

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of)
)
 K H)
_____)

OAH No. 13-0647-MDS
Agency No.

DECISION

I. Introduction

K H was denied six hours per day of residential habilitation supported-living services¹ under Medicaid's Individuals with Developmental Disabilities Medicaid Home and Community Based Waiver program (waiver program).² The services were requested under a Plan of Care (POC) Amendment brought about by a change in Mr. H's living arrangement. The division denied the request for three reasons: 1) because the type of service sought is not provided under supported-living services, 2) the program functions as the payer of last resort, and 3) the services already provided are sufficient to prevent institutionalization. The decision of the division is affirmed because the service sought, an attendant on site while he is sleeping, is not provided under residential habilitation services.

II. Facts

There is little factual dispute between the parties. Mr. H is a 28-year-old man diagnosed with autism who, until January 2013, lived with his parents on No Name. Mr. H's parents are aging and suffering age related health problems so they can no longer oversee and care for their son in their home.

Mr. H lives a very active life, and like many young men, Mr. H wants independence and to live on his own.³ Mr. H participates in Medicaid's Home and Community Based Waiver program and receives 18 hours of waiver services per day. Twelve hours are residential supported-living habilitation services and six hours are day habilitation services. The present dispute centers on whether he is entitled to an additional six hours of residential supported-living

¹ 7 AAC 130.265(b)(3).

² Exhibit D.

³ Testimony of W H, J J, and N E.

services to meet his goal of becoming more independent with his night time safety skills when he wakes up at night.⁴

Mr. H has a tendency to get up at night and not go right back to bed, and there are concerns for his safety while he is awake. Mr. H has certain obsessive-compulsive behaviors. For example, he is fixated on garbage and will go out at night to patrol for garbage without dressing, putting on a coat, boots, etc. Testimony was received that if he were to look out the window and see a plastic bag in the road he would run outside and into the road, unaware of an oncoming car. Mr. H also has a history of ingesting dangerous items. He has ingested a radio antenna, which resulted in surgery and a loss of several inches of intestine. He does not get up every night, but when Mr. H does get up, he needs assistance.

Because no assisted living facilities were available on No Name, his mother obtained an apartment for Mr. H, and because he required supervision at night the amendment process for his POC commenced.

The amended POC requested 18 hours of residential supported-living services and six hours of other day habilitation services. Included in the 18 hours was an unspecified period of time to work on his new goal of becoming independent with his safety skills at night. The objective of this goal was for Mr. H to “successfully choose from one of three suggested activities if he is unable to sleep. . . .”⁵

The division reviewed the amended POC and denied six hours of residential habilitation services because it believed the services sought were not habilitation services, the time authorized was of “sufficient amount, duration and scope to prevent institutionalization,” and the program is the payer of last resort.⁶ At hearing, the division explained that the type of services requested were not provided through habilitation services, but rather were appropriately provided in an assisted living facility environment rather than 24 hour one-on-one assistance.⁷ The division was unaware of any community or natural supports available on No Name to provide this service, and suggested that if the No Name assisted living facility was full, Mr. H may have to move to Anchorage where facilities are available.

⁴ Exhibit F at 9.

⁵ Exhibit F at 9.

⁶ Exhibit D.

⁷ Testimony of Corina Castillo-Shepard.

III. Discussion

At issue is whether Mr. H is eligible for another six hours of supported habilitation services. Mr. H requires a person be awake while he is sleeping so if he wakes up, he can be redirected and learn to go back to sleep. The division has denied six hours of supported-living habilitation services primarily because it does not believe the service provided while Mr. H is sleeping is a supported living habilitation service. If the service sought is not a residential habilitation service, then it cannot be provided through the waiver program. Because Mr. H seeks to add additional services, he has the burden of proving by a preponderance of the evidence that he is eligible for the additional service hours.⁸

Supported-living services are a type of residential habilitation service provided under the division's waiver program. This service is provided to recipients over the age of 18 and in their private residences.⁹ Habilitation services are:

Services that help recipients acquire, retain, or improve skills related to activities of daily living and self-help, social, and adaptive skills necessary to enable the recipient to reside in a noninstitutional setting that is provided in the recipient's home. . .

The definition of habilitation requires that the service help Mr. H with skills related to the activities of daily living, self-help, social and adaptive skills. Sleep, while not one of the enumerated activities of daily living (ADL),¹⁰ is essential to maintaining one's health and well-being. Mr. H does not need help sleeping. The services he requires kick in when he is awake so he can learn how to go back to sleep. The dilemma presented is that Mr. H's habilitation goal, to work on sleeping skills and safe behaviors while awake, is not required every night or at the same time of the night.¹¹ It is this "down time" when Mr. H is sleeping that the division contends is not a supported-living habilitation service.

It is arguable that the ADL of sleep is a necessary incidental activity to Mr. H's goal and is in fact the end goal. Learning how to go to sleep after waking in the night is a necessary skill for Mr. H to learn if he is to avoid institutional care. The POC includes, in an eight hour night,

⁸ 7 AAC 49.135.

⁹ 7 AAC 130.265(b)(3).

¹⁰ 7 AAC 125.030(b) (enumerated ADLs identify activities of daily living that require physical assistance, such as transferring or locomotion. Sleeping does not require physical assistance, but is essential, so it would not be listed.)

¹¹ Exhibit F at 9.

two hours for this service. Sleeping, however, is not something he can receive services for, as he needs no habilitation service while asleep.

The time he spends sleeping does not help Mr. H acquire, retain, or improve skills necessary for the ADL of sleeping.¹² That is accomplished when he is awake. The division has disallowed six hours per day of supported living services because they are not habilitation services. Mr. H has not presented evidence sufficient to establish that the services sought are habilitation services. Therefore, under the facts presented, the division's decision is affirmed.

Because the service is not a habilitation service, it is not a waiver service and the remaining reasons for denial are not relevant.

IV. Conclusion

Mr. H has not established that it is more likely than not that the services requested are residential habilitation supported-living services to be provided under the Medicaid Home and Community Based Waiver program. The decision of the division is affirmed. This decision does not preclude Mr. H from resubmitting a POC with additional information when it is appropriate to do so.

DATED this 5th day of August, 2013.

Signed _____
Rebecca L. Pauli
Administrative Law Judge

¹² This decision does not hold, nor should it be read as, barring sleeping from fitting under the umbrella of habilitation services.

Non-Adoption Options

C. The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(4), adopts the Proposed Decision with the following modification to one factual finding:

Mr. H is 29 years of age. Page one of the Proposed Decision is modified to reflect that Mr. H is 29 years of age and not 28 years of age.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 14th day of August, 2013.

By: Signed
Name: Jared C. Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS

[This document has been modified to conform to the technical standards for publication.]