



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
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**A copy of the administrative law
judge's decision is enclosed.**

**This decision was mailed to the parties
on APR 15 2016**



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 04703-15

P.R.-P.,

Petitioner,

v.

UNITED HEALTHCARE,

Respondent.

Donald D. Vanarelli, Esq., for Petitioner (Donald D. Vanarelli, attorney)

Adam J. Pettitt, Esq. for Respondent (Stradley, Ronon, Stevens & Young,
attorneys)

Record Closed: February 1, 2016

Decided: April 13, 2016

BEFORE LELAND S. MCGEE, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, P.R.-P. appeals the determination by respondent United Healthcare (United) to reduce her personal care assistant (PCA) services from 40 hours to 29 hours per week.

The Division of Medical Assistance and Health Services (DMAHS) transmitted the matter to the Office of Administrative Law (OAL), where on April 2, 2015, it was filed

as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held on December 17, 2015. Thereafter the parties submitted post-hearing arguments, and the record closed on February 1, 2016.

FACTS

Based on the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess credibility, I make the following **FINDINGS of FACT**:

Petitioner age eighty-four, is diagnosed with advanced Alzheimer's dementia, coronary artery disease, diabetes, kidney failure, congestive heart failure, renal failure, blindness and low vision (legally blind), generalized weakness, sleep apnea, psoriasis, and bladder incontinence. In addition to a pacemaker, petitioner has a continuous positive airway pressure (CPAP) oxygen machine. She walks with assistance and suffers from insomnia and episodes of sleeplessness for up to three days, with agitation. Her initial assessment was conducted in 2012, and it was determined that her condition supported the need for PCA services at 40 hours per week. Once PCA services are approved, a nursing reassessment is conducted every six months or sooner if necessary. Thus, in January 2015, petitioner was assessed by United, who determined that her condition required only 29 hours per week of PCA services. Petitioner resides with her daughter, son-in-law, and grandchildren. Since the initial assessment in 2012, petitioner's medical condition has declined.

Testimony

P.R.

P.R., the twenty-two-year-old granddaughter of petitioner, testified that her grandmother has lived with the family for the past twelve years. A home attendant provides care from 10:30 a.m. to 4:30 p.m. After the home attendant leaves for the day, petitioner's daughter and grandchildren provide care until midnight. P.R., a full-time student, has "night duty" for her grandmother from midnight until 10:00 a.m., when the

home attendant comes. P.R. described the assistance that her grandmother requires as follows:

Ambulation—she stated that it takes 10 minutes for petitioner to get to the bathroom because she gets dizzy. There is an extensive process for assisting her in getting undressed and onto the toilet. This occurs approximately four times per night. It is her understanding that petitioner goes to the bathroom about ten times during the day, and it has gotten worse since she was assessed. Petitioner uses a wheelchair when she goes out. Petitioner is able to walk with assistance and cannot stand on her own strength. Since petitioner is legally blind, she can't use a walker. She does understand instructions, but with prompting.

When P.R. cares for petitioner overnight, petitioner goes to the bathroom four times. Since the beginning of this year, petitioner has had to go to the bathroom more frequently.

The designation of "modified mobility with or without assistive device" is not correct. Petitioner is not mobile.

Transferring/mobility—P.R. stated that petitioner sits in her recliner three times per day in her bedroom and sits at least one time in the living room. It takes 5 to 8 minutes to get her to the recliner in the bedroom, and 10 minutes to get her to the living room.

Positioning (bed/chair)—Respondent marked "no assist" on the assessment. (R-5.) P.R. stated that this designation is not accurate. Petitioner is able to sit in a reclining chair in her bedroom, but needs assistance to be positioned in her chair and her bed. Petitioner's daughter and grandson assist her with this.

Toileting—it takes approximately 8 minutes to get petitioner to the bathroom four times per night. Petitioner cannot clean herself when she goes to the bathroom and is incontinent of bladder and bowel. Petitioner uses a diaper, and sometimes petitioner will wait to get to the bathroom before going on herself. The diaper has to be changed

approximately four times per night because petitioner has open wounds and the psoriasis requires medication.

