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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-2360
)
 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) On or about March 18, 2011, Claimant submitted an amended plan of care requesting 896 units of supported employment services. (Ex. F) On August 22, 2011, the Division of Senior and Disabilities Services (SDS) notified Claimant of its denial of Claimant's request for the 896 hours of supported employment benefits. (Ex. D, p. 1)

However, on or about October 31, 2011, Claimant filed another amended plan of care changing and reducing her request from 896 units to only 147 units of supported employment services. (Ex. H) The subject of this case is the denial by the Division of Senior and Disabilities Services (Division) of Claimant's October 31, 2011 request for 147 units, which units represented a portion of the 896 units originally requested.¹ (Parties' agreement; *see* Ex. H, p. 6) The Division did not issue a notice denying the request for only 147 units, but the parties agreed the August 22, 2011 denial notice would suffice as notice applicable to the Division's denial of the October 31, 2011 amendment request.

On September 13, 2011, Claimant requested a fair hearing. (Ex. J) This office has jurisdiction pursuant to 7 AAC 49.010-.020.

A Fair Hearing was scheduled for October 12, 2011 and continued to November 9, 2011 and November

¹ Claimant's provider supplied her with supported-employment services without prior authorization from the Division. [REDACTED] paid the provider for the supported-employment services given to Claimant without prior authorization. [REDACTED] is seeking Medicaid payment of 147 hours of supported-employment services through Claimant's right to a Fair Hearing. (Care Coordinator Supervisor's testimony) Whether this is appropriate is a separate issue which need not be addressed because Claimant has the right to a fair hearing based on the Division's denial of her request. 7 AAC 40.010.

16, 2011 for Claimant's benefit. Claimant was represented by her mother, Ms. [REDACTED], who participated telephonically and testified on Claimant's behalf. Claimant was assisted by Mr. [REDACTED], Care Coordinator Supervisor, [REDACTED] and Ms. [REDACTED], Care Coordinator, [REDACTED], who also participated telephonically and testified on behalf of Claimant. Mr. [REDACTED], Fair Hearing Representative for the Senior and Disabilities Services Division, participated in person and testified on behalf of the Division. Ms. [REDACTED], Health Program Manager for Senior and Disabilities Services, participated in person and testified on behalf of the Division. The evidentiary record closed on November 28, 2011 after the Division supplied the supplementary information the parties agreed to be received as an Exhibit during the hearing. All offered exhibits were admitted.

ISSUE

On August 22, 2011, was the Division correct to deny Claimant's request to receive additional units of supported-employment services as an amendment to her plan of care?

FINDINGS OF FACT

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

1. Claimant² was receiving Medicaid benefits, through the Home and Community Based Waiver, MRDD program, according to an approved plan of care spanning October 8, 2010 through October 7, 2011. (Ex. E, pp. 3, 8) Included in the existing plan of care were 328 units of supported employment for a minimum of 2 hours per week for 41 weeks between December 21, 2010 and October 7, 2011. (Ex. E, pp. 2, 22-23) These 328 units were authorized by the Division to meet Claimant's request for a job coach at her Papa Murphy's Pizza workplace.
2. The Division proved Claimant used all 328 units as of June 15, 2011. (Ex. J, p. 7) Claimant billed the Division, through [REDACTED], for these 328 units used from March 3, 2011 through June 15, 2011. (Ex. J) The Division paid the claim for these 328 units. (Ex. J) However, in her amendment requests, Claimant informed the Division she had used none of these units. (Ex. F, p. 5; Ex. H, p. 6)
3. On or about March 18, 2011, Claimant submitted an amended plan of care requesting an additional 896 units of supported employment services so she could be trained for janitorial duties at [REDACTED].³ (Ex. F, pp. 2, 5-6) Claimant requested the services for use during the period from April 1, 2011 through October 7, 2011. (Ex. F, p. 5) Claimant's request also specifically stated that "no [supported employment] units were used" between December 21, 2010 and April 1, 2011.⁴ (Ex. F, p. 5)

² Claimant did not appear or testify at the hearing. In this decision, all references to Claimant include attribution of testimony made by Claimant's caregivers.

