

**STATE OF WASHINGTON  
HEALTH CARE AUTHORITY  
BOARD OF APPEALS**

In Re:	)	Docket No. 12-2014-HCA-05321
	)	
[APPELLANT]	)	<b>REVIEW DECISION AND FINAL ORDER</b>
	)	
Appellant	)	Chore/COPES/Medicaid Personal Care

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**I. NATURE OF ACTION**

1. The Department of Social and Health Services (Department or DSHS) terminated in-home personal care services for [APPELLANT] (Appellant) in [DATE] and thus denied payment to her individual care provider. The Appellant has previously litigated this particular issue several times. The Appellant again requested an administrative hearing in [DATE] to challenge the Department's 2008 decision to terminate her personal care services.

2. Administrative Law Judge (ALJ) Jason Grover of the Seattle Office of Administrative Hearings (OAH) held a hearing on [DATE]. Constantin Korff, an administrative hearings coordinator, represented DSHS and moved to dismiss the matter because it was filed late and/or had already been decided. [NAME 1], the Appellant's caregiver, represented the Appellant. Exhibits 1 through 17 were presented for admission to the hearing record and the ALJ said he would consider them.<sup>1</sup> The following people were sworn in to testify: (1) Mr. Korff; (2) [NAME 1]; and (3) the Appellant. [INTERPRETER] provided interpretation services in the Russian language. The hearing record closed on [DATE].

3. The OAH mailed an *Initial Order* on [DATE]. In his decision, the ALJ dismissed the Appellant's request for hearing based on collateral estoppel because this matter had been previously decided.

4. The Appellant timely<sup>2</sup> filed a petition for review of the *Initial Order* with the Health

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<sup>1</sup> These exhibits are admitted to the hearing record.

<sup>2</sup> Pursuant to WAC 182-526-0580, the HCA BOA must receive a written request for review within 21 days following the date on which the *Initial Order* was issued.

Care Authority (HCA) Board of Appeals (BOA) on [DATE]. In her petition, she wrote:

Judge Jason Grover said he can't resolve this problem because he don't have jurisdiction for this case. The judge protect right of the Department to close this case. Department and judges previously tried close this case and they did this every hearings. Please, resolve the problem about Medical Personal Care payment from [DATE] – [DATE]. Thank you.

5. The Department's representative timely<sup>3</sup> filed a response to the Appellant's petition for review on [DATE]. He pointed out that there had been previously requested hearings on this same issue and that there were at least eight other docket numbers addressing it.<sup>4</sup> He argued that the Appellant did not have a right to hearing in this matter and the ALJ's *Initial Order* should be affirmed.

## II. FINDINGS OF FACT

To determine the adequacy and appropriateness of the ALJ's Findings of Fact in this matter and to make any necessary modifications to those findings, the undersigned reviewed the entire hearing record. No ruling by the ALJ on the admissibility of proffered evidence is overruled or altered unless that is made explicit in this *Review Decision and Final Order*. When making the Conclusions of Law in this *Review Decision and Final Order*, the undersigned considered the following facts:

1. The Appellant, born [DATE],<sup>5</sup> was notified by the Department in a Planned Action Notice, dated [DATE], on [DATE], that her Medicaid Personal Care (MPC) benefits would end, effective [DATE], due to MPC ineligibility.<sup>6</sup> This was because the Appellant had lost her eligibility for medical assistance due to her loss of SSI benefits based on her citizenship status.<sup>7</sup> Termination of the Appellant's MPC benefits resulted in termination of payments to the

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<sup>3</sup> Pursuant to WAC 182-526-0590(2), a response to a petition for review must be received by the HCA BOA within seven business days of mailing the notice of a request for review. The *Notice of Request for Review and Time to Respond* in this matter was mailed by the BOA to the parties on [DATE].

<sup>4</sup> Docket numbers 09-2008-A-2013, 07-2009-A-0794, 08-2009-A-1119, 01-2010-A-1298, 04-2010-A-0919, 03-2013-HCA-0040, 08-2013-0260, and 04-2014-HCA-0352.

<sup>5</sup> Exhibit 1.

<sup>6</sup> Exhibit 1; exhibit 2 at 1 through 2; and testimony of Constantin Korff.

<sup>7</sup> Exhibit 5 at 6.

Appellant's individual caregiver for provision of personal care services to the Appellant.

