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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-2278
)
 Claimant.) Division Case No. [REDACTED]

FAIR HEARING DECISION

STATEMENT OF THE CASE

Ms. [REDACTED] (Claimant) was receiving Medicaid benefits under the Home and Community-Based Waiver (HCBW) Mentally Retarded and Developmentally Disabled (MRDD) program. (Ex. A, pp. 1-2) Claimant filed an amended plan of care requesting to apply her Medicaid benefits while Claimant was travelling out of Alaska between June 21, 2011 and July 6, 2011. (Ex. E, p. 8) On June 2, 2011, the Division of Senior and Disabilities Services (SDS) approved Claimant's request and notified Claimant of its determination on June 16, 2011. (Ex. D, p. 1; Ex. F, p. 1) On July 1, 2011 SDS gave Claimant written notice correcting and clarifying its June 16, 2011 approval. (Ex. D, p. 1) On July 1, 2011 SDS notified Claimant that Medicaid payment was approved only for services provided during travel within the United States. (Ex. D, p. 1)

On July 12, 2011, Claimant requested a fair hearing.¹ (Ex. C) This office has jurisdiction pursuant to 7 AAC 49.010-.020.²

¹ The reason for requesting a Fair Hearing Request was written as "Out-of-State Travel Denied." In fact, the Division first approved out-of-state travel and then corrected its approval. The issue has been restated after the hearing.

² Alaska regulation 7 AAC 49.020(4) provides a Fair Hearing to individuals whose "request for a covered Medicaid service has been denied." Medicaid regulation 42 C.F.R. §431.52 authorizes payment of Medicaid benefits to recipients who are in a state other than their home state. The Division denied Claimant Medicaid benefits during the portion of her travel out of the country on grounds payment was not authorized outside the United States, i.e., not a "covered" service. (Ex. D) The implication is that Claimant is not entitled to a Fair Hearing because she was not denied a "covered" service. Fair Hearings are provided to Claimants who believe they are entitled to benefits that have been denied to them by the Department of Health and Social Services. To the extent Claimant was denied Medicaid benefits while she was in the country, she might have been denied a "covered" Medicaid service. Also, Claimant sought to have Medicaid pay for the services of her companion because it had agreed to do so initially. For at least these two reasons, Claimant is entitled to a Fair Hearing.

A Fair Hearing was held on August 7, 2011. Claimant was represented by her mother and legal guardian, Ms. [REDACTED], who appeared telephonically and testified on Claimant's behalf. Ms. [REDACTED], Standing-In Care Coordinator, and Ms. [REDACTED], Supportive Services Skills Teacher (companion), also appeared telephonically and testified on behalf of Claimant. Mr. [REDACTED], Fair Hearing Representative for the Senior and Disabilities Services Division attended the hearing in person, and testified on behalf of the Division. Ms. [REDACTED], Health Program Manager for Senior and Disabilities Services appeared in person and testified on behalf of the Division. The evidentiary record closed on August 7, 2011 at the end of the hearing. All offered exhibits were admitted.

ISSUE

On July 1, 2011, was the Division correct to deny Medicaid benefits to Claimant when Claimant traveled outside the United States between June 21, 2011 and July 6, 2011?

FINDINGS OF FACT

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

1. Claimant³ was receiving Medicaid benefits, including Supported Living and Day Habilitation services, through the Home and Community Based Waiver, MRDD program according to an approved plan of care. (Ex. E, p. 8)
2. On April 29, 2011, Claimant requested approval of an amendment to her plan of care. (Ex. E, pp. 7-20) Her request was to apply her Medicaid benefits, in the form of Supported Living and Day Habilitation services, while "in Seattle Washington." (Ex. E, pp. 9, 16) However, the plan-of-care Amendment Description justified the need for amendment by stating that Claimant was seeking the use of these Medicaid benefits for vacation travel to [REDACTED]. (Ex. E, p. 8) Claimant's amendment stated: "Her guardian knows that for medical emergencies they will have to pay for health care because Medicaid doesn't work in foreign countries." (Ex. E, p. 8)
3. On June 2, 2011, the Senior and Disabilities Services Division (Division or SDS) approved Claimant's request and notified Claimant of its approval on June 16, 2011. (Ex. D, p. 1; Ex. F, p. 1) The Division's notification stated: "Senior & Disabilities Services has approved your Home and Community-Based Medicaid Waiver Plan of Care." (Ex. F, p. 1) The notifying letter did not reference Claimant's request to amend her plan-of-care. (Ex. F, p. 1)
4. On July 1, 2011, the Division issued a corrected notice of its prior approval of Claimant's request. (Ex. D) The correction denied approval of Medicaid payment while Claimant was outside the United States. (Ex. D, "Corrected Notice of Benefits; MRDD Denial of HCVBW Service, Effective Date 6/21/2011) The Division relied on Medicaid regulation 42 C.F.R. § 431.52 as authority

