [REDACTED] on Monday, September 13, 2010 (Claimant testimony). Accordingly, she checked out of Providence Hospital on that date. *Id.* However, ERA, the airline with which she had booked, was unable to fly into [REDACTED] on that date due to bad weather. *Id.* She returned to Providence Hospital because she did not know what else to do. *Id.* She stayed at the Hickel Guest House at Providence Hospital that night (the night of September 13-14, 2010). *Id.*

8. On Tuesday, September 14, 2010 the Claimant checked out of the Hickel House and flew back to [REDACTED] via ERA airlines (Exs. F1, F2, and Claimant testimony).

9. The Claimant’s father had given her \$100.00 before she left [REDACTED] (Claimant testimony). She used \$71.00 of this to pay for her lodging at the Hickel Guest House at Providence Alaska Medical Center (Ex. F2; Claimant testimony).

10. At some time between September 13, 2010 and September 27, 2010 the Claimant’s physician submitted an authorization request (i.e. requested reimbursement for Claimant from Medicaid) for the medically-related travel referenced above (Ex. D; Claimant hearing testimony).

11. On September 27, 2010 Affiliated Computer Services (ACS) (a private contractor utilized by the Division) mailed to the Claimant a notice stating that the Claimant’s travel reimbursement request had been denied (Exs. D1–D3). The Division’s denial letter stated in relevant part as follows:

Based on the information provided by the rendering provider at the time of review, Affiliated Computer Services has determined that the [Claimant’s travel expenses] are not authorized or have been subject to modification.

* * * * *

This determination is based on the following: The requested services for lodging and/or meals and/or extension of stay for 09/13/10 have been denied. This decision is based on regulation 7 AAC 120.410(E).

* * * * *

12. The Claimant requested a fair hearing with regard to the Division's denial of her request for Medicaid travel authorization / reimbursement on October 7, 2010 (Ex. C1).

13. At the hearing of November 23, 2010 the Division's Hearing Representative credibly testified in relevant part as follows:

a. A Medicaid recipient cannot "self-refer" (i.e. he or she cannot contact Alaska Medicaid directly to request authorization for medical procedures or travel). Accordingly, Medicaid recipients most depend on their health care providers to obtain this authorization for them.

b. Had the Claimant's gall bladder been bad enough to qualify for emergency care, the regulations would allow the Division to pay the Claimant's travel expenses without prior authorization. However, the Claimant did not request or utilize emergency travel (i.e. a Medevac flight).

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

This case involves the Division's denial of a claimant's initial application or claim for Medicaid benefits. The party seeking a change in the status quo (i.e. a change in the existing state of affairs) normally bears the burden of proof.³ In this case, the Claimant is attempting to change the existing state of affairs by obtaining Medicaid travel 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.⁴ 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.⁵

³ *State of Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

⁴ 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).

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

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 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).

On the federal level, the Secretary of the U.S. Department of Health and Human Services (“HHS”) administers the Medicaid program through the Centers for Medicare and Medicaid Services (“CMS”). See CMS website at <http://www.cms.gov/> (date accessed December 30, 2010). The Medicaid program is codified in the federal statutes and regulation under Title XIX and Title XXI of the Social Security Act and in the Code of Federal Regulations at Title 42 Part 435 and Title 45 Part 233. Medicaid is, in the words of Judge Friendly, “a statute of unparalleled complexity.” *DeJesus v. Perales*, 770 F.2d 316, 321 (2d Cir.1985).

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

III. Medicaid Transportation and Accommodation Services.

The Alaska state Medicaid regulations governing medical transportation and accommodation services are located at 7 AAC 120.400 - 7 AAC 120.490.

7 AAC 120.490(2) defines "emergency transportation" as “the transportation necessary *immediately* when a *sudden, unexpected occurrence* creates a medical emergency.” [Emphasis added].

7 AAC 120.405, titled “Transportation and Accommodation Covered Services,” provides in relevant part as follows:

(a) The department will pay a provider for only those transportation and accommodation services that are (1) provided to assist the recipient in receiving medically necessary services; and (2) *authorized by the department under 7 AAC 120.410 and 7 AAC 120.415*. [Emphasis added].

(b) The department may approve transportation and accommodations outside the recipient's community of residence to obtain medically necessary services for the recipient if (1) those services are not available in the recipient's community

* * * * *

7 AAC 120.410, titled “Prior Authorization for Nonemergency Transportation Services,” provides in relevant part as follows:

(a) Except as provided in (d) of this section, and except for transportation services subject to prior authorization under 7 AAC 110.205(c) and (d), transportation and accommodation services that are *not required by a medical emergency must receive prior authorization from the department before the time that the service is provided.* [Emphasis added].⁶

(b) The recipient's health care provider shall request prior authorization for medically necessary transportation and accommodations on behalf of the recipient by submitting the request to the department

* * * * *

(d) The department will pay for nonemergency transportation and accommodation services provided without prior authorization if (1) a recipient is forced to change *authorized* travel plans for reasons beyond the recipient's control, including the cancellation of an airline flight due to weather conditions or the closing of an airport for security reasons; or (2) the medical service for which the recipient traveled reveals the need for additional services, screening, or treatment that requires the recipient to stay longer than previously approved. [Emphasis added].

