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**STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
OFFICE OF HEARINGS AND APPEALS**

In the Matter of:

████████████████████

Claimant.

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OHA Case No. 09-FH-300

DPA Case No. ██████████

FAIR HEARING DECISION

STATEMENT OF THE CASE

████████████████████ (Claimant) was a recipient of the Alaska Senior Benefits Payment (ASBP) Program (Ex. 1). On March 25, 2009 the Claimant’s conservator submitted an ASBP renewal application to the State of Alaska Division of Public Assistance (DPA or Division) (Exs. 2.0 – 2.3). On March 27, 2009 the Division mailed to the Claimant a written notice, stating that the Claimant’s ASBP benefits would terminate after April 30, 2009 due to excess income (Exs. 4, 5.2). On April 24, 2009 the Claimant’s representative requested a fair hearing with regard to the Claimant’s ASBP benefits (Exs. 5.0, 5.1, 5.3). This Office has jurisdiction to resolve this case pursuant to 7 AAC 49.010.

A hearing was held as scheduled on August 6, 2009 before Hearing Officer Jay Durych. The Claimant was represented by ██████████, a Benefits Specialist with the Office of Public Advocacy. Mr. ██████████ attended the hearing in person and argued the case on behalf of the Claimant.¹ ██████████, the Claimant’s conservator, attended the hearing telephonically and testified on the Claimant’s behalf. ██████████, a Public Assistance Analyst with the Division, attended the hearing in person and represented and testified on behalf of the Division.

All testimony and exhibits offered by the parties at the hearing was admitted into evidence. At the end of the hearing the record was closed, except for the submission of post-hearing briefing by the parties. The Claimant’s opening brief was timely submitted on September 8, 2009. The Division’s

¹ Some of the facts adopted here were stated at the hearing by the Claimant’s representative. The Claimant’s representative indicated at the hearing that he would not be testifying, and therefore he was not sworn. Accordingly, his statements are technically argument rather than testimony. However, his statements as to factual matters pertained primarily to “background” facts, and in any event they were not disputed by the Division. Accordingly, for purposes of this decision only, his unsworn factual assertions are accepted as true.

brief was timely submitted on September 15, 2009. The Claimant's reply brief was timely submitted on October 20, 2009. The record was then closed and the case was submitted for decision.

ISSUE

Was the Division correct when on March 27, 2009 it gave notice that the Claimant's Alaska Senior Benefits Payment Program payments would terminate after April 30, 2009, because the Claimant's available income exceeded the maximum annual income limit for the Alaska Senior Benefits Payment Program?

FINDINGS OF FACT

The following facts were proven by a preponderance of the evidence:

1. NANA Regional Corporation (NANA) is an Alaska Native corporation created pursuant to the Alaska Native Land Claims Settlement Act (ANCSA) (Claimant representative statements; Claimant's post-hearing briefing).
2. The Claimant is a NANA shareholder and receives periodic monetary distributions from NANA (Exs. 2.7 – 3.0; Claimant representative statements). The NANA distributions are mailed by NANA to OPA in check form (██████ testimony). The checks list the payee as either (a) the Claimant (by name), or (b) "the Office of Public Advocacy as conservator for [the Claimant]." *Id.* The dividends are then deposited directly into the Claimant's trust account. *Id.*
3. The State of Alaska Office of Public Advocacy (OPA) was appointed as the Claimant's public guardian by the Anchorage Superior Court on May 24, 2006 (██████ testimony).
4. OPA established an irrevocable asset trust for the Claimant on December 28, 2007 (██████ testimony; ██████ statement). The trust was established primarily to ensure that the Claimant's NANA corporation dividends were not counted against him for purposes of Medicaid and Social Security. *Id.* The Claimant is the beneficiary of this trust, while OPA is the settlor and the trustee of the trust (Claimant's Ex. 1, p.1). The trust was filed with the Alaska Court System on December 28, 2007 (Claimant's Ex. 1 p. 9).
5. OPA has never failed to deposit the full amount of the Claimant's NANA distributions directly into his trust (██████ testimony). The Claimant's Exhibit 4 is an accurate record of how OPA has applied the Claimant's NANA distributions. *Id.*
6. Ms. ██████ of OPA has the power to direct that the NANA distributions *not* be placed into the Claimant's trust (██████ testimony). However, she would be in "a lot of trouble" if she did that. *Id.*
7. The Claimant was a recipient of the Alaska Senior Benefits Payment (ASBP) Program prior to March 25, 2009 (Ex. 1).
8. On March 25, 2009 the Claimant's conservator submitted an ASBP renewal application to the Division (Exs. 2.0 – 2.3).