³ Claimant did not appear or testify at the hearing. In this decision, all references to Claimant includes attribution of testimony made by Claimant's caregivers.

for its amended approval. (Ex. D, p. 1) The Health Program Manager checked with the Department's Policy division, who informed her that CMS⁴ interprets this regulation to prohibit payment of Medicaid benefits to recipients who are outside of the United States. (Health Program Manager's testimony) This notification was a correction of the Division's prior approval. (Health Program Manager's testimony)

5. The purpose of Claimant's travel was to attend the World Special Olympic games in [REDACTED]. (Ex. E, p. 8; Claimant's testimony) Claimant's travel was exclusively for her vacation and was a once in a life-time opportunity for her to see her life-long friend compete as one of three Alaskans in the World Special Olympics. (Claimant's mother's testimony) Claimant "planned well" and "got medical coverage because they knew it would not be covered." (Standing-In Care Coordinator's testimony) Claimant planned and engaged in fund-raising a long time in anticipation of the vacation and submitted her amendment request when her travel dates were firm. (Claimant's mother's testimony)

6. Claimant travelled to [REDACTED] by flying on June 21, 2011 from Anchorage, Alaska to [REDACTED], without stopping overnight, but changing planes in [REDACTED], and returned to Alaska similarly on July 6, 2011. (Claimant's testimony) When she returned, she learned of the corrected notice that denied her Medicaid benefits when she was out of the country.

7. The State did not pay any amount of funds to Claimant in relation to the trip. (Care Coordinator's testimony; Claimant's mother's testimony) Claimant testified both that she would have gone and that she would not have gone on the trip if her requested amendment had been denied because the trip was very important to her. (Claimant's mother's testimony)

8. During her vacation, Claimant was accompanied by her mother and Claimant's Supportive Living Skills Teacher (Companion), employed by [REDACTED]. (Companion's testimony) [REDACTED] paid the companion and is not seeking reimbursement from Claimant or the State. (Claimant's mother's testimony; Care Coordinator's testimony). No one is seeking reimbursement from Claimant. (Claimant's mother's testimony) Claimant is seeking Medicaid benefits for services while she was out of the country. (Claimant's mother's testimony)

PRINCIPLES OF LAW

Burden of Proof and Standard of Proof

"Ordinarily the party 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 standard of proof in an administrative proceeding is a "preponderance of the evidence," unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Com'n*, 711 P.2d 1170, 1183 (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)

⁴ CMS is the acronym for the federal Medicaid agency which oversees the States' administration of Medicaid programs.

Medicaid

The State of Alaska provides medical assistance to needy persons who are eligible. AS 47.07.010; AS 47.07.020. It does this, in part, by participating in the national medical assistance program provided by 42 U.S.C. 1396 – 1396p, (Title XIX of the Social Security Act), which provides grants to states for medical assistance programs, including Medicaid.

The Alaska Mentally Retarded/Developmentally Disabled (MRDD) program is administered as one of the Home and Community Based Waiver programs and is a Medicaid benefit program. 7 AAC 130.100 et seq.

Alaska Regulation 7 AAC 105.120 “Out-of-state covered services” at subsection (a)(1)-(2) provides for payment of Medicaid benefits to recipients when they are out of state if the Department of Health and Social Services (Department) is able to “verify” the service is required for medically related purposes. This Alaska regulation is similar to the federal regulation of 42 C.F.R. § 431.52.

Medicaid regulations govern the circumstances under which payment may be made to a Medicaid recipient who is out of state. Title 42 of the Code of Federal Regulations (C.F.R) § 431.52 , “Payments for services furnished out of State” provides, in relevant part:

(a) Statutory basis. Section 1902(a)(16) of the Act authorizes the Secretary to prescribe State plan requirements for furnishing Medicaid to State residents who are absent from the State.

(b) Payment for services. A State plan must provide that the State will pay for services furnished in another State to the same extent that it would pay for services furnished within its boundaries if the services are furnished to a recipient who is a resident of the State, and any of the following conditions is met:

- (1) Medical services are needed because of a medical emergency;
- (2) Medical services are needed and the recipient’s health would be endangered if he were required to travel to his State of residence;
- (3) The State determines, on the basis of medical advice, that the needed medical services, or necessary supplementary resources, are more readily available in the other State;
- (4) It is general practice for recipients in a particular locality to use medical resources in another State.