2. **Docket numbers 09-2008-A-2013, 07-2009-A-0794, and 08-2009-A-1119.** On [DATE], the Appellant asked for a hearing to contest the termination of her MPC benefits and nonpayment to her caregiver.<sup>8</sup> After much confusion over whether the matter was settled, resulting in withdrawal and dismissal of the Appellant's hearing request, and then subsequent requests for hearing by the Appellant on the same issue and reinstatement of her original request, a hearing was held on [DATE], under docket numbers 09-2008-A-2013, 07-2009-A-0794, and 08-2009-A-1119.<sup>9</sup> In the intervening time, DSHS again found the Appellant eligible for medical assistance and MPC services, but there was a gap in eligibility between [DATE] through [DATE].<sup>10</sup> The Appellant asserted then and in the present matter that the Department mistakenly determined she was ineligible for MPC during those months, as well as [DATE], and that the Appellant's caregiver should be paid for the personal care services the Appellant received during that time.<sup>11</sup>

3. On [DATE], OAH issued an *Initial Order* for docket numbers 09-2008-A-2013, 07-2009-A-0794, and 08-2009-A-1119.<sup>12</sup> The ALJ in that matter determined the Appellant was not eligible for MPC benefits from [DATE] through [DATE], and that the Department was correct in not paying the Appellant's caregiver during this period.<sup>13</sup>

4. The Appellant appealed the [DATE], *Initial Order* to the DSHS BOA.<sup>14</sup> On [DATE], the DSHS BOA issued a *Review Decision and Final Order*.<sup>15</sup> In this decision, the DSHS BOA Review Judge affirmed the *Initial Order*.<sup>16</sup>

5. The Appellant requested reconsideration of the [DATE], *Review Decision and*

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<sup>8</sup> *Id.*

<sup>9</sup> Exhibit 5 at 4 through 5.

<sup>10</sup> Exhibit 1 and exhibit 5 at 6 through 7.

<sup>11</sup> *Id.*

<sup>12</sup> Exhibit 4.

<sup>13</sup> Exhibit 4 at 4.

<sup>14</sup> Exhibit 5 at 1.

<sup>15</sup> *Id.*

<sup>16</sup> Exhibit 5 at 9.

*Final Order*.<sup>17</sup> The DSHS BOA Review Judge declined to change his decision and issued an *Order on Reconsideration* on [DATE], which held that the *Review Decision and Final Order* remained the final administrative decision.<sup>18</sup>

6. The Appellant was advised in both the [DATE], *Review Decision and Final Order* and the [DATE], *Order on Reconsideration* that she could ask a Superior Court judge to review the Department's decision if she continued to disagree with it.<sup>19</sup> There is no indication in the hearing file that the Appellant filed a request for judicial review of the final administrative order issued for docket numbers 09-2008-A-2013, 07-2009-A-0794, and 08-2009-A-1119.

7. **Docket number 01-2010-A-1298.** On [DATE], the Appellant filed another request for hearing with the OAH, which was assigned docket number 01-2010-A-1298, and a hearing was held on [DATE].<sup>20</sup> The stated issue was whether the Appellant was entitled to payment for MPC benefits for the months of [DATE] through [DATE].<sup>21</sup> The ALJ decided in an *Initial Order* mailed [DATE], that the *Initial Order* mailed on [DATE], completely resolved the issues regarding MPC benefits and payments to the Appellant's caregiver from [DATE] through [DATE].<sup>22</sup> The ALJ also held that the Appellant had no right to a hearing regarding benefits for [DATE] because she did not file a hearing request within 90 days of [DATE], which was the date she was notified that she was again eligible for MPC benefits.<sup>23</sup>

8. The Appellant asked for review of the [DATE], *Initial Order* with the DSHS BOA.<sup>24</sup> On [DATE], the DSHS BOA issued a *Review Decision and Final Order*, affirming the [DATE], *Initial Order*.<sup>25</sup>

9. The Appellant was advised in the [DATE], *Review Decision and Final Order* that

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<sup>17</sup> Exhibit 6.

<sup>18</sup> Exhibit 6.

<sup>19</sup> Exhibit 5 at 9 and 11, and exhibit 6 at 2.

<sup>20</sup> Exhibit 7 at 1.

<sup>21</sup> *Id.*

<sup>22</sup> Exhibit 7 at 2.

<sup>23</sup> *Id.* and exhibit 8 at 4.

<sup>24</sup> Exhibit 8 at 1.

<sup>25</sup> Exhibit 8 at 1 and 8.

she could seek reconsideration or judicial review of the Department's decision if she continued to disagree with it.<sup>26</sup> There is no indication in the hearing file that the Appellant filed a request for reconsideration or a request for judicial review of the final administrative order issued for docket number 01-2010-A-1298.

