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

In the Matter of)
)
ABSOLUTE CARE OF ALASKA, LLC) OAH No. 20-0814-MDA
)

DECISION

I. Introduction

Absolute Care of Alaska, LLC (Absolute Care) is an Alaska Medicaid Personal Care Services (PCS) provider whose Alaska Medicaid billings were audited for the time period encompassing January 1, 2014 through September 30, 2017. That audit was performed by randomly selecting 200 of Absolute Care's billing claims for that time. The audit found billing errors in thirteen of the sampled claims, which resulted in overpayments. The audit statistically extrapolated the amount of the overpayments over the billings for the entire time period. After the extrapolation, the audit initially found that Absolute Care had been overpaid a total of $129,050.99. Following the submission of additional information from Absolute Care, the final audit results were revised to find that Absolute Care was overpaid by the Alaska Medicaid program for PCS by a total of $78,774.50. The Alaska Department of Health and Social Service, Medicaid Program Integrity Section (Program Integrity) notified Absolute Care that it was required to reimburse the Alaska Medicaid program in that amount.

Absolute Care requested an administrative hearing to challenge the repayment requirement. The evidence presented demonstrates that it is more likely true than not true that Absolute Care was overpaid $78,774.50 by the Alaska Medicaid program. As a result, Program Integrity's requirement that Absolute Care reimburse the Alaska Medicaid program $78,774.50 is AFFIRMED in its entirety.

II. Overview of Personal Care Services[1]

The Medicaid program authorizes Personal Care Services (PCS) for the purpose of providing assistance to Medicaid recipients whose physical condition causes them to require physical assistance with specified activities of daily living (ADLs) and specified instrumental activities of daily living (IADLs).[2] Those activities are broken down into eight specific

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[1] All references to regulations in this decision are to those in effect during the pertinent time periods for the sampled billing claims in this case, which range from November 28, 2015 through May 22, 2017.

[2] 7 AAC 125.010(a).

"activities of daily living" (ADLs) – bed mobility, transfers, locomotion, dressing, eating, toileting, personal hygiene, and bathing[3] -- and five specific "instrumental activities of daily living" (IADLs) – light meal preparation, main meal preparation, housework, laundry, and shopping.[4] PCS are provided by personal care assistants (PCA) who are employed by personal care agencies. Personal care agencies are required to be certified and enrolled as Medicaid providers by Department of Health and Social Services.[5]

Medicaid recipients are assessed to determine their eligibility for the PCS program and the amount of assistance needed for covered activities and services.[6] Following that assessment, the recipient is provided with an authorized service plan that lists the specific ADLs and IADLs with which they are to receive assistance, and the frequency allowed for that assistance on a weekly basis.[7] The PCS plan is quite specific. It contains an itemization of what tasks are allowed, how many times per week PCS for those tasks are allowed, and how many minutes are authorized for each task. For instance, if extensive assistance with bathing is allowed, then the PCS plan would specify how many days per week the assistance is to be provided and that the recipient would receive 22.5 minutes of PCA service time each time he or she is bathed.[8] The PCS regulations do not allow a recipient to substitute services, for example a recipient may not forgo bathing one day and have the PCA use the bathing time to provide a service not authorized on the PCS plan.[9]

If a recipient disagrees with the PCS plan, the recipient has the option of requesting a hearing to challenge the plan.[10] If a recipient's care needs change, the recipient can request that the department modify the plan.[11]

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[3] 7 AAC 125.030(b).

[4] 7 AAC 125.030(c). PCS are also provided for medication assistance, maintaining respiratory equipment, dressing changes, and wound care, medical escort, and passive range-of-motion exercises. 7 AAC 125.030(d). The regulation contains specific conditions that a recipient must satisfy to receive these specialized services.

[5] 7 AAC 125.010(b)(3); 7 AAC 125.030(a); 7 AAC 125.060(a); 7 AAC 125.090.

[6] Medicaid recipients are assessed using a form entitled the Consumer Assessment Tool (CAT). *See* 7 AAC 125.020(a) and (b). The CAT is itself a regulation, adopted in 7 AAC 160.900(d)(6).

[7] 7 AAC 125.024(a).

[8] The specific times allotted to the PCS tasks are set out in the *Personal Care Assistance Service Level Computation* document, which is adopted into regulation in 7 AAC 160.900(d)(29). The version of that document which was in effect during all relevant times was the one revised as of March 20, 2012. It is available online at http://dhss.alaska.gov/dsds/Documents/pca/PCA%20Service%20Computation.pdf (date accessed February 9, 2021).

[9] 7 AAC 125.024(c).

[10] 7 AAC 125.180(c); 7 AAC 49.010 – 020.

[11] 7 AAC 125.026.