Payment of Medicaid benefits is made for activities and supervision approved under the State Medicaid program and payment is not made for “activities or supervision for which a source other than Medicaid makes payment.” 7 AAC 130.255(c)(2)(C).

Medicaid funding is not available for “services during travel outside the United States...” Department of Health and Social Services, Senior and Disabilities Services, Policy and Procedure Manual, Section 3 Out-of-State Travel for Waiver Recipients, Procedures, A.1 (Ex. E, p. 4)

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

Equitable Estoppel

When an individual seeks to estop a government from changing an action it has taken, the individual must prove four elements: (1) the government asserted a position by conduct or words; (2) the individual acted in reasonable reliance thereon; (3) the individual suffers resulting prejudice; and (4) the estoppel is necessary to serve the interest of justice and limit public injury. *Crum v. Stalnakar*, 936 P.2d 1254, 1256 (Alaska 1997) *Wassink v. Hawkins*, 763 P.2d 971, 975 (Alaska 1988).

The individual must have a reasonable basis to rely on the position of the government:

Often, even where reliance has been foreseeable, reasonable, and substantial, the interest of justice may not be served by the application of estoppel because the public interest would be significantly prejudiced. However, this is not true in every case. When the public will not be significantly prejudiced, and the other elements of the theory are present, the majority rule which forecloses the use of estoppel causes arbitrary and unjust results. *Municipality of Anchorage v. Schneider* 685 P.2d 94, 97 (Alaska 1984)

ANALYSIS

Issue

On July 1, 2011, was the Division correct to amend its June 2, 2011 approval of Medicaid payment while Claimant travelled out of Alaska between June 21, 2011 and July 6, 2011?

Burden of Proof and Standard of Proof

The Division has the burden of proof by a preponderance of the evidence because it sought to change its prior approval of Claimant’s plan amendment. This is attempting to change the status quo of its prior approval. “Ordinarily the party 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).

Analysis

All of the material facts in this case are undisputed. Claimant is a recipient of Medicaid benefits through the MRDD program of the Home and Community Based Waiver program of the State of Alaska. On April 29, 2011, Claimant sought approval to apply Medicaid benefits to pay for Supported Living and Day Habilitation services during the period of her travel out of Alaska to and from [REDACTED] between June 21, 2011 and July 6, 2011. The purpose of the travel was to vacation by attending the World Special Olympic games. Claimant flew directly from Alaska to [REDACTED] and return, with only

some time in United States airspace and to change planes. It is undisputed Claimant's absence from Alaska was not medically related. Claimant relied on the Division's approval, received before travel began, and learned only after her return to Alaska that, on July 1, 2011, the Division had withdrawn its approval of Medicaid benefits for the out of United States portion of her travel.

The Division of Senior and Disabilities Services (Division) approved Claimant's use of Medicaid benefits for the entire portion of her travel on June 16, 2011. However, on July 1, 2011, the Division denied Claimant's use of Medicaid benefits for the time when Claimant was outside of the United States.

Claimant argued that the Division was incorrect to change its approval after Claimant had begun her travel. No one, neither [REDACTED] nor Claimant's Companion, sought reimbursement from Claimant. Claimant seeks Medicaid benefits to pay for her Companion's services while Claimant was out of the country, in effect, to reimburse [REDACTED].⁵

The parties did not dispute that federal Medicaid regulation 42 C.F.R. § 431.52(b) is the controlling legal authority. This regulation authorizes payments to recipients who are within the United States and provides that

the State will pay for services furnished in another State to the same extent that it would pay for services furnished within its boundaries if the services are furnished to a recipient who is a resident of the State, and any of the following conditions is met:

- (1) Medical services are needed because of a medical emergency;
- (2) Medical services are needed and the recipient's health would be endangered if he were required to travel to his State of residence;
- (3) The State determines, on the basis of medical advice, that the needed medical services, or necessary supplementary resources, are more readily available in the other State;
- (4) It is general practice for recipients in a particular locality to use medical resources in another State.

In this case, Claimant's absence from the State of Alaska was not related to obtaining medical services in any form. Claimant's absence was for purposes of vacationing out of the United States. There are two Medicaid issues: a) that Claimant's travel was not for medically related purposes; and b) that Claimant was travelling out of the country.