(e) The department will not pay the costs allowed in (d) of this section unless the recipient's health care provider notifies the department of the change in the recipient's travel plans no later than the next business day following the change in those plans.

* * * * *

7 AAC 120.425, titled “Accommodation Services,” provides in relevant part as follows:

(a) The department will pay for accommodation services, including food and lodging, incurred by a recipient and the recipient's authorized escort who are required to travel to receive necessary medical care and cannot reasonably return to the recipient's home community on the same day.

⁶ The exceptions specifically referenced in 7 AAC 120.410 do not apply to this case. The first exception (7 AAC 120.410(d)) dispenses with the pre-authorization requirement for travel-related expenses incurred *due to changes in previously authorized travel plans*. However, in this case, the Claimant’s travel plans were not pre-authorized in the first instance. Accordingly, this exception does not apply.

The second exception is for “transportation services subject to prior authorization under 7 AAC 110.205(c) and (d).” This regulation (7 AAC 110.205) contains no subsections (c) or (d), so this cross-reference is in error. The cross-reference is probably meant to refer to 7 AAC 110.210, which is the regulation immediately following 7 AAC 110.205. Regulation 7 AAC 110.210 *does* contain subsections (c) and (d), and those subsections pertain to travel authorization. However, those provisions pertain only to travel *by persons under the age of 21 years*. The Claimant is over 21 years of age (Ex. E-1). Accordingly, this exception also does not apply.

* * * * *

IV. Lack of Agency Discretion to Disregard Applicable Regulations.

An administrative agency is “bound by [its] regulations unless and until it repeals or amends the regulation using the proper procedure. 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

Introduction; Definition of Issue.

The issue in this case is whether or not the Division was correct when, on September 27, 2010, it denied the Claimant’s request for retroactive authorization (reimbursement) for non-emergency medically-related air fare and lodging expenses, based on the assertion that the applicable Medicaid regulations require prior authorization for non-emergency medically-related travel and lodging.

There are no disputed factual issues relevant to this decision. The Division asserts that it cannot pay for the non-emergency travel services / expenses at issue because the Claimant’s doctor did not have these services / expenses authorized prior to the Claimant’s trip to Anchorage. The Claimant does not contest the fact that her doctor did not obtain authorization for her travel expenses prior to her trip to Anchorage on September 11, 2010.⁷

The Claimant asserts, however, that her decision to travel to Anchorage for surgery without receiving prior authorization was reasonable under the circumstances of this case. The Division did not contest that the Claimant’s actions may have been reasonable; it asserts only that the regulations in question require pre-authorization in this case and do not give the Division the discretion to consider the reasonableness of a claimant’s decision to travel without pre-authorization.

Accordingly, there are really two sub-issues to be determined. The first is whether the relevant regulation requires pre-authorization of travel expenses. The second is whether there is any exception to that rule and/or whether the Division has discretion to relax or dispense with any pre-authorization requirement. These two sub-issues will be addressed below in the order stated.

I. Does 7 AAC 120.410 Generally Require Pre-Authorization for Non-Emergency Medically-Related Travel?

7 AAC 120.410, titled “Prior Authorization for Nonemergency Transportation Services,” provides in relevant part as follows:

⁷ The Claimant did not assert that she required *emergency transportation services* as defined by 7 AAC 120.490(2) (see Principles of Law, above).

(a) Except as provided in (d) of this section, and except for transportation services subject to prior authorization under 7 AAC 110.205(c) and (d), *transportation and accommodation services that are not required by a medical emergency must receive prior authorization from the department before the time that the service is provided.* [Emphasis added].

As indicated above, 7 AAC 120.410 clearly requires that, with *two exceptions*, non-emergency medically-related transportation and accommodation services must receive prior authorization from the department before the time that the services are provided. Do either of the two exceptions stated in the regulation apply here?

The first exception is “as provided in [7 AAC 120.410(d)].” That subsection dispenses with the pre-authorization requirement for non-emergency travel-related expenses when they are incurred *because of changes in previously authorized travel plans*. However, in this case, the Claimant’s travel plans were not pre-authorized in the first instance. Thus, this exception does not apply.

