

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

In the Matter of:)
)
 E Q) OAH No. 13-1733-MDS
) HCS Case No.
)
_____)

DECISION

I. Introduction

The issue in this case is whether the State of Alaska Division of Senior and Disabilities Services (Division) was correct to deny E Q's September 23, 2013 request to amend her Medicaid Personal Care Assistant (PCA) service plan to add time for additional services. Ms. Q's amendment request was based on her doctor's September 18, 2013 prescription for range-of-motion exercises and walking exercises.¹ The Division denied Ms. Q's PCA services amendment request on November 8, 2013 on the grounds that Ms. Q failed to demonstrate a material change in her condition so as to justify the amendment.² This decision concludes, based on the evidence in the record, that the Division was correct to deny Ms. Q's service plan amendment request (seeking additional PCA time for daily range-of-motion exercises and walking exercises as prescribed by Ms. Q's physician) because Ms. Q failed to demonstrate a material change in her condition to justify the amendment. Accordingly, the Division's decision denying Ms. Q's PCA service plan amendment request is affirmed.

II. Facts

A. Ms. Q's Medical Diagnoses and Condition

Ms. Q is 85 years old and weighs about 148 pounds.³ She lives alone in a private home.⁴ Her current or recent diagnoses include chronic kidney disease / chronic renal failure, kidney cysts, thyroid nodules, abnormal thyroid function, recurrent urinary tract infections, nephrolithiasis, diverticulosis, deep vein thrombosis, chronic anticoagulation, adenocarcinoma / malignant neoplasm of the lungs / lung cancer, severe chronic obstructive pulmonary disease (COPD), anemia / thrombocytopenia, hypercalcemia, essential hypertension, heart murmur, gastroesophageal reflux disease (GERD), restless leg syndrome (RLS), cervical and lumbar spinal stenosis, cataract, hearing

¹ Ex. F.
² Ex. D.
³ Ex. E1.
⁴ Ex. E1.

loss, weight loss, memory loss with mild dementia, depression, insomnia, sleepwalking, ataxia, tremor, dizziness, and cachexia.⁵ Ms. Q's current and recent medications include albuterol, amlodipine besylate, aspirin, citalopram hydrobromide, melatonin, metoprolol succinate, prednisone, sensipar, spireva, xopenex, and zolpidern.⁶

Bernard G, M.D., Ms. Q's primary treating physician since July 2012, wrote a letter to the Division on September 19, 2013 which stated in relevant part as follows:⁷

Ms. Q's conditions are degenerative and her dependence on others will likely increase over time.

. . . .

Ms. Q's overall level of intellectual functioning is significantly compromised and she experiences memory loss. Therefore, it is essential she have an escort to medical appointments and assistance with medications. Ms. Q requires assistance with meal preparation, medication reminders, completion of household tasks, personal hygiene . . . [and] assistance with her one flight of outside stairs.

Ms. Q is dependent on others for most activities of daily living and all instrumental activities of daily living

Also on September 19, 2013, Dr. G wrote Ms. Q a prescription for the services at issue in this case.⁸ Dr. G prescribed range of motion and walking exercises, each to be performed for two 15 minute sessions per day, five days per week, for one year (*i.e.* 150 minutes of range of motion exercises per week, and an additional 150 minutes of walking exercises per week, for a total of five hours per week).

Ms. Q reported to her doctor on October 21, 2013 that she awoke five days earlier coughing up blood.⁹ Her physician felt that this was related to her lung cancer and scheduled a bronchoscopy.¹⁰ A PET scan indicated that lung cancer had recurred in her right lung.¹¹ Ms. Q had extreme difficulty recovering from lung surgery in 2011, and is currently not a candidate for either

⁵ Ex. E3; Ex. 1 pp. 1 - 2; Ex. 2 pp. 4, 5, and 29. Ataxia is the loss of the ability to coordinate muscular movement; cachexia is weight loss, wasting of muscle, loss of appetite, and general debility that can occur as a result of a chronic disease. *See* American Heritage Dictionary of the English Language, Fourth Edition (Houghton Mifflin Company 2009), accessed online on January 13, 2014 at <http://www.thefreedictionary.com/cachexia>.