10. **Docket number 04-2010-A-0919.** On [DATE], and [DATE], the Appellant again requested a hearing to demand payment for her provider for MPC services rendered from [DATE] through [DATE].<sup>27</sup> This matter was assigned docket number 04-2010-A-0919.<sup>28</sup> The ALJ decided in an *Initial Order Dismissing Proceeding*, mailed [DATE], that the Appellant had no right to another hearing on her [DATE] through [DATE] MPC benefits and dismissed the hearing requests.<sup>29</sup> There is no indication in the hearing file that the Appellant asked the BOA to review the [DATE], *Initial Order* in docket number 04-2010-A-0919.

11. **Docket number 02-2012-HCA-0662.** In [DATE] and [DATE], the Appellant filed duplicate hearing requests with the OAH on this same issue again, and the matter was assigned docket number 02-2012-HCA-0662.<sup>30</sup> In an *Initial Order*, mailed [DATE], the ALJ dismissed the Appellant's requests for hearing on issues that had already been litigated based on the doctrine of *res judicata*. The Appellant timely requested review in that matter, and the undersigned upheld the *Initial Order* in a *Review Decision and Final Order* issued on [DATE]. The Appellant filed a late petition for reconsideration with the HCA BOA on [DATE], which was denied.<sup>31</sup>

12. The Appellant was advised in the [DATE], *Order Denying Reconsideration* that she could seek judicial review of the agency's decision if she continued to disagree with it.<sup>32</sup> There is no indication in the hearing file that the Appellant filed a request for judicial review of the final administrative order issued for docket number 02-2012-HCA-0662.

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<sup>26</sup> Exhibit 8 at 8 and 9.

<sup>27</sup> Exhibit 9 at 1.

<sup>28</sup> *Id.*

<sup>29</sup> Exhibit 9 at 4.

<sup>30</sup> Exhibit 14.

<sup>31</sup> *Id.*

<sup>32</sup> Exhibit 14 at 1 and 2.

13. **Docket number 03-2013-HCA-0040.** On [DATE], the Appellant filed another hearing request on the same issue with the OAH, which was assigned docket number 03-2013-HCA-0040, and a hearing was held on [DATE].<sup>33</sup> The ALJ ruled in an *Initial Order*, mailed [DATE], that the Appellant did not have a right to another hearing regarding payments to her caregiver from [DATE] through [DATE].<sup>34</sup> This *Initial Order* advised the Appellant that she had 21 days from the date of its mailing to request review of the decision.<sup>35</sup>

14. The Appellant requested review of the [DATE], *Initial Order* with the HCA BOA on [DATE], and was asked to explain why she had good cause for submitting a late petition for review.<sup>36</sup> No good cause was shown and the Appellant's request for review was denied on [DATE].<sup>37</sup>

15. The Appellant was advised in the [DATE], *Order Denying Request for Review* that she could seek reconsideration or judicial review of HCA's decision if she continued to disagree with it.<sup>38</sup> There is no indication in the hearing file that the Appellant filed a request for reconsideration or judicial review for docket number 03-2013-A-0040.

16. **Docket number 08-2013-HCA-0260.** On [DATE], the Appellant filed another hearing request on the same issue with the OAH, which was assigned docket number 08-2013-HCA-0260, and a hearing was held on [DATE].<sup>39</sup> At the hearing in that matter, the ALJ dismissed with prejudice the Appellant's hearing right.<sup>40</sup> The ALJ also explained to the Appellant why the Appellant no longer had a right to a hearing or additional relief on this issue of payment to her MPC provider for the months of [DATE] through [DATE].<sup>41</sup> The ALJ clearly instructed the Appellant not to file another hearing request on this issue and told the Appellant that if she did

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<sup>33</sup> Exhibit 11 at 1.

<sup>34</sup> Exhibit 11 at 1 and 2.

<sup>35</sup> Exhibit 11 at 3 and 4.

<sup>36</sup> Exhibit 10 at 1.

<sup>37</sup> *Id.*

<sup>38</sup> Exhibit 10 at 2.

<sup>39</sup> Exhibit 12 at 1 and exhibit 13 at 6.

<sup>40</sup> Exhibit 12 at 1 and 2; exhibit 13 at 1 and 6.