³ Claimant also requested additional day habilitation services for 28 weeks. These were approved as requested. The result led to a total of 28 hours per week of day habilitation.. (Exs. E, p. 17; F, p. 4; Heath Program Manager's testimony)

⁴ An inconsistency with the billing records showing Claimant billed the Division for 80 units between March 3, 2011 and March 16, 2011, may be attributable to the time gap between preparation of the amendment request and the Division's receipt of it. (Compare Ex. J, p. 2 with Ex. F, p. 5)

4. On or about October 31, 2011, Claimant “amended her amendment” request by reducing the number of units requested from 896 to 147 units of supported-employment services. (Hearing Representative’s testimony; Care Coordinator Supervisor’s testimony; Ex. H) The 147 units represent units supplied to Claimant by a job coach, without prior authorization from the Division, when Claimant was being trained for janitorial duties at [REDACTED]. (Care Coordinator Supervisor’s testimony)

5. On August 22, 2011, the Senior and Disabilities Services Division (Division) denied Claimant’s request for 896 units of supported employment services. (Ex. D) The Division’s notification states, in part:

Page 4 of the amendment states, “[Claimant] is currently employed with [REDACTED] [REDACTED] ... and has improved her work skills in that setting to where she no longer requires a job coach. She has however recently acquired a janitorial job at [REDACTED]....” Additional information provided to SDS states, “No DVR services have been used with this consumer period. No additional services have been requested for her ‘competing employment location’ and none were utilized in this waiver year, as she has been able to successfully and independently complete her job duties and does not need support staff for that job.” Supported Employment services assist participant’s who are ‘unlikely to obtain competitive employment,’ clearly [Claimant] is capable of obtaining and maintaining ‘competitive employment’.

Per regulation, the department will not pay for services that are available under the Rehabilitation Act. ... If [Claimant] requires assistance learning job skills that differ from the job skills she’s acquired while working at [REDACTED], DVR services should be sought to assist her.

Given that [Claimant] maintains competitive employment at [REDACTED], and she has not accessed DVR services for assistance with learning different job skills, the request for 896 units... is denied.

6. Claimant is employed at [REDACTED] for 9-10 hours a week and does not have a job coach. She is employed there because her provider and mother “approached them and asked them if they would get her into their program for just a few hours a week so she could have some job experience.” (Mother’s testimony) Claimant tried a few hours of job coaching there and it did not go well. (Mother’s testimony; Care Coordinator’s testimony) As of November 2011, Claimant had been employed at [REDACTED] [REDACTED] for a little over a year and was successful because the job is tailored to individuals. Claimant did not have to compete for the job and was hired because of her disability. (Mother’s testimony)

7. Claimant requested the additional (896 units) supported-employment units to use a job coach to enhance her job skills, to open doors for her in employments that would provide more hours and better pay. Claimant did not want to make pizza the rest of her life and wanted to explore other work. That is why Claimant was selected to be a janitorial candidate at [REDACTED]. Claimant attempted the janitorial work but it proved to be stressful and so Claimant is asking for approval of only 147 units. (Mother’s testimony)

8. After March 2011, Claimant had a job coach at [REDACTED] while she also was working part time at [REDACTED]. Claimant's job coach did help her work at [REDACTED] because her performance reviews improved. (Care Coordinator's testimony)

9. Claimant is not in danger of being institutionalized if she does not get the requested supported-employment services. (Mother's testimony)

10. The Division's Health Program Manager's testimony provided the following:

a. Before requests for supportive employment are approved, the Division must evaluate the request to determine if the person needs the "intensive ongoing support system" that supportive employment provides. When evaluating, the Division considers the following:

1) If the applicant is seeking to work where persons without disabilities are working, so the applicant will be integrated into the employment workplace.

2) If the applicant able to obtain competitive employment at or above a minimum wage level and, if they are capable of doing that, then supportive employment is not authorized.

3) Are the activities the applicant seeks to do of the kind needing supported-employment services, such as monitoring or overseeing work duties, or are they the kind subject to normal employee supervision?