⁶ Ex. 2 p. 4; Ex. 2 p. 10; Ex. 2 p. 11; Ex. 2 p. 21.

⁷ Ex. 1 pp. 1 - 2.

⁸ Ex. 1 p. 3.

⁹ Ex. 2 p. 3.

¹⁰ Ex. 2 pp. 6, 7.

¹¹ Ex. 2 p. 10.

surgery or chemotherapy.¹² Ms. Q began radiation therapy to treat her lung cancer in December 2013.

At hearing, Ms. Q credibly testified as follows:

(a) She lives in a second-floor apartment. She has a walker. She does not use the walker within her apartment, but does use it in the hallway outside her apartment.

(b) She sometimes needs PCA assistance with walking within her apartment, but most of the time she is able to move around inside her apartment by herself.

(c) She likes to get out when she feels well enough and is currently walking in the hallway of her apartment building and outside the apartment building.

(d) She fell and hurt her right shoulder in 2011 or 2012 and has not yet regained full range of motion.

At hearing, Ms. Q's PCA, M B, credibly testified as follows:

(a) Ms. Q's health worsened during the six months between the June 17, 2013 assessment and the Division's denial of her amendment request on November 8, 2013. Ms. Q got weaker during this period and had greater difficulty going up and down the stairs leading to her apartment.

(b) Dr. G wrote Ms. Q a prior prescription for PCA assistance with various services, which included assistance with locomotion when going up or down stairs, at about the time of Ms. Q's 2012 assessment.

(c) The current PCA amendment for assisted walking was requested to improve Ms. Q's ability to negotiate the stairs leading to her apartment.

B. Ms. Q's Service Utilization History and Relevant Case Procedural History

Ms. Q has received PCA services since March 2012.¹³ Ms. Q was most recently assessed regarding her continued eligibility for PCA services by Denise Kichura, R.N. on June 17, 2013.¹⁴ Significantly, at that time Ms. Q was not undergoing physical therapy, and had no prescriptions requiring hands-on PCA assistance for range-of-motion exercises or walking exercises.¹⁵ The Division's findings from the 2013 assessment, as relevant to the matters at issue here, were as follows:

¹² Ex. 2 p. 15.

¹³ Undisputed hearing testimony.

¹⁴ Ex. E.

¹⁵ Ex. E5.

General Balance and Flexibility: Ms. Q was able to grip strongly with both her hands, touch her hands behind her back, touch her feet, pick up an item off the floor, microwave meals, and tie-off trash bags.¹⁶ Ms. Q had no falls during the 12 months preceding the assessment.¹⁷

Body mobility / bed mobility:¹⁸ Ms. Kichura reported that Ms. Q told her that she did not need much help moving around in bed, and that she could get into and out of bed by herself. Ms. Kichura reported that she observed Ms. Q pull back the covers on her bed, adjust the pillows, and get into her bed by herself, and then get out of her bed and slip her shoes back on independently.

Transfers:¹⁹ Ms. Kichura reported that Ms. Q told her that she "usually needs help getting up and around," but that, when alone, she could get up by pushing against her furniture. Ms. Kichura reported that she observed Ms. Q stand up from a dining room chair by pushing off from the dining table.

Locomotion:²⁰ Ms. Kichura reported that Ms. Q told her that she has a walker but does not use it inside her house, preferring to move around by supporting herself on pieces of furniture. Ms. Kichura reported observing Ms. Q walk down the hall holding her PCA's hand but leading her, walk into her bedroom unassisted, and pull a door shut.

Dressing:²¹ Ms. Kichura reported that Ms. Q told her that she can put her socks on and take them off by herself, but that she requires assistance to clasp her bra, put on a shirt, and zip or button her jeans. Ms. Kichura reported that she observed Ms. Q have difficulty trying to put on a button-down shirt due to shoulder pain.

