

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

In the Matter of)
)
 H U)
_____)

OAH No. 14-0780-MDS
Agency No.

DECISION

H U requested a hearing regarding the decision issued by the Division of Senior and Disabilities Services terminating her PCA services. The hearing was scheduled for June 19, 2014 and continued to June 25, 2014. Ms. U was given notice of the hearing date, time, and place, and how to participate by telephone. Numerous attempts were made to contact Ms. U at the time of hearing. In addition to using the contact numbers provided by Ms. U, her agency representative was contacted and he made several attempts to locate Ms. U. Ms. U did not appear and could not be reached by telephone. A notice was issued giving her until July 8, 2014 to show good cause for failing to appear. Ms. U did not respond.

A hearing request may be dismissed when the person requesting the hearing fails, without good cause, to appear in person, by telephone, or through an authorized representative.¹ Ms. U's case is unique and a straight forward dismissal is inappropriate in this instance. There is a prior decision involving Ms. U and the Division that necessitates addressing certain issues to avoid inconsistent results.

Ms. U received both PCA services and Waiver services. On April 2, 2014, the division determined that she was ineligible for PCA services and gave notice that services would terminate effective April 12, 2014.² At some earlier date, the division gave notice that Ms. U was ineligible to receive Waiver program services. A hearing was held on whether Waiver services should be terminated and on April 17, 2014 an order was issued upholding the division's termination (Waiver order).³

The Waiver order made several factual findings relating to five of the ten activities of daily living (ADLs): Ms. U does not require physical assistance for the ADLs of body mobility,

¹ 7 AAC 49.100(4).

² Exhibit D.

³ *In Re H U*, OAH No. 13-1789-MDS at pp. 9 - 12 (Commissioner of Department of Health and Social Services) (2014).

locomotion, and eating, but does require physical assistance for the ADLs of transfer and toileting. Specifically, Ms. U was scored 3/3 for transfers and 3/2 for toileting.

Ms. U and the division are collaterally estopped from relitigating the scoring of body mobility, locomotion, and eating as well as transfers and toileting.⁴ Under this reasoning the division's determination to terminate PCA services is incorrect as a matter of law because the Waiver order found Ms. U required physical assistance to complete the ADLs of transfers and toileting. How often Ms. U required assistance (frequency) with transfers and toileting was not addressed in the Waiver order.

At the June 25, 2014 hearing on PCA services, the division presented the testimony of the assessor, Scott Chow R.N., and David Chadwick. The only evidence submitted by Ms. U was her letter requesting a fair hearing and letter identifying areas of disagreement.⁵ The division's sworn testimony is given more weight than a document outlining areas of disagreement. This document establishes only that Ms. U disagrees with the division. It does not provide evidence in support of those areas. For this reason it is not persuasive. However, the division's witnesses established that it is more probable than not that Ms. U requires physical assistance with toileting when there is a bowel movement, which occurs twice a day. Their testimony also established by a preponderance of the evidence that Ms. U transfers four times a day.

In *conclusion*, Ms. U is authorized to receive PCA services for Toileting scored at 3/2 with a frequency of two times per day, and Transfers scored at 3/3 with a frequency of four times per day. The division's scoring of the October 8, 2013 Consumer Assessment Tool is affirmed in all other respects.

DATED this 17th day of July, 2014.

By: Signed
Rebecca L. Pauli
Administrative Law Judge

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

⁴ Collateral estoppel is applicable to administrative proceedings. *Harrod v. Alaska Department of Revenue*, 255 P.3d 991 (Alaska 2011) (holding that collateral estoppel was properly invoked in administrative proceeding to determine ineligibility of applicant). Collateral estoppel prevents the relegation of issues where 1) collateral estoppel is asserted against the same party or one in privity with the party to the first action; 2) the issue to be precluded must be identical to the issue decided in the first action; and 3) the issue to be precluded must have been resolved by a final judgment on the merits. *Id.* at 14, 15.

⁵ Exhibit C.