

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

In the Matter of)	
)	
F C)	OAH No. 14-1643-MDS
_____)	Agency No.

DECISION

I. Introduction

F C receives Personal Care Assistance (“PCA”) services that are paid for by Medicaid. The Division of Senior and Disabilities Services (“Division”) reassessed her condition and reduced her PCA services by 29.5 hours per week. Ms. C contested that decision and requested a hearing.

A telephonic hearing was held on December 22, 2014. Ms. C did not appear, but she was represented by her daughter M C, and her grandson K C, who also holds power of attorney for her. The Division was represented at the hearing by fair hearing representative Tammy Smith and health program manager Vonda Roark-Martinez. Ms. Roark-Martinez and nurse assessor Mary Tanaka testified for the Division.

Based upon the evidence in the record, and as further discussed below, the Division’s decision is reversed as to PCA services for locomotion, toileting, range of motion and walking exercises, and foot care; the decision is affirmed in all other respects.

II. Facts

Ms. C is 91 years old and is diagnosed as suffering from neuralgia, neuritis, radiculitis, osteoporosis, hypertension, gout, lymphedema-lower extremity, aortic dissection (thoracic), water blisters on and between her toes, and depression.¹ Prior to her reassessment, Ms. C received 37.25 hours of PCA services per week.² On May 2, 2014 nurse assessor Mary Tanaka reassessed Ms. C, using the Division’s Consumer Assessment Tool (CAT).³ After the reassessment visit, the Division stated that Ms. C’s PCA services would be reduced to 7.75 hours per week.⁴ The Division notified Ms. C of the reduction in PCA benefits via a letter dated September 9, 2014.⁵ It is this decision that is the subject of Ms. C’s request for a hearing.

¹ Exhibits E3, F3.
² Exhibit D1. Her previous assessment was conducted on November 16, 2012. Exhibit F1.
³ Exhibit E1.
⁴ Exhibit D1.
⁵ *Id.*

III. Discussion

A. *The 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[.]^{6]}

The Division uses the CAT to help it assess the level of assistance needed.⁷ The amount of time allotted for needed assistance is determined by the Personal Care Assistance Service Level Computation chart.⁸ The Service Level Computation chart shows the amount of time allotted for each ADL or IADL, depending on the level of assistance needed for each task.

The different levels of assistance with ADLs are defined by regulation and in the CAT.⁹ “Supervision” is defined as oversight, encouragement, or cueing three or more times a week, with physical assistance no more than two times a week.¹⁰ “Limited assistance” is defined as requiring direct physical help or guidance from another individual three or more times a week, with weight-bearing support no more than two times a week.¹¹ “Extensive assistance” is defined as requiring direct physical help with weight-bearing support at least three times a week, or full assistance without any involvement by the recipient at least three times a week, but not all of the time.¹² “Full assistance” means the recipient has to rely entirely on the caretaker to perform the activity.¹³

The Division may change the number of hours of allotted PCA services if there has been a *material change* in the recipient’s condition.¹⁴ A *material change* means that the recipient’s medical condition has changed, or his living conditions have changed.¹⁵ When the Division wishes to reduce the amount of allotted time, it has the burden of proving a change of condition justifying that reduction by a preponderance of the evidence.¹⁶

⁶ 7 AAC 125.010(a).

⁷ 7 AAC 125.020(b).

⁸ 7 AAC 125.024(1).

⁹ The July 29, 2009 version of the CAT has been adopted by reference, 7 AAC 160.900(d)(6), and therefore the definitions in the CAT have the same effect as a regulation.

¹⁰ Exhibit E6.

¹¹ 7 AAC 125.020(a)(1); Exhibit E6.

¹² 7 AAC 125.020(a)(2); Exhibit E6.

¹³ 7 AAC 125.020(a)(3); Exhibit E6. Bathing and the IADLs have their own assistance level definitions.

¹⁴ 7 AAC 125.026(a).

¹⁵ 7 AAC 125.026(d). A material change also exists if the services were based on a prescription that has since expired, there was a time-limited amendment to the plan of care, or the services are no longer authorized by regulation. 7 AAC 125.026(d)(3).