In order for a personal care agency to be reimbursed for PCS services, it must comply with the PCS regulations and other applicable state and federal law. Payment is made based "on the total time documented by a personal care assistant in which the personal care assistant provided the services and tasks covered under 7 AAC 125.030 and in accordance with the recipient's approved personal care service level authorization."[12] PCS care is billed in 15-minute units. The cost per unit in the Anchorage region, which is where the PCS was provided, was $6.10 during the relevant time period.[13]

III. Facts[14]

A. Procedural History

Absolute Care provides PCS to Medicaid recipients and is paid by the Alaska Medicaid program for those services. It operated under Medicaid Provider Number 1571378 during January 1, 2014 through October 31, 2016, and under Medicaid Provider Number 1654537 during November 1, 2016 through September 30, 2017. During the 2014 – 2016 period it had 77,982 service dates with a total of $4,783,883.73 in Medicaid reimbursements. During the 2016 – 2017 period it had 56,650 service dates with a total of $3,464,958.60 in Medicaid reimbursements.[15]

Absolute Care's Medicaid billings for January 1, 2014 through September 30, 2017 were audited by Qlarant Integrity Solutions (Qlarant), a Centers for Medicare and Medicaid Services United Program Integrity Contractor. Qlarant randomly selected 100 of Absolute Care's billing claims for the 2014 – 2016 period and 100 of Absolute Care's billing claims for the 2016 – 2017 period for the audit.[16]

Qlarant issued its draft report on March 3, 2020. It found errors in sixteen of the billing claims in its sample from the 2014 – 2016 period and with thirteen of the billing claims in its sample from the 2016 – 2017 period. After receiving Absolute Care's response to the draft, Qlarant revised its findings and issued its final report on July 2020. It found errors with eight of

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12 7 AAC 125.195.

13 Mr. Virbitsky's testimony; DHSS *Chart of Personal Care Attendant and Waiver Service Rates* effective July 1, 2015 (available online at http://dhss.alaska.gov/dsds/Documents/pca/PCA-waiver-service-rates201507.pdf date accessed February 10, 2021); DHSS *Chart of Personal Care Attendant and Waiver Service Rates* effective July 1, 2016 (available online at http://dhss.alaska.gov/dsds/Documents/pca/PCA-waiver-service-rates201607.pdf date accessed February 10, 2021).

14 To ensure consistency, all references to the record refer to the Agency Record (AR), rather than the exhibits or excerpts filed by the parties.

15 AR 4 – 5.

16 AR 4 – 5; Mr. Virbitsky's testimony.

the sampled billing claims from the 2014 – 2016 period and with ten of the sampled billing claims from the 2016 – 2017 period, specifically that Absolute Care had overbilled for services on those claims. The payment errors on those claims were statistically extrapolated and resulted in a total overpayment claim of $129,050.99. Absolute Care was then required to repay that amount to the Alaska Medicaid program.[17]

Absolute Care requested a hearing to challenge the overpayment finding.[18] While the case was pending, Absolute Care provided additional information, which resulted in Qlarant revisiting its findings. The revised findings are contained in Qlarant's November 19, 2020 report, which was then issued by the Centers for Medicare & Medicaid Services on December 30, 2020. It found billing errors resulting in an overpayment to Absolute Care with four of the sampled billing claims from the 2014 – 2016 period and nine of the sampled billing claims from the 2016 – 2017 period. After statistically extrapolating the overpayment findings from those thirteen sampled billing claims, the overpayment amount, which Absolute Care was required to reimburse the Alaska Medicaid program, was reduced to $78,774.50.[19]

Absolute Care's hearing was held on January 26, 2021. Fledz Lastimoso, Absolute Care's owner and managing member, represented and testified on its behalf. Assistant Attorney General Scott Friend represented Program Integrity. Program Integrity's witnesses were Steven Virbitsky and Douglas Jones. Mr. Virbitsky, who was qualified as an expert witness, is a certified public accountant, who is employed with Jackson, Dunham, Sato & Associates, a subcontractor to Qlarant. He was a lead investigator on this audit, planning and supervising the review of Absolute Care's billing claims. Douglas Jones is the manager of the Alaska Medicaid program's Program Integrity section, where he has been the manager since 2008.

The entire agency record and Absolute Care's exhibit were admitted into evidence without objection.

B. The Audited Claims

There were thirteen billing claims, out of the 200 in the sample, found to contain errors, which resulted in overpayment findings. The overpayment findings resulted in the audit's

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[17] AR 5 – 8.
[18] AR 30.
[19] AR 865- 872. For a discussion of the sampling process and the extrapolation methodology, see AR 900 – 909.

extrapolated finding that Absolute Care had been overpaid a total of $78,774.50. Each is discussed below.

1. Claim 16060[20] - Service Date February 1, 2016

This overpayment finding is for services rendered to a Medicaid recipient on February 1, 2016. Absolute billed and was paid for $36.60, which was six PCS billing units. The audit rejected a portion of that claim, $12.20 or two PCS billing units, because it found that a portion of the claim contained billings for PCS that were not authorized by the recipient's PCS plan of care.[21] The PCS authorization chart shows that PCS was allowed for dressing, bathing, personal hygiene, and light and main meal preparation.[22] The time sheet, however, shows that assistance was provided for three tasks on February 1, 2016 that were not authorized on the recipient's plan: toileting (15 minutes), laundry (45 minutes), and medication assistance (4 minutes).[23]

Absolute billed for six PCS billing units on February 1, 2016. The authorized tasks contained on the time sheet for that day, only comprised three billing units. However, the audit only disqualified two of the three unauthorized units.[24]

Absolute's written response to the audit findings did not dispute that toileting assistance was checked off on the PCA's timesheet as having been provided. It stated that bathing, an authorized task, was actually provided, not toileting and that the checking off of toileting was an error on the part of the PCA.[25] Absolute submitted an unsworn letter, dated August 27, 2020, to that effect from the PCA.[26] Ms. Lastimoso testified that this was a PCA error and pointed out that this was a short-term client who only received services from Absolute for 26 weeks, arguing that it should either not be included in the audit sample or that instead, all of the billings for this client should be looked at instead of just one.[27]

2. Claim 15344 – Service Date November 28, 2015

This overpayment finding is for services provided to a Medicaid recipient on November 28, 2015. Absolute billed for and was paid $42.70, which was seven PCS billing units. The

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[20] Each claim has a 17-digit identifying number. The first five digits of that number will be used to identify the pertinent claim. Recipient names and Medicaid identification numbers will not be used to protect their privacy.

