

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

In the Matter of )  
 )  
 F N )  
\_\_\_\_\_ )

OAH No. 13-0994-MDS  
Agency No.

**DECISION**

**I. Introduction**

F N disagrees with the Division of Senior and Disabilities Services' (division) determination that she is not eligible to receive Personal Care Assistance (PCA) services for the prescribed tasks of range of motion (ROM), foot care, and walking. The division denied time for these tasks concluding that the assessor's observations, unanswered questions regarding the scope of prescription, and the results of Ms. N's functional assessment did not demonstrate the need for physical assistance to complete these tasks. Because this is an initial assessment, Ms. N has the burden of proving she is eligible for the services sought. The evidence considered at hearing establishes that Ms. N's physician prescribed these tasks but that only foot care and walking require physical assistance. Therefore, the division's assessment decision is affirmed as to its decision on ROM and reversed as to its decision on walking and foot care.

**II. Facts**

F N is 89 years old and lives with her daughter, E S, and son-in-law, P S, Jr.<sup>1</sup> Ms. N suffers from a primary diagnosis of advanced Alzheimer's and a variety medical conditions secondary to the Alzheimer's disease.<sup>2</sup>

Ms. N has received PCA services in prior years but her case file was closed in April 2013 because she failed to submit a request for reassessment. At the time of closure she was receiving 40 hours of PCA per week.<sup>3</sup> After her case file was closed, Ms. N submitted a new application for services and the division conducted a "new" initial assessment evaluation on May 24, 2013.<sup>4</sup> The division eventually approved 20.75 hours per week of PCA services.<sup>5</sup>

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<sup>1</sup> Mr. S is Ms. N's Power of Attorney (POA) and he participated in the proceeding.  
<sup>2</sup> Her secondary diagnosis include malignant neoplasm of colon, osteoporosis, asbestosis, anemia, and hypertension. Exhibit E at 3 (listing of diagnosis).  
<sup>3</sup> Ms. N does not challenge the division's decision to close her PCA services file.  
<sup>4</sup> Results of the assessment are presented at Exhibit E.  
<sup>5</sup> Exhibit D.

Olga Levy conducted the initial assessment evaluation which took place in Ms. N's home. The evaluation lasted an hour and was conducted in the presence of the S's and E D.<sup>6</sup> Mr. D is Ms. N's PCA services provider representative.<sup>7</sup>

During the evaluation, Ms. Levy asked Ms. N to perform a variety of tasks and provided an opportunity for those present to provide any additional information they thought would be useful to the evaluation.<sup>8</sup> Ms. Levy recorded her observations and impressions of Ms. N's ability to perform activities of daily living (ADL), the type and amount of assistance to complete the ADLs, and the frequency of each ADL per week.<sup>9</sup> These results are commonly referred to respectively as "self-performance score," "support score," and "frequency score."

The form used by the assessor is the consumer Assessment Tool (CAT). When scored correctly, the results of the CAT and any additional information received between the evaluation and the assessment decision determines Ms. N's eligibility for PCA services and identifies the areas where she needs physical assistance.<sup>10</sup> The division reviews the assessor's evaluation and if there are no discrepancies between Ms. N's diagnosis and the information contained in the CAT, the CAT will drive the division's assessment of needs and level of PCA services. The division's determination is provided to Ms. N in an assessment decision letter.<sup>11</sup> Tammy Smith, a Health Program Manager 1, reviewed Ms. Levy's scoring and, finding no discrepancies, issued the assessment decision on June 10, 2013 approving 20.75 hours of PCA services for Ms. N.<sup>12</sup>

The assessment decision informed Ms. N that the division did not authorize PCA time for prescribed ROM, foot care, and walking for exercise.<sup>13</sup> Ms. N's treating physician, Sharon Smith, prescribed these tasks on April 9, 2013.<sup>14</sup> The prescription form ordered that Ms. N receive physical assistance with each of these tasks and provided a frequency, scope, and duration for each.

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<sup>6</sup> Exhibit E at 2.

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

<sup>8</sup> Testimony of O. Levy.

<sup>9</sup> Testimony of O. Levy and Tammy Smith.

<sup>10</sup> 7 AAC 125.010 - .030; *In re: T.C.*, 13-0204-MDS (Comm'r of Health & Soc. Serv. 2013); Testimony of T. Smith.

<sup>11</sup> Testimony of T. Smith.

<sup>12</sup> Exhibit D.

<sup>13</sup> Exhibit D.

<sup>14</sup> Exhibit AA at 4. The prescription is presented on a division PCA Prescriber Form typically used when an individual needs to amend their PCA services. It is treated as a prescription.

