

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

In the Matter of:)	
)	
F H)	OAH No. 12-0610-MDS
)	Former OHA Case No.
_____)	DSDS Case No.

DECISION

I. Introduction

The issue in this case is whether the Division of Health Care Services (DHCS or Division) is required to time its authorization of prescription medications so as to ensure that a Medicaid recipient with an ongoing prescription has a reasonable opportunity to refill the prescription before the medication supply from the prior month or prior period's prescription runs out. This decision concludes that the Division has an obligation to implement prior authorization procedures which allow a Medicaid recipient to obtain, without interruption, those medications which are refilled on a continuing basis.

II. Facts¹

F H receives a prescription medication (Fentanyl patches)² under the Medicaid Program. She uses the Fentanyl patches on an ongoing basis to control chronic pain. Accordingly, any lapse between refills of Ms. H's Fentanyl patches results in the re-emergence of her chronic pain.

Alaska's Medicaid Program generally limits prescription medication refills to a 30 day supply; *i.e.*, only a 30 days' supply of a medication may be prescribed at one time if it is to be covered by Medicaid.³ As a result, Ms. H would often encounter a situation in which there would be a "gap" of at least one day between the day she would run out of her prior month's prescription, and the date on which her medication refill would be processed by Medicaid and be available for pick-up at the pharmacy.

¹ Factual findings in this section are derived from Mr. J's testimony unless otherwise indicated.

² Fentanyl patches are used to control moderate to severe chronic pain that cannot be controlled by the use of other pain medications. *See* MedLine Plus online medical dictionary, (a service of the United States National Library of Medicine and National Institutes of Health, accessed on August 2, 2012 at <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a601202.html>). Fentanyl patches can be habit-forming. *Id.*

³ 7 AAC 120.110(e)(4); Ex. B-9.

On or before April 18, 2012 Ms. H ran out of Fentanyl patches. Her doctor refilled the prescription, and Ms. H's husband, C J, attempted to pick up the prescription at the pharmacy that day (April 18, 2012). However, Mr. J was told that he could not pick up the prescription until the next day (April 19, 2012) because of the Medicaid "30 day refill rule" mentioned above.

On April 18, 2012 Mr. J requested a hearing on behalf of Ms. H. Her hearing began as scheduled on May 29, 2012. The hearing was recorded. Mr. J participated in the hearing by telephone, represented his wife, and testified on her behalf. Gerry Johnson of DHCS participated in the hearing by telephone on behalf of the Division. Chad Hope of DHCS also participated in the hearing by telephone and testified on behalf of the Division. All testimony and exhibits offered by the parties were admitted into evidence.

On July 3, 2012 the Division implemented a new prescription authorization procedure, specific to the Fentanyl patch, designed to eliminate the "prescription gap" problem which had arisen in this case.⁴ This new procedure appears to allow the reauthorization of prescriptions for Fentanyl patches every 28 days instead of every 30 days, thereby providing a two day "grace period" to allow time for the dispensing and pickup of the medication.

III. Discussion

A. Does the Division's Action of July 3, 2012 Make This Case Moot?

Initially, the question arises as to whether Ms. H's hearing issue is now moot because the Division has modified its Fentanyl prescription issuance/renewal procedure to avoid the lapse of Ms. H's medication in the future. In *In re Tracy C.*, 249 P.3d 1085, 1090 (Alaska 2011), the Alaska Supreme Court explained that a matter is generally considered moot "if it is no longer a present, live controversy, and the party bringing the action would not be entitled to relief, even if it prevails."

There are, however, exceptions to the mootness doctrine. In *In re Tracy C.*, the Alaska Supreme Court stated that it would "consider the merits of a claim that would otherwise be moot if the claim falls within the public interest exception to the mootness doctrine." *Id.* "Whether the public interest exception applies depends on three factors: (1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the

⁴ Ex. D.

public interest as to justify overriding the mootness doctrine.” [Internal quotation marks and footnotes omitted].

The public interest exception applies to the situation here. First, even though the problem encountered here by Ms. H appears to have been remedied as to the Fentanyl patch, the "prescription gap" problem is capable of arising repeatedly as to other medications and/or other Medicaid recipients. Second, if applied, the mootness doctrine could cause review of the "prescription gap" problem to be avoided repeatedly as to other medications and/or other Medicaid recipients. Finally, the uninterrupted receipt of prescription medications by Medicaid recipients is a matter of significant importance to the general public. Accordingly, the issue raised in this case falls within the public interest exception to the mootness doctrine and should be addressed on its merits.

