

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

In the Matter of:)
)
 E R) OAH No. 14-1389-MDS
) Agency Case No.

DECISION

I. Introduction

The issue in this case is whether the State of Alaska Division of Senior and Disabilities Services (Division or DSDS) was correct to deny E R's Medicaid Personal Care Assistant (PCA) service plan amendment request dated April 4, 2014.¹ Mr. R's amendment request sought to obtain additional PCA time for assistance with walking for exercise and foot care.² Mr. R's amendment request was based on a Prescribed Task Form (PTF) for these activities signed by his physician.³ The Division denied Mr. R's amendment request on July 28, 2014.⁴ The Division denied Mr. R's request for PCA time for walking for exercise on the bases that (1) Mr. R had demonstrated the ability to walk at his prior assessment; and (2) Mr. R did not demonstrate a material change in his condition since his last assessment.⁵

At hearing, Mr. R's representative indicated that Mr. R was no longer disputing the Division's denial of PCA time for foot care, and was only disputing the Division's denial of PCA time for walking for exercise. This decision concludes, based on Mr. R's doctor's prescription and the testimony of his PCA, that Mr. R's condition changed materially between the time of his prior assessment and the time the amendment request at issue was submitted. Accordingly, the Division's decision denying Mr. R's PCA service plan amendment request, as to PCA assistance with walking for exercise, is reversed.

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¹ Ex. 1, Ex. 2, Ex. 3, Ex. D1, Ex. F.

² Ex. 1, Ex. 2, Ex. F. The PTF also indicated a need for set-up help for range-of-motion exercises, but time for set-up assistance is generally not provided by the PCA program. See 7 AAC 125.010, 7 AAC 125.020, 7 AAC 125.030, and 7 AAC 125.040.

³ Ex. 1 p. 3, Ex 2 p. 3, Ex. F3.

⁴ Ex. 3 p. 1; Ex. D1.

⁵ Ex. 3 pp. 1 - 2, Exs. D1 - D2.

II. Facts

A. *Mr. R's Medical Diagnoses and Condition*

Mr. R is 80 years old and lives in an apartment with one other person.⁶ His current or recent diagnoses include atopic dermatitis, atrial fibrillation, chronic airway obstruction, epilepsy, essential hypertension, late effects of tuberculosis, macular degeneration, and restless leg syndrome (RLS).⁷ Mr. R's current and recent medications include Clopidogrel, Digoxin, Diltizem, Klor-con, Levetiracetam, Lorazepam, and Warfarin.⁸

Mr. R suffered two falls, causing minor bruises, during the period just prior to the assessment.⁹ At hearing, Mr. R's PCA credibly testified that his overall physical condition deteriorated during the nine months between the October 2013 assessment and the denial of the amendment request in July 2014.

B. *Mr. R's 2013 Assessment and Relevant Case Procedural History*

Mr. R has received PCA services since 2012 or before.¹⁰ Mr. R was most recently assessed regarding his continued eligibility for PCA services by Peter Ndenderoh of DSDS on October 8, 2013.¹¹ The Division's findings from the October 2013 assessment, relevant to the matters at issue here, were as follows:

General Balance and Flexibility: Mr. R was able to grip strongly with both his hands, touch his hands over his head, and touch his hands behind his back, but was unable to touch his feet from a sitting position, or stand up with his hands crossed over his chest.¹²

Body Mobility / Bed Mobility:¹³ Mr. Ndenderoh reported that Mr. R told him that he did not need help moving around in bed. Mr. Ndenderoh reported that he observed Mr. R reposition and move himself while in bed (CAT score 0/0).

Transfers:¹⁴ Mr. Ndenderoh reported that Mr. R told him that he needs help with transfers due to frequent minor seizures and pain in his knees and lower back. Mr. Ndenderoh reported that he observed Mr. R stand up from a recliner chair by pushing off the side arms, while receiving support under one arm from his PCA (CAT score 2/2).

⁶ Ex. E1.

⁷ Ex. E3.

⁸ Ex. E20.

⁹ Ex. E21.

¹⁰ Ex. E1.

¹¹ Ex. E.

¹² Ex. E4.

¹³ Ex. E6.

¹⁴ Ex. E6.

Locomotion:¹⁵ Mr. Ndenderoh reported that Mr. R told him that he is able to walk slowly inside his house without assistance, occasionally using a cane or supporting himself on pieces of furniture. Mr. Ndenderoh reported that he observed Mr. R "walk on short steps unassisted around the room" (CAT score 1/1).

Dressing:¹⁶ Mr. Ndenderoh reported that Mr. R told him that he can dress his upper body, but requires assistance to put on and take off pants, socks, and shoes. Mr. Ndenderoh reported that he observed that Mr. R was appropriately dressed at the time of the assessment (CAT score 2/2).

Eating:¹⁷ Mr. Ndenderoh reported that Mr. R told him that he can eat and drink without assistance. Mr. Ndenderoh reported that he observed that Mr. R had an adequate grip with both hands (CAT score 0/1).