Regardless of the prescription, the division denied time for assisted walking because Ms. N was assessed as independent with locomotion.<sup>15</sup> The division determined Ms. N only required supervision while walking, which is not a covered PCA service. It denied time for ROM because the functional assessment demonstrated that Ms. N had a good range of motion.<sup>16</sup> Finally, the division believed, based on the information provided prior to the June 10, 2013 assessment decision, that the foot care required could be accomplished under time authorized for personal hygiene when Ms. N could have lotion applied and nail care performed.<sup>17</sup>

On July 9, 2013, in response to the division's decision, Ms. N's PCA service provider wrote to Dr. Smith seeking additional medical documentation for walking and foot care as well as a prescription for documenting vital signs.<sup>18</sup> On July 11, 2013, Dr. Smith completed a medical order for "daily walks, foot care to include cold compresses for foot swelling and foot elevation."<sup>19</sup> Accompanying the medical order was a letter from Dr. Smith explaining that Ms. N is "severely demented and requires constant attention to ensure her safety."<sup>20</sup> Dr. Smith emphasized that Ms. N needs to walk for her health but requires supervision. "While I don't think she will necessarily fall, I am worried she will become confused and get lost."<sup>21</sup> The letter also provided specific foot care instructions.<sup>22</sup>

Dr. Smith's April and July prescriptions appeared to contradict the CAT scores, so Ms. Levy attempted to contact Dr. Smith for further explanation.<sup>23</sup> The record contains Ms. Levy's notarized statement attesting to an email containing her recollection of the events surrounding her unsuccessful attempt to speak with Dr. Smith:

I have a few comments regarding F N[e] FH. During the assessment I observed that the consumer did not have any difficulty with walking and performing functional assessment tests. I informed the agency rep. and consumer's relatives that I would call client's MD to clarify prescription for ROM and walking exercise. E D from the agency told me that if I do not give time for ROM and walking exercise they will request FH and I do not

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<sup>15</sup> Exhibit D at 2.

<sup>16</sup> Exhibit D at 2.

<sup>17</sup> Exhibit D at 2.

<sup>18</sup> Exhibit AA at 1.

<sup>19</sup> Exhibit H at 3.

<sup>20</sup> Exhibit H at 4.

<sup>21</sup> Exhibit H at 4.

<sup>22</sup> The letter also addresses the need to document vital signs but Ms. N is requesting PCA services for documentation as an amendment to her plan.

<sup>23</sup> Testimony of O. Levy.

have authority to ignore MD's prescriptions. I called client's MD Sharon Smith who gave these prescriptions but was not able to talk to her directly. Her assistant April called me back and gave a msg. from the doctor. Dr. Smith said that the client's relatives were very demanding and pushy so she gave prescription for these exercises to get the caregiver more time and be sure that FN[e] would be safe.<sup>[24]</sup>

At the hearing the S's disputed the CAT findings because they do not accurately reflect the information provided. First, the S's take issue with the statement that Dr. Smith only provided the prescriptions because they were demanding. Next, they disagree with Ms. Levy's narrative that Ms. N could place her hands across her chest and stand up.<sup>25</sup> The S's noted that they told Ms. Levy that Ms. N will, at times, have difficulty getting up, and the family did not know if it was Ms. N's extra weight or that she could not remember how to get up.<sup>26</sup> Regardless, the family recalled that Ms. N had to use the couch to push off of so she could stand up.<sup>27</sup>

The family also disputed the assessment decision's conclusion regarding N's need for foot care<sup>28</sup> Ms. Levy noted the absence of observable foot problems in her narrative, yet the CAT acknowledges foot problems.<sup>29</sup> The S's contend that the absence of notable foot problems is attributable to the foot care provided (hot and cold compresses, Epson salt soaks, etc.).<sup>30</sup> Finally, the S's argue that the CAT's findings are incorrect because the assessor failed to consider the April 2013 prescribed tasks and the division continues to disregard Dr. N's July 11, 2013 prescription and letter.<sup>31</sup>

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<sup>24</sup> Exhibit F at 1 (Email from Olga levy to Tammy Smith dated July 25, 2013. Signed and notarized August 14, 2013).

<sup>25</sup> Exhibit AA at 2.

<sup>26</sup> Exhibit AA at 2.

<sup>27</sup> Exhibit AA at 2; Testimony of P. S.

<sup>28</sup> Exhibit AA at 6, 8. Testimony of P. S.

<sup>29</sup> Exhibit AA at 6; Exhibit E at 24, Testimony of O, Levy; Testimony of P. S.

<sup>30</sup> Exhibi5t AA at 6, 8; Testimony of P. S.

<sup>31</sup> Exhibit AA at 2; Testimony of P. S. The family also contested the CAT at page 16 as not accurately reflecting Ms. N's cognitive abilities. Exhibit AA at 5. This was not noted as an unresolved issue for hearing. Testimony of P. S.