Eating:²² Ms. Kichura reported that Ms. Q told her that she can bring her hands to her mouth, swallow her medications, eat and drink using regular utensils and an open cup, pour cereal and milk into a bowl, and warm-up meals in a microwave oven. Ms. Kichura reported that she observed Ms. Q pick up a soda bottle with her left hand and drink from it independently.

¹⁶ Ex. E4.
¹⁷ Ex. E3.
¹⁸ Ex. E6.
¹⁹ Ex. E6.
²⁰ Ex. E7.
²¹ Ex. E8.
²² Ex. E9.

Toileting:²³ Ms. Kichura reported that Ms. Q told her she does not wear adult diapers, and can clean herself using her left hand, but needs help transferring on and off the toilet about half the time. Ms. Kichura reported that she observed Ms. Q sit on a closed toilet independently, and get back up by pushing on the bathroom counter with one hand and holding her PCA's hand with the other.

Personal Hygiene:²⁴ Ms. Kichura reported that Ms. Q told her that she is able to brush her dentures herself, comb her hair herself, and wash and dry her face herself. Ms. Kichura reported that she observed Ms. Q demonstrate how she could pick up her comb and combed her hair, and how she could turn the bathroom faucets on and off.

Bathing:²⁵ Ms. Kichura reported that Ms. Q told her that she can get into her shower herself, and wash her front and her feet by herself, but that she needed assistance from her PCA to wash her back and her hair.

The assessment of June 17, 2013 also scored Ms. Q as follows with regard to her Instrumental Activities of Daily Living (IADLs):²⁶ independent with telephone use; requires assistance with light meal preparation, light housework, and grocery shopping; and dependent as to finance management, main meal preparation, routine housework, and laundry.

The Division found Ms. Q eligible for 12 hours per week of PCA services based on its 2013 assessment.²⁷ This amount was later increased, with regard to multi-level locomotion, personal hygiene, bathing, medication administration, and medical escort, by a Fair Hearing decision issued on January 15, 2013 (OAH Case No. 13-1185-MDS).

Ms. Q submitted the PCA service plan amendment request at issue here on September 23, 2013.²⁸ The Division denied Ms. Q's PCA service plan amendment request on November 8, 2013.²⁹ However, on November 21, 2013 the Division notified Ms. Q that it had found her eligible for Medicaid Home and Community-Based Waiver services.³⁰

Ms. Q requested a hearing to contest the Division's denial of her PCA service plan amendment request on November 27, 2013.³¹ Ms. Q's hearing was held on January 24, 2014. Ms.

²³ Ex. E9.

²⁴ Ex. E10.

²⁵ Ex. E11.

²⁶ Ex. E26.

²⁷ Ex. D1.

²⁸ Ex. F.

²⁹ Ex. D.

³⁰ Ex. D7.

³¹ Ex. C.

Q participated in the hearing by phone, represented herself, and testified on her own behalf. Ms. Q's Program Coordinator, S F, participated by phone and helped represent Ms. Q. Ms. Q's PCA, M B, also participated by phone and testified on Ms. Q's behalf. Anita Halterman participated in the hearing by phone and represented the Division. Teresa Burnette, R.N. and Angelika Fey-Merritt (who prepared the Division's denial notice) participated by phone and testified on behalf of the Division. The record was left open for post-hearing filings through February 6, 2014, at which time the record closed.

III. Discussion

A. *The PCA Program - Overview*

The purpose of the Medicaid personal care services program is to provide assistance to the elderly, people with disabilities, and individuals with chronic or temporary conditions so that they can remain in their homes and communities.³² Alaska's PCA program authorizes services for the purpose of providing "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 . . .".³³ The department will not authorize personal care services for a recipient if the assessment shows that the recipient only needs assistance with supervision, cueing, and setup in order to independently perform an ADL or IADL.³⁴ Also, pursuant to 7 AAC 125.040(a)(11), PCA services are not available in cases where they would duplicate Home and Community-Based Waiver services provided under 7 AAC 130.