9. At all times relevant to this case the maximum annual income limit for the ASBP Program was \$23,678.00 (Ex. 3.0, Division representative's testimony).

10. During the annual review period at issue the monies which were received by the Claimant, and which were counted by the Division for purposes of ASBP Program eligibility, were as follows:

- a. Adult Public Assistance Program payments in the amount of \$4,344.00;
- b. Social Security payments in the amount of \$8,328.00; and
- c. NANA Corporation dividends in the amount of \$19,387.50.

The above-listed payments total \$32,059.50 (Division representative's testimony).

11. On March 27, 2009 the Division mailed to the Claimant a written notice stating that the Claimant's ASBP benefits would terminate after April 30, 2009 due to excess income (Exs. 4, 5.2). This notice stated in relevant part as follows:

You will not receive [an ASBP payment] after April 30, 2009. You are no longer eligible for Senior benefits because:

We count native benefits in this program. Last year you received \$19,387.50 from NANA. We are anticipating a bit less this year, but this amount will put you over the \$23,678.00 [ASBP program maximum annual income limit]

This action is supported by . . . 7 AAC 47.563.

12. On April 24, 2009 the Claimant's representative requested a fair hearing with regard to the Division's termination of the Claimant's ASBP benefits (Exs. 5.0, 5.1, 5.3).

PRINCIPLES OF LAW

I. Burden of Proof and Standard of Proof.

This case involves the Division's termination of existing ASBP benefits previously paid to the Claimant. The party seeking a change in the status quo normally has the burden of proof.² In this case the Division is attempting to change the status quo or existing state of affairs by terminating existing benefits. Accordingly, the Division bears the burden of proof in this case.

The regulations applicable to this case do not specify any particular standard of proof. Therefore, the "preponderance of the evidence" standard is the standard of proof applicable to this case.³ This

² *State of Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

³ A party in an administrative proceeding can assume that preponderance of the evidence is the applicable standard of proof unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission*, 711 P.2d 1170 (Alaska 1986).

standard is met when the evidence, taken as a whole, shows that the facts sought to be proved are more probable than not or more likely than not.⁴

II. The Alaska Senior Benefits Payment Program.⁵

The Alaska Senior Benefits Payment Program is a state program established and funded by the Alaska Legislature. Its statutes are located at A.S. 47.45.301 – A.S. 47.45.309. Its implementing regulations are located at 7 AAC 47.545 – 7 AAC 47.599.

The Alaska Senior Benefits Payment Program provides monthly cash benefits to needy Alaskan residents 65 years old or older. AS 47.45.301 - .302(a). The household income of a recipient of these benefits cannot exceed 175% of the annual federal poverty line for Alaska, as determined by the United States Department of Health and Human Services.

7 AAC 47.547, an implementing regulation promulgated by the State of Alaska Department of Health and Social Services, reiterates the above-referenced statutory program requirements.

7 AAC 47.549 provides in relevant part as follows:

(a) An individual is eligible for assistance under AS 47.45.301 - 47.45.309 and 7 AAC 47.545 - 7 AAC 47.599 if the individual or the individual's household has a *total annual gross income* for the calendar year in which the application is received that does not exceed the appropriate income levels in AS 47.45.302 (a)(3) [Emphasis added].