Personal hygiene/grooming—it takes more than the allocated 10 minutes per day to brush petitioner's teeth twice a day, brush her hair, and clean her nails. It takes five minutes to brush her hair each time and 5 to 8 minutes to brush her teeth. Sometimes petitioner does not want her teeth brushed so it requires some coaxing. P.R. gets involved with brushing hair and teeth twice a day. P.R. cuts her fingernails, while the podiatrist cuts her toenails.

The home health aide brushes hair and teeth, but cannot do petitioner's nails because she is not allowed to use sharp objects. The PCA is also not allowed to apply the prescription cream for the psoriasis.

Dressing—it can take up to 15 minutes to change petitioner each time she urinates on herself. Changing her involves undressing her, washing her, and dressing her again. She is not able to dress herself and is not able to comply with commands in the process of dressing.

Petitioner wears robes around the house, which are one-piece garments.

Bed linens—the routine sometimes requires changing the bed linens twice per day. P.R. has observed her mother change the linens, and it takes approximately 12 minutes each time. P.R. has also changed bed linens.

Laundry—it takes approximately an hour to wash and dry the bedding, at least once a day. The home attendant does most of the laundry. The allocation of 45 minutes per week is not accurate.

Shopping—the family does the shopping, so no PCA time was allocated for shopping. The laundry detergent and lotions purchased for petitioner are different from those of the rest of the family because of the psoriasis.

Meal preparation—Petitioner eats a different diet than the rest of the family and separate foods are necessary. There is no PCA allocation for dinner, because the family provides that.

Nursing summary—there are episodes of sleeplessness for up to three days, with agitation. Petitioner is very agitated and “strikes out” at people, including P.R.

Personal care—the home health aide helps with brushing petitioner’s hair and teeth. She is not allowed to use sharp objects and therefore may not manicure petitioner’s nails. P.R. and her mother have to apply the skin medication. Petitioner’s daughter bathes petitioner and needs assistance with this activity, particularly when petitioner goes to the bathroom on herself many times.

Eating—Petitioner has specific dietary needs because she is diabetic. Petitioner’s daughter cooks her meals separate from everyone else’s. The home attendant cooks breakfast and prepares lunch, and petitioner’s daughter prepares dinner. Petitioner does not feed herself; she is not able to put a spoon to her mouth.

The home attendant comes on the weekends from 10:30 a.m. to 3:30 p.m. on Saturday and 9:30 a.m. to 2:30 p.m. on Sunday. The family provides assistance during the rest of the day.

Since the first assessment in 2012 petitioner has gotten worse. Initially petitioner did not have psoriasis, and the effectiveness of her only functioning kidney declined 16 percent since the 2012 assessment. Petitioner did not use a sleep-apnea mask. Petitioner has gotten weaker, in that she was able to feed herself in 2012 and was able to walk with less assistance. Petitioner was able to go out more and attend church in 2012. She attended family activities and went shopping with the family in the wheelchair in 2012, but is unable to do so now. There is nothing about her medical condition that has improved since the initial assessment.

There are steps into and out of the one-family home. Petitioner’s brother J. picks petitioner up and carries her to the car, and then out of the car to the wheelchair. The

space in the house is limited and they can't maneuver the wheelchair in the house. Petitioner is either walked with assistance or her brother picks her up and carries her. Her brother B. is involved, as well.

Mr. Gridley directed all of his questions to P.R. and none to petitioner. She was present while Gridley spoke with her parents.

Ray Gridley

Respondent presented Ray Gridley, R.N., (Gridley) who is a field care coordinator for United Healthcare. He conducted an assessment of Petitioner in January 2015, at her home. He interviewed P.R. and her mother during the assessment. Gridley "was curious" about why petitioner received 40 hours of PCA services per week and how it was paid for. He was able to conclude that she received this allocation through the State's Global Options program. His information about the allocation was as a result of his discussion with P.R. The Personal Care Assistant Nursing Assessment Tool used was implemented by the State of New Jersey as of January 1, 2015. It is the tool required to be used. (P-3; R-5.)

In conducting the assessment, Gridley used the tool and asked P.R. about petitioner's cognitive functioning. As a result of his conversation with P.R. he determined that petitioner was "moderately" impaired and not "severely" impaired. The term "severely impaired" means that a patient is unable to follow commands, and cannot respond to or recognize family members; he said, "the lights are on but nobody is home."