Medicaid benefits paid to recipients who are away from their state of residence are allowed a) for specified medically related purposes only, and b) while they are in another state. 42 C.F.R. § 431.52(b)(1)-(4). If Claimant had been in another state for medically related purposes as provided by the federal regulation, the Division would have been correct to approve Medicaid benefits. However,

⁵ During the hearing, the parties agreed the provider, [REDACTED], was not appealing or disputing the Division's action and that only Claimant was disputing the Division's corrective action of July 1, 2011.

Claimant's absence from the state was for vacationing, and hence Medicaid benefits are not authorized for any period of time she was not receiving medically related services. 42 C.F.R. § 431.52(b)(1)-(4). Claimant was not entitled to Medicaid benefits when she was out of the United States (even if her travel had been for medically related purposes) because Medicaid benefits are not available outside the United States.

Alaska law is similar to the federal Medicaid law and does not allow the Division to pay Medicaid benefits to recipients who are out of state for non-medically related purposes or who are out of the country. Alaska regulation 7 AAC 105.120 (a)(1)-(2) provides for payment of Medicaid benefits to recipients when they are out of state if the Department of Health and Social Services (Department) is able to "verify" the service is required for medically related purposes. Although this regulation is silent about payment while out of the United States, it does authorize payment for covered services provided "out of state." By implication the regulation does not authorize payment for covered services when a recipient is outside of any state, i.e., in a foreign country.

The facts of this case do not permit the Division to pay for Medicaid benefits to Claimant during her vacation travel. Alaska regulation 7 AAC 130.255(c)(2)(C), provides that the Division will not pay for "activities or supervision for which a source other than Medicaid makes payment...." First, Claimant's companion's expenses were paid by another source than Medicaid, i.e., [REDACTED]. Second, this regulation, by reverse implication, states the Department will not pay expenses which are not authorized by Medicaid. Claimant's out of country vacation travel is not authorized by Medicaid and therefore the Division cannot pay for the services rendered.

Finally, the Division does not have the authority to create an exception to the law concerning Medicaid and is required to implement the law as it exists.⁶ Medicaid regulation 42 C.F.R. § 431.52 clearly restricts payment of Medicaid benefits to a Medicaid recipient who is out of state for medically related purposes and within the United States. "Administrative agencies are bound by their regulations just as the public is bound to them." *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868-869 (Alaska 2010).

Therefore, the State erred in approving Claimant's request to amend her plan-of-care to apply Medicaid benefits during her vacation between June 21, 2011 and July 6, 2011 and was right to correct its approval on July 1, 2011 and deny Medicaid benefits during Claimant's out of country travel.

⁶ Moreover, the authority of the Office of Hearings and Appeals is limited to the scope identified in 7 AAC 49.170, that provides, in relevant part:

Except as otherwise specified in applicable federal regulations...the role of the hearing authority is limited to the ascertainment of whether the laws, regulations, and policies have been properly applied in the case and whether the computation of the benefit amount, if in dispute, is in accordance with them.

The Office of Hearings and Appeals cannot deviate from its application of the facts to the statutes and regulations governing the administration of the Medicaid program, and has no authority to create exemptions from the requirements of the law for any reason(s).

Equitable Estoppel

Claimant argued it was unfair to first approve the use of Medicaid benefits for the whole vacation and then, after the fact travel was begun, to deny benefits for a portion of the travel. Thus, Claimant argues the Division should be estopped from withdrawing its approval of her plan-of-care amendment.

Facts pertinent to equitable estoppel include the following:

1. Testimony was both that Claimant would have travelled, and would not have travelled, if her amendment request had been denied. It is reasonable to believe that Claimant would have travelled notwithstanding denial of her amendment request in light of a) the importance of the trip to Claimant, b) the evidence of long term fund raising and planning, c) the fact that Claimant “planned well” and obtained medical coverage because she knew she would not be covered outside of the United States, and d) that no payment for Claimant’s companion has been sought from Claimant.

2. The Division first approved the use of Medicaid benefits for the entirety of Claimant’s travel but later corrected its approval to deny Medicaid benefits while Claimant was out of the country because they were not authorized by federal Medicaid law.

3. Claimant travelled in reliance on the Division’s approval during the time she was in the United States. Claimant did not rely on the Division’s approval for the time when she was not in the United States, because she obtained medical coverage before departure knowing she would not be covered when out of the country.

4. Claimant has not paid for her companion. ██████████ has paid the expenses of Claimant’s companion and has not sought reimbursement from Claimant or the State. Claimant seeks payment from Medicaid, through the Division.