<sup>41</sup> *Id.*

request another hearing there would again be the same outcome.<sup>42</sup>

17. The Appellant timely requested review in that matter, and the undersigned upheld the *Initial Order* in a *Review Decision and Final Order* issued on [DATE].<sup>43</sup> The Appellant filed a petition for reconsideration with the HCA BOA on [DATE].<sup>44</sup> The undersigned explained in the *Order on Reconsideration*, mailed [DATE], why the Appellant's arguments failed and that there was nothing in the Appellant's request for reconsideration that required a change to the [DATE], *Review Decision and Final Order*.<sup>45</sup>

18. The Appellant was advised in the [DATE], *Order on Reconsideration* that she could seek judicial review of the agency's decision if she continued to disagree with it.<sup>46</sup> There is no indication in the hearing file that the Appellant filed a request for judicial review of the final administrative order issued for docket number 08-2013-HCA-0260.

19. **Docket number 04-2014-HCA-0352.** On [DATE], the Appellant filed another hearing request on the same issue with the OAH, which was assigned docket number 04-2014-HCA-0352, and a hearing was held on [DATE].<sup>47</sup> The hearing request stated: "Need whole payments for my caregiver from [DATE], [DATE], [DATE], [DATE], [DATE], [DATE] and [DATE]. Total underpayments \$4,376.40."<sup>48</sup> The request also stated, "[p]lease, make hearing by telephone."<sup>49</sup> This is the exact same hearing request the Appellant made in docket numbers 02-2012-HCA-0662 and 08-2013-HCA-0260,<sup>50</sup> both of which were dismissed as barred by *res judicata* and collateral estoppel.

20. The Appellant timely requested review in that matter on [DATE].<sup>51</sup> The

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<sup>42</sup> *Id.*

<sup>43</sup> Exhibit 13 at 1 and 14.

<sup>44</sup> Exhibit 15.

<sup>45</sup> *Id.*

<sup>46</sup> Exhibit 14 at 1 and 2.

<sup>47</sup> Exhibit 17 at 1 and 7.

<sup>48</sup> Exhibit 17 at 7.

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., exhibit 13 at 6.

<sup>51</sup> Exhibit 17 at 1.

undersigned affirmed the *Initial Order* in a *Review Decision and Final Order* issued on [DATE].<sup>52</sup>

21. The Appellant was advised in the [DATE], *Review Decision and Final Order* that she could seek reconsideration or judicial review of HCA's decision if she continued to disagree with it.<sup>53</sup> There is no indication in the hearing file that the Appellant filed a request for reconsideration or judicial review for docket number 04-2014-A-0352.

22. **Docket number 12-2014-HCA-05321.** In the current case, the Appellant filed a hearing request with OAH on [DATE].<sup>54</sup> The hearing request stated: "Need whole payments for my caregiver from [DATE], [DATE], [DATE], [DATE], [DATE], [DATE] and [DATE]. Total underpayments \$4,376.40."<sup>55</sup> The request also stated, "[p]lease, make hearing by telephone."<sup>56</sup> This is the exact same hearing request the Appellant made in docket numbers 02-2012-HCA-0662, 08-2013-HCA-0260, and 04-2014-HCA-0352,<sup>57</sup> which were all dismissed based on *res judicata* and collateral estoppel.

23. The OAH mailed each party a *Notice of Hearing* on [DATE], setting the hearing for [DATE], although the time and location of the hearing were changed in a notice issued [DATE]. At the hearing on [DATE], the Appellant's representative asked the ALJ to explain the concepts of *res judicata* and collateral estoppel, which he did. The Appellant's representative then asked the ALJ to determine the truth about the Department's termination of the Appellant's MPC benefits and denial of payment to provide those services between [DATE] and [DATE]. She pleaded with the ALJ to address the essence of the case rather than to determine only whether the Appellant had a right to a hearing. The ALJ explained that the first step is to evaluate whether there is a hearing right on a given matter. He told her that if he found the Appellant's hearing request was barred by *res judicata* and collateral estoppel then he would not

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<sup>52</sup> Exhibit 17 at 15.

<sup>53</sup> Exhibit 17 at 14, 16, and 17.

<sup>54</sup> Exhibit 1.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See, e.g., exhibit 13 at 6 and exhibit 17 at 7.



have the authority to hold a hearing on the merits to address the “essence” of the case as described by the Appellant’s representative.<sup>58</sup>

### III. CONCLUSIONS OF LAW<sup>59</sup>

1. **General Authority.** The Appellant’s petition for review of the *Initial Order* was timely filed and is otherwise proper.<sup>60</sup> The ALJ had general jurisdiction to hear and decide the Appellant’s challenge to the Department’s determination about her in-home personal care hours.<sup>61</sup> Chapter 388-106 WAC implements RCW 74.09.520(2) through (6). The authority to promulgate rules related to personal care services is granted to the Department and HCA in RCW 74.09.520(2). Administrative hearings conducted pursuant to Chapters 388-106 WAC and subsequent administrative review of the ALJs’ *Initial Orders* are subject to the statutes and regulations found at Chapter 34.05 RCW, Chapter 10-08 WAC, and Chapter 182-526 WAC. Jurisdiction exists to review the *Initial Order* and to enter the Department’s *Review Decision and Final Order*.<sup>62</sup>