Pursuant to 7 AAC 125.024(e), PCA services are generally authorized for a period of 12 months following the initial assessment, and can be reauthorized annually following a new assessment under 7 AAC 125.020. Pursuant to 7 AAC 125.026(a), changes in the amount of a recipient's PCA services, *at times other than the annual reassessment*, can only be made if the recipient demonstrates that he or she has had a *material change in condition*. Thus, an amendment request must always be based on a change in condition; an amendment request cannot be used as a means to obtain services which the recipient believes should have been authorized by the initial assessment or annual reassessment.

³² See Social Security Act § 1905(a)(24), codified at 42 USC 1396d(a)(24); see also 42 CFR 440.167 (defining personal care services).

³³ 7 AAC 125.010(a) [emphasis added].

³⁴ 7 AAC 125.020(e). This regulation defines "cueing" as "daily verbal or physical guidance provided to a recipient that serves as a signal to the recipient that the recipient needs to perform an activity;" "setup" as "arranging items for use or getting items ready for use so that the recipient can independently perform an ADL or IADL;" and "supervision" as "observing and giving direction, as needed, so that the recipient can independently perform an ADL or IADL." *Id.*

B. Alaska's PCA Program - Use of the Consumer Assessment Tool (CAT)

The Department conducts an assessment for PCA services using the Consumer Assessment Tool or "CAT."³⁵ The goal of the assessment process is to determine the level of physical assistance that an applicant or recipient requires in order to perform their activities of daily living (ADLs) and instrumental activities of daily living (IADLs).³⁶ The CAT seeks to make the assessment process more objective by attempting to standardize the assessment of an applicant or recipient's functional impairment.³⁷

C. Burden of Proof

In this service plan amendment denial case, Ms. Q is seeking to change the existing status quo by increasing her PCA services as to range-of-motion exercises and walking exercises. Accordingly, Ms. Q bears the burden of proof as to those issues.³⁸

D. The Amendment Request for Range of Motion Exercises and Walking Exercises

Before analyzing the specific facts of this case, it is appropriate to review 7 AAC 125.026, the regulation governing PCA service plan amendment requests (also known as "Changes of Information" or "COIs"). The regulation provides in relevant part:

(a) If the department confirms that a recipient has had a material change in condition, the department may increase, reduce, or terminate services or the number of hours of service authorized under 7 AAC 125.010 - 7 AAC 125.199.

....

(d) For purposes of this section, a material change in condition is confirmed if the department has determined in its records that (1) the recipient's medical condition has changed since the last assessment

Under 7 AAC 125.026(a), there is a threshold that must be met before a change to a recipient's PCA service level authorization can be made by the Department. That threshold is the Department's confirmation "that [the] recipient has had a material change in condition." *Id.* The phrase "material change in condition" is defined, for purposes of the PCA program, by 7 AAC 125.026(d). Subsection (d) specifies four different situations which "confirm" that there has been a "material change in condition." These scenarios are:

³⁵ 7 AAC 125.020(b). The CAT has been adopted into DHSS regulations by reference. *See* 7 AAC 160.900(d)(6).

³⁶ *See* 7 AAC 125.010(a).

³⁷ Ex. E.

³⁸ *See* 42 CFR 435.930, 2 AAC 64.290(e), 7 AAC 49.135, and *Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

- (1) the recipient's medical condition has changed since the last assessment;
- (2) the recipient's living conditions have changed since the last assessment, including an improvement in the physical living environment, supportive services, or caregiver services;
- (3) the recipient was receiving personal care services under a time-limited amendment to the recipient's personal care service level authorization, based on a prescription for foot care, walking and simple exercises, or range of motion or stretching exercises, and that amendment has expired; or
- (4) the recipient's PCA services are no longer authorized under 7 AAC 105 - 7 AAC 160 due to a regulation change.