¹⁶ 7 AAC 49.135.

Prior to the beginning of the hearing M C, K C, and the Division's representatives engaged in off-record discussions and were able to resolve some of their areas of disagreement. The terms of their agreement regarding those issues were read into the record.¹⁷ As a result, the only contested issues to be decided at the hearing were the service levels for the ADLs of locomotion and toileting, and services pursuant to a doctor's prescription for assistance with range of motion exercises, walking exercises, and foot care.

B. Locomotion

The ADL of locomotion refers to the manner in which a person moves within his or her own room or other areas on the same floor.¹⁸ On her previous assessment, Ms. C was given a score of 2/2 (limited assistance with one person physical assist) for locomotion (single level or "in room"), with a frequency of 42 per week or six per day.¹⁹ On the current assessment she was given a score of 0/0, or independent, based on the assessor's observation of Ms. C walking "using cane from bedroom to bathroom."²⁰ In support, the assessor also noted comments of Ms. C's daughter to the effect that "on warm days" Ms. C walks "with her cane down the sidewalk fronting the apt. to meet grandson's school bus in the afternoon."²¹ M pointed out, however, that Ms. C walks outside with a wheeled walker rather than a cane.²² She testified credibly that Ms. C has great difficulty walking without physical assistance, due to her advanced age and the swelling, rashes and pain in her feet, that she has difficulties balancing due to these problems with her feet, and that it is only on exceptional summer days that she can walk outside with her walker to meet her grandson's bus.²³ M explained that Ms. C's foot problems are related at least in part to uric acid build-up in her feet.²⁴

In response to Ms. M's explanation, the Division focused on the fact that Ms. C does not take any medication for excess uric acid, a condition which is also referred to as "gout."²⁵ The Division's argument, however, overlooks the fact that Ms. C was diagnosed with gout in September 2012.²⁶ In addition, although nurse Tanaka testified that rashes are

¹⁷ The result was an increase in Ms. C's authorized PCA services to a total of 11 hours per week.

¹⁸ See Exhibit E7.

¹⁹ Exhibits D3, D10.

²⁰ Exhibit E7.

²¹ *Id.*

²² Testimony of M C.

²³ *Id.*

²⁴ *Id.*

²⁵ Testimony of nurse Tanaka; exhibit E20.

²⁶ Exhibit E3.

not typically associated with gout, she also noted in her testimony that Ms. C’s physician has prescribed a cream, clotrimazole, used to treat fungal rashes of the feet.²⁷

Whether or not Ms. C’s rash is related to her gout is irrelevant, as is whether or not she takes medication for her gout. The relevant consideration is whether all these conditions, taken together, cause her to require physical assistance with the ADL of locomotion. M gave credible testimony that her mother requires such physical assistance, and the undisputed facts regarding Ms. C’s foot-related ailments corroborate that testimony. The only actual evidence cited by the Division in support of the reassessment was nurse Tanaka’s brief observation of Ms. C walking with her cane from the bedroom to the bathroom. This testimony is outweighed by the compelling evidence presented by M on Ms. C’s behalf, especially in light of the absence of any explanation for how the 91-year-old claimant could experience such dramatic medical improvement over the course of about 18 months. The Division, therefore, did not meet its burden of establishing by a preponderance of the evidence that Ms. C experienced a material change of condition justifying the reduction of her PCA scoring for the ADL of locomotion.²⁸

C. Toileting

Toilet use includes transfers on and off the toilet, cleaning oneself, adjusting clothing and routine incontinence care.²⁹ On her previous assessment Ms. C was given a score of 3/2 (extensive assistance with one person physical assist) for toileting, with a frequency of 42 times per week or six per day.³⁰ On the current assessment she was given a score of 1/1 (supervision – set up only), which does not qualify her for any PCA time for toileting.³¹ In support of this score, nurse Tanaka recorded in the CAT that Ms. C “held onto grab bar and sat on toilet, transferred off toilet using grab bar by herself,” and also noted “[g]ood range of motion throughout the assessment observed.”³² Ms. Tanaka testified that Ms. C was assessed as needing only supervision and set up, based on her daughter’s report during the assessment that Ms. C could change her “Depends” by herself, and because Ms. C’s good range of motion allowed her to reach behind her back, so she should be able to clean herself

²⁷ Testimony of nurse Tanaka; exhibit E20.