[21] AR 873, 920; Mr. Virbitsky's testimony.

[22] AR 918.

[23] AR 913 (Service Plan); 918 – 919 (Timesheet); Mr. Virbitsky's testimony.

[24] AR 918, 929; Mr. Virbitsky's testimony.

[25] AR 32.

[26] AR 91.

[27] Ms. Lastimoso's testimony.

audit rejected a portion of that claim, $6.10 or one PCS billing unit, because it found that a portion of the claim contained a billing for PCS that were not authorized by the recipient's PCS plan of care.[28] The PCS time sheet entry, which was signed by both the recipient and the PCA, shows that assistance was provided for bathing on November 28, 2015; bathing assistance is not listed as authorized on the recipient's plan.[29] The authorized tasks contained on the time sheet for that day, only comprised six billing units. The audit disqualified the one unit billed for the unauthorized task of bathing.[30]

Absolute did not dispute that PCS was not authorized for bathing on November 28, 2015. However, Ms. Lastimoso stated the PCS plan did not accurately reflect the needs of the recipient, whose needs had changed since the PCS plan was authorized. She further testified that in the 117 weeks that this recipient received PCS from Absolute, Absolute only billed for bathing five times, and testified that Absolute underbilled for PCS on November 28, 2015, and did not actually bill for bathing on November 28, 2015. She also testified that only 91.25 minutes, or 1.5 hours were billed for on November 28, 2015.[31]

3. Claim 16257 – Service Date August 9, 2016

There are two separate overpayment findings for this claim number. This is because the recipient had two PCAs who each provided services to her on August 9, 2016. The audit found errors with the separate service claims submitted for each PCA for services provided on August 9, 2016.

a. Part 1 – PCA M. C.

This overpayment finding is for PCS provided by PCA M. C. The amount of that claim was for $97.60, which was sixteen PCS billing units. The audit rejected a portion of that claim, $12.20 or two PCS billing units, because it found that a portion of the claim contained a billing for PCS that were not authorized by the recipient's PCS plan of care.[32] The timesheet for PCA M.C., signed by the PCA and the recipient, contains an entry showing that the recipient was provided assistance twice that day with eating. The recipient's PCS plan does not authorize assistance with eating.[33] Although the auditor found that only the PCA timesheet only contained

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28 AR 873; Mr. Virbitsky's testimony.
29 AR 922 (Service Plan); 927 - 928 (Timesheet); Mr. Virbitsky's testimony.
30 AR 918; Mr. Virbitsky's testimony.
31 Ms. Lastimoso's testimony.
32 AR 873; Mr. Virbitsky's testimony.
33 AR 934 (Service Plan); 945 – 946 (Timesheet); Mr. Virbitsky's testimony.

seven units of authorized services out of the sixteen billed, the auditor only found an overpayment on the two units billed for eating.[34]

Absolute did not dispute that eating assistance was not authorized for this recipient, testifying that the recipient's condition had deteriorated and that she required additional help.[35]

b. Part 2 – PCA D. N.

This overpayment finding is for PCS provided by PCA D. N. The amount of that claim was for $73.20, which was twelve PCS billing units. The audit rejected a portion of that claim, $6.10 or one PCS billing unit, because it found that a portion of the claim contained a billing for PCS that was not authorized by the recipient's PCS plan of care.[36] The timesheet for PCA D. N., signed by the PCA and the recipient, contains an entry showing that the recipient was provided assistance once that day with eating. As noted above, it is not disputed that eating assistance was not an authorized part of the recipient's PCS plan.[37] Although the auditor found that the PCA timesheet only contained seven units of authorized services out of the twelve billed, the auditor only found an overpayment on the one unit billed for eating.[38]

4. Claim 16343 – Service Date November 28, 2016

This overpayment finding is for services provided to a Medicaid recipient on November 28, 2016. Absolute billed for and was paid $48.80 which was eight PCS billing units. The audit rejected a portion of that claim, $42.70 or seven PCS billing units, because it found that a portion of the claim contained a billing for PCS that were not authorized by the recipient's PCS plan of care.[39] The timesheet, signed by the PCA and the recipient, contains checkmarks indicating showing that the recipient was provided assistance on November 28, 2016 with shopping and medication in addition to bathing. Bathing was an authorized service, for which one PCS billing unit was authorized. The recipient's PCS plan does not authorize assistance with either shopping or medication.[40] The auditor found that only the PCA timesheet only contained one unit of authorized services out of the 8 billed and found an overpayment for the seven units billed for assistance with shopping and medication.[41]

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34 Mr. Virbitsky's testimony.
35 Ms. Lastimoso's testimony.
36 AR 873; Mr. Virbitsky's testimony.
37 AR 934 (Service Plan); 947 - 948 (Timesheet); Mr. Virbitsky's testimony.
38 Mr. Virbitsky's testimony.
39 AR 874, 961; Mr. Virbitsky's testimony.
40 AR 953 (Service Plan); 957 (Timesheet); Mr. Virbitsky's testimony.
41 Mr. Virbitsky's testimony.