### III. Discussion

#### A. PCA Program

The purpose of the PCA program is to provide a recipient physical assistance with activities of daily living (ADL), physical assistance with instrumental activities of daily living (IADL), and other services based on the physical condition of the recipient[.<sup>32</sup>]

The division uses the Consumer Assessment Tool (CAT) to assess the level of assistance needed for each ADL or IADL.<sup>33</sup> The amount of time allotted for each ADL or IADL is determined by the Personal Care Assistance Service Level Computation.<sup>34</sup> This document shows the amount of time that will be authorized for each ADL or IADL, depending on the level of assistance needed for each task. Because Ms. N's PCA services terminated, her most recent assessment is considered an "initial assessment." Whether it is an initial assessment or a reassessment resulting in a reduction in hours determines who will have the burden of proving their position. In this instance, Ms. N is requesting benefits that she is was not receiving at the time of application, so she has the burden of proving eligibility for the services denied.<sup>35</sup>

#### B. Evidence to be Considered

In this type of administrative proceeding the formal rules of evidence do not apply.<sup>36</sup> Evidence will be admitted if it is relevant and is "evidence of the type on which a reasonable person might rely in the conduct of serious affairs. . . ."<sup>37</sup> The record contains evidence that was created and obtained after the date of the assessment decision, June 10, 2013. The post decision evidence consists of the PCA provider's July 9, 2011 letter to Dr. Smith,<sup>38</sup> Dr. Smith's July 11, 2013 medical order and letter of explanation,<sup>39</sup> Ms. Levy's notarized email memorializing her attempts to speak with Dr. Smith,<sup>40</sup> and the testimony provided at hearing.

It is well settled that the administrative law judge and the final decision maker can consider new evidence that tends to establish whether the individual was eligible at the time of

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<sup>32</sup> 7 AAC 125.010(a).

<sup>33</sup> 7 AAC 125.020(b).

<sup>34</sup> 7 AAC 125.024(1).

<sup>35</sup> 7 AAC 40.135.

<sup>36</sup> 2 AAC 64.290(b). Formal Rules may apply if the parties stipulate to their use. Here there was no stipulation.

<sup>37</sup> 2 AAC 64.290(a).

<sup>38</sup> Exhibit AA at 1.

<sup>39</sup> Exhibit H at 3, 4.

<sup>40</sup> Exhibit F at 1.

the original denial determination, regardless of whether the division had access to the evidence.<sup>41</sup> The new evidence speaks to Ms. N's eligibility for PCA services and was generated in response to the division's claim that medical evidence was lacking. Therefore, the July 2013 correspondence to and from Dr. Smith and her medical order will be considered.

Considering post-decision evidence of this sort appears to be in keeping with division practice, as evidenced by Ms. Levy's notarized statement that she was seeking post-decision clarification from Dr. Smith.<sup>42</sup> If the division was not willing to consider new information, there would have been no need for Ms. Levy to contact Dr. Smith's office or attempt to bolster the division's position by relaying a conversation with Dr. Smith's assistant, which took place after June 10, 2013.

However, the portion of Ms. Levy's testimony and notarized statement relaying Dr. Smith's assistant, April's, statements to Ms. Levy regarding what Dr. Smith told April to tell Ms. Levy, will not be considered for the truth of the matter asserted because it is not the type of evidence on which a reasonable person might rely in the conduct of serious affairs. Dr. Smith (the declarant of the statement) is not available to testify so her statement to April is hearsay, and April's statement to Ms. Levy is hearsay.<sup>43</sup> This is hearsay within hearsay, there is no independent evidence to corroborate the statements and they are too far removed from the purported speaker, Dr. Smith, to be the type of evidence on "which a reasonable person might rely in the conduct of serious affairs" so the statements are not admissible for the truth of the matter asserted.<sup>44</sup> It does, however, remain in the record as evidence that Ms. Levy attempted to contact Dr. Smith after the assessment decision.

### C. Range of Motion

Dr. Smith prescribed ROM four times a day for 15 minutes each time.<sup>45</sup> She also marked the box indicating that she wanted Ms. N to have physical assistance with this task. Ms. Levy explained that the denial was based on the fact that Ms. N was able to perform the functional

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<sup>41</sup> *In re T.S.*, OAH No. 12-0911-MDS at 8 – 9 (Comm'r of Health & Soc. Serv. 2013) (discussing the nature of a *de novo* hearing as required by regulation and ability to bring in new evidence bearing on the condition at the time of assessment and whether the assessment correctly reflected condition or eligibility).

<sup>42</sup> Exhibit F at 1.