2. The Health Care Authority (HCA) is now the designated single state agency for administering the Washington State Medicaid program,<sup>63</sup> including in-home personal care

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<sup>58</sup> According to the Appellant’s representative, DSHS incorrectly determined the Appellant was not eligible for MPC benefits from [DATE] through [DATE] and that the Department incorrectly denied payment to the Appellant’s caregiver during this period.

<sup>59</sup> Determinations made by a process of legal reasoning from the facts in evidence are conclusions of law. *Neidergang*, 43 Wn. App. at 658-59.

<sup>60</sup> WAC 182-526-0560 through WAC 182-526-0585.

<sup>61</sup> RCW 74.09.741; RCW 34.12.040; and WAC 182-526-0215.

<sup>62</sup> Chapter 34.05 RCW; RCW 74.09.741; WAC 182-526-0218; WAC 182-526-0530(2); WAC 182-526-0570; and WAC 182-526-0600(1).

<sup>63</sup> RCW 74.09.530(1)(a). *See also* 42 USC § 1396a(a)(5); 42 CFR § 431.10; RCW 41.05.021(1)(m); and RCW 74.09.010 note (stating

**Agency transfer -- 2011 1st sp.s. c 15:** "(1) All powers, duties, and functions of the department of social and health services pertaining to the medical assistance program and the medicaid purchasing administration are transferred to the health care authority to the extent necessary to carry out the purposes of this act. All references to the secretary or the department of social and health services in the Revised Code of Washington shall be construed to mean the director or the health care authority when referring to the functions transferred in this section....

(4) All rules and all pending business before the department of social and health services pertaining to the powers, functions, and duties transferred shall be continued and acted upon by the health care authority...").

services.<sup>64</sup> The HCA may collaborate with other state agencies to carry out its duties.<sup>65</sup> The undersigned was designated by Dorothy F. Teeter, HCA Director, to enter the final administrative order in this matter.<sup>66</sup>

3. It is well settled that an ALJ's or a Review Judge's authority to render a decision in an administrative hearing is limited to that which is specifically provided for in the authorizing statute(s) or Washington Administrative Code (WAC) provision(s).<sup>67</sup> "The power of an administrative tribunal to fashion a remedy is strictly limited by statute."<sup>68</sup>

4. In an adjudicative proceeding such as this, the undersigned has the same authority as the ALJ to enter Findings of Fact, Conclusions of Law, and Orders.<sup>69</sup> The Washington Administrative Procedure Act also states that the undersigned Review Judge has the same decision-making authority when deciding and entering the *Review Decision and Final Order* as the ALJ had while presiding over the hearing and deciding and entering the *Initial Order*, unless the Review Judge or a provision of law limits the issue(s) subject to review.<sup>70</sup> This includes the authority to make credibility determinations, weigh the evidence, and change or set aside the ALJ's findings of fact.<sup>71</sup> This is because "...administrative review is different

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<sup>64</sup> RCW 74.09.520(1)(l), (2), and (5) (defining the term "medical assistance" to include "personal care services," and describing what those services entail).

<sup>65</sup> RCW 74.09.530(1)(d). See also RCW 43.20A.865 (directing the DSHS Secretary to enter into agreements with the HCA Director to administer and divide responsibilities related to the Medicaid program, including long-term care services such as in-home personal care) and RCW 74.09.741(4) and (5) (giving an applicant or recipient the option of filing a hearing request with either the Department or HCA, and describing an appellant's right to a consolidated adjudicative proceeding when more than one agency has rendered a decision).

<sup>66</sup> See RCW 41.05.021(1) (stating that the HCA Director "...may delegate any power or duty vested in him or her by law, including authority to make final decisions and enter final orders in hearings conducted under chapter 34.05 RCW").

<sup>67</sup> *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998), and *Taylor v. Morris*, 88 Wn.2d 586, 588 (1977). See also *State Ex rel. Tarver v. Smith*, 78 Wn.2d 152, 159 (1970), *cert denied*, 402 U.S. 1000 (1971) (stating that a public assistance applicant's or recipient's hearing right is limited to grievances directly related to eligibility for, or the amount of, public assistance benefits, not general complaints or grievances over collateral matters) and WAC 182-526-0216.

