

1 July 19, 2011, Becky Hobbs, a ManorCare “RN Case Manager” reviewed Bonham’s records,
2 noted that “IV antibiotics were completed” on July 15, 2011, that Bonham was “now refusing
3 therapy,” and recommended that further SNF coverage be denied. (*Id.* at 229.) On July 20, 2011,
4 Dr. Steve Smith agreed with Hobbs’ assessment. (*Id.* at 239.)

5 That same day, Bonham’s Medicare Advantage Organization, (“MAO”), United
6 Healthcare, notified her that SNF coverage would end effective July 22, 2011. (*Id.* at 137-39.)
7 On July 22, 2011, Health Services Advisory Group, (“HSAG”), a Medicare Quality Improvement
8 Organization, (“QIO”), reviewed the July 20, 2011 decision and “agree[d] with the
9 discontinuation of coverage for the skilled services.” (*Id.* at 55.) Bonham requested
10 reconsideration, and on July 25, 2011, HSAG notified Bonham that the “initial decision to end
11 coverage was *upheld* by a second HSAG physician.” (*Id.* at 58) (emphasis in original).

12 On August 18, 2011, Bonham filed an appeal of the July 25, 2011 denial of
13 reconsideration with the Office of Medicare Hearings and Appeals (“OMHA”). (*Id.* at 106-08.)
14 Bonham was discharged from ManorCare on October 3, 2011. (*Id.* at 18.) A hearing was held
15 before an Administrative Law Judge, (“ALJ”), on October 7, 2011. (*Id.* at 468-523.) Plaintiff
16 was represented by an attorney and testified at the administrative hearing. (*Id.* at 475, 500.)
17 Bonham passed away on February 22, 2012. (ECF No. 30 at 5.) On March 21, 2012, the ALJ
18 issued a fully favorable decision, finding that the “MAO’s decision to terminate coverage of SNF
19 services was not medically appropriate.” (AR at 29.)

20 On May 18, 2012, the Medicare Appeals Council, (“MAC”), received a request for review
21 by the MAO. (*Id.* at 14.) On May 23, 2014, the MAC issued a notice of decision, reversing the
22 ALJ’s decision, and finding that “the enrollee’s services were appropriately terminated on July
23 22, 2011.” (*Id.* at 7.) Plaintiff, the estate of Jayne Bonham, sought judicial review pursuant to 42
24 U.S.C. § 405(g) by filing the complaint in this action on October 20, 2014. (ECF No. 1.)

25 LEGAL STANDARD

26 The Medicare Act allows district courts to review the Secretary’s final decision with
27 regard to Medicare coverage to ensure the decision is supported by substantial evidence.² 42

28 ² The MAC’s ruling is the final decision of the Secretary. *Conahan v. Sebelius*, 659 F.3d 1246,

1 U.S.C § 405(g) (incorporated through 42 U.S.C § 1395w-22(g)(5)). Substantial evidence is such
2 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
3 Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001); Sandgathe v. Chater, 108 F.3d 978,
4 980 (9th Cir. 1997). Moreover, “[t]he agency’s interpretation of its own regulations receives
5 ‘substantial deference’ and ‘must be given controlling weight unless it is plainly erroneous or
6 inconsistent with the regulation.’” Conahan v. Sebelius, 659 F.3d 1246, 1249 (9th Cir. 2011)
7 (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)); see also International
8 Rehabilitative Sciences Inc. v. Sebelius, 688 F.3d 994, 1000 (9th Cir. 2012) (“The Secretary’s
9 denial of coverage will be affirmed unless it is arbitrary, capricious, an abuse of discretion, or
10 otherwise not in accordance with law.”).

11 APPLICATION

12 The MAC found that “termination of services furnished to the enrollee as of July 22,
13 2011, was appropriate.” (AR at 5.) Plaintiff argues that the MAC’s decision “is contrary to the
14 decision of the Administrative Law Judge and is not supported by facts, evidence or law.” (Pl.’s
15 MSJ (ECF No. 24) at 3.) In this regard, plaintiff argues that the MAC’s decision failed to
16 consider the July 21, 2011 opinion of Bonham’s treating physician, Dr. Reinhardt Hilzinger. (Id.
17 at 4.) The ALJ’s decision relied on Dr. Hilzinger’s opinion, stating that “[t]he Beneficiary’s
18 physician noted that she was benefiting from therapy and required continued therapy.” (AR at
19 29-30.)

20 However, the MAC found that Bonham’s “condition had plateaued, and even regressed by
21 July 22, 2011.” (Id. at 5.) The finding of the MAC is supported by substantial evidence. In this
22 regard, the July 21, 2011 “Detailed Explanation of Non-coverage” explained that prior to her
23 admission, Bonham “was noted to be Independent with dressing and requiring Moderate Assist
24 (Mod A) with bathing.” (Id. at 140.) On June 6, 2011, a “Physical Therapy (PT) Evaluation”
25 stated:

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28 1249 (9th Cir. 2011) (citing Heckler v. Ringer, 466 U.S. 602, 607 (1984)).