²⁸ 7 AAC 49.135.

²⁹ 7 AAC 125.030(b)(6).

³⁰ Exhibits D3, D10.

³¹ *Id.*

³² Exhibit E9.

after toileting.³³ M acknowledged that her mother can change her Depends on her own, because she can do so sitting down.³⁴ But she also testified emphatically that her mother cannot clean herself after a bowel movement.³⁵

It appears that nurse Tanaka's assessment and testimony are inconsistent with M C's testimony regarding toileting. However, when one takes into account Ms. C's problems in balancing herself while walking or standing, due to her foot ailments, M's testimony makes sense. One's ability to independently toilet is not just a function of upper extremity range of motion; it also requires the ability to employ that range of motion while standing up and reaching behind oneself. Taken as a whole, the preponderance of the evidence supports the view that Ms. C requires limited physical assistance with toileting. The Division, therefore, did not meet its burden of establishing that she experienced a material change of condition justifying the reduction of her PCA scoring for this ADL.

D. Prescribed Tasks

On her previous assessment Ms. C was allowed assistance for prescribed tasks in range of motion ("ROM") exercises (315 minutes per week), walking exercise (105 minutes per week), and foot care (140 minutes per week).³⁶ Although a doctor's prescription for these tasks was still in effect at the time of the May 2, 2014 assessment, the Division denied authorization for PCA time for any of these tasks.³⁷ The justifications for these denials were as follows:

- (1) ROM: "denied because you were assessed as able to perform the functional assessment on your own."
- (2) Walking: "denied because you were assessed as independent or as only requiring supervision with locomotion. Time for walking exercise is only allowed if you require physical assistance."
- (3) Foot care: "foot care . . . is denied. You have already been authorized time to wash, dry and apply lotion to the feet; no other medical documentation was submitted to justify additional time for foot care."³⁸

As a general matter, the Division's justifications for denying assistance to Ms. C for these prescribed tasks are problematic because they appear to accord no weight to the fact that they were prescribed by her physician. This approach is contrary to the overall

³³ Testimony of nurse Tanaka; exhibit E9.

³⁴ Testimony of M C.

³⁵ *Id.*

³⁶ Exhibit D10.

³⁷ Exhibit D5.

³⁸ *Id.*

Medicaid statute and regulatory scheme, which creates a presumption in favor of the medical judgment of the attending physician in determining the medical necessity of treatment.³⁹ In order to overcome this presumption, the Division must do more than just disagree with the physician's determination that the prescribed tasks are medically necessary – the Division must present evidence that directly addresses, and contradicts, the basis for the physician's determination. As discussed below, the Division did not meet that burden in this case.

1. Range of Motion

Regarding range of motion exercises, the Division denied Ms. C's services because the assessor concluded that Ms. C had good range of motion (e.g. she was able to touch her feet while seated and was able to touch her hands over her head⁴⁰). This observation, however, begs the question of whether the doctor's prescription was medically justified. By prescribing range of motion exercises, Ms. C's physician made a judgment that, notwithstanding her good range of motion for a 91-year-old woman, range of motion exercises were medically justified. The Division's rationale simply does not address the medical justification for the prescription, and therefore it did not overcome the presumption in favor of the physician's determination that range of motion exercises should be provided for Ms. C.

