IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

[redacted]

Appellant,

v.

STATE OF ALASKA, DEPT. OF HEALTH AND SOCIAL SERVICES, DIVISION OF SENIOR AND DISABILITIES SERVICES,

Appellee.

Case No. 3AN-13-[redacted] CI

I. INTRODUCTION

Appellant [redacted] received in-home services from Alaska's Medicaid program. After five years it reassessed her needs and concluded she no longer qualified. She invoked her right to a hearing. But her treating physician, whose testimony was crucial to her cause, suffered a traumatic injury and became temporarily unavailable. [redacted] was granted a thirty-day continuance at the close of testimony, but the doctor reported that he needed a short additional period of recuperation. The hearing officer denied a further continuance. Given the centrality of medical testimony and the absence of prejudice to the state, was denial of the continuance an abuse of discretion?

II. FACTS AND PROCEEDINGS

In 2007 appellant [redacted] qualified for in-home skilled nursing care pursuant to a joint federal-state Medicaid Home and Community-Based Waiver

Program ("waiver program").[1] The program affords home-based services to disabled persons who might otherwise be institutionalized in a care facility. It is administered by appellee State of Alaska, Department of Health and Social Services, Division of Senior and Disabilities Services ("the Division"). The term "waiver" reflects that Medicaid most typically funds long-term care for disabled persons in nursing home or hospital settings only; states can request that this standard operating procedure be waived as to persons for whom limited nursing or support services within the home can avoid or postpone such institutionalization.

The Division assesses a recipient's eligibility for continued services annually.[2] An assessor visits the recipient and completes a lengthy protocol termed a "Consumer Assessment Tool" (CAT). The assessor interviews and observes the recipient, generally for about 1.5 hours, and gauges the recipient's needs regarding such matters as bed mobility, transfers, movement, and toilet use.[3]

On January 12, 2012, a nurse employed by the Division went to [redacted] home to perform an assessment, which she used to complete the CAT form.[4] The completed CAT indicated that [redacted] no longer met the Division's criteria for waiver services. Although [redacted] had scored one point on the CAT due to her

[1] R. 32.

[2] AS 47.07.045(a); 7 AAC 130.230(g).

[3] *See generally* Test. of Karen Mattson, R.N. (Sept. 12, 2012).

[4] *See* R. 38-68.

need for assistance with transfers, she needed two additional points to qualify for the waiver program. The assessor concluded she did not require physical therapy three times weekly, nor assistance with bed transfers. Had the assessor found to the contrary, [redacted] would have qualified.[5] A second nurse reviewed the 2012 CAT for accuracy and compared the new CAT results to previous assessments and other agency records. These findings confirmed the initial conclusion that [redacted] no longer met the eligibility requirements for the waiver program.[6] In accordance with the applicable regulations, the Division then referred the CAT to a third-party contractor to review the agency finding; this final review affirmed the Divison's finding of ineligibility.[7] On April 9, 2012, the Division notified [redacted] of her termination from the waiver program because the CAT indicated she was sufficiently independent to cope without the program's services.[8]

Ms. [redacted] timely invoked her right to a fair hearing before an administrative hearing officer to challenge the Division's finding.[9] The hearing took place on September 12 and October 23, 2012 before Administrative Law Judge Jeffrey Friedman ("the ALJ"). Nancy Mattson testified that her duties as

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[5] *See generally* Test. of Karen Mattson, R.N. (Sept. 12, 2012).

[6] *See generally* Test. of Jan Bragwell, R.N. (Oct. 23, 2012).

[7] *See* Test. of Dr. Eric Wall (Oct. 23, 2012).

[8] R. 32-36.

[9] *See Krone v. State, Dept. of Health and Social Services*, 222 P.3d 250, 251 (Alaska 2009) (enjoining termination of waiver benefits until the Division affords a "full and fair hearing" at which it proved by a preponderance of the evidence that a waiver recipient's medical condition had materially improved.)

an assessor include review of medical records, physical therapy notes, incident reports, and previous assessments, prior to an in-person assessment. Mattson observed at the in-home assessment that [redacted] was able to arise from her chair several times to answer the door, to deal with her young child, and to break up a dog fight. [redacted] self-reported that she needed some help with dressing and nail and hair care, but that she attended to her own toilet needs. She required occasional help to arise from chairs due to her arthritis. Based on Mattson's interview of [redacted] and her contemporaneous observations, Mattson concluded [redacted] was not eligible for a nursing home level of care.[10]