Absolute did not dispute that assistance with IADLs, which includes shopping, and medication was not authorized. Instead, Absolute stated that the recipient needed the assistance, that assistance for IADLs was authorized at a later date, and that a doctor in 2019 wrote that the recipient had a history of non-compliance with medications.[42]

5. Claim 17130 – Service Date May 6, 2017

This overpayment finding is for services provided to a Medicaid recipient on May 6, 2017. Absolute billed for and was paid $91.50 which was fifteen PCS billing units. The audit rejected a portion of that claim, $30.50 or five PCS billing units, because it found that a portion of the claim contained a billing for PCS that were not authorized by the recipient's PCS plan of care.[43] The timesheet, signed by the PCA and the recipient, states that the recipient was provided assistance on May 6, 2017 with medications four times and three times with eating. The recipient's PCS plan does not authorize assistance with either.[44] The auditor found that these unauthorized services totaled 70 minutes, which he rounded to five PCS billing units (75 minutes) and disallowed those five units.[45]

Absolute did not dispute that neither medication nor eating assistance were allowed as part of this recipient's authorized PCS plan. Instead, it pointed out that the April 28, 2017 authorization letter for this recipient's continued PCS stated on the first page, that this recipient was authorized to receive a total of 27.75 hours per week of PCS, whereas the authorized service plan, which contains the itemized list of authorized services and the amount of time allowed for each, only contains a total of 27.25 hours per week.[46]

6. Claim 17024 – Service Date January 20, 2017
Claim 17087 – Service Date March 19, 2017
Claim 17116 – Service Date April 22, 2017

These overpayment findings allow involve the same recipient, for services provided on separate dates.

Claim 17024 involves a billing claim for services provided on January 20, 2017. Absolute billed for and was paid $79.30, which was thirteen PCS billing units. The audit rejected a portion of that claim, $6.10 or one PCS billing unit, because it found that a portion of

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[42] Ms. Lastimoso's testimony.
[43] AR 874; Mr. Virbitsky's testimony.
[44] AR 963, 972 (Service Plan); 970 (Timesheet); Mr. Virbitsky's testimony.
[45] Mr. Virbitsky's testimony.
[46] Ms. Lastimoso's testimony; AR 962 – 963.

the claim contained a billing for PCS that were not authorized by the recipient's PCS plan of care.[47] The timesheet, signed by the PCA and the recipient, states that the recipient was provided assistance on January 20, 2017 with transfers four times on that day. The recipient's PCS plan does not authorize assistance with transfers.[48] The auditor found that the transfer assistance on January 20, 2017 totaled 10 minutes, which he rounded to one PCS billing unit (15 minutes) and disallowed that one unit from the thirteen billed.[49]

Claim 17087 involves a billing claim for services provided on March 19, 2017. Absolute billed for and was paid $85.40 which was fourteen PCS billing units (3.5 hours).[50] The audit rejected a portion of that claim, $6.10 or one PCS billing unit, because it found that the PCA's timesheet reflected a total of 3.25 hours, or thirteen PCS billing units, whereas Absolute Care billed and was paid for fourteen PCS billing units on that day.[51]

Claim 17116 involves a billing claim for services provided on April 22, 2017. Absolute billed for and was paid $97.60 which was sixteen PCS billing units. The audit rejected a portion of that claim, $6.10 or one PCS billing unit, because it found that a portion of the claim contained a billing for PCS that were not authorized by the recipient's PCS plan of care.[52] The timesheet, signed by the PCA and the recipient, states that the recipient was provided assistance on May 6, 2017 with transfers four times on that day. The recipient's PCS plan does not authorize assistance with transfers.[53] The auditor found that these services totaled 10 minutes, which he rounded to one PCS billing unit (15 minutes) and disallowed that one unit from the sixteen billed.[54]

Absolute did not dispute that transfer assistance was not an authorized PCS task at the time of claims 17024 and 17116. However, Ms. Lastimoso testified that the recipient used to be authorized for transfer assistance but that the transfer authorization had been removed and that the transfer assistance was provided because the recipient's condition was such that he needed it. She also testified that transfer assistance was not checked as having been provided in other

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[47] AR 874, 981; Mr. Virbitsky's testimony.
[48] AR 977 (Service Plan); 123 (Timesheet); Mr. Virbitsky's testimony.
[49] Mr. Virbitsky's testimony.
[50] AR 874, 990, Mr. Virbitsky's testimony.
[51] AR 988 (Timesheet); 990 (DHSS Remittance printout); Mr. Virbitsky's testimony.
[52] AR 874, 999; Mr. Virbitsky's testimony.
[53] AR 995 (Service Plan); 997 (Timesheet); Mr. Virbitsky's testimony.
[54] Mr. Virbitsky's testimony.

weeks.[55] In addition, Absolute's written response to the initial audit findings maintained that, under IADL rules, that the recipient could use his PCS for other services allowed by the PCS regulations.[56]