The second exception is for “transportation services subject to prior authorization under 7 AAC 110.205(c) and (d).” However, as stated in footnote 6, above, 7 AAC 110.205 contains no subsections (c) or (d), so this cross-reference is in error. The cross-reference is probably meant to refer to 7 AAC 110.210, which is the regulation immediately following 7 AAC 110.205. Regulation 7 AAC 110.210 *does* contain subsections (c) and (d), and those subsections pertain to travel authorization. However, those provisions pertain only to travel *by persons under the age of 21 years*. The Claimant is over 21 years of age (Ex. E-1). Thus, this exception also does not apply.

In summary, on its face 7 AAC 120.410 requires that the Division deny the Claimant’s request for reimbursement of non-emergency medically-related travel expenses because her doctor admittedly failed to obtain prior authorization for those services. As discussed above, neither of the two exceptions to 7 AAC 120.410’s preauthorization requirement for non-emergent medically-related travel apply to the facts of this case. The last issue is thus whether the Division has the discretion to relax the pre-authorization requirement of 7 AAC 120.410 given the sympathetic facts of this case.

II. Does the Division Have the Discretion Under 7 AAC 120.410 to Relax the Pre-Authorization Requirement for Non-Emergency Medically-Related Travel?

The last issue is whether the Division has the discretion to relax 7 AAC 120.410’s pre-authorization requirement for non-emergency medically-related travel under the sympathetic facts of this case.

7 AAC 120.410 states in relevant part that “transportation and accommodation services that are not required by a medical emergency *must* receive prior authorization from the department

before the time that the service is provided” [emphasis added]. The use of the word “must” in the regulation makes the pre-authorization requirement mandatory.⁸

When a regulation uses mandatory language, an agency is bound to follow it. *See Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 – 869 (Alaska 2010). In that case the court stated that an administrative agency is “bound by [its] regulations unless and until it repeals or amends the regulation using the proper procedure,” and that “[a]dministrative agencies are bound by their regulations just as the public is bound by them.” *Id.*

In summary, because of the mandatory language used in 7 AAC 120.410, the Division does not have the discretion to relax the pre-authorization requirement for non-emergency medically-related travel, even under the sympathetic facts of this case. Accordingly, the Division was correct when, on September 27, 2010, it mailed to the Claimant a notice denying her request for retroactive authorization (reimbursement) for non-emergency medically-related air fare and lodging expenses, because the applicable Medicaid regulations require prior authorization for non-emergency medically-related travel and lodging.

CONCLUSIONS OF LAW

1. State Medicaid regulation 7 AAC 120.410 requires, (except in limited circumstances not present in this case), that non-emergency medically-related air fare and lodging expenses receive prior authorization before services are provided.
2. Neither of the two exceptions to 7 AAC 120.410’s preauthorization requirement for non-emergency medically-related travel apply to the facts of this case.
3. Because of the mandatory language used in 7 AAC 120.410, the Division does not have the discretion to relax the pre-authorization requirement for non-emergency medically-related travel.
4. The Division was therefore correct when, on September 27, 2010, it mailed to the Claimant a notice denying her request for retroactive authorization (reimbursement) for non-emergency medically-related air fare and lodging expenses, because the applicable Medicaid regulation requires prior authorization for non-emergency medically-related travel and lodging.

DECISION

The Division was correct when, on September 27, 2010, it mailed to the Claimant a notice denying her request for retroactive authorization (reimbursement) for non-emergency medically-

⁸ Webster’s New World Dictionary of the American Language (Second College Edition 1970) defines “must” at p. 939 in relevant part as “(1) compulsion, obligation, requirement, or necessity . . .”. The American Heritage Dictionary of the English Language (Houghton Mifflin Co. 1978) defines “must” at p. 865 in relevant part as (1) Compulsion or obligation (2) Requirement or prerequisite” Black’s Law Dictionary (West Publishing, Fifth Edition, 1979) defines “must” at p. 919 as “primarily of mandatory effect . . . and in that sense is used in antithesis to ‘may’.” Webster’s II New Riverside University Dictionary (Riverside Publishing Co. 1994) defines “must” at p. 779 in relevant part as “(1) To be required or obliged by law (2) To be compelled (3) Used to express a command or admonition . . .”.

related air fare and lodging expenses, because the applicable Medicaid regulation requires prior authorization for non-emergency medically-related travel and lodging.

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:

Director, Division of Health Care Services
State of Alaska Department of Health and Social Services
4501 Business Park Boulevard, Suite 24
Anchorage, Alaska 99503-7167

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 January, 2011.

(signed)

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 6th day of January 2011 true and correct copies of the foregoing 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 - via Certified Mail, Return Receipt Requested
[REDACTED], DHCS Hearing Representative

[REDACTED], Director, DHCS
[REDACTED], Policy & Program Development
[REDACTED], Staff Development & Training
[REDACTED], Eligibility Technician I

(signed)

J. Albert Levitre, Jr.
Law Office Assistant I