(b) *In determining total annual gross income under this section, the department will not* (1) include any payment received under AS 43.23 (permanent fund dividends) as income; or (2) *count income that is not legally available to the individual to spend for the individual's basic needs.* [Emphasis added].

7 AAC 47.563 provides in relevant part that “the department may require an individual to complete a review form annually, or more frequently if circumstances warrant, on a form approved by the department, to determine if the individual continues to be eligible to receive assistance under AS 47.45.301 - 47.45.309 and 7 AAC 47.545 - 7 AAC 47.599.”

III. Federal Social Security and Medicaid Statutes Cited By The Claimant.

The Medicaid program was established under Title XIX of the Social Security Act of 1965 as a cooperative program to be funded by both federal and state governments. Because Medicaid is partially funded by the federal government, it establishes broad guidelines through federal statute,

⁴ *Black's Law Dictionary* at 1064 (West Publishing, 5th Edition, 1979).

⁵ The Alaska Statutes refer to the program as the “Alaska Senior Benefits Payment Program.” *See* A.S.47.45.301. The Alaska Administrative Code’s Table of Contents for Title 47 refers to the program as the “Senior Benefits Program.”

regulations, and policies that set the parameters for eligibility, coverage, reimbursement, and administration. For example, 42 U.S.C.A. § 1396p discusses liens, adjustments, recoveries, asset transfers, and the treatment of trusts for purposes of the Medicaid program.

42 U.S.C.A. § 1382a defines earned and unearned income, and lists statutory exclusions from income, for purposes of the Social Security Administration's Supplemental Security Income (SSI) program. Various criteria from this statute are also used in administration of the Medicaid program.

ANALYSIS

Introduction: Contentions of the Parties; Definition of Issues.

Following the parties' hearing presentations, the parties stipulated that there were no disputed factual issues in this case and that the only issues to be resolved were purely legal issues.

A. The Claimant's Contentions.

At the hearing of August 6, 2009 the Claimant's representative asserted in relevant part as follows:

1. "[The Claimant's] irrevocable asset trust was established under 42 USC which excludes the assets of this type of trust"
2. "The NANA dividends were distributed to [OPA] in its capacity as conservator for [the Claimant]."
3. "[OPA] has a general responsibility to protect [the Claimant's] financial interests as his conservator and also, as a trustee, [OPA] has a fiduciary obligation to administer the trust to at all times protect Mr. [REDACTED]' best interests."
4. "[OPA] acted in conformance with its statutory duties as conservator and trustee by placing the NANA distributions in the irrevocable asset trust . . . within the month in which the distributions were received."
5. "The NANA distributions were placed in [the Claimant's] irrevocable trust and therefore do not constitute income within the meaning of 42 USC 1382a."
6. "The NANA dividends placed in the trust must [also] be considered excludable assets of the trust and not as countable income because they fall within the definition of assets established under 42 USC 1396e(1)."

In the Introduction of his initial post-hearing brief dated September 8, 2009 the Claimant's representative defined the pertinent issues as:

1. Whether [the Claimant's] NANA dividend distributions are legally available to meet his basic needs; and

2. Whether the NANA distributions placed in [the Claimant's] irrevocable trust are considered excluded assets of the trust and [thus] do not constitute countable income.

Finally, in his reply brief dated October 20, 2009, the Claimant further refined the issue, stating: "This case turns upon whether the NANA dividends within an irrevocable asset trust are available to [the Claimant] to spend for [his] basic needs." See Claimant's reply brief at p. 8.