Mobility—Gridley asked P.R. what petitioner could do. He stated that her testimony at the hearing was accurate—30 minutes/day is the maximum. He gave petitioner the maximum time on the assessment.

Transferring—at the time of the assessment, P.R. described a "hand-up kind of assistance of transfer" scenario where "a person sits there, you just kinda pull them up, we're talking literally a two-second process."

Bathing—based upon P.R.'s description, petitioner received the maximum amount of time.

Feeding/eating—Petitioner may be able to get her hand to her mouth, and she can hold a cup for drinking, but she does need to be fed. The maximum time for feeding is 20 minutes/meal. In order to receive the maximum, patient must be "resistant" to eating. Petitioner received the minimum.

Positioning—this is for "non-mobile" people, and in this case petitioner is able to walk.

Toileting—the PCA takes petitioner to the bathroom six or seven times per day. The maximum time that can be allotted is 90 minutes per day. He gave petitioner 70 minutes per day to account for daytime PCA care only.

Personal hygiene—the maximum is 105 minutes. He gave her 70 minutes because petitioner is not getting dressed up to do anything, she's not putting on makeup, and is only doing basic things around the house; she's not getting fully dressed to go out of the house. Therefore, she does not require more time.

Dressing and adaptive equipment—at the time, petitioner was following commands and was wearing a one-piece pajama.

Housekeeping—Gridley explained that the household size is 5, and not 1 as indicated on the assessment. The calculation is to divide by the number of people in the household to arrive at the number of minutes allocated. In this case, petitioner received the maximum allowable of 120 minutes per week/household size based upon a household size of 1.

Bed linens—the maximum is 10 minutes per occasion with a limit of 30 minutes per day. Petitioner received 20 minutes per occasion, at three occasions per week.

Shopping—the family does the shopping, and no time was allocated in the assessment.

Meal preparation—the family prepares dinner. The allocated score covers the time that the aide spends on meals, and does not include the family's time.

Laundry—the state allows 45 minutes per week if there is a washer and dryer in the home. Petitioner received 45 minutes.

Gridley acknowledged that the amounts of time indicated on the form as “maximums” are guidelines, and patients are not limited to those numbers.

M.T.

M.T. is petitioner's daughter, and testified as to her mother's condition. Her husband, J.R., translated. She cares for petitioner between the hours of 5:30 p.m. and 10:30 p.m.

Ambulation—M.T. takes petitioner to the bathroom up to ten times during the evening at 10 minutes each trip.

Transferring—her mother has psoriasis, and M.T. moves petitioner from the bed to the chair two times every hour. It takes 10 minutes each occasion. She has observed the PCA take petitioner from the bedroom to the living room, and it takes 7 to 10 minutes each trip.

Bathing—it takes time for petitioner to “get herself together” every time she gets up because of dizziness. Removing her clothes must be done delicately because of her skin rashes. M.T. gets petitioner seated on the shower chair, uses special soap to lather her, and has to leave the soap on petitioner's body for 5 minutes before patting it off with a wash cloth. M.T. then dries petitioner, applies lotion, dresses her, and gets her back to bed. This process takes 40 to 45 minutes.

Feeding—the assessment tool allows 10 minutes per meal. Dinner preparation takes 40 minutes. M.T. steams meat and vegetables and it takes petitioner 30 minutes to actually eat. The food has to be cut up into small pieces, and sometimes she falls asleep while eating. M.T. has observed the aide go through the same process. This has been the same throughout calendar year 2015.

Incontinence—Petitioner has been incontinent throughout 2015. She goes to the bathroom seven to ten times during the hours that M.T. cares for her. After allowing her time to sit on the toilet, it takes time to clean her up. It can take up to 15 minutes each occasion.

Personal hygiene—M.T. brushes petitioner's hair twice a day, but does not brush her teeth. She manicures petitioner's fingernails and a podiatrist does her feet. It takes 5 minutes to brush her hair.

Dressing—Petitioner has a cardiac monitor that is wireless so it is not an issue when dressing. It takes 15 to 20 minutes to dress her. The number of times that Petitioner has to be changed depends upon how often she goes to bathroom on herself—sometimes three times per evening. M.T.'s husband assists with dressing.