Absolute also did not dispute that it billed for and was paid for fourteen PCS billing units on claim 17087, date of service March 19, 2017, whereas the PCA's timesheet for that day only showed that the PCA spent 3.25 hours that day, which was thirteen PCS billing units. Ms. Lastimoso testified that it had underbilled for services provided to this recipient on March 25, 2017, and that that underbilling balanced out the overbilling on March 19, 2017.[57]

7. Claim 17059 – Service Date February 11, 2017

This overpayment finding is for services provided on February 11, 2017. Absolute billed for and was paid $79.30 which was thirteen PCS billing units. The audit rejected a portion of that claim, $18.30 or three PCS billing units, for two separate reasons. Those reasons were that Absolute Care billed for more total service time than was allowed per week and that Absolute Care billed for services that were not authorized as part of the recipient's PCS plan.[58]

For the first reason, being that the billed services exceeded the weekly authorized amount, the Division provided a copy of the authorization letter stating that the recipient was authorized to receive a total of 22 weekly hours of PCS.[59] The PCA's timesheet for the week of February 4, 2017, which culminated on February 11, 2017, billed for 3.25 hours of PCS each day. The timesheet for that week, exceeded the 20-hour weekly cap on February 11, 2017 by .75 hour, or three PCS billing units.[60] That same timesheet also showed that the PCS billed for main meal preparation and light housework on February 11, 2017, neither of which are authorized on the recipient's PCS plan.[61] The audit determined that of the 3.25 hours or thirteen PCS billing units claimed on February 11, 2017, that only ten of those were authorized by the recipient's service plan. The audit then disallowed three of the thirteen PCS billing units billed on February 11, 2017 for two separate reasons: first, that three of those units caused the recipient to exceed

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[55] Ms. Lastimoso's testimony, referring to AR 574 – 598.
[56] AR 881.
[57] Ms. Lastimoso's testimony, referring to AR 988.
[58] AR 874, 1011; Mr. Virbitsky's testimony.
[59] AR 1001.
[60] AR 1009.
[61] AR 1002 (Service Plan); 1009 (Timesheet); Mr. Virbitsky's testimony.

the total authorized billing units for that week; and second, that three of those units were attributable to the receipt of services not authorized by the recipient's PCS plan.[62]

Absolute's written response to the initial audit findings was that the recipient had her billing claims for a week in March 2017 denied, and that this balanced out any overbilling on this claim.[63] Ms. Lastimoso testified that after a reduction in services, that the PCS were provided at the same level, because the recipient was deciding whether to appeal the reduction. However, no appeal was filed. Absolute did not dispute that main meal preparation and housework were not authorized as part of the recipients PCS plan, characterizing it as an error on the part of the PCA.[64] The reduction in this recipient's PCS plan took effect July 28, 2016.[65]

8. Claim 17179 – Service Date May 17, 2017

This overpayment finding is for services provided to a Medicaid recipient on May 17, 2017. Absolute billed for and was paid which was four PCS billing units. The audit rejected a portion of that claim, $12.20 or two PCS billing units, because it found that a portion of the claim contained a billing for PCS that were not authorized by the recipient's PCS plan of care.[66] The timesheet, signed by the PCA and the recipient, states that the recipient was provided assistance on May 17, 2017 with single-level locomotion, personal hygiene, and all of the IADLs. The recipient's PCS plan does not authorize assistance with any of these.[67] The auditor found that the allowable services only comprised two of the four PCA units billed, and he disallowed the other two units.[68]

Absolute did not dispute that the disallowed services were not authorized as part of the recipient's PCS plan.[69]

9. Claim 17166 – Service Date May 22, 2017

This overpayment finding is for services provided to a Medicaid recipient on May 22, 2017. Absolute billed for and was paid $48.80 which was eight PCS billing units. The audit rejected a portion of that claim, $36.60 or six PCS billing units, because it found that a portion of the claim contained a billing for PCS that were not authorized by the recipient's PCS plan of

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62 Mr. Virbitsky's testimony.
63 AR 40.
64 Ms. Lastimoso's testimony.
65 AR 219, 1024.
66 AR 874; Mr. Virbitsky's testimony.
67 AR 1016 (Service Plan); 1020 (Timesheet); Mr. Virbitsky's testimony.
68 Mr. Virbitsky's testimony.
69 Ms. Lastimoso's testimony.

care.[70] The timesheet, signed by the PCA and the recipient, states that the recipient was provided assistance on May 22, 2017 with main meal preparation and shopping. The recipient's PCS plan does not authorize assistance with either.[71] The auditor found that the allowed services per the recipient's plan were dressing/undressing and bathing, which comprised two PCS billing units, and disallowed the other six PCS units billed that day.[72]

Absolute did not dispute that the IADLs (main meal preparation and shopping) were not authorized but argued that the recipient needed the assistance.[73]

10. Claim 17082 – Service Date March 13, 2017

This overpayment finding is for services provided to a Medicaid recipient on March 13, 2017. Absolute billed for and was paid $48.80 which was eight PCS billing units. The audit rejected a portion of that claim, $30.50 or five PCS billing units, because it found that a portion of the claim contained a billing for PCS that were not authorized by the recipient's PCS plan of care.[74] The timesheet, signed by the PCA and the recipient, states that the recipient was provided assistance on March 13, 2017 with walking exercise and IADLs, which were not authorized on the recipient's PCS plan.[75] The auditor found that the authorized services were transfers, locomotion, and personal hygiene which came to three PCS units, and he disallowed the remaining five units.[76]