B. The Division's Contentions.

The Division's contentions, as stated at the hearing and in its post-hearing brief dated September 15, 2009, are as follows:

1. The ASBP Program is a State program governed by State policy versus Federal regulations.
2. The Federal regulations quoted by the Claimant apply to the Medicaid Program and certain other Public Assistance programs, but do not apply to the ASBP program.
3. The only income *not counted* by the Division for purposes of determining an applicant or recipient's ASBP Program eligibility are (a) State of Alaska Permanent Fund dividends, and (b) monies not legally available to the ASBP Program recipient.
4. Although the Claimant's NANA Corporation dividends have been directed into a trust, these funds are legally available to the Claimant because, prior to being deposited into the trust, they can be redirected at any time pursuant to the Claimant's (or his representative's) request.

C. The Resulting Issues.

Based on the contentions of the parties as set forth above, the resulting issues can fairly be stated as follows:

1. Do the federal Medicaid statutes cited by the Claimant (42 U.S.C.A. § 1382a et. seq. and/or 42 U.S.C.A. § 1396p et. seq.) govern eligibility for the Alaska Senior Benefits Payment Program?
2. If the federal Medicaid statutes relied on by the Claimant do not apply to the Alaska Senior Benefits Payment Program, did the Division properly apply its own regulations in terminating the Claimant's ASBP benefits?

These issues will be discussed below in the order stated. Because the Division is seeking to alter the status quo or existing state of affairs by terminating benefits, the Division bears the burden of proving its case by a preponderance of the evidence. See discussion in Principles of Law at page 4, above.

I. Do Federal Medicaid Statutes Govern Eligibility for the Alaska Senior Benefits Payment Program?

The Claimant's position is founded primarily on the assertion that certain Medicaid statutes (specifically 42 U.S.C.A. § 1382a et. seq. and 42 U.S.C.A. § 1396p et. seq.) must be applied in determining whether the Claimant's NANA distributions are legally available to the Claimant to spend for his basic needs under 7 AAC 47.549(b). However, the Claimant's only support for this proposition is his assertion, at page 3 of his reply brief, that "the Department which ministers to the state's federally funded Medicaid programs, must necessarily recognize the federal government's definition of 'income.'"

The Alaska statutes establishing the ASBP program do not reference any federal Medicaid statutes in the text of the statutes themselves. *See* AS 47.45.301 - AS 47.45.309.⁶ The parties have likewise not asserted the existence of any legislative history indicating that the Alaska legislature intended that its ASBP statutes be interpreted in conformance with federal Medicaid law.

Similarly, the regulations implementing the ASBP program fail to show any intent on the part of the State of Alaska Department of Health and Social Services that its ASBP regulations be interpreted in conformance with federal Medicaid law. *See* 7 AAC 47.545 – 7 AAC 47.599. 7 AAC 47.553(c) contains one reference to a federal regulation, and 7 AAC 47.571(b) contains one reference to a federal statute, but neither of these references are in any way related to the matters at issue here.

Finally, research has revealed no federal statute or case law indicating that Congress intended 42 U.S.C.A. § 1382a et. seq., 42 U.S.C.A. § 1396p et. seq., or any other federal Medicaid statute or regulation, to apply to state benefit programs (like ASBP) *which are not federally funded*.

In summary, the statutes relied on by the Claimant (42 U.S.C.A. § 1382a et. seq. and 42 U.S.C.A. § 1396p et. seq.) facially apply *only* to Medicaid and Social Security cases. The Claimant has not demonstrated that these federal statutes apply in any way to the Alaska Senior Benefits Payment Program, *a program created and funded solely by the state*. Accordingly, the Division was not required to apply these federal statutes in making its ASBP Program eligibility determination. The only remaining issue is whether the Division's own ASBP regulations require that the Claimant's NANA distributions be excluded from countable income.