On cross-examination Mattson testified that she reviewed a post-assessment prescription written by [redacted] physician Dr. David Baines on July 23, 2012 for three-times-per-week physical therapy.[11] Mattson disagreed that this prescription meant [redacted] should have received one CAT point for physical therapy, because the prescription did not specify the nature of the therapy, and because a physical therapist might have disagreed as to frequency.[12] She also persisted in her conclusion that [redacted] had no bed mobility needs because she slept with a wedge, had no decubitus ulcers (bedsores), was able to arise from her chair, and because [redacted] denied a need for such help.[13] And since [redacted] failed to demonstrate a need for hands-on bed-mobility assistance three times

[10] *See generally* Test. of Karen Mattson, R.N. (Sept. 12, 2012).

[11] *Id.*

[12] *Id.*

[13] *Id.*

per week or weight-bearing assistance once per week, she similarly scored zero for that criterion.[14]

The hearing adjourned pending other witness testimony. At a status hearing on September 28, 2012, [redacted] lawyer revealed that Dr. Baines had suffered a hunting accident leading to amputation of his foot, and would likely be unavailable for the continued hearing on October 23, 2012. The ALJ suggested testimony by affidavit or telephone; [redacted] lawyer rejoined that if Dr. Baines was not available at the next scheduled hearing he would pursue that course.

The evidentiary hearing resumed on October 23, 2012. The Division's second-tier reviewing nurse Jan Bragwell discounted a letter from Dr. Baines affirming a need for waiver services, opining that physicians only see patients intermittently, and sometimes lack nuanced understanding of level-of-care decisions.[15]

Ms. [redacted] then testified to intermittent debilitating pain four to five days per week that precluded dog and child care and required affirmative pulling and pushing to position herself in bed or to arise.[16] She acknowledged she had previously told Mattson that she was bed-mobility independent, but implied that she had under-reported her needs due to reticence in admitting her

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[14] *Id.*

[15] *See* Test. of Jan Bragwell, R.N. (Oct. 23, 2012).

[16] *See* Test. of [redacted] (Oct. 23, 2012).

On that date [redacted] counsel filed an affidavit stating that Dr. Baines, who had cared for [redacted] since 2009, remained unavailable. The affidavit detailed that Dr. Baines indicated through e-mail on October 21, 2012 that he hoped to return to work by the scheduled November 21 hearing. But on November 14, 2012 Dr. Baines informed counsel that he still was a month shy of returning to work, and that he would inquire if his employer Providence Hospital would allow him to testify telephonically. On November 19, 2012, a Providence official declined to permit Dr. Baines to so testify prior to his full-time return to work.

[redacted] argued for a second continuance to permit Dr. Barnes to testify. The Division opposed, citing the absence of a date certain for Dr. Baines' availability as a witness, and suggested that other treating physicians could have testified. The Division identified no specific prejudice to its interests. The ALJ denied [redacted] motion for an additional continuance, opining that Ms. [redacted] could reapply to the waiver program in January, and that such would render the present matter moot; he also cited the lack of a date certain for the doctor's availability.

The record contains several medical notes written by Dr. Baines. On April 12, 2011 he noted that [redacted] was disabled by osteoarthritis in her knees.[22] He stated that she had deteriorated in the two years he had cared for

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[22] R. 255.

her.[23] On September 1, 2011 he noted arthritis of the neck, knees, hands, elbows and hips.[24] On July 23, 2012, after the CAT assessment but before the fair hearing, Dr. Baines prescribed physical therapy three times per week.[25]

The Division adopted the ALJ's January 7, 2013 decision on January 23, 2013. The ALJ found that Dr. Baines' July 2012 prescription for physical therapy was "particularly persuasive" since it came from a treating physician, but that it was not particularly probative of [redacted] medical needs at the time of the assessment six months earlier when the Division was evaluating her CAT score. The opinion concluded that it was more likely than not she did not require such therapy six months earlier, and so did not qualify for waiver services. The ALJ deemed it unnecessary to rule upon the bed-mobility issue, but noted that based on the testimony regarding bed assistance, she might be currently eligible and so could reapply for waiver services.

III. APPLICABLE LAW

This court has jurisdiction pursuant AS 44.62.560(a). Alaska Statute 44.62.570(b) prescribes the following jurisdiction for administrative appeals:

> Inquiry in an [administrative] appeal extends to the following questions: (1) whether the agency has proceeded without, or in excess of jurisdiction; (2) whether there was a fair hearing; and (3) whether there was a prejudicial abuse of discretion.

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[23] *Id.*

[24] R. 256.

[25] R. 257.

> Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

"Factual findings will be upheld so long as there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[26] On the other hand, "in questions of law involving the agency's expertise, a rational basis standard will be applied and we will defer to the agency's determination so long as it is reasonable."[27] For legal questions "that do not involve agency expertise [the court] adopt[s] the rule of law that is most persuasive in light of precedent, reason, and policy."[28]

The Administrative Procedure Act specifies that "[i]f a hearing officer is assigned to a hearing, a continuance may not be granted except by the hearing officer for good cause shown."[29] Recently, in *Wagner v. Wagner*, the Supreme Court articulated the applicable standard of review for a denial of a party's request for a continuance:

> We review a superior court's refusal to grant a continuance for abuse of discretion. A refusal to grant a continuance constitutes an abuse of discretion when a party has been deprived of a substantial right or seriously prejudiced. We look to the particular facts and circumstances of each case to determine whether the denial of a continuance is so unreasonable or so prejudicial as to amount to an abuse of discretion. Because of the necessity for orderly, prompt and

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[26] *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1231 (Alaska 2003).

[27] *Id.*

[28] *Id.*

[29] AS 44.62.580.

> effective disposition of litigation and the loss and hardship to the parties and witnesses, a motion for continuance should be denied absent a weighty reason to the contrary. But the trial court's legitimate concern for preventing delay should not prejudice the substantial rights of parties by forcing them to go to trial without being able to fairly present their case.[30]

IV. DISCUSSION

The ALJ's decision framed the relevant issue as [redacted] condition as of the assessment date, or January 12, 2012. He appeared to accept Dr. Baines' conclusion that [redacted] required physical therapy as of July 2012. But he concluded that she did not need it six months earlier, in part because she did not then claim to need it:

> In this case, there was no information provided to Ms. Mattson in January of 2012 that Ms. [redacted] needed physical therapy. . . . Prior assessments did not indicate a need for physical therapy. The prescription six months after the assessment does not outweigh the evidence gathered during the assessment and, it is more likely true than not true that Ms. [redacted] did not need physical therapy as of the date of her January 2012 assessment.[31]

The parties do not dispute that the proceeding below was a *de novo* evidentiary hearing. In other words, the issue was not whether Mattson or the Division abused their discretion in evaluating the record before them. Rather, the hearing involved the creation of a new record: witnesses testified to facts not before the Division at the time of its assessment decision. The ALJ's remark

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[30] 299 P.3d 170, 175 (Alaska 2013) (quotations and citations in original omitted); *Fidler v. Fidler*, 296 P.3d 11, 13 (Alaska 2013).

[31] ALJ Decision p. 7, pl. exc. 93.

that Mattson could only evaluate the information she possessed at the time of the assessment is true but irrelevant. The question before this court is not whether the Division abused its discretion in its pre-hearing findings, but whether the ALJ's decision is fairly supported by the record created during the fair hearing.

Dr. Baines' prescription for [redacted] to receive physical therapy was based on his medical judgment. As an assessor, Mattson was not qualified to render such a decision, because her bailiwick is function, not medical diagnosis. Nor could [redacted] or her lay care providers reasonably be expected to assert [redacted] need for physical therapy at the annual assessment. The failure of prior assessors to identify such a need is not probative; the need for physical therapy is a medical decision not discerned by the CAT assessment methodology. Absent testimony by Dr. Baines or some other medical doctor, the ALJ had no reasoned basis to conclude that a need for physical therapy arose after, but did not exist during, January of 2012. The more logical inference is that if she needed physical therapy in July, she may well also have needed it in January, given her chronic and degenerative diagnoses as noted by Dr. Baines in April of 2011.

[redacted] could not prevail at the fair hearing without establishing a need for physical therapy three times a week. The ALJ's denial of a continuance was effectively outcome-determinative because it deprived [redacted] of any ability to prove a retroactive need for the prescribed physical therapy. Since [redacted]

ability to present her case was substantially prejudiced by the denial of a continuance, the denial was an abuse of discretion unless it was justified by unreasonable litigation conduct or by substantial prejudice to the state.

Dr. Baines had salient qualifications that were irreplaceable in the short term. He had treated [redacted] for at least three years. He knew as a person from repeat visits, and could speak to her credibility as a self-reporter. And he had concluded that she both needed intensive physical therapy and that she qualified for the waiver program. The Division's suggestion that [redacted] could have readily replaced him with another testifying physician assumes an unrealistic fungibility of expert witnesses.