Bed linens—sometimes the bed must be changed twice per day. It takes 10 to 12 minutes to change the bed, and about an hour to wash the linens. The PCA sometimes does the laundry. It is done on a daily basis.

Shopping—M.T. does all of the shopping for the family, and does not need help with that.

Cooking—M.T. does all of the cooking for the family and would accept help from an aide. It takes 30 minutes to prepare food for the family.

Sleeplessness—it can be up to three days that petitioner is up without sleeping. During those times she is very agitated.

M.T. works as a housekeeper in University Center in Newark. She works 40 hours per week, Monday through Saturday. Her husband works the same hours at the same place. Both of their sons, B. and J., work. J. works Monday through Friday, and sometimes Saturday, from 7:00 a.m. to 4:00 p.m.; B. works two jobs, seven days per week.

Neither party introduced the personal care assistant to testify as to the time that she takes to provide services for petitioner. In the absence of her firsthand knowledge, I must rely on the testimony and the evidence presented.

Credibility

It has long been established "as a general rule that all persons should be qualified to testify, and that disqualification should be the exception." Germann v. Matriss, 55 N.J. 193, 217 (1970); see also State v. Butler, 27 N.J. 560, 602 (1958) (citing State v. Mohr, 99 N.J.L. 124, 127 (E. & A. 1923)). The determination as to whether a particular witness is competent is within the discretion of the judge. State v. R.W., 104 N.J. 14, 19 (1986). The issue commonly arises in the instance of children called to testify. The parameters of the judge's discretion are governed by N.J.R.E. 601. Rule 601 provides for the general presumption of competency to testify unless (a) the judge finds that the proposed witness is incapable of expression concerning the matter so as to be understood by the judge and jury either directly or through interpretation; or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth; or (c) except as otherwise provided by these rules or by law. See State v. Scherzer, 301 N.J. Super. 363, 463 (App. Div. 1997).

The New Jersey Supreme Court recently revisited Rule 601, supporting the prior iterations of the appropriate analysis. The Court emphasized that a judge is also free to relax the formal testimonial oath in order to suit the circumstances, putting substance above form, in assuring that the witness understands that she or he is obligated to tell the truth and the consequences for failing to do so. State v. G.C., 188 N.J. 118, 121 (2006).

Competency, however, is just a threshold issue. That determination does not mandate that I find their testimony to have been more credible or believable than that of other witnesses, or “such as the common experience and observation of mankind can approve as probable in the circumstances.” In re Estate of Perrone, 5 N.J. 514, 522 (1950).

When the testimony of witnesses is in disagreement, the trier of fact must weigh the witnesses’ credibility in order to make factual findings. Credibility is the value that the fact finder gives to testimony of a witness and contemplates an overall assessment of the witness’s story in light of its rationality, internal consistency, and manner in which it “hangs together” with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). A fact finder is expected to base credibility decisions on his or her common sense and life experiences. State v. Daniels, 182 N.J. 80, 99 (2004). Credibility is not dependent on the number of witnesses who appeared, State v. Thompson, 59 N.J. 396, 411 (1971), and the finder of fact is not bound to believe the testimony of any witness. Perrone, supra, 5 N.J. at 521-22.

In this case, I **FIND** that the testimony of all of the witnesses was credible. I also note that the assessment conducted by respondent was largely dependent upon the report provided by petitioner’s granddaughter, P.R. There is no evidence that respondent consulted the aide who actually provided the assistance for which the PCA-services allocation was made.

LEGAL DISCUSSION

Title XIX of the Social Security Act established the Medicaid program, under which participating states may provide federally funded medical assistance to certain eligible needy persons. Dougherty v. Dep’t of Human Servs., Div. of Med. Assistance and Health Servs., 91 N.J. 1, 4 (1982); see also 42 U.S.C.A. §1396. By enacting the

New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 to -19.1, New Jersey has elected to participate in the Medicaid program. L.M. v. Div. of Med. Assistance and Health Servs., 140 N.J. 480, 485 (1995). The New Jersey Act established the Division of Medical Assistance and Health Services, within the Department of Human Services, as the State agency obligated to perform the administrative functions required for participation in the Medicaid program through the promulgation of rules and regulations. Bergen Pines Cnty. Hosp. v. N.J. Dep't of Human Servs., 96 N.J. 456, 465 (1984); see also N.J.S.A. 30:4D-4, -5.