4) Have the services of the Division of Vocational Rehabilitation been "researched and utilized first"?⁵

5) Has the applicant first researched and used educational resources.

b. Claimant had been approved for 24 hours per week of day habilitation in her (existing) plan of care. (Ex. E, p. 17) Claimant was using some of her day habilitation time in relation to her employment goals. In relation to day habilitation time, the Division relied on Claimant's statement in her plan of care that:

"[Claimant] is currently working but doesn't have a lot of hours. While she is currently comfortable with her job, she would like to have the option of utilizing day hab for exploring future employment options, possibly through volunteer work or classes for further education. At her current place of employment she is working on taking positive criticism from her support provider and utilizing it to improve, communicating with her employer on her schedule and needs, and acquiring further work skills." (Ex. E, pp. 9, 17)

⁵ On June 30, 2011, the Division sought information concerning Claimant's use of the services of the Division of Vocational Rehabilitation (DVR). Claimant informed the Division "No DVR services have been used with this consumer period." (Ex. I, p.1) During the hearing, the parties agreed that there was no issue concerning whether Claimant had researched and used the services of the Division of Vocational Rehabilitation. Therefore, this decision does not address DVR services.

c. Claimant's goal was to "further develop job maturity skills to maintain gainful employment in the community." The Division approved four additional hours of day habilitation services to provide for Claimant's goal to go out into the community and acquire additional employment skills. (See Ex. H, pp. 3, 5)

(Health Program Manager's testimony)

11. Claimant was denied additional units of supported-employment because she was currently employed and had acquired a skill set sufficient that she did not need a job coach. Also, Claimant had not used any of the supportive employment units she had been authorized in her existing plan of care. (Health Program Manager'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)

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. The purpose of Home and Community-Based Waiver services is to offer a recipient a choice other than institutional care. 7 AAC 130.200

Regulation 7 AAC 130.270 pertaining to supported-employment services states, in relevant part:

- (a) The department will pay for supported-employment services that ...
- (2) are approved under 7 AAC 130.230 as part of the recipient's plan of care; if a recipient is under 22 years of age, the plan of care must document that the supported-employment services to be received do not duplicate or supplant educational services for which a recipient is eligible under 4 AAC 52; and (3) receive prior authorization.

(b) The department will consider services to be supported-employment services if ... (3) the recipient is unlikely to obtain competitive employment at or above the minimum wage and, because of the recipient's disability, needs intensive ongoing support, including supervision and training, to perform in a work setting.

(c) The department will not pay for ... (2) supervisory activities rendered as a normal part of the business; or (3) accommodations routinely provided to employees.

ANALYSIS

I. Issue

On August 22, 2011, was the Division correct to deny Claimant's request to receive 147 hours of supported employment services as an amendment to her plan of care?

II. Burden of Proof and Standard of Proof

Claimant has the burden of proof by a preponderance of the evidence because she sought additional benefits as an amendment to her plan of care, which is a change from the status quo. "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).

III. Facts

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. Claimant had an existing plan of care which spanned October 8, 2010 through October 7, 2011. Included in the existing plan of care were 328 units of supported-employment providing a minimum of 2 hours per week for 41 weeks between December 21, 2010 and October 7, 2011. (Ex. E, pp. 2, 22-23) These 328 units were authorized by the Division to meet Claimant's request for a job coach at her [REDACTED] workplace. Claimant billed the Division, through [REDACTED] for 328 units from March 3, 2011 through June 15, 2011. These were paid by the Division. (Ex. J) The billing records are inconsistent with Claimant's Care Coordinator's testimony and Claimant's mother's testimony that the job coach services at [REDACTED] were discontinued after a few hours because they were unsuccessful. There is no clear evidence when the job coach services were terminated at [REDACTED]

On or about March 18, 2011, Claimant sought 896 units of additional supported-employment services to enable her to have a job coach while training to perform janitorial duties at [REDACTED]. There is no clear evidence when the job coaching services at [REDACTED] were begun or terminated. The job coaching for the janitorial work also was unsuccessful and Claimant's attempt to do janitorial work with a job coach was discontinued. Without the Division's authorization, [REDACTED] paid the job coach for

the work coaching Claimant in janitorial duties at [REDACTED]. Claimant then reduced her request from 896 units to 147 units.⁶

At all times relevant to this case, Claimant was employed at [REDACTED] for 9-10 hours a week and was paid for her work.

IV. The Division correctly denied Claimant's request for additional supported-employment services.

Regulation 7 AAC 130.270, specifies the basis on which the Division will authorize (Medicaid) payment of supported-employment services. This regulation states the Division will pay for support-employment , if the services are (quoted in relevant part):

(2) ... approved under 7 AAC 130.230 as part of the recipient's plan of care; if a recipient is under 22 years of age, the plan of care must document that the supported-employment services to be received do not duplicate or supplant educational services for which a recipient is eligible under 4 AAC 52; and

(3) receive prior authorization.

