

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

In the Matter of )  
 )  
 K J ) OAH No. 15-1298-MDS  
 ) Agency No.

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**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 K J's August 24, 2015, request to amend his Medicaid Personal Care Assistant (PCA) service plan to add time for additional services. Mr. J's amendment request was based on his doctor's prescription for foot care and walking exercises.<sup>1</sup> The Division denied Mr. J's PCA services amendment request on September 9, 2015, on the grounds that Mr. J was ineligible for foot care through the PCA program because he had diabetes, and that his assessment and medical documentation did not justify walking exercises.<sup>2</sup>

Mr. J requested a hearing. Prior to hearing, the Division approved Mr. J's prescription for foot care based on a doctor's letter stating he is no longer diabetic. Whether the Division was correct to deny walking exercises is the sole issue in contention.

Because the record supports a need for assisted walking to complete the exercises as prescribed, the Division's decision to deny Mr. J's walking prescription was incorrect. Accordingly, the decision is reversed.

**II. Facts**

Mr. J is 80 years old and lives alone.<sup>3</sup> Mr. J's diagnoses include chronic pancreatitis, chronic pain, dermatitis, prostate cancer, kidney disease, generalized anxiety disorder, obesity, and congestive heart failure.<sup>4</sup>

The Division conducts an assessment for PCA services using the Consumer Assessment Tool or "CAT."<sup>5</sup> The Division conducted Mr. J's most recent assessment on January 5, 2015.<sup>6</sup> Mr. J scored as needing supervision only (score 1/1) for walking on one level and scored as needing limited assistance (score 2/2) to move up and down stairs.<sup>7</sup>

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<sup>1</sup> Ex. C10-C13.

<sup>2</sup> Ex. D.

<sup>3</sup> Ex. E10.

<sup>4</sup> Ex. C 16; E10.

<sup>5</sup> 7 AAC 125.020(b). The CAT has been adopted into DHSS regulations by reference. See 7 AAC 160.900(d)(6).

<sup>6</sup> Ex. E.

<sup>7</sup> Ex. E8.

Mr. J submitted the PCA service plan amendment request at issue here on August 24, 2015.<sup>8</sup> Mr. J's physician, Dr. L M, prescribed 30 minutes of walking exercises, five times per week, "for patient to build endurance and strength. As of now, patient can only walk 5 minutes with a cane before tiring."<sup>9</sup> Dr. M also prescribed the walking exercises on the Division's "Request for Prescribed Personal Care Activities" form. Under walking, the form states, "recommend only when direct physical assistance is required to enable walking."<sup>10</sup> It also states that any misrepresentation can result in civil penalties and criminal prosecution.

On September 9, 2015, the Division denied Mr. J's request because his most recent assessment, in January 2015, scored him as needing supervision only.<sup>11</sup> In other words, Mr. J does not need hands on physical assistance to walk. Mr. J does not dispute that he can walk with his cane for up to five minutes.

Mr. J requested a hearing to contest the Division's denial of his PCA service plan amendment request on September 29, 2015.<sup>12</sup> Mr. J's telephonic hearing was held on October 23, 2015 and November 3, 2015. Mr. J did not testify. N G, Mr. J's daughter, and U T, of No Name, represented Mr. J. Victoria Cobo presented the Division's position. Phillip Martinez, health program manager, testified on behalf of the Division. The October 23<sup>rd</sup> hearing was continued in order for Mr. J to submit additional information from his provider. On October 30, 2015, Mr. J submitted a new prescription for "assisted walking" three times per week, for 30 minutes.<sup>13</sup>

### **III. Discussion**

Because Mr. J seeks additional PCA services for walking exercises, he bears the burden of proof.<sup>14</sup>

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.<sup>15</sup> Alaska's PCA program authorizes services for the purpose of providing "physical assistance with activities of daily living (ADL), physical

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<sup>8</sup> Ex. C10-C17.

<sup>9</sup> Ex. C12-13.

<sup>10</sup> Ex. C12.

<sup>11</sup> Ex. D; Ex. E8; Martinez testimony.

<sup>12</sup> Ex. C.

<sup>13</sup> Ex. 2. The Division objected to the admission of the new walking prescription as beyond the scope of hearing. This objection was overruled.

<sup>14</sup> 7 AAC 49.135.