The Department of Health and Senior Services has promulgated regulations governing the provision of personal care assistant services through Medicaid. PCA services shall be provided by a certified licensed home health agency or by a proprietary or voluntary non-profit accredited homemaker agency. PCA services include personal care, household duties, and health-related tasks performed by a qualified individual in a beneficiary's place of residence, under the supervision of a registered professional nurse, as certified by a physician in accordance with a written plan of care. These services are available from a home health agency or a homemaker agency. N.J.A.C. 10:60-3.1. PCA services "accommodate long-term chronic or maintenance health care, as opposed to short-term skilled care required for some acute illnesses." Ibid.

PCA services shall be reimbursable when provided to Medicaid beneficiaries in their place of residence, among other living settings, and cover a wide range of home-care-assistance needs. N.J.A.C. 10:60-3.2, -3.3. PCA services shall be reimbursed on a per-hour, fee-for-service basis for weekday, weekend, and holiday services. Nursing assessment and reassessment visits under this program shall be reimbursed on a per-visit, fee-for-service basis. N.J.A.C. 10:60-3.7(a). PCA services reimbursement rates are all inclusive maximum allowable rates. No direct or indirect cost over and above the established rates may be considered for reimbursement. At all times the provider shall reflect its standard charge on required forms; however, the actual payment amount may differ. N.J.A.C. 10:60-3.7(b).

To commence PCA services, “the beneficiary’s need for services shall be certified in writing to the home health agency or homemaker agency by the attending physician.” N.J.A.C. 10:60-3.4. After certification, “[t]he registered professional nurse, in accordance with the physician’s certification of need for care, shall perform an assessment and prepare a plan of care for the personal care assistant to implement.” N.J.A.C. 10:60-3.5(a)(1). Such plan of care is defined as “the individualized and documented program of health care services provided by all members of the home health or homemaker agency involved in the delivery of home care services to a beneficiary.” N.J.A.C. 10:60-1.2. The plan of care “includes short-term and long-term goals for rehabilitation, restoration or maintenance made in cooperation with the beneficiary and/or responsible family members or interested person. Appropriate instruction of beneficiary, and/or the family or interested person as well as a plan for discharge are also essential components of the treatment plan.” Ibid. The plan of care includes “the tasks assigned to meet the specific needs of the beneficiary, hours of service needed, and **shall take into consideration the beneficiary’s strengths, the needs of the family and other interested persons.**” Ibid. (emphasis added).

Eligibility for PCA services requires prior authorization. N.J.A.C. 10:60-3.9(a). To obtain prior authorization, “[a] registered nurse employed by the PCA provider agency shall complete a face-to-face evaluation of the beneficiary and shall complete the PCA Assessment form (FD-410).” N.J.A.C. 10:60-3.9(b)(1). Form FD-410 enumerates ten categories of ADL to consider, including:

- i. Supportive service/living environment needs;
- ii. Cognitive/mental status;
- iii. Ambulation/mobility;
- iv. Ability to transfer (for example, from wheelchair to bed)
- v. Ability to feed himself or herself;
- vi. Ability to bathe himself or herself;
- vii. Ability to toilet himself or herself;
- viii. Ability to perform grooming and dressing tasks;
- ix. Ability to perform shopping tasks; and
- x. Ability to perform laundry tasks.

[Ibid.]

The pertinent regulations provide that “[a] personal care assistant nursing reassessment visit shall be provided at least once every six months, or more frequently if the beneficiary’s condition warrants, to reevaluate the beneficiary’s need for continued care.” N.J.A.C. 10:60-3.5(a)(3). Furthermore, the regulations provide that the plan of care must “be reviewed periodically and revised appropriately according to the observed changes in the beneficiary’s condition.” N.J.A.C. 10:60-1.2. In amending the current regulations, the Division noted that “[a] reassessment of service needs can be done any time that a beneficiary’s circumstances change.” 38 N.J.R. 2810(a) (July 3, 2006) (Response to Comment 7).

PCA services are “limited to a maximum of 40 hours per calendar work week and shall be prior authorized in accordance with N.J.A.C. 10:60-3.9.” N.J.A.C. 10:60-3.8(g). However, “[a]dditional hours of service may be approved by [the Division] on a case-by-case basis, based on exceptional circumstances.” Ibid.