<sup>43</sup> Hearsay is a statement, other than one made by someone while testifying at the hearing and is offered to prove the truth of the matter asserted. Alaska Rule of Evidence 801(c).

<sup>44</sup> 2 AAC 64.290(a)(1). There may be times when the record contains corroborating evidence sufficient to meet the threshold for admission. This, however, is not one of those times.

<sup>45</sup> Exhibit AA at 4.

assessment without physical assistance and for this reason Ms. Levy could not understand the need for physical assistance.

Unfortunately Dr. Smith did not testify so she cannot be questioned regarding her prescription for physical assistance with this task. Regardless, ROM was prescribed by a licensed physician. Whether PCA time will be authorized for this task depends upon whether Ms. N requires physical assistance to complete her ROM exercises. For purposes of this decision, it is accepted that certain ROM exercises would, by their very nature, require physical assistance such as when physical assistance is required to eke out additional ROM from a joint. Here, the record does not establish what exercises were prescribed or would even be performed. The record developed through the hearing process is insufficient to establish by a preponderance of the evidence that Ms. N requires physical assistance to complete the prescribed activity.

D. Assisted Walking.

The division denied PCA time for assisted walking exercise after determining that Ms. N was independent in locomotion and required supervision only. Arguably, this conclusion could be supported by Dr. Smith's explanation contained in her July 11, 2013 letter that she was more concerned that someone be with Ms. N to keep her from wandering off than she was about Ms. N falling.

However, neither the CAT scoring nor Ms. Levy's observations and testimony support the division's action. Ms. Levy scored Ms. N as needing supervision when walking around her own room, and needing limited assistance with a one person physical assist when walking within the home and outside. When asked to explain her scoring, Ms. Levy testified credibly that she observed Ms. N walking on a single floor, and she required some supervision at that time, but that Ms. N required hands on assistance when walking up stairs or outside.<sup>46</sup> What is not apparent on the face of the prescription is whether Ms. N walks for exercise outside or inside on a single floor. Dr. Smith and Ms. N's care providers were concerned about Ms. N getting lost and wandering if not accompanied on her walks. Reading Dr. Smith's letter of explanation supports the conclusion that some, if not all of Ms. N's exercise takes place outside of the home. Dr. Smith prescribed walking exercise once a day for 20 minutes. If Dr. Smith's letter is accepted as supporting the division's denial, it is insufficient to support the division's action

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<sup>46</sup> This is consistent with the CAT's scoring of locomotion which captures how Ms. N moves between locations and other areas on the same floor.

when it is weighed against Ms. Levy's testimony and CAT scores for walking within the home and outside. The record supports a finding that it is more likely than not that Ms. N requires a one person limited physical assist for walking for exercise 20 minutes once a day.

E. Foot Care

Dr. Smith prescribed foot care for 20 minutes four times a week. The CAT notes that Ms. N does have foot problems but that Ms. N's "feet appear healthy, no DX or medications for foot care. There is time in her services plan for personal hygiene and bathing sections that covers her daily needs for foot care."<sup>47</sup> The controlling regulation does not require a diagnosis before foot care will be considered a separate PCA service category; it only requires that the foot care be "prescribed."<sup>48</sup> Here foot care was prescribed in April 2013 and a diagnosis, further explanation, and another prescription were provided in July 2013. The Ss explained that Ms. Levy observed that Ms. N's feet were healthy because Ms. N received foot care. The evidence in the record supports a finding that it is more likely than not that Ms. N is eligible to receive foot care as a PCA service four times a week for 20 minutes each time.

**IV. Conclusion**

Ms. N has established by a preponderance of the evidence that she is eligible for PCA services for foot care and walking for exercise. Therefore, the division's assessment decision is affirmed as to its decision on ROM and reversed as to its decision on walking and foot care. Accordingly, the division shall recalculate her service level authorization in a manner consistent with the findings in this decision. If Ms. N disagrees with the new calculation, she may appeal that determination pursuant to 7 AAC 49.030.

All other aspects of the division's assessment decision dated June 10, 2013 are affirmed.

DATED this 17<sup>th</sup> day of October, 2013.

*Signed*  
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Rebecca L. Pauli  
Administrative Law Judge

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<sup>47</sup> Exhibit E at 24, 30.

<sup>48</sup> "In addition to the types of physical assistance set out in (b) and (c) of this section, personal care services include . . . (5) prescribed foot care. . . ." 7 AAC 125.030(d).



## Adoption

The undersigned, by delegation from of the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

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

DATED this 4<sup>th</sup> day of November, 2013.

By: Signed \_\_\_\_\_  
Name: Jared C. Kosin, J.D., M.B.A.  
Title: Executive Director  
Agency: Office of Rate Review, DHSS

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