Toileting:¹⁸ Mr. Ndenderoh reported that Mr. R told him that he has urinary incontinence on the days that he has seizures, and requires assistance at those times with changing and washing his clothes, changing his adult diapers, and emptying / cleaning his urinal. Mr. Ndenderoh reported observing that Mr. R had incontinence supplies on hand (CAT score 2/2).

Personal Hygiene:¹⁹ Mr. Ndenderoh reported that Mr. R told him that he requires assistance shaving, combing his hair, applying body lotions, and performing nail care. Mr. Ndenderoh reported that he observed that Mr. R appeared to be well groomed at the time of the assessment (CAT score 2/2).

Bathing:²⁰ Mr. Ndenderoh reported that Mr. R told him that he requires assistance getting in and out of the bath tub / shower, transferring on and off his bath chair, and washing his legs and feet. Mr. Ndenderoh reported that he observed that Mr. R's bath / shower was equipped with a bath chair and a hand-held shower nozzle (CAT score 3/2).

The assessment of June 17, 2013 also scored Mr. R as follows with regard to his Instrumental Activities of Daily Living (IADLs):²¹ independent with financial management and telephone use; requires assistance with light meal and main meal preparation, light housework, routine housework, grocery shopping, and laundry.

¹⁵ Ex. E7.

¹⁶ Ex. E8.

¹⁷ Ex. E9.

¹⁸ Ex. E9.

¹⁹ Ex. E10.

²⁰ Ex. E11.

²¹ Ex. E26.

The Division ultimately found Mr. R eligible for 17 hours per week of PCA services based on its 2013 assessment.²² Importantly, Dr. T, M.D. was one of Mr. R's primary treating physicians at the time of the 2013 assessment, and Dr. T had not prescribed walking for exercise, range of motion exercises, or foot care at the time of the 2013 assessment.²³

Mr. R submitted the PCA service plan amendment request at issue here on or about April 4, 2014.²⁴ The justification for the additional services at issue was stated on the Division's change of information / amendment request form in relevant part as follows:²⁵

Please see the attached PTF from Dr. T. She has recommended that Mr. R [have] walking for exercise . . . to help with his current medical conditions....

Submitted with the Division's change of information / amendment request form was the Division's prescribed task form (PTF).²⁶ Mr. R's PTF was completed and signed by his doctor, T, M.D. Although the handwriting on the form is difficult to read, the parties agree that Dr. T prescribed 30 minutes of walking for exercise per day, seven days per week, for a total of 210 minutes per week.

The Division denied Mr. R's PCA service plan amendment request on July 28, 2014.²⁷ The bases for the Division's denial of Mr. R's amendment request were stated as follows:²⁸

S L, R.N. reviewed the COI . . . received on 04/07/14 that contained COI forms and a PTF for ROM for set-up only, walking for each day for 30 minutes, and foot care for each day for 20 minutes, all signed on 03/18/14. She also reviewed the most recent assessment dated 10/08/2013. Upon review of this COI, *this request is denied for walking as the client demonstrated walking in the home and has a cane for support if needed.* The foot care is [also] denied . . . [Emphasis added].

Mr. R requested a hearing to contest the Division's denial of his PCA service plan amendment request on August 5, 2014.²⁹ Mr. R's hearing was held on September 24, 2014. Mr. R participated in the hearing by phone. Mr. R's PCA agency representative, Ms. V, participated by phone and represented Mr. R. Mr. R's PCA, Ms. M, participated by phone and testified on Mr. R's behalf. Victoria Cobo participated in the hearing by phone and represented the Division. W C,

²² Ex. D1.

²³ Ex. E5.

²⁴ Ex. F.

²⁵ Ex. F1.

²⁶ All factual findings in this paragraph are based on Ex. F3 unless otherwise stated.

²⁷ Ex. D.

²⁸ Exs. D1 - D2.

²⁹ Ex. C.

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 closed at the end of the hearing.

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.³⁰ 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 . . ." ³¹

The Department conducts assessments for PCA services using the Consumer Assessment Tool or "CAT."³² 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).³³ The CAT seeks to make the assessment process more objective by attempting to standardize the assessment of an applicant or recipient's functional impairment.³⁴

B. *PCA Service Plan Amendment Requests*

PCA services are generally authorized for a period of 12 months following the initial assessment,³⁵ 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.³⁶ 7 AAC 125.026 provides in relevant part as follows:

- (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.

³⁰ See Social Security Act § 1905(a)(24), codified at 42 USC 1396d(a)(24); see also 42 CFR 440.167 (defining personal care services).

³¹ 7 AAC 125.010(a) [emphasis added].

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

³³ See 7 AAC 125.010(a).

³⁴ Ex. E.

³⁵ 7 AAC 125.024(e).

³⁶ 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.

(b) If a change to a personal care service level authorization is made before the end of the current authorization period, (1) a personal care services agency must support the change by (A) completing the form provided by the department for that purpose; and (B) sending the department any medical or other relevant documentation of the recipient's condition that supports the change . . .