2. Walking

The Division denied Ms. C services for prescribed walking exercise because she was found to be independent in locomotion. This Decision, however, reverses the Division's determination regarding Ms. C's eligibility for locomotion-related services, thus removing the basis for the Division's denial of services for this prescribed task. In addition, the same analysis discussed above with regard to range of motion exercises also applies to walking, i.e., the Division gave no deference or weight to the physician's medical judgment. Even if Ms. C were deemed to be independent in locomotion, her physician could still have a legitimate, compelling medical rationale for prescribing walking exercise. The Division's

³⁹ *Pinneke v. Preisser*, 623 F.2d 546, 549 (8th Cir. 1980); *Smith v. Rasmussen*, 249 F.3d 755, 759 (8th Cir. 2001); *Weaver v. Reagan*, 886 F.2d 194, 200 (8th Cir. 1989); *A.M.L. v. Department of Health, Div. of Health Care Financing*, 863 P.2d 44 (Utah App. 1993). See also *Snyder v. Florida Dept. of Children and Family District V, Pinellas Unit: 89262, 705 So.2d 1067, 1069* (Fla. App. 1st Dist. 1998) (“[u]nder controlling federal case law, the agency must give considerable and substantial weight to the opinions of treating physicians. . . . Failure to credit these opinions must be accompanied by a showing of good cause.”) (internal citations omitted).

⁴⁰ See Exhibit E4.

denial fails to address this possibility, and the Division's evidence at the hearing did not overcome the presumption in favor of the physician's determination on this issue.

3. Foot Care

The Division denied Ms. C services for foot care because she had "already been authorized time to wash, dry and apply lotion to the feet" through PCA services for bathing, and "no other medical documentation was submitted to justify additional time for foot care."⁴¹ The Division's rationale is based on its view that PCA assistance with bathing necessarily includes prescribed assistance with foot care after bathing, and therefore it satisfies the physician's order for such services.⁴²

There are several problems with the Division's analysis, however. First, there is a fundamental flaw in the analysis: if prescribed foot care was included in bathing, it would not be identified in the CAT as a separate activity that requires a written order from a physician.⁴³ Second, the stated requirement that "other medical documentation" be submitted to support the prescription fails to acknowledge the information regarding Ms. C's gout diagnosis found within the CAT itself. Third, as with the other prescribed tasks discussed above, the Division's denial of foot care fails to accord any deference to the physician's medical judgment that foot care services are necessary.

One can safely assume that if a physician prescribes services related to a patient's foot-related medical problems, such services are likely intended to go beyond the scope of foot care normally associated with bathing. For all of these reasons, the Division failed to overcome the presumption in favor of the physician's determination regarding foot care.

The Division has failed to meet its burden of establishing by a preponderance of the evidence that its denial of services is justified as to range of motion exercise, walking exercise, and foot care called for by the physician's prescribed task form. Therefore the Division's denial of these services is reversed.

⁴¹ Exhibit D5. Note that M C testified that she applies Ms. C's prescribed foot lotion three times per day, and the Division has authorized PCA bathing services once per day. Also, for unknown reasons the physician prescribed foot care for only one day per week. See PCA Prescriber Form, 10/30/13; Exhibit D10. Although this may have been done in error, as a result the form calls for only 15 minutes of foot care assistance per week.

⁴² Testimony of Ms. Roark-Martinez.

⁴³ See Exhibit E5; see also Exhibit E at 24 (identifying "foot problems or infections such as corns, calluses, bunions, hammer toes, overlapping toes, pain, structural problems, gangrene toe, foot fungus, onychomycosis.").

IV. Conclusion

Ms. C is nearly 92 years old, and she suffers from a variety of ailments, including neuralgia, neuritis, radiculitis, osteoporosis, hypertension, gout, lymphedema-lower extremity, aortic dissection (thoracic), water blisters on and between her toes, and depression. The Division failed to meet its burden of proving that Ms. C does not require physical assistance to complete the ADLS of locomotion and toileting, and the prescribed tasks of range of motion and walking exercises, and foot care. Her PCA service levels should be recomputed in accordance with the discussion above. The Division’s reassessment decision is reversed as to these two ADLs and three prescribed tasks, and is affirmed in all other respects.

Dated this 26th day of January, 2015.

Signed

Andrew M. Lebo
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 5th day of February, 2015.

By: *Signed*

Name: Andrew M. Lebo
Title: Administrative Law Judge

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