Based on the language of 7 AAC 125.026(a), only if the department *first* confirms that a recipient has had a material change in condition, as defined by 7 AAC 125.026(d), can it then “increase, reduce, or terminate services or the number of hours of service authorized[.]” Thus, under 7 AAC 125.026(a), the precise issues to be determined in this case are:

- (1) Did Ms. Q's medical condition relevant to walking for exercise change between her assessment on June 17, 2013 and the Division's denial of her amendment request on November 8, 2013?
- (2) Did Ms. Q's medical condition relevant to range of motion exercises change between her assessment on June 17, 2013 and the Division's denial of her amendment request on November 8, 2013?

Ms. B testified that Ms. Q's health worsened during the six months between the June 17, 2013 assessment and the Division's denial of her amendment request on November 8, 2013, and that Ms. Q got weaker during this period and had greater difficulty going up and down the stairs leading to her apartment. However, Ms. B further testified that Dr. G had previously written Ms. Q a prescription for PCA assistance with walking at about the time of Ms. Q's 2012 assessment. In other words, during Ms. Q's 2012 - 2013 PCA service plan year, Ms. Q's physical condition was already such that her doctor felt she needed a prescription for PCA assistance with walking for exercise. This being the case, the need for PCA assistance with walking for exercise, during the 2013 - 2014 PCA service plan year, does not constitute a material change in condition, but rather a continuation of Ms. Q's prior condition.³⁹ Accordingly, there has been no material change in Ms.

³⁹ This demonstrates the importance, under the current PCA regulations, of the *timing* of a recipient's submission of evidence intended to show a need for PCA services. Consider a scenario in which a recipient has a need for assistance with (for example) an ADL in 2013, but, due to an error in the assessment, PCA assistance is not provided for that ADL in the 2013 service plan. If the recipient waits until the next (2014) annual assessment, the recipient can be found eligible for PCA assistance with the ADL, even if the recipient's condition has not worsened, simply by showing a need for limited or extensive PCA assistance with that ADL. However, for the same recipient to qualify for an

Q's need for walking for exercise since the time of her most recent assessment, and the Division was therefore correct to deny Ms. Q's amendment request for walking for exercise.

Similarly, with regard to the request for PCA assistance with range-of-motion exercises, Ms. Q testified that she fell and hurt her right shoulder in 2011 or 2012 and that her diminished range-of-motion dates back to that event. Accordingly, any need for PCA assistance with range of motion exercises did not arise in the months since Ms. Q's 2013 assessment, but instead existed for years prior to that assessment. Accordingly, there has been no material change in Ms. Q's need for range-of-motion exercises since the time of her most recent assessment, and the Division was therefore correct to deny Ms. Q's amendment request for range-of-motion exercises.

IV. Conclusion

In summary, under 7 AAC 125.026(d), a material change in condition is confirmed if the department has determined that the recipient's medical condition has changed since the last assessment. In this case, the preponderance of the evidence does not indicate that Ms. Q's medical condition relevant to walking and range-of-motion changed between her June 2013 assessment and the Division's November 2013 denial of her amendment request. Because Ms. Q failed to prove, by a preponderance of the evidence, that a material change in condition occurred between the date of her assessment and the date the Division denied her amendment request, the Division was correct to deny Ms. Q's PCA service plan amendment request pursuant to 7 AAC 125.026. Accordingly, the Division's decision denying Ms. Q's PCA service plan amendment request is affirmed.

DATED this 26th day of March, 2014.

Signed _____

Jay Durych

Administrative Law Judge

amendment to his or her service plan *prior to the next annual assessment*, the recipient must, under 7 AAC 125.026, demonstrate a material change in condition. Because of the more stringent requirements for obtaining new services through an amendment request, it is incumbent upon applicants and recipients to marshal their evidence prior to the annual reassessment rather than afterward. Also, as aptly noted by the Division's hearing representative, doing so also allows the Division to make its eligibility determinations more accurately and more efficiently.

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 7th day of April, 2014.

By: Signed _____
Name: Jay D. Durych
Title: Administrative Law Judge, DOA/OAH

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