<sup>68</sup> *Id.* at 558.

<sup>69</sup> WAC 182-526-0600(1); WAC 182-526-0215; and WAC 182-526-0520. See also RCW 34.05.464(4); *Tapper v. Employment Security*, 122 Wn.2d 397 (1993), *superseded by statute on other grounds*, RCW 50.04.294 (2003), and *overruled on other grounds by Markam Group, Inc. v. Employment Sec. Dep't*, 148 Wn. App. 555, 562 (2009); and *Northwest Steelhead and Salmon Council of Trout Unlimited v. Washington State Dept. of Fisheries*, 78 Wn. App. 778 (1995).

<sup>70</sup> RCW 34.05.464(4). See also WAC 182-526-0600(1).

<sup>71</sup> See *Hardee v. Dep't of Soc. & Health Servs.*, 152 Wn. App. 48, 59 (2009), *aff'd*, 172 Wn.2d 1 (2011). See also *Regan v. Dep't of Licensing*, 130 Wn. App. 39, 59 (2005) and *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1,

from appellate review.”<sup>72</sup> The undersigned Review Judge does not have the same relationship to the ALJ as an Appellate Court Judge has to a Trial Court Judge or that a Trial Court Judge has to a Review Judge in terms of the level of deference owed by the Review Judge to the presiding ALJ’s findings of fact.<sup>73</sup> The Review Judge’s authority to substitute his or her judgment for that of the presiding ALJ on matters of fact as well as law is the difference.<sup>74</sup> However, if the ALJ specifically identifies any findings of fact in the *Initial Order* that are based substantially on the credibility of evidence or demeanor of the witnesses,<sup>75</sup> a Review Judge must give due regard to the ALJ’s opportunity to observe the witnesses when reviewing those factual findings by the ALJ and making his or her own determinations.<sup>76</sup> This does not mean a Review Judge must defer to an ALJ’s credibility findings, but it does require that they be considered.<sup>77</sup>

5. Review Judges must personally consider the whole record or such portions of it as may be cited by the parties.<sup>78</sup> Because the ALJ is directed to decide the issues *de novo*,<sup>79</sup> the undersigned has also decided the issues *de novo*.<sup>80</sup> The undersigned has given due regard

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18-19 (2011) (stating that:

When reviewing the factual findings and conclusions of an ALJ,

“The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer’s opportunity to observe the witnesses.”

*Tapper*, 122 Wn.2d at 404 (emphasis omitted) (quoting RCW 34.05.464(4)); *see also* WAC 170-03-0620 (providing the Department’s own definition of the Review Judge’s authority). Regardless of whether “[i]t would perhaps be more consistent with traditional modes of review for courts to defer to factual findings made by an officer who actually presided over a hearing,” the legislature chose otherwise. *Tapper*, 122 Wn.2d at 405. “[I]t is not our role to substitute our judgment for that of the Legislature.” *Id.* at 406. The findings of fact relevant on appeal are the reviewing officer’s findings of fact – even those that replace the ALJ’s. *Id.* Here, the Review Judge meticulously reviewed the evidence, as well as the ALJ’s factual findings, and appropriately substituted her own findings when warranted...(footnotes omitted)).

<sup>72</sup> *Kabbae*, 144 Wn. App. at 441 (explaining that this is because the final decision-making authority rests with the agency head). *See also Messer v. Snohomish County Bd. of Adjustment*, 19 Wn. App. 780, 787 (1978) (stating that “[t]he general legal principles which apply to appeals from lower to higher courts do not apply to administrative review of administrative determinations”).

<sup>73</sup> *See, e.g., Tapper*, 122 Wn. 404-05, and Andersen, *The 1988 Washington Administrative Procedure Act – An Introduction*, 64 Wash. L. Rev. 781, 816 (1989).

<sup>74</sup> *Id.*

<sup>75</sup> RCW 34.05.461(3).

<sup>76</sup> RCW 34.05.464(4) and WAC 182-526-0600(1).

<sup>77</sup> *Hardee*, 152 Wn. App. at 59.

<sup>78</sup> RCW 34.05.464(5).

<sup>79</sup> WAC 182-526-0215(1).

<sup>80</sup> RCW 34.05.464(4) and WAC 182-526-0600(1). *See also Hardee*, 152 Wn. App. at 59.

to the ALJ's opportunity to observe the witnesses, but has independently decided the case.