<sup>15</sup> See Social Security Act § 1905(a)(24), codified at 42 USC 1396d(a)(24); see also 42 CFR 440.167 (defining personal care services).

assistance with instrumental activities of daily living (IADL), and other services based on the physical condition of the recipient . . . ."<sup>16</sup> 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.<sup>17</sup>

It is undisputed that Mr. J is able to walk for up to five minutes without hands on physical assistance. The Division argues that he is therefore unable to qualify for assisted walking because he can walk for up to 30 minutes per day, five minutes at a time. The Division bases its argument on the Personal Care Assistance Service Level Computation, adopted by regulation, and Division policy.<sup>18</sup> The Personal Care Assistance Service Level Computation states that exercise is authorized, "as prescribed, and consistent with the assessment, and meets the identified needs of the applicant/recipient."<sup>19</sup> The Division argues that an applicant must score as needing at least limited assistance, in order to qualify for walking exercises.

Mr. J asserts that the regulation governing exercise does not limit approval to applicants who require at least limited assistance. The regulation provides in relevant part:

(a) the department will pay for a personal care agency...for the personal care services identified in this section if those services are provided in accordance with 7 AAC 125.010 – 7 AAC 125.199 and a recipient's personal care service level authorization.

. . .

(b)(3)(B) for the ADL of locomotion...walking and simple exercises prescribed by a physician, a physician assistant, or an advanced nurse practitioner who is licensed under AS 08.68; or a federal employee described in 7 AAC 105.200(c).<sup>20</sup>

Mr. J argues that he needs hands on physical assistance to build up his strength and endurance because he is unable to walk for more than five minutes. Mr. J also asserts that his physician meant to note that Mr. J required hands on physical assistance to perform the prescribed walking exercises.

First, the regulations do not limit walking exercises to applicants with at least a score of limited assistance. The regulations require that the prescription be consistent with the

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<sup>16</sup> 7 AAC 125.010(a) [emphasis added].

<sup>17</sup> 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.*

<sup>18</sup> 7 AAC 160.900(a)(29); Ex. B46; Cobo testimony.

<sup>19</sup> Ex. B46.

<sup>20</sup> 7 AAC 125.030.

assessment. Although this supports the Division's position that someone independent or requiring supervision only with locomotion should generally not get approved for walking exercises, whether or not to approve a prescription is necessarily a fact-specific inquiry. In Mr. J's case, the evidence supports a finding that he cannot walk more than five minutes without physical assistance.

Next, the prescriptions specifically indicate the need for physical assistance. In addition, Dr. M wrote that the exercises were intended to build strength and endurance. The Division's contention that Mr. J can build up strength and endurance five minutes at a time fails to give weight to the fact that Mr. J's provider recommended 30 minutes per day, not five minutes, six times per day, unassisted. It is well-established that the Medicaid regulatory scheme creates a presumption in favor of the physician's medical judgment.<sup>21</sup>

The Division also supports its denial by highlighting Ms. T's testimony that Mr. J is likely unable to complete a full 30 minutes of exercise even with assistance at this time. In reality, Mr. J may well have to break the walking exercises in smaller units, until his endurance increases, but this should not be a basis for denial.

Also, approval is in line with previous OAH decisions. Walking exercises have been denied where the recipient failed to demonstrate a need for more than stand by assistance or supervision to complete the prescribed task.<sup>22</sup> In that case, the doctor did not check the box that the person needed physical assistance and wrote only that the recipient needed care-giver guided assistance.<sup>23</sup> On the other hand, walking exercises were approved where the ALJ increased the Division's locomotion score, finding that the recipient needed limited assistance, and the Division had not given enough weight to the doctor's recommendation.<sup>24</sup> Lastly, in a recent range of motion case, the Division's argument that it is prevented from approving prescribed tasks unless someone scored at least limited assistance was specifically rejected.<sup>25</sup>

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<sup>21</sup> See *Pinneke v. Preisser*, 623 F.2d 546, 549 (8th Cir. 1980); *T v. Rasmussen*, 249 F.3d 755, 759 (8th Cir. 2001); *Weaver v. Reagan*, 886 F.2d 194, 200 (8<sup>th</sup> 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).

<sup>22</sup> See *In re: M. X.*, OAH No. 14-2294-MDS (Comm'r Health & Soc. Serv., 2015).

<sup>23</sup> See *In re: M. X.*, OAH No. 14-2294-MDS (Comm'r Health & Soc. Serv., 2015).

<sup>24</sup> See *In re: F. C.*, OAH No. 14-1643-MDS (Comm'r Health & Soc. Serv. 2015).

<sup>25</sup> See *In re: D.T.*, OAH No. 15-1062-MDS (Comm'r Health & Soc. Serv. 2015) (Division filed a proposal for action. Commissioner's designee, Chris Ashenbrenner, adopted ALJ's proposed decision).

#### **IV. Conclusion**

Mr. J demonstrated that he requires hands on physical support to complete his walking exercises as prescribed. Accordingly, the Division's decision denying Mr. J's request for walking exercises is reversed.

DATED: December 2, 2015.

*Signed* \_\_\_\_\_  
Bride Seifert  
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 6th day of January, 2016.

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.]