(c) A change to a personal care service level authorization may be made . . . (2) without personal observation of the recipient by the department.

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

. . . .

C. *Applicable Burden of Proof and Standard of Review*

In this service plan amendment denial case, Mr. R is seeking to change the existing status quo by increasing his PCA services by adding time for walking for exercise. Accordingly, Mr. R bears the burden of proof as to that issue.³⁷

The standard of review in a Medicaid "Fair Hearing" proceeding is *de novo* review; this standard of review allows the administrative law judge to consider testimony and documentary evidence, presented at hearing, that may not have been available to the Division at the time of its initial determination.³⁸ Under this standard, the administrative law judge may independently weigh the evidence and reach a different conclusion than did the Division's staff, even if the original decision is factually supported and has a reasonable basis in law.

D. *Does the Evidence in the Record Support the Amendment Request?*

As discussed in Section III(B), above, the regulation governing PCA service plan amendment requests (also known as "Changes of Information" or "COIs") is 7 AAC 125.026. In the context of this case, 7 AAC 125.026(d)(1) requires that Mr. R demonstrate that his medical condition has changed, since his last assessment, in order to qualify for additional PCA services. Only if the Division *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."

³⁷ 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).

³⁸ See 42 CFR 431.244; *Albert S. v. Dept. of Health and Mental Hygiene*, 891 A.2d 402 (2006); *Maryland Dept. of Health and Mental Hygiene v. Brown*, 935 A.2d 1128 (Md. App. 2007); *In re Parker*, 969 A.2d 322 (N.H. 2009); *Murphy v. Curtis*, 930 N.E.2d 1228 (Ind. App. 2010).

Pursuant to 7 AAC 125.030(b)(3)(B), PCA time is available for assistance with walking and simple exercises if the walking or exercise is prescribed by a physician, a physician's assistant, or an advanced nurse practitioner licensed in the State of Alaska. Mr. R submitted a prescribed task form for walking for exercise, signed by his physician, and there is no dispute that his physician is licensed in Alaska. Accordingly, the only remaining issue is whether Mr. R's condition has deteriorated such that he *did not require walking for exercise at the time of his 2013 assessment*, but *requires walking for exercise now* and at the time of his 2014 amendment request.

Dr. T, M.D. was Mr. R's primary treating physician at the time of the 2013 assessment, and she is also the physician who signed the PTF submitted with Mr. R's 2014 amendment request. Significantly, Dr. T *had not* prescribed walking for exercise, range of motion exercises, or foot care for Mr. R at the time of his 2013 assessment.³⁹ However, Dr. T *did prescribe those services* for Mr. R on March 18, 2014, based on Mr. R's condition as of January 2014.⁴⁰

There are two possible inferences from these facts. The first possible inference is that Mr. R's condition was the same at the time of the 2013 assessment as it was at the time Dr. T completed the PTF in March 2014, but that Dr. T simply neglected to prescribe walking for exercise back in 2013. However, there is no evidence in the record to indicate that the doctor's failure to provide an earlier prescription was a mere oversight. Further, the negligence of a physician will not be simply inferred.⁴¹

The other possible inference is that Dr. T did not prescribe walking in 2013, but did prescribe walking in 2014, *because Mr. R's condition had deteriorated between those dates*. This inference is more probable, because Mr. R's PCA testified that his condition deteriorated during that period, and because it is common knowledge that, when persons of advanced age suffer from chronic conditions, those conditions rarely improve.

In summary, the undersigned concludes that, while each side could have provided more persuasive evidence, the preponderance of the evidence indicates that Mr. R's medical condition (relevant to walking for exercise) worsened between the date of his 2013 assessment and the Division's denial of his amendment request on July 28, 2014. Accordingly, Mr. R meets the criteria for adding walking for exercise to his PCA service plan under 7 AAC 125.026.

³⁹ Ex. E5.

⁴⁰ Ex. F3.

⁴¹ See generally *Huffman v. Lindquist*, 234 P.2d 34 (Cal. 1951); *Webb v. Lungstrum*, 575 P.2d 22 (Kan. 1978); *Baker v. Promise Regional Medical Center-Hutchinson, Inc.*, 2013 WL 593665 (D. Kan. 2013).

IV. Conclusion

Under 7 AAC 125.026, additional services may be added to a PCA service plan, during the period between annual assessments, if the recipient demonstrates a material change in condition. This is confirmed if the evidence shows that the recipient's medical condition has changed since the last assessment. In this case, the preponderance of the evidence indicates that Mr. R's medical condition, relevant to walking for exercise, deteriorated between his 2013 assessment and the Division's July 2014 denial of his amendment request. Accordingly, the Division erred in denying Mr. R's PCA service plan amendment request. The Division's decision denying Mr. R's PCA service plan amendment request, as to walking for exercise, is therefore reversed.

DATED this 31st day of December, 2014.

Signed _____

Jay D. Durych

Administrative Law Judge

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 12th day of January, 2015.

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.]