6. **Applicable Law.** ALJs and Review Judges must first apply the HCA and/or Department rules adopted in the WAC to resolve an issue.<sup>81</sup> If there is no agency WAC governing the issue, the ALJ and the Review Judge must resolve the issue based on the best legal authority and reasoning available, including that found in federal and Washington constitutions, statutes and regulations, and court decisions.<sup>82</sup> The ALJ and the Review Judge may not declare any rule invalid, and challenges to the legal validity of a rule must be brought *de novo* (anew) in a court of proper jurisdiction.<sup>83</sup>

7. **Termination of MPC Services/Payment, *Res Judicata*, and Collateral Estoppel.** Personal care services are long-term care services designed to help eligible clients remain in the community, either in their own homes or in residential facilities.<sup>84</sup> Generally, a client receiving personal care services is entitled to a hearing when those services are terminated by the agency.<sup>85</sup> However, this hearing right generally may be exercised only once for the same agency action.

8. The ALJ is authorized to determine whether a party has a right to a hearing and to dismiss the hearing if a party does not have a hearing right.<sup>86</sup> The ALJ correctly determined the Appellant did not have a hearing right in this matter and dismissed it because the Appellant had already litigated the issue of the Department's termination of and nonpayment for personal care services for the Appellant from [DATE] through [DATE]. When an issue or claim has already been decided or could have been decided in a separate action, re-litigation of that same issue or claim is not permitted under the doctrines of *res judicata* and collateral estoppel.<sup>87</sup>

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<sup>81</sup> WAC 182-526-0220(1).

<sup>82</sup> WAC 182-526-0220(2).

<sup>83</sup> WAC 182-526-0216.

<sup>84</sup> WAC 388-106-0015(1) and (2).

<sup>85</sup> See RCW 74.09.741(1)(a).

<sup>86</sup> WAC 182-526-0085(7) and WAC 182-526-0215(2)(m).

<sup>87</sup> *Montana v. United States*, 440 U.S. 147, 153-54 (1979) and *Irondale Cmty. Action Neighbors v. W. Wash. Growth Mgmt. Hearings Bd.*, 163 Wn. App. 513, 523-24 (2011).

9. Unless its enabling statute specifically directs otherwise, an adjudicative agency has the implied authority under the Washington Administrative Procedure Act to do everything lawful and necessary to resolve the issues that arise before it.<sup>88</sup> This means that an administrative tribunal governed by the Washington Administrative Procedure Act has authority to apply the doctrines of *res judicata* and collateral estoppel.<sup>89</sup>

10. Under the doctrine of *res judicata*, or claim preclusion, a prior judgment will bar litigation of a subsequent claim if the prior judgment has a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.<sup>90</sup>

Another claim by the Appellant for MPC services and payment would not be barred by *res judicata* if it were made based on a different agency action<sup>91</sup> with new evidence because the subject matter would be different. However, in this case there was one action by DSHS in 2008 terminating the Appellant's MPC services and payment for those services during the months of [DATE] through [DATE], and one termination letter. Every part of the claim in this current case is identical to the Appellant's previous claims in hearings that have been held—with final decisions issued on the merits—since 2009.

11. Collateral estoppel, or issue preclusion, requires (1) identical issues, (2) a final judgment on the merits, (3) the party against whom the plea is asserted must have been a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom it is applied.<sup>92</sup>

Again, a new agency action on the Appellant's MPC benefits with new evidence would not fulfill the requirement of identical issues. However, the issue in this case is identical to the identified

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<sup>88</sup> See Chapter 34.05 RCW; *Irondale*, 163 Wn. App. at 528; and *Motley-Motley, Inc. v. PCHB*, 127 Wn. App. 62, 74 (2005) (citing *Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 125 (1994) and stating "[a]n agency's implied authority is its power to do those things that are necessary in order to carry out the statutory delegation of authority"). See also RCW 41.05.021(1) and (1)(m) (authorizing the HCA Director to make final decisions and enter final hearing orders in medical assistance matters, and to delegate that authority).

<sup>89</sup> *Irondale*, 163 Wn. App. at 523.

<sup>90</sup> *Id.* (internal citations omitted).

<sup>91</sup> For example, if DSHS terminated or reduced the Appellant's MPC services in [DATE], the Appellant may have a new hearing right on that hypothetical action.

<sup>92</sup> *Irondale*, 163 Wn. App. at 524.

issue in the Appellant's previous cases, namely, the termination of MPC services and payment for those services from [DATE] through [DATE]. In addition, there was a final judgment on the merits of those cases and all of them involved the same party. There is also no injustice as the Appellant had full and fair hearings to address this issue. The Appellant had an opportunity to make her case and present her evidence.

