

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

In the Matter of)
)
O C) OAH No. 17-0998-MDS
) Agency No.
_____)

DECISION

I. Introduction

O C receives personal care assistance (PCA) services through the Division of Senior and Disabilities Services (Division). The Division denied her amendment request seeking approval of a prescribed task form for assistance with range of motion exercises, and Ms. C requested an administrative hearing. The hearing was held on December 21, 2017 and January 22, 2018.

After a thorough review of the evidence, this decision concludes that the Division’s narrow interpretation of the regulation governing range of motion is not consistent with the plain language of the regulation, and that Ms. C’s prescription for range of motion exercises meets the terms of the regulation. Therefore, the denial of Ms. C’s amendment request is reversed.

II. Facts

O C is a 75 year-old Medicaid recipient. She has multiple medical diagnoses, including dementia, mental retardation, delusional disorder, diabetes, immobility syndrome,¹ obstructive sleep apnea, hypoxemia, COPD, enlarged heart, hypertension, urinary tract infection,² bronchitis, GERD, and reactive airway disease.³ It is undisputed that her cognitive capacity is worsening, and that the cumulative effect of her medical conditions is that she is sedentary and “unable to use her upper extremities as a typical 75 year old woman would.”⁴

In the past, Ms. C has received PCA services for range of motion exercises that were prescribed for her to prevent contractures that would otherwise result from her immobility. In August 2017, her physician wrote a prescription for Ms. C for the continuation of these range of motion exercises, and Ms. C’s daughter and legal guardian, D M, submitted the prescription to

¹ Ms. C’s exh. 1, p. 1 (7/19/17 Verification of Diagnosis).

² Division exh. F, pp. 4, 11.

³ Division exh. F, p. 15.

⁴ Ms. C’s exh. 5 (12/29/17 letter from Dr. Smith).

the Division with an amendment request.⁵ The Division denied the amendment request in a letter dated August 29, 2017. The letter states as follows:

This amendment request is Denied for adding Range of Motion ... as the requirements to qualify for passive Range of Motion have changed per new PCS regulations effective 07/22/2017. There is no diagnosis of contractures for this client in accordance with 7 AAC 125.030(d)(5).^[6]

Ms. M then requested an administrative hearing on Ms. C's behalf. The hearing was held on December 21, 2017 and January 22, 2018. Ms. M attended the hearing and testified on her mother's behalf, and was assisted by PCA agency representative B B, and care coordinator N U. Terri Gagne represented the Division.

III. Discussion

The only issue in dispute in this matter is the Division's denial of the amendment request with the prescribed task form calling for range of motion exercises for Ms. C. As noted in the Division's August 29, 2017 letter denying the amendment request, the regulation governing Medicaid payment for passive range of motion exercises was recently amended. The new regulation provides that passive range of motion exercises will be approved "if physical assistance is necessary for a recipient to complete the activity," and the person has "a documented physical condition associated with contractures that results in a need for passive range-of-motion for the extremities affected by that condition."⁷

The Division's denial of the amendment request was based on its view that the language of the new regulation requires that the recipient be currently suffering from contractures. Ms. C does not have contractures; rather, her physician has prescribed range of motion exercises to prevent contractures from occurring. On the first day of the hearing, the Division took the position that Ms. C does not currently suffer from contractures, and none of her diagnosed conditions are "associated with contractures."⁸ The Division contended that the diagnoses that

⁵⁵ Division exh. E.

⁶ Division exh. D, p. 1.

⁷ 7 AAC 125.030(d)(5).