Ms. Lastimoso testified that the recipient required help with IADLs but was disqualified from receiving them because he was married. She also referred to doctors' notes from April 12, 2017 and May 4, 2018, stating that the recipient experienced left-sided weakness, was a fall risk, and was unable to perform household tasks.[77]

IV. Discussion

This case involves an audit of Absolute Care, an Alaska Medicaid provider that furnishes PCS to Alaska Medicaid recipients. Under 7 AAC 160.110, the Department of Health and Social Services or its designee is authorized to audit Medicaid providers.[78] The regulation authorizes

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[70] AR 874, 1033; Mr. Virbitsky's testimony.
[71] AR 1027 (Service Plan); 1031 (Timesheet); Mr. Virbitsky's testimony.
[72] Mr. Virbitsky's testimony.
[73] Ms. Lastimoso's testimony; AR 41.
[74] AR 874, 1040; Mr. Virbitsky's testimony.
[75] AR 1035 (Service Plan); 1038 (Timesheet); Mr. Virbitsky's testimony.
[76] Mr. Virbitsky's testimony.
[77] Ms. Lastimoso's testimony; AR 244 – 245.
[78] A substantially identical regulation, former 7 AAC 43.1440, was in effect when some of the charges at issue were billed.

DHSS to gather information "sufficient to support a reasonable basis for determining the provider's compliance with the legal requirements of the Medicaid program."[79] An overpayment results when a provider is incorrectly reimbursed for services that do not meet the standards established for the reimbursement of services. A second regulation, 7 AAC 160.120, provides that the "department or its designee may use statistically valid sampling methodologies to calculate overpayment amounts."[80] If an overpayment is found, DHSS must recover that overpayment from the Medicaid provider.[81]

The audit, which encompasses the time from January 1, 2014 through September 30, 2017, found billing errors in thirteen of the payment claims submitted. Absolute Care objected to the findings as to each of those claims on various grounds, both legal and factual. A review of Absolute's objections revealed three legal arguments, in addition to specific factual arguments.

A. Absolute's Legal Arguments

Absolute's first argument, which pertains to each of the claims is that the audit should not have used a sample, and instead should have looked at all claims for the identified recipients. The Division is specifically authorized by its regulation 7 AAC 160.120 to conduct audits using statistical sampling methods instead of looking at the entire universe of claims. As a result, this argument is not persuasive and will not be addressed further.

Absolute's second argument is essentially that recipients are allowed flexible use of their PCS hours. Absolute relies upon a Division "Clarification Regarding Reinstatement of PCA Hours" dated October 20, 2008. That memorandum, in response to a question, states that flexible use of service plan hours is allowed, as long as the PCS are provided for tasks allowed by the PCS program.[82] However, the PCS regulation that applies to the thirteen claims in this audit, which span from November 28, 2015 to May 22, 2017, was revised after 2008, both in 2010 and 2012. The version of that regulation, 7 AAC 125.024, which was in effect from January 26, 2012 through July 21, 2017, reads, in pertinent part:

> **7 AAC 125.024. Personal care service level authorization.**
>
> (a) For each recipient, based upon that recipient's assessment conducted under 7 AAC 125.020, the department will
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> * * *

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[79] 7 AAC 160.110(i)(1) [former 7 AAC 1440(i)(1)].
[80] *See* 7 AAC 160.120.
[81] 7 AAC 160.110(h).
[82] AR 52 - 55.

> (2) develop a personal care service level authorization that identifies the specified ADL tasks, IADL tasks, and other services covered under 7 AAC 125.030 that the personal care assistant must complete to provide the level of assistance approved by the department.
>
> (b) The total number of hours authorized under (a)(1) of this section may be used to provide any task or other service covered under 7 AAC 125.030 that is identified in the individual's personal care service level authorization developed under (a)(2) of this section.
>
> (c) The department will not pay a provider for a task or other service that is not listed in 7 AAC 125.030 and is not identified in a recipient's personal care service level authorization.[83]

In short, the regulation, which was revised after the Division's October 2008 memorandum, superseded that memorandum. The regulation does not allow flexible use of PCS overall. It only authorizes payment for tasks that are specifically listed on the recipient's authorized PCS plan.

Absolute's third argument was essentially that some recipients' care needs were not met by the authorized PCS plan or that they had a change in their condition requiring increased assistance. The regulation, however, is clear. Assistance with a task must be authorized as part of a recipient's PCS plan before Medicaid will reimburse the provider.[84] If recipients believe that the authorized plan does not meet their needs, they have the option of appealing the plan, if timely, or requesting a change to their plan.[85] Recipients do not have the ability to unilaterally change their plan.

B. The Individual Claims

1. Claim 16060 - Service Date February 1, 2016

Absolute did not dispute that it billed for PCS on February 1, 2016 that were not authorized as part of the recipient's PCS plan. Instead, it argued that no billing error should be found on this claim because this was a relatively short-term client and should not have been part of the sample, or alternatively that all of the billing claims for the recipient should be taken into account.

This is essentially an argument that the audit should not having been conducted using the statistical sampling method. As discussed above, the Medicaid audit regulations specifically

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[83] 7 AAC 125.024 (emphasis in original).

[84] 7 AAC 125.024(c).

[85] 7 AAC 125.026; 7 AAC 125.180.

authorize audits conducted through statistical sampling. Accordingly, Absolute's argument is not persuasive.