II. Were the Division's Regulations Properly Applied In Terminating The Claimant's Benefits?

The Division terminated the Claimant's ASBP benefits based on its assertion that the Claimant's income exceeded the annual program maximum (see Exs. 4, 5.2). The only ASBP regulation which addresses income eligibility is 7 AAC 47.549. Subsection (a) of the regulation bases eligibility on the individual's household's "total annual gross income for the calendar year in which the

⁶ The only SBPP statutory reference to federal law appears to be the reference, in AS 47.45.302, to the annual federal poverty line for Alaska, which is determined by the United States Department of Health and Human Services and revised under 42 USC 9902(2).

application is received . . . “. Subsection (b) of the regulation states in relevant part that “*in determining total annual gross income under this section, the department will not . . . (2) count income that is not legally available to the individual to spend for the individual's basic needs.*” [Emphasis added]. Accordingly, the only issue here under 7 AAC 47.549 is whether the Claimant’s NANA distributions are “legally available to [him] to spend for [his] basic needs.”

The Claimant emphasized, at the hearing and in his briefing, that *once his NANA distributions were deposited into his trust*, they were not legally available to him to spend for his basic needs. The Division did not appear to contest this. Accordingly, for purposes of this decision, it is assumed that *once the Claimant’s NANA distributions were deposited into his trust* they were not legally available to him to spend for his basic needs.

The Claimant did not, however, directly address the remaining issue: whether the Claimant’s NANA distributions are legally available to him to spend, for his basic needs, *before they are deposited into his trust*. Ms. [REDACTED] specifically acknowledged at the hearing that she has the power to direct that the Claimant’s NANA distributions *not* be placed into the Claimant’s trust. Based on this testimony, it is clear that the Claimant’s NANA distributions have not been irrevocably assigned to the Claimant’s trust.⁷ There being no irrevocable assignment of the Claimant’s NANA distributions, they could be paid to him directly; they in fact *are his*, to do with as he (or his conservator and trustee) wishes, prior to such time as the distributions are deposited into the Claimant’s trust.

In summary, until the Claimant’s NANA distributions are deposited into his trust, they are legally available to him to spend for his basic needs. Accordingly, the Division correctly determined that the Claimant’s NANA distributions were properly includable as income, for purposes of the Alaska Senior Benefits Payment Program, pursuant to 7 AAC 47.549. The Division therefore did not err when it terminated the Claimant’s Alaska Senior Benefits Payment Program payments after April 30, 2009, because the Claimant’s available income exceeded the maximum annual income limit for the Alaska Senior Benefits Payment Program.

CONCLUSIONS OF LAW

1. The Division carried its burden and proved, by a preponderance of the evidence, that pursuant to 7 AAC 47.549 the Claimant’s NANA distributions were properly includable as income for purposes of the Alaska Senior Benefits Payment Program.

2. Accordingly, the Division was correct to terminate the Claimant’s Alaska Senior Benefits Payment Program payments after April 30, 2009 because the Claimant’s available income exceeded the maximum annual income limit for the Alaska Senior Benefits Payment Program.

⁷ An assignment is the “transfer or making over to another of the whole of any property, real or personal The transfer by a party of all of its rights to some kind of property, usually intangible property” Black’s Law Dictionary 109 (West Publishing, 5th Edition, 1979). The term “irrevocable” is defined as “[t]hat which cannot be revoked or recalled.” Black’s Law Dictionary 744 (West Publishing, 5th Edition, 1979).

DECISION

The Division was correct to terminate the Claimant's Alaska Senior Benefits Payment Program payments after April 30, 2009 because the Claimant's available income exceeded the maximum annual income limit for the Alaska Senior Benefits Payment Program.

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. To do this, 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

If the Claimant appeals, the 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.

DATED this _____ day of November, 2009.

Jay Durych
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this _____ day of November 2009 true and correct copies of the foregoing document were sent to the Claimant via U.S.P.S. mail, and to the remainder of the service list by e-mail, as follows:

Claimant's Representative: [REDACTED], OPA
– Certified Mail, Return Receipt Requested
[REDACTED], Director
[REDACTED], Policy & Program Development
[REDACTED], Administrative Assistant II
[REDACTED], Eligibility Technician I
[REDACTED], Staff Development & Training
[REDACTED], Fair Hearing Representative

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