1 Documentation showed her to require Mod A with Bed mobility
2 and transfers due to being Non-weight bearing (NWB) on the left
3 foot. Sitting balance was Fair+/F, standing balance was Not tested
4 due to NWB on left foot. Gait was not tested either. Wheel Chair
(WC) mobility was 70' with Mod A.

5 (Id.) An Occupational Therapy evaluation performed that same day found Bonham to be “Mod A
6 for Upper Body (UB) dressing and Maximum Assist (Max) for Lower Body dressing.” (Id.)

7 Bonham was then reviewed regularly thereafter. A July 12, 2011, review

8 . . . reflected a regression with bed mobility now requiring
9 mod/max A. Transfers from chair to bed were fluctuating from
10 Max to mod/max. Gait was declined secondary to increased
11 fatigue. There was no change with OT functions. She remained
12 Non-Weight Bearing.

13 (Id. at 141; see also at 226.)

14 A July 19, 2011 review found:

15 Her Level of Assist with bed mobility had not changed, she refused
16 chair to bed transfers, sitting balance remained Fair/Fair. She
17 remained unable to ambulate secondary to increased fatigue. There
18 was no change with ADL transfers.

19 (Id. at 142; see also at 228.) “Notes through 7/20 were requested as [Bonham] had not made
20 improvements with therapy . . . and had also been refusing therapy.” (Id. at 142.) “The
21 documentations confirmed no progress had been made.” (Id.)

22 Neither plaintiff’s argument nor Dr. Hilzinger’s opinion refutes the evidence noted above.
23 To the contrary, while Dr. Hilzinger’s opinion states that Bonham had “gained some strength” it
24 also reflects that Bonham suffered from “[m]uscle wasting in upper and lower extremities with
25 chronic weakness.” (Id. at 116.)

26 Moreover, Dr. Hilzinger’s opinion erroneously states that Bonham was “progressing with
27 her physical therapy despite having some setbacks a couple of weeks ago.” (Id. at 117.) As the
28 MAC’s decision noted, “[o]n multiple instances [Bonham] was unable to participate in PT and/or
OT.” (Id. at 6.) In this regard, it appears from the record that Bonham refused, declined, or did
not perform some or all portions of her physical therapy and/or occupational therapy on June 7, 8,
9, 10, 14, 17, 23, 24, 25, 27 and 28, 2011, and on July 4, 6, 9, 15 and 16, 2011. (Id. at 165-68,

1 170-72, 175, 178.)

2 Medicare regulations explain that “skilled nursing and skilled rehabilitation services
3 means services that . . . [a]re furnished directly by, or under the supervision of” technical or
4 professional personnel. 42 C.F.R. § 409.31 (a). “The beneficiary must require skilled nursing or
5 skilled rehabilitation services, or both, on a daily basis.” 42 C.F.R. § 409.31(b)(1). “To meet the
6 daily basis requirement specified in § 409.31(b)(1) [s]killed nursing services or skilled
7 rehabilitation services must be needed and provided 7 days a week.” 42 C.F.R. § 409.34(a)(1).

8 Finally, Medicare coverage, in general, does not extend to custodial
9 care. 42 U.S.C. § 1395y(a)(9) (“Notwithstanding any other
10 provision of this subchapter, no payment may be made under part A
11 or part B of this subchapter for any expenses incurred for items or
12 services . . . where such expenses are for custodial care.”).
Custodial care is defined in the regulations as “any care that does
not meet the requirements for coverage as SNF care as set forth in
§§ 409.31 through 409.35 of this chapter.” 42 C.F.R. § 411.15(g).

13 United HealthCare, 774 F.Supp.2d at 1020. In this regard, the MAC stated that “any failure to
14 participate [in therapy] of any frequency or significance, whether based on mere refusal or on a
15 legitimate medical basis, will require discharge from SNF care.” (AR at 6.)

16 Here, Bonham was authorized for SNF services to receive intravenous antibiotics and
17 rehabilitation following left foot surgery. (*Id.* at 126, 241-42.) By July 22, 2011, Bonham had
18 received her intravenous antibiotics. Moreover, by July 22, 2011, Bonham had not been
19 receiving rehabilitation, in the form of physical and occupation therapy, on a daily basis.

20 For the reasons stated above, the court finds that the MAC’s decision was supported by
21 substantial evidence and that the agency’s interpretation of its own regulations was not plainly
22 erroneous or inconsistent.

23 CONCLUSION

24 Having found no error, the court finds that plaintiff is not entitled to relief with respect to
25 its claim.

26 Accordingly, IT IS HEREBY ORDERED that:

- 27 1. Plaintiff’s motion for summary judgment (ECF No. 24) is denied;

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2. The final decision of the Secretary is affirmed; and
3. The Clerk of the Court is directed to enter judgment for the defendant.

Dated: March 10, 2017



DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

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