When an individual seeks to estop a government from changing an action it has taken, the individual must prove four elements: (1) the government asserted a position by conduct or words; (2) the individual acted in reasonable reliance thereon; (3) the individual suffers resulting prejudice; and (4) the estoppel is necessary to serve the interest of justice and limit public injury. *Crum v. Stalnaker*, 936 P.2d 1254, 1256 (Alaska 1997); *Wassink v. Hawkins*, 763 P.2d 971, 975 (Alaska 1988).

The individual must have a reasonable basis to rely on the position of the government. However, reliance is not determinative of whether the government should be estopped from changing its position:

Often, even where reliance has been foreseeable, reasonable, and substantial, the interest of justice may not be served by the application of estoppel because the public interest would be significantly prejudiced. However, this is not true in every case. When the public will not be significantly prejudiced, and the other elements of the theory are present, the majority rule which forecloses the use of estoppel causes arbitrary and unjust results. *Municipality of Anchorage v. Schneider* 685 P.2d 94, 97 (Alaska 1984)

In this case Claimant has not prevailed on her estoppel argument because she has not proved several of

the required elements of estoppel. First, Claimant did not act in reasonable reliance on the Division's approval of her plan-of-care amendment. This conclusion is supported by the following facts: a) Claimant was engaged a long time in planning and financing her vacation and submitted her amendment request only about 2 months before departure, after her travel dates were firm; b) Claimant obtained medical coverage with the expectation that Medicaid would not be available to her when out of the United States; c) Claimant would have taken the trip notwithstanding the Division's approval because it was a once in a life-time opportunity for her to see her life-long friend compete as one of three Alaskans in the World Special Olympics.

Second, Claimant did not suffer prejudice as a result of the Division's action because Claimant did not pay her companion's expenses and no one is seeking reimbursement from Claimant. The Division's action did not deprive Claimant of any public assistance benefit to which she was entitled by law. 42 C.F.R. § 431.52 clearly limits the use of Medicaid benefits by recipients who are within the United States, and seeking medical services. Therefore, the denial of Medicaid benefits while Claimant was vacationing out of the United States did not prejudice Claimant.⁷

Third, estoppel is not necessary in the interest of justice to protect the public. Claimant suffered no injury from which she can be protected because, as discussed above, Claimant did not incur any expense for her companion.

CONCLUSIONS OF LAW

1. The Division proved by a preponderance of the evidence that it was correct, on July 1, 2011, to deny Claimant Medicaid benefits for the time when she was outside the United States between June 21, 2011 and July 6, 2011. 42 C.F.R. § 431.52
2. Claimant did not prove she was entitled to equitable estoppel because she did not prove by a preponderance of the evidence that she reasonably relied on the Division's approval as the basis for her decision to vacation, did not suffer prejudice as a consequence of the Division's denial of Medicaid benefits during out of country travel, and suffered no injury that can be remedied in the interest of justice. *Municipality of Anchorage v. Schneider* 685 P.2d 94, 97 (Alaska 1984); *Crum v. Stalnaker*, 936 P.2d 1254, 1256 (Alaska 1997).

DECISION

On July 1, 2011, the Division was correct to deny Claimant Medicaid benefits while Claimant travelled out of the country on vacation between June 21, 2011 and July 6, 2011.

⁷ The Division incorrectly interpreted 42 C.F.R. § 431.52 to allow it to approve Medicaid benefits for Claimant while she was within the United States for vacation and not for any of the (medically related) reasons identified in 42 C.F.R. § 431.52(b)(1)-(4). Because Claimant was not out of Alaska for any purpose for which Medicaid benefits are authorized by 42 C.F.R. § 431.52, the Division erred when it approved the amendment to the plan-of-care. .

APPEAL RIGHTS

If for any reason Claimant is not satisfied with this decision, Claimant has the right to appeal by requesting a review by the Director. An appeal 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, Claimant must 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

DATED this October 10, 2011.

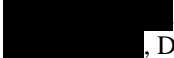
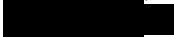
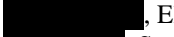


Claire Steffens
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on October 10, 2011 true and correct copies of the foregoing were sent to:

Claimant, Certified Mail, Return Receipt Requested.

and to other listed persons (via secure, encrypted e-mail), as follows:

, Hearing Representative
, Director, DSDS
, Chief, Policy & Program Dev.
, Eligibility Technician
, Staff Development & Training

J. Albert Levitre, Jr.
Law Office Assistant I