Absolute also made the factual argument that the PCA had actually supplied bathing assistance and that the PCA had erroneously checked off toileting on the time sheet. In support of this factual contention, it supplied an unsworn letter dated August 27, 2020 from the PCA to that effect. This letter is given no weight. It was provided over 4.5 years (date of service February 1, 2016) after the fact. This is not a contemporaneous record. The contents are not verified by the oath of the writer. It is hearsay. While hearsay is admissible in this proceeding, this letter is not the type of substantial evidence which can be relied upon by a finder of fact. Accordingly, Program Integrity has met its burden of proof on this point and the audit finding disallowing two PCS billing units from this claim is upheld.

2. Claim 15344 – Service Date November 28, 2015

This overpayment finding involves a disallowance of one PCS billing unit for providing bathing on November 28, 2015. Absolute did not dispute that bathing was not an allowed task and that it was checked off as having been provided on the PCA's time sheet.

Absolute made two arguments. The first was that the recipient's care needs had changed. However, this argument is not persuasive. The PCS regulations are clear. The Medicaid program will not pay for tasks that are not authorized as part of the PCS plan. Absolute also argued that bathing was not actually billed for. A review of the time sheet for November 28, 2015, however, shows that 7 PCS billing units were billed, whereas the authorized tasks, locomotion (5 minutes), dressing (7.5 minutes), light meal preparation (15 minutes), main meal preparation (18.75 minutes), and shopping (45 minutes) totaled 91.25 minutes, or 6 PCS billing units.[86] In other words, the record shows that Absolute did bill for providing bathing to this recipient. Consequently, Program Integrity has met its burden of proof on this point and the audit finding disallowing one PCS billing unit from this claim is upheld.

3. Claim 16257 – Service Date August 9, 2016

This two-part overpayment finding consists of the disallowance of PCS provided on August 9, 2016. The overpayment was based upon the audit finding that PCS was provided for eating assistance on that day, when eating assistance was not authorized as part of the recipient's

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[86] AR 922, 927.

PCS plan. The recipient's PCS was provided by two separate PCAs on that day. PCA M. C. billed two PCS billing units for eating. PCA D. N. billed one PCS billing unit for eating.

Absolute did not dispute that eating was not an authorized task. Instead, Absolute argued that a deterioration in the recipient's condition justified it billing for this unauthorized task. The PCS regulations specifically provide that the Medicaid program will not pay for tasks that are not authorized as part of the PCS plan. Consequently, Program Integrity has met its burden of proof on both parts of this overpayment finding and the audit finding disallowing two PCS billing units for PCA M. C.'s time and one PCS billing unit for PCA D. N.'s time are upheld.

4. Claim 16343 – Service Date November 28, 2016

This overpayment finding consists of the disallowance of seven PCS units billed on November 28, 2016 for shopping and medication assistance when assistance with neither of these tasks was authorized by the recipient's PCS plan. Absolute did not dispute that assistance with IADLs, which includes shopping, and medication was not authorized. Instead, Absolute argued that assistance for IADLs, which would include shopping was authorized at a later date, and that a doctor in 2019 wrote that the recipient had a history of non-compliance with medications. However, the Medicaid program will not pay for tasks that are not authorized as part of the PCS plan, and the fact that those services might have been authorized or required years later do not change this fact. Consequently, Program Integrity has met its burden of proof on this point and the audit finding disallowing seven PCS billing units from this claim is upheld.

5. Claim 17130 – Service Date May 6, 2017

This overpayment finding consists of the disallowance of five PCS billing units for services provided to a Medicaid recipient on May 6, 2017. Absolute did not dispute that it billed for five units on that day for assistance with medications and eating, when assistance was not authorized for these tasks as part of the recipient's PCS plan. Instead, Absolute argued that a clerical error on the April 28, 2017 authorization letter for this recipient's continued PCS, which stated on the first page, that this recipient was authorized to receive a total of 27.75 hours per week of PCS, justified the overbilling. However, that same clerical error was not present on the accompanying authorized service plan, which contained the itemized list of authorized services and the amount of time allowed for each, and which did not list either medication assistance or eating assistance as authorized tasks. The specific listing of authorized tasks is what controls,

despite the clerical error in the accompanying cover letter.[87] It therefore follows that Program Integrity has met its burden of proof on this point and the audit finding disallowing five PCS billing units from this claim is upheld.

6. Claim 17024 – Service Date January 20, 2017
Claim 17087 – Service Date March 19, 2017
Claim 17116 – Service Date April 22, 2017

These overpayment findings involve billing claims made for the same recipient. For each of those claims, the auditor disallowed one PCS billing unit.

Claims 17024 and 17116 each involve the PCA billing for transfer assistance. Absolute did not dispute that transfer assistance was not an authorized PCS task. Instead, it argued that the transfer assistance had been authorized in the past and was still necessary. This argument is not persuasive, given that the PCS regulations only allow assistance for tasks authorized as the part of the recipient's PCS plan, which this was not at the time it was provided. Absolute also argued that, under IADL rules, that the recipient could use his PCS for other services allowed by the PCS regulations. However, as discussed above, the PCS regulations do not allow the use of PCS time for tasks that are not authorized as part of the recipient's PCS plan. Consequently, Program Integrity has met its burden of proof on this point and the audit finding disallowing one PCS billing unit from claims 17024 and 17116 is upheld.