It is undisputed Claimant did not receive prior authorization, but this is not at issue. (*See* footnote 6.) Also not at issue is whether Claimant's proposed amended plan of care documented that the supported-employment services sought would not duplicate or supplant educational services for which Claimant is eligible under 4 AAC 52.

Claimant argues the Division should have approved additional units of supported-employment as an amendment to her plan of care. Claimant supports her argument with testimony that the supported-employment services were provided. But the undisputed facts prove that Claimant does not need the additional supported-employment units she seeks.

Claimant's argument is not persuasive by a preponderance of the evidence for the following reasons.

First, job coaching efforts at [REDACTED] had been unsuccessful. The job coaching provided to train Claimant to do janitorial work at [REDACTED] also was unsuccessful. This suggests that supported-employment services are not appropriate for Claimant.

Second, regulation 7 AAC 130.270(b)(3) specifies that supported-employment services must meet three conditions, the third of which is:

⁶ FOCUS, Inc. elected to pay the provider of supported-employment services given to Claimant even though it knew, or reasonably should have known, that the services had not been authorized by the Division as required. FOCUS, Inc. gratuitously paid the provider. Neither party provided evidence or testimony concerning who was paid by FOCUS, Inc. for providing the supported employment services, how many hours were provided, and what amount was paid. FOCUS, Inc. has not sought reimbursement from Claimant. Fair Hearing 7 AAC 49.002 provides an opportunity for a fair hearing to Claimant because her request for a covered Medicaid service was denied. 7 AAC 49.020(4). Therefore, this decision addresses only the Division's denial of the request for supported employment services, and not the issue that services were provided without authorization. 7 AAC 120.270(a).

The recipient is unlikely to obtain competitive employment at or above the minimum wage and, because of the recipient's disability, needs intensive ongoing support, including supervision and training, to perform in a work setting.

The undisputed testimony is that at the time Claimant requested additional supported-employment units, Claimant already had been working for a considerable time at [REDACTED]. The evidence is undisputed that she was paid for her work and was being treated and supervised as a regular employee, with limited part-time work hours. In short, Claimant already was successfully performing in a work setting, without intensive ongoing support, supervision and training. Claimant admitted she did not need supported-employment services (i.e., a job coach) to successfully perform her work at [REDACTED].

There was no evidence that Claimant would be unlikely to obtain employment in another pizza parlor. Claimant has experience and has proved she works successfully on a part-time basis. The evidence was that Claimant did not want to make pizza the rest of her life and wanted to explore other work, not that she was unable to perform in a competitive employment environment.

Finally, Claimant's initial amendment request disclosed she had not used the supported employment units previously provided to her in her existing plan of care. Her revised amendment request likewise disclosed that 328 units had been approved [the 328 units were approved in her initial plan of care] and none (0) had been used. *See* Exhibit H, p. 6. Given these facts, the Division was correct not to authorize additional units of supported employment.

CONCLUSIONS OF LAW

1. Claimant failed to prove by a preponderance of the evidence that the Division erred in denying her March 18, 2011 or her October 31, 2011 requests to amend her plan of care to obtain additional units of supported-employment. 7 AAC 130.270(b)(3).
2. Claimant failed to prove by a preponderance of the evidence that the Division erred in denying either request for 896 or 147 additional units of supported-employment services, because Claimant informed the Division she had not used the 328 units of support-employment services she had been authorized under her existing plan of care.
3. Claimant's mother agreed that Claimant would not be institutionalized if she did not receive additional units of supported employment services. 7 AAC 130.200.

DECISION

On August 22, 2011, the Division was correct to deny Claimant's request to amend her plan of care for additional units of supported-employment services.

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 January 30, 2012.

/signed/
Claire Steffens
Hearing Authority

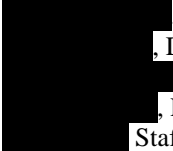
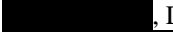
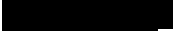
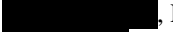
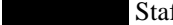
CERTIFICATE OF SERVICE

I certify that on January 30, 2012 true and correct copies of the foregoing were sent to:

Claimant, Certified Mail, Return Receipt Requested.

/signed/

and on January 31, 2012 to other listed persons (via secure, encrypted e-mail), as follows:

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

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