PCA services are “reimbursed on a per-hour, fee-for-service basis for weekday, weekend, and holiday services.” N.J.A.C. 10:60-3.7(a). The reimbursement rates for PCA services are codified at N.J.A.C. 10:60-11, and are “all-inclusive maximum allowable rates.” N.J.A.C. 10:60-3.7(b). The maximum hourly rate for individual PCA service is currently \$15.50 for weekdays and \$16 for weekends. N.J.A.C. 10:60-11.2(a).

Finally, beneficiaries of PCA services may request a fair hearing to dispute a reduction in PCA services. N.J.A.C. 10:60-1.10; N.J.A.C. 10:49-9.14(c).

Notably, applicable statutes, regulations, and the New Jersey Register contain few references to the Personal Preference Program. In response to comments regarding amendments to the Personal Assistance Services Program, the Division noted “the on-going success of the Medicaid funded Personal Preference Program. A cash model program offers program recipients the greatest possible degree of self-control and self-direction.” 44 N.J.R. 1262(b) (April 16, 2012) (Response to Comment 9). In adopting amendments to organization rules, the Division noted an amendment that “reflects a change in the name for the New Jersey Personal Preference

Demonstration Program to the New Jersey Personal Preference Program as it no longer operates as a demonstration program.” 39 N.J.R. 2536(b) (July 2, 2007). However, the subject amended regulation merely provides that “the specific functions and goals of the Division” include operating “the New Jersey Personal Preference Program.” N.J.A.C. 10:139-1.2(c)(7). The term does not appear elsewhere in the relevant statutes and regulations. However, the Division website provides information on the Personal Preference Program.¹ The website explains that “[u]sing a ‘Cash & Counseling’ approach, along with the idea of ‘consumer direction,’ PCA services can [be] accessed under PPP, which allows seniors and people with disabilities who are NJ FamilyCare recipients to direct and manage their own services.” Ibid.

Personal care assistant services are health-related tasks performed by a qualified individual in a beneficiary’s residence, under the supervision of a registered nurse. N.J.A.C. 10:60-3.1. The purpose of PCA services is to accommodate patients who require long-term chronic or maintenance health care. Ibid. Personal care assistant services include, but are not limited to, grooming care (hair, shaving, and bathing), using the toilet or bed pan, changing bed linens, ambulation indoors and outdoors, eating and preparing meals, and dressing. N.J.A.C. 10:60-3.3.

The limitations on personal care assistant services are set forth in N.J.A.C. 10:60-3.8, which provides in part:

(g) Personal care assistant services shall be limited to a maximum of 40 hours per calendar work week and shall be prior authorized in accordance with N.J.A.C. 10:60-3.9. Additional hours of service may be approved by the Division of Disability Services on a case-by-case basis, based on exceptional circumstances.

United Healthcare operates a managed health plan for Medicaid recipients in New Jersey and has an obligation to provide medically necessary care. N.J.A.C. 10:49-5.1. Medically necessary care can entail provision of personal care assistance to manage the individual needs of the recipient. N.J.A.C. 10:60-3.5(a)(1). These

¹ Department of Human Services, Personal Preference Program <<http://www.state.nj.us/humanservices/dds/services/ppp/>> (last visited March 17, 2016).

individual needs include activities of daily living (ADLs) and instrumental activities of daily living (IADLs), as well as physician-prescribed personal care and other health services. N.J.A.C. 10:60-2.1(d). The amount of personal care services is determined during a face-to-face evaluation with the recipient using the standard PCA Assessment Form FD-410, capturing the recipient's supportive service/living environment needs, cognitive/mental status, ambulation/mobility, ability to transfer, ability to feed him/herself, ability to bathe him/herself, and the ability to perform shopping and laundry tasks. N.J.A.C. 10:60-3.9.