12. The Appellant cannot simply keep having hearings on this same claim and issue in hopes that she will eventually obtain the decision she seeks. As noted by the United States Supreme Court, application of the *res judicata* and collateral estoppel doctrines is necessary in civil matters to conclusively resolve disputes.<sup>93</sup> "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial actions by minimizing the possibility of inconsistent decisions."<sup>94</sup> The Appellant is not entitled to another hearing in this matter and her latest request was appropriately dismissed.

13. ALJs at the OAH heard the merits of the Appellant's case in 2009 and then in 2010 (for an additional month of disputed payment), and decided that the Department's termination of the Appellant's MPC eligibility and non-payment to her provider for the months of [DATE] through [DATE] were appropriate.<sup>95</sup> These OAH initial decisions were affirmed in final decisions by the BOA on administrative review. The Appellant did not appeal either of those final decisions to Superior Court for judicial review. The Appellant repeatedly asked for more hearings on the same claim and issue of her MPC provider's payment for [DATE] through [DATE], and several OAH ALJs and BOA Review Judges correctly determined that another hearing could not be held because the Appellant no longer has a hearing right on this particular

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<sup>93</sup> *Montana*, 440 U.S. at 153 (internal citations omitted).

<sup>94</sup> *Id.* at 153-54.

<sup>95</sup> See exhibit 17 at 2 through 4, Findings of Fact 2 through 9 (referencing docket numbers 09-2008-A-2013, 07-2009-A-0794, 08-2009-A-1119, and 01-2010-A-1298).

issue due to *res judicata* and collateral estoppel.<sup>96</sup> The Appellant has not sought judicial review of any of those administrative decisions.

14. Even if, assuming for argument's sake, the Appellant is correct that DSHS incorrectly terminated her MPC eligibility from [DATE] through [DATE] and incorrectly denied payment to her caregiver, there is nothing that the undersigned, another Review Judge, or any ALJ can do at this time to change the previous final decisions issued in this matter.<sup>97</sup> *Res judicata* and collateral estoppel automatically revoke the right to a hearing on the merits of this matter and thus make it impossible to hold another hearing; the judges have no say on that and no power to do anything except dismiss the Appellant's latest hearing request. This has been explained to the Appellant many times and yet she persists in asking for hearings on this same issue, despite that all of the judges before whom she has appeared since her substantive hearings have patiently told her that they no longer have the power to give her the relief she seeks, namely, payment to her MPC provider for the time period in question. The remedy the Appellant wants cannot be granted in the administrative hearings forum.

15. In her petition for review in the current case, the Appellant asked for help resolving "...the problem about Medical Personal Care payment from [DATE] – [DATE]." However, the undersigned does not have a choice and has no power to help with that issue because the doctrines of *res judicata* and collateral estoppel absolutely preclude the possibility of having another hearing on that issue. That issue was already decided and—although the Appellant continues to disagree with the decision in DSHS's favor—the undersigned, another Review Judge, and the ALJs have no legal authority to consider or change it.

16. The undersigned has considered the *Initial Order* and the entire hearing record.

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<sup>96</sup> See exhibit 17 at 5 through 8, Findings of Fact 10 through 20 (referencing docket numbers 04-2010-A-0919, 02-2012-HCA-0662, 03-2013-HCA-0040, 08-2013-HCA-0260, and 04-2014-HCA-0352).

<sup>97</sup> This is due to the legal doctrines of *res judicata* and collateral estoppel. The undersigned understands that these are not concepts with which members of the general public are usually familiar, but several judges have tried to explain them to the Appellant in the context of her case.

Any arguments in the petition for review or response that are not specifically addressed in this decision have been duly considered, but are found to lack merit or to not substantially affect a party's rights. The procedures and time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

#### IV. DECISION AND ORDER

1. The *Initial Order* is **affirmed**.
2. This matter is **dismissed** because the Appellant no longer has a hearing right about the termination of and nonpayment for her in-home personal care services from [DATE] through [DATE]. This is because the Appellant already exercised her hearing right in this matter, this matter has already been conclusively decided, and further litigation of this matter is thus barred by the doctrines of *res judicata* and collateral estoppel. The undersigned cannot grant the Appellant another hearing about the contested issues or the payment remedy she seeks.

Mailed on the 5TH day of August 2015.

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DIAMANTA TORNATORE  
Review Judge/Board of Appeals

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: [APPELLANT], Appellant  
Constantin Korff, Agency Representative  
Bill Jeg, Agency Representative  
Stacy Graff, Program Administrator, MS: 45600  
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Jason Grover, ALJ, [CITY] OAH