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

In the Matter of	)	
	)	
D T	)	OAH No. 21-0106-MDX
	)	Agency No.

DECISION

I. Introduction

D T is a Medicaid recipient who was notified by the Division of Health Care Services (Division) that she was being placed in Care Management. Ms. T requested a hearing to challenge that placement.

A review of this case reveals two legal issues that each preclude the Division from prevailing in this case.[1] The first is that the Division's notice to Ms. T that she was being placed in Care Management does not meet minimal procedural due process requirements. The second is that the Division's action was based upon a regulatory change that did not take effect until January 1, 2021. The underlying facts that support the Division's action took place in 2020. Under the general rule that regulations operate only prospectively, not retroactively, the Division could not, as a legal matter, utilize the revised regulation to place her in the Care Management based upon events that predated the regulatory change. As a result, the Division's placement of Ms. T in Care Management is REVERSED.

II. Facts

A. The Hearing

Ms. T's hearing was held telephonically on March 26, 2021. Ms. T represented herself and testified on her own behalf. F N, her medical case manager with the City A Medical Center, testified on her behalf, as did L P, MD, one of Ms. T's medical providers. Laura Baldwin, a fair hearing representative with the Division, represented the Division. Jason Ball, a quality assurance manager with the Medicaid program, testified for the Division. All of the parties' exhibits were admitted.

[1] Because this decision finds for Ms. T on these two legal grounds, it is not necessary to address the issue of whether Ms. T's medical treatment during the salient period was medically appropriate.

B. Factual Findings

Ms. T is a Medicaid recipient. She had a gynecological procedure conducted in early 2020. There were complications resulting from that procedure, which resulted in her having to seek medical follow up. She had several opiate prescriptions as a result, all of which were for limited amounts. She also had multiple ongoing medical appointments due to her gynecological and other medical issues.[2]

The Division performed a statistical analysis of Ms. T's medical usage, including prescriptions, on December 18, 2020. That analysis found that Ms. T's medical usage of services in January through June 2020 had high usages of services, in a number of categories, as compared to her peer group of permanently disabled adults, which made her eligible for Care Management.[3] The Division then sent Ms. T notice, on January 25, 2021, that she was being placed in Care Management.[4]

Dr. P has been providing Ms. T with medical care since March of 2020. Her credible testimony established that the medical services that Ms. T received, and the prescriptions that she has been provided, in 2020 were medically necessary and appropriate in light of Ms. T's ongoing health conditions.[5]

III. Discussion

Medicaid recipients are normally allowed the free choice of their medical providers and pharmacies. The Medicaid program allows it, under certain circumstances to restrict a recipient's choice of medical providers and pharmacies, which is generally referred to as Care Management.[6]

This case was initiated by the Division sending Ms. T notice that it was placing her in Care Management for thirty-six months effective March 1, 2021. That notice stated that she was being placed in Care Management because during January 1 through June 30, 2020, the Division found that she "[d]uring a period of three consecutive month, received an opioid prescription from two or more prescribers," citing to 7 AAC 106.600(b)(1)(C), and that she "[d]uring a period of not less than three consecutive months, used a medical item or service with a frequency that

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2 Ms. T's testimony; Dr. P's testimony.
3 Ex. E; Mr. Ball's testimony.
4 Ex. D.
5 Dr. P's testimony.
6 7 AAC 105.600.

exceeds 2 standard deviations from the average (peer group analysis)," citing to 7 AAC 105.600(b)(1)(G).[7]

The citations to the regulation in the Division's notice are to the version of the regulation that took effect January 1, 2021. The Division's notice does not list the dates when the prescriptions, medical items or services in question were provided, nor does it identify the prescriptions, providers, or the medical items or services, that gave rise to the Division's findings.

A. Notice Requirements

7 AAC 49.010 *et seq.* is the section of the Alaska regulations that sets out the procedural requirements for "Fair Hearings." 7 AAC 49.010(c) specifically provides that "Federal regulations relating to hearings within the Medicaid program under 42 C.F.R. 431.220 – 431.250 . . . take precedence where inconsistent with the requirements of this chapter and 2 AAC 64."

Under the Alaska Fair Hearing regulations, the Division must provide written notice to applicants prior to the date it "intends to take action denying, reducing, suspending, or terminating assistance . . ."[8] That written notice must contain "the reasons for the proposed action, including the statute, regulation, or policy upon which that action is based."[9] The federal Medicaid regulation regarding notice requirements, 42 C.F.R. § 431.210, is similar to the Alaska regulations.

In *Baker v. State*[10], a case involving the Department of Health and Social Services' administration of the Medicaid program, the Alaska Supreme Court held that before the Division terminated or reduced benefits, it must first provide adequate notice to recipients:

> We agree that decisional law strongly supports the position that "'due process requires an explanation of the *specific* reasons for reducing . . . benefits." . . . to the extent feasible, the department should be required to show how and why it determined that a reduction in PCA services was in order.[11]

The *Baker* Court further stated, "due process demands that recipients facing a reduction in their public assistance benefits be provided a meaningful opportunity to understand, review, and where appropriate, challenge the department's action."[12] Importantly, the context in which

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7 Ex. D, p. 1.
8 7 AAC 49.060.
9 7 AAC 49.070.
10 *Baker v State, Dep't of Health and Social Services*, 191 P.3d 1005 (Alaska 2008).
11 *Baker at* 1011 (citations omitted, emphasis in original).
12 *Id.*

Baker was decided makes it clear that this requirement attaches at the point of the initial agency decision, **before** administrative appeal. In that decision, the Court specifically referred to both the state Fair Hearing regulation and federal Medicaid hearing regulation as embodying constitutional due process notice requirements.[13]