Claim 17087 does not involve billing for an unauthorized PCS task. Instead, it deals with overbilling. It is undisputed that the PCA's timesheet shows that the PCA spent 3.25 hours, thirteen PCS billing units, providing assistance to the recipient on March 19, 2017. However, Absolute undisputedly billed and was paid for providing fourteen PCS billing units on that date. Absolute argued that an overpayment should not be found for this one date because it had underbilled for services later that week, on March 25, 2017. This argument is not persuasive. It would require an exception to the random sampling process allowed by the Medicaid audit regulations. It would defeat the purpose of random sampling to allow a party to select billings that support its position. Accordingly, the audit finding disallowing one PCS billing unit from claim 17087 is upheld.

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[87] As a general rule, when there is a conflict between general terms and specific terms in a document, the specific terms control. *Norville v. Carr-Gottstein Foods Co.*, 84 P.2d 996, 1004 (Alaska 2004).

7. Claim 17059 – Service Date February 11, 2017

This overpayment finding is for services provided on February 11, 2017. The amount of that billing claim was for $79.30 which is thirteen PCS billing units. The audit rejected a portion of that claim, $18.30 or three PCS billing units, for two separate reasons. Those reasons were that Absolute Care billed for more total service time than was allowed per week and that Absolute Care billed for services that were not authorized as part of the recipient's PCS plan.[88]

Absolute did not dispute either that more hourly service was billed for than authorized for that week, nor that services were billed for that were not authorized as part of the recipient PCS plan. Instead, Absolute stated that services were provided at the same level while waiting to determine if the recipient would appeal the reduction, and further characterizing the provision of services as an error on the part of the PCA. Notably, the reduction in the recipient's PCS plan took effect on July 28, 2016, and the services were provided on February 11, 2017, over five months. A recipient only has thirty days after notice of a reduction to appeal that reduction.[89] Overall, Absolute's argument can best be characterized as one that the circumstances justify a deviation from the PCS program's billing regulations. This argument is not persuasive. Both the overbilling and the provision of unauthorized services provide independent reasons for disallowing the three PCS billing units.

Program Integrity has met its burden on this point and the audit finding disallowing three PCS billing units from this claim is upheld.

8. Claim 17179 – Service Date May 17, 2017

This overpayment finding is for services provided to a Medicaid recipient on May 17, 2017. The amount of that billing claim was for $24.40 which was four PCS billing units. The audit rejected a portion of that claim, $12.20 or two PCS billing units, because it found that a portion of the claim contained a billing for PCS that were not authorized by the recipient's PCS plan of care.[90]

Absolute did not dispute that it billed two PCS billing units for services that were not authorized as part of the recipient's PCS plan. Accordingly, Program Integrity has met its burden on this point and the audit finding disallowing two PCS billing units from this claim is upheld.

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[88] AR 874; Mr. Virbitsky's testimony.
[89] 7 AAC 49.030(a).
[90] AR 874; Mr. Virbitsky's testimony.

9. Claim 17166 – Service Date May 22, 2017

This overpayment finding is for services provided to a Medicaid recipient on May 22, 2017. The amount of that billing claim was for $48.80 which was eight PCS billing units. The audit rejected a portion of that claim, $36.60 or six PCS billing units, because it found that a portion of the claim contained a billing for PCS (IADLs) that were not authorized by the recipient's PCS plan of care.[91]

Absolute did not dispute that it billed six PCS billing units for services that were not authorized as part of the recipient's PCS plan. Absolute, however, argued that it was allowed flexible use of the recipient's authorized PCS time, because the recipient needed the assistance. As discussed above, the PCS regulations do not allow use of authorized PCS time for services that are not authorized as part of the recipient's PCS plan. Accordingly, Program Integrity has met its burden on this point and the audit finding disallowing six PCS billing units from this claim is upheld.

10. Claim 17082 – Service Date March 13, 2017

This overpayment finding is for services provided to a Medicaid recipient on March 13, 2017. The amount of that billing claim was for $48.80 which was eight PCS billing units. The audit rejected a portion of that claim, $30.50 or five PCS billing units, because it found that a portion of the claim contained a billing for PCS that were not authorized by the recipient's PCS plan of care. Absolute did not dispute that it had billed for providing assistance with tasks that were not authorized as part of the recipient's PCS plan. However, it argued that the recipient's care needs were such that he required assistance with those tasks, despite the fact that they were not authorized. As discussed above, the PCS regulations do not allow PCS for tasks that are not authorized as part of the recipient's PCS plan. Accordingly, Program Integrity has met its burden of this point and the audit finding disallowing five PCS billing units from this claim is upheld.

V. Conclusion

An audit, conducted using random sampling and statistical extrapolation techniques as authorized by the applicable Alaska Medicaid regulations, found that Absolute Care had been overpaid by Alaska Medicaid in the amount of $78,774.50. The evidence presented in this case shows that Program Integrity has met its burden of proof, by a preponderance of the evidence,

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[91] AR 874; Mr. Virbitsky's testimony.

and established that Absolute Care was overpaid in that amount. Consequently, the audit findings and the repayment requirement are Affirmed in their entirety.

Dated: February 23, 2021

*Signed*____________________
Lawrence A. Pederson
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

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 17th day of March, 2021.

By: *Signed*____________________
Name: Jillian Gellings
Title: Project Analyst, DHSS