The initial hearing adjourned to accommodate both parties' witness testimony. Shortly thereafter [redacted]s counsel served notice that her expert treating physician had undergone amputation of his foot and that his return-to-work date was uncertain. When counsel stated at the October 23, 2012 hearing that Dr. Baines needed at least another thirty days,[32] the ALJ calendared continued proceedings for less than that time. Counsel's affidavit in support of a second continuance revealed that Dr. Baines had told counsel that he could probably be ready for the November 21 hearing, and that he had only revealed on November 14 that he needed another month or so to be physically present. Dr. Baines was willing to testify telephonically at the November 21

[32] *See* Test. of Robert Lynch, Counsel for [redacted] (Oct. 23, 2012) (requesting a sixty-day continuance).

hearing, but that offer was countermanded by a Providence Hospital functionary on November 19.

Thus, at the November 21 hearing there was every reason to expect that Dr. Baines would by physically available within a month. Yet the ALJ referenced a delay until January or February, and suggested the proceeding would be moot by then. That off-the-cuff suggestion was incorrect: a proceeding asserting a legal right and raising justiciable issues of law is not mooted by an opportunity to re-apply to a program. Neither party suggests the present appeal is moot.

[redacted] requested a second continuance in reasonable reliance on Dr. Baines' representation that he was on the mend. The ALJ could have required [redacted] to simply subpoena the doctor for telephonic testimony within a short time; from Dr. Baines' e-mail comments he would have appeared in response to the subpoena, and Providence Hospital has no standing to impede a percipient witness from testifying. The ALJ instead denied the continuance without meaningfully considering the weightiness of [redacted] rights to or need for the testimony; nor did he identify any potential prejudice to the Division.

Would the Division have been substantially prejudiced by a continuance to allow additional testimony by [redacted] only expert witness? The Division stipulated in early 2006 to provide fair hearings prior to waiver program

terminations, and commenced drafting enabling regulations.[33] Mattson testified that from then until 2012, the Division was unable to terminate any waiver program participant for lack of enabling regulations. Put differently, the matter of waiver terminations was sufficiently inconsequential that the state took six years to adopt regulations. Contextually, a continuance of several weeks to a month recedes to comparative insignificance. The ALJ did not issue his decision until seven weeks after the close of proceedings; it is unlikely his decision would have been significantly delayed had he accommodated additional brief testimony by Dr. Baines. [redacted] was liable to reimburse the state for services if she failed to prevail, so diminishing the state's financial interest in an immediate decision.[34]

The court concludes that [redacted] ability to fairly present her case on the issue of her need for physical therapy was prejudiced by the ALJ's denial of her request to a continuance in order to allow her uniquely qualified treating physician an opportunity to testify as a witness. This prejudice was not outweighed by any countervailing prejudice to the state. Because the denial of the continuance [redacted] rendered her ineligible for an important benefit, the ALJ's denial was an abuse of discretion that prejudiced her substantial rights because she was not "able to fairly represent [her] case."[35]

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[33] *See Krone supra* note 2.

[34] *See* 7 AAC 49.240.

[35] *Wagner v. Wagner supra* note 3 at 175.

The other grounds argued by [redacted] are without merit. The Division is entitled to deference as to its legal interpretation of its own rules and regulations when it brings expertise to those issues. [redacted] argues that the ALJ should have gauged her eligibility as of the time of the hearing and not as of the original assessment period. Normally those will be close in time. If a recipient of services undergoes a post-assessment medical exam, the examiner will normally be able to opine that a condition existed in the recent past. Presumably Dr. Baines will explain whether he would have prescribed physical therapy six months earlier than he actually did had he seen her at that point. The Division is entitled to reimbursement for post-assessment services if a recipient opts to continue them until a hearing but fails to prevail. The clarity of this rule becomes muddled if the goalpost for determination is a moving target. Accordingly, it was within the discretion of the Division to conclude that the focus of the fair hearing was the actual assessment period.

[redacted] also argues that the independence of the third-party contractual reviewer was compromised because it was not allowed to commence a *de novo* investigation. The Division interpreted the third-party review as limited to the record. Given the hundreds of reviews conducted annually and the potential problems associated with the inevitably varied intensity of review that discretion to investigate anew would entail, the Division's construction of Medicaid rules was not unreasonable.

V. ORDER

The ALJ's denial of a continuance to permit Dr. Baines to testify was an abuse of discretion. This case is REMANDED to the Division for it to refer the matter to the ALJ for further proceedings.

DATED at Anchorage, Alaska this 21st day of April, 2014.

[redacted]

John Suddock
Superior Court Judge

[redacted]