Baker is applicable to Ms. T's case because the Division is seeking to reduce Ms. T's Medicaid benefits. She had free choice of medical providers and pharmacies; the Division wishes to restrict that choice. Under *Baker,* Ms. T is entitled to an explanation of why the Division maintains that the restriction is appropriate as part of her initial notice. The notice, however, did not do that. It merely recited the sections of the regulation that authorized her placement in Care Management, without explaining any of the underlying factual basis for the placement. As such, it failed to comply with the *Baker* requirement that Division's notice provide the recipient with "a meaningful opportunity to understand [and] review" the Division's proposed action. Consequently, the Division may not seek to place Ms. T in Care Management until it first provides adequate notice.[14]

B. Retroactive Regulation Effect

The regulation that sets out the requirements for a recipient to be placed in Care Management, 7 AAC 105.600, was substantially revised effective January 1, 2021.

The pre-January 1, 2021 regulation set out a two-step process. If the recipient was (1) referred to the Division as using unnecessary medical services or items, (2) received average daily prescriptions that exceeded the recommendations in *Drug Facts and Comparisons*, or (3) a statistical analysis of the recipient's medical usage showed that it exceeded certain parameters, then the Division was required have a "qualified health care professional" "conduct an individualized clinical review of the recipient's medical and billing history" to determine whether the usage was medically necessary. If that review resulted in a determination that the use was not medically necessary, then the Division could restrict a recipient's choice of their primary care provider and pharmacy for up to twelve months.[15]

The version of the regulation, 7 AAC 105.600, that went into effect on January 1, 2021 is substantially different from its predecessor. The prior regulation required a clinical review by a

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[13] *Baker*, 191 P.3d at 1009 n. 13.

[14] The Division may initiate a new Care Management placement action if it first provides Ms. T with an initial adequate notice. *See Allen v. State, Dept. of Health and Social Services*, 203 P.2d 1155, 1169 (Alaska 2009).

[15] 7 AAC 105.600 (Register 193, Regulation in effect from February 1, 2010 through December 31, 2020).

qualified health care professional in all circumstances. The current regulation dispenses with the clinical review by a qualified health care professional for recipients who fall within certain categories. In addition, the current regulation allows the Division to restrict a recipient's choice of their primary care provider and pharmacy for up to thirty-six months, in the event that a recipient had been previously placed in care management.[16]

In the case of Ms. T, the Division found that she fell into two coverage categories, receiving an opioid prescription from two or more prescribers during a consecutive three-month period, and using a medical item/service "with a frequency that exceeds 2 standard deviations from average." The first coverage category is not listed in the prior 7 AAC 105.600. The second category is.[17] Ms. T was to be placed in Care Management for thirty-six months, although the notice did not specify the reason for that length of time.

Under the regulation that was in effect during 2020, which was when the underlying events occurred, the Division could have only placed Ms. T in Care Management after a clinical review, and the length of that placement would have only been up to twelve months.

The issue is therefore whether the Division could utilize the 2021 version of the regulation to place Ms. T in Care Management for events that occurred in 2020, before the effective date of the 2021 regulation. This would be a retroactive application of the current regulation, because it would "'give[s] to preenactment conduct a different legal effect from that which would have had without the passage of the [regulation]'"[18] The different legal effect to Ms. T would be two-fold: she would be placed in Care Management without her medical services/prescriptions being first reviewed by a "qualified health care professional" for medical necessity, and the length of Care Management placement increased from up to twelve months to up to thirty-six months.

The Administrative Procedure Act addresses the question of when a regulation can be applied retroactively. AS 44.62.240, entitled "**Limitation on retroactive action"** provides:

> If a regulation adopted by an agency under this chapter is primarily legislative, the regulation has prospective effect only. A regulation adopted under this chapter that is primarily an "interpretative regulation" has retroactive effect only if the agency adopting it has adopted no earlier inconsistent regulation and has followed

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[16] 7 AAC 105.600 (Register 236, Regulation in effect from January 1, 2021 forward).

[17] 7 AAC 105.600(b)(3) (Register 193, Regulation in effect from February 1, 2010 through December 31, 2020).

[18] *Norton v. Alcoholic Beverage Control Bd.,* 695 P.2d 1090, 1093 (Alaska 1985) (citations omitted).

no earlier course of conduct inconsistent with the regulation. Silence or failure to follow any course of conduct is considered earlier inconsistent conduct.[19]

The Alaska Supreme Court has defined whether a statute (which also applies to regulations) is "legislative" or "interpretative." A legislative regulation is one that formulates policies and acts in the place of the legislature.[20] An interpretative regulation is one that helps to construe an existing statute.[21] In this case, the current regulation is legislative because it formulates policies: it sets out the policy that restricts a recipient's choice of a primary medical care provider and pharmacy and sets out the procedures to implement that restriction. As such, the regulation may not be applied retroactively.

In the context of this case, it means that the Division could not utilize the current version of 7 AAC 105.600 to place Ms. T in Care Management based upon her medical history in 2020, because that medical history occurred prior to the effective date of the current regulation.

IV. Conclusion

The Division is precluded from placing Ms. T into Care Management for two separate and independent reasons. First, its notice placing her in Care Management fails to satisfy procedural due process requirements. Second, its placement of her in Care Management is based upon an impermissible retroactive application of the current regulation.

Dated: April 7, 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 12th day of May 2021.

By: *Signed*
Name: Jillian Gellings
Title: Project Analyst
Agency: Office of the Commissioner, DHSS

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]:

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19 AS 44.62.240 (emphasis in original).
20 *Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971).
21 *Kelly* at 910, citing *Whaley v. State,* 438 P.2d 718, 722 (Alaska 1968).