B. Does Medicaid Require the Division to Eliminate the "Prescription Gap"?

The Alaska Medicaid regulation which generally limits prescription medication refills to a 30 day supply (7 AAC 120.110(e)(4)) does not address the timing of reauthorization of continuing prescriptions. However, under federal Medicaid regulation 42 CFR 440.230(b), "[e]ach service [provided by the state Medicaid plan] must be sufficient in amount, duration, and scope to reasonably achieve its purpose."

State participation in Medicaid is voluntary, but once a state chooses to participate, it is bound by federal Medicaid statutory and regulatory requirements.⁵ Accordingly, the State of Alaska's Medicaid regulations must be interpreted and administered in conformity with federal Medicaid regulations.⁶ If 7 AAC 120.110(e)(4) and the rest of Alaska's prescription drug regulations are to achieve their desired purpose, they must be interpreted to provide prescription medications in a duration and scope which eliminates Medicaid-caused lapses in the availability of prescription medications.

⁵ *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 502 (1990).

⁶ *See Ind. Commission v. Board of County Commissioners*, 690 P.2d 839, 844 (Colo. 1984) and *Sorlien v. North Dakota Workmen's Compensation Bureau*, 84 N.W.2d 575 (N.D. 1957) (recognizing the rule of construction that state statutes should be construed to harmonize with federal legislation on the same subject). These rules of construction are simply more specific versions of the more general rule (adopted by the Alaska Supreme Court) that statutes *in pari materia* should be construed together. 2A C. Sands, *Sutherland Statutory Construction* § 51.01, at 449 (4th Edition 1973). Statutes are deemed to be *in pari materia* when they relate to the same purpose or thing or have the same purpose or object. *See Morton v. Hammond*, 604 P.2d 1 (Alaska 1979).

IV. Conclusion

The applicable federal and state Medicaid regulations cumulatively require that Alaska's Medicaid prescription drug program be administered in such a way as to prevent Medicaid-caused lapses in the availability of prescription medications to Medicaid recipients. Accordingly, the Division was not correct to delay the reauthorization of Ms. H's Fentanyl patches in this case.

Dated this 3rd day of August, 2012.

Signed _____
Jay Durych
Administrative Law Judge

Non-Adoption Options

C. The undersigned, by delegation from the Commissioner of Health and Social Services, and in accordance with AS 44.64.060(e)(4), rejects, modifies or amends one or more factual findings as follows, based on the specific evidence in the record described below:

After review of the documents and testimony in this matter, the undersigned modifies the decision issued by Jay Durych, Administrative Law Judge, in the following matter:

Each conclusion referencing “refill(ed)” shall be stricken. As testified to by Chad Hope, pharmacy program manager, during the hearing, Fentanyl is a scheduled medication therefore, it is not eligible for a “refill”. Scheduled narcotic medications, like Fentanyl patches, are subject to different rules regarding the frequency and quantity in which they can be dispensed. Each individual prescription for Fentanyl must be initiated by the physician prior to being filled.

The issue in this matter, Ms. H's ability to fill a prescription for Rentanyl patches more frequently than every 31 days, was rendered moot by the modifications put in place by Magellan, the pharmacy benefits management vendor. As testified to by Chad Hope, the claims processing system managed by Magellan has been modified to recalculate the 30-day fill cycle so that a Fentanyl patch prescription may be obtained by the 30th day. As Mr. Hope explained, because Fentanyl patches are applied in a particular manner, one patch is applied every three days, and it is a scheduled narcotic medication, unique coding is required. The code has been modified to prevent a reoccurrence of the 30-day fill concern raised by Ms. H. This modification of the coding eliminates the likelihood that the unique factual situation will repeat for Ms. H or any other recipients who are prescribed Fentanyl patches, accordingly, the public interest exception to mootness does not apply.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 10th day of September, 2012.

By: Signed
Signature
Kimberli M. Poppe-Smart
Name
Deputy Commissioner
Title

[This document has been modified to conform to the technical standards for publication.]