Petitioner cites to a recent OAL decision in support of her position that absent evidence of a "remarkable increase in the petitioner's independence," the service-provider fails its burden of proving that a decrease in PCA hours is warranted. C.S. v. United Healthcare, OAL Dkt. No. HMA 16677-14, Initial Decision (June 4, 2015), modified, Dir. (July 2, 2015). In that case, although the assessment-tool calculation resulted in a reduction from 40 hours to 16 hours, the DMAHS determined that 25 hours was appropriate. Further, the assessment tool that was used in that case predated the tool introduced in January 2015. In fact, in the Final Decision, the DMAHS disagreed with the administrative law judge's conclusion that United Healthcare failed to meet its burden of proof. Instead, it determined that the patient was due for a six-month assessment and it continued the 40-hour week subject to the assessment with the new assessment tool.

In the present case, the definitions under the category "Cognitive" on the assessment tool indicate that a "severely impaired" person is a person who "never or rarely makes decisions, unable to initiate or self-direct any activity," and the maximum time allocated for this is 180 minutes. (R-5.) The evidence indicates that petitioner meets the criteria of "severely impaired"; however, she was determined to be "moderately impaired." Ibid. Further, in the assessment tool, under the category "ADLs," respondent indicated that petitioner requires "extensive/max assist" (weight-bearing support), which allows for up to 45 minutes per day of assistance. Id. at 2. However, petitioner was only allocated 2 minutes per day. There is no explanation for why she was only granted 2 minutes when the lowest designation, "supervision/limited assist," allows up to 15 minutes per day. Further, respondent acknowledges that, as

stated on the assessment tool itself, the times listed for each activity are only guidelines, and more time may be allocated than the specified "limits."

There is no dispute that the family does the shopping, and that respondent did not allocate any time for this activity. There is also no dispute that the family must provide separate meals for petitioner, and the regulations provide that the plan of care includes tasks necessary "to meet the specific needs of the beneficiary, hours of service needed, and **shall take into consideration the beneficiary's strengths, the needs of the family and other interested persons.**" Respondent designated hours to cover the time spent by the home health aide only. For example, "0" time was allocated for shopping because that is a task the family performs. This fails to "meet the needs of the family" pursuant to N.J.A.C. 10:60-1.2.

CONCLUSIONS

Based on the whole of the record, I **CONCLUDE** that there is insufficient evidence that the number of hours allocated for each activity is consistent with petitioner's assistance requirements. Therefore, I **CONCLUDE** that respondent has not met its burden of proof that it properly reduced the number of PCA hours allocated to petitioner.

There are inconsistencies in the number of hours assigned in the assessment tool itself. There are incongruities in the time allocated for tasks and the time required to perform those tasks. There are allocations of time that neglect to consider the "needs of the family." Further, there is no dispute that since the initial assessment in 2012, petitioner's medical condition has declined. It is neither logical nor equitable to accept that the number of hours needed to provide for her care would decrease regardless of the assessment tool used. In the absence of evidence that the initial assessment allocating 40 hours of PCA was flawed, any subsequent assessment that results in a decreased need for assistance for a person whose health has declined is inherently flawed or improperly administered.

ORDER

It is **ORDERED** that the determination of the DMAHS to reduce the hours of personal care assistant services from 40 hours to 29 hours per week provided to petitioner is **REVERSED**.

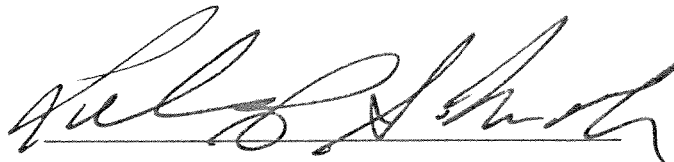
I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, the designee of the Commissioner of the Department of Human Services, who by law is authorized to make a final decision in this matter. If the Director of the Division of Medical Assistance and Health Services does not adopt, modify or reject this decision within 40-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within seven days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR OF THE DIVISION OF FAMILY DEVELOPMENT, Six Quakerbridge Plaza, Room 304, P.O. Box 716, Trenton, New Jersey 08625-0716**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 13, 2016 _____

DATE



LELAND S. MCGEE, ALJ

Date Received at Agency:

April 13, 2016 _____



DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:

APR 15 2016

LSM/lr

APPENDIX

WITNESSES

For Petitioner:

P.R.

M.T.

For Respondent:

Ray Gridley, R.N.

EXHIBITS

For Petitioner:

P-1 Introduced but not admitted

P-2 Introduced but not admitted

P-3 Introduced but not admitted

For Respondent:

R-5 Personal Care Assistance Nursing Assessment Tool