⁸ At that point in the hearing, the most recent "verification of diagnosis" document in the record was dated June 8, 2015, and it listed "mild mental retardation, dementia, delusional disorder, diabetes, and gait instability." Division exh. F, p. 37.

are typically associated with contractures are burns, cerebral palsy, stroke, muscular dystrophy, and adrenoleukodystrophy.⁹

In the period between the first and second day of the hearing, Ms. M submitted numerous additional records describing Ms. C's medical conditions, including a more recent verification of diagnosis document, dated July 19, 2017, which listed "mild mental retardation, dementia, delusional disorder, diabetes, and immobility syndrome" for Ms. C. Ms. M also submitted several scholarly medical articles describing the linkages between contractures and dementia, diabetes, and immobility syndrome. At the second day of the hearing, the Division, after reviewing the materials submitted by Ms. M, conceded that Ms. C's medical conditions could be deemed to be conditions "associated with contractures." However, the Division still contended that Ms. C does not qualify under the new regulation. Ms. Gagne explained that this is because the Division reads the regulation's requirement that a person's extremities must be "affected by that condition" to mean that the person must currently be suffering from contractures.

Again, the key language of the regulation is that the person must have "a documented physical condition associated with contractures that results in a need for passive range-of-motion for the extremities affected by that condition."¹⁰ The Division's interpretation of this language to limit it to a person currently experiencing contractures is incorrect. The Alaska Supreme Court has stated that "[s]tatutory interpretation begins with the plain meaning of the text... ." ¹¹ The plain meaning of the regulation at issue here is that if a person has a medical condition associated with contractures, the person's extremities must be affected by that condition, not necessarily by the contractures themselves. If the regulation was intended to have the meaning espoused by the Division, it would have been drafted to read "... that results in a need for passive range-of-motion for the extremities affected by the contractures."¹²

⁹ Division exh. G, p. 1. This exhibit appears to be a downloaded, summary page from an online source (<https://www.healthline.com/symptom/muscle-contraction>); as such, it carries very little weight as a source purporting to define the coverage of a Division regulation.

¹⁰ 7 AAC 125.030(d)(5).

¹¹ *American Marine Corp. v. Sholin*, 295 P.3d 924, 926 (Alaska 2013), citing *State Commercial Fisheries Entry Commission v. Carlson*, 270 P.3d 755, 762 (Alaska 2012). It is true that, in these cases, the Alaska Supreme Court further stated that statutory construction should not stop with the plain meaning of the enactment, and that the legislative purpose or intent should also be considered. However, in this case no evidence of the intent of the drafter of the range of motion exercise regulation has been presented.

¹² It should also be noted that when a regulation is legislative in character, rules of interpretation applicable to statutes should be used in determining its meaning. 1A N. Singer, *Sutherland Statutory Construction and Statutory Interpretation*, § 31:6 at 723-24 (6th Ed. 2002); see also *State of Alaska Department of Highways v. Green*, 586 P.2d 595, 603 at n.24 (Alaska 1978) ("[a]dministrative regulations which are legislative in character are interpreted using

For Ms. C, whose conditions of dementia, diabetes and immobility syndrome are associated with contractures, the regulation means that her extremities must be affected by those conditions - dementia, diabetes, or immobility syndrome. Ms. M submitted medical records, and a letter from Ms. C's physician Dr. Smith, that demonstrate that Ms. C's extremities are affected by dementia, diabetes, and immobility syndrome, in that those conditions cause her to not use her extremities, which in turn creates the potential for the onset of contractures, absent the prescribed range of motion exercises.

Ms. M's testimony, and the documents that she submitted, also establish that Ms. C requires physical assistance to complete the range of motion exercises, because she is simply incapable of doing the exercises when she is given only verbal directions. Therefore, even though Ms. C does not yet suffer from contractures, she qualifies for Medicaid payment of the passive range of motion exercises called for by her physician's prescribed task form.

IV. Conclusion

The Division's determination to deny Ms. C's amendment request and prescribed task form for range of motion exercises is reversed.

Dated: April 5, 2018

Signed _____
Andrew M. Lebo
Administrative Law Judge

Adoption

The undersigned, by delegation from 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 17th day of May, 2018.

By: *Signed* _____
Name: Deborah Erickson
Title: Project Coordinator
Agency: Office of the Commissioner, DHSS

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

the same principles applicable to statutes"), citing 1A C. Sands, *Sutherland Statutory Construction*, § 31.06, at 362 (4th ed. 1972) .