

Office of Hearings and Appeals
3601 C Street, Suite 1322
P. O. Box 240249
Anchorage, AK 99524-0249
Ph: (907)-334-2239
Fax: (907)-334-2285

**STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
OFFICE OF HEARINGS AND APPEALS**

In the Matter of)
)
 [REDACTED],) OHA Case No. 08-FH-628
)
 Claimant.) Div. Case No. [REDACTED]
)
 _____)

FAIR HEARING DECISION

STATEMENT OF THE CASE

[REDACTED] (Claimant) is a recipient of Medicaid Personal Care Assistant (PCA) services. On August 14, 2008, the Division of Senior and Disabilities Services (Division) notified the Claimant her PCA services hours were reduced to 28.25 hours per week effective August 29, 2008 through August 7, 2009.¹ (Ex. D, p. 1) The Claimant requested a fair hearing on September 2, 2008. (Ex. C) This office has jurisdiction pursuant to 7 AAC 43.791(c) and 7 AAC 49.010.

The hearing was held on November 3, 2008.

The Claimant appeared telephonically for the hearing, and represented herself. [REDACTED], the Claimant's care coordinator, appeared telephonically, helped represent the Claimant, and testified on her behalf. [REDACTED], the Claimant's PCA, appeared telephonically and testified on her behalf.

[REDACTED], a Health Program Manager III employed with the Division of Health Care Services, appeared in person and represented the Division. [REDACTED], a registered nurse employed with the Division, appeared telephonically and testified on the Division's behalf.

ISSUES

The Claimant's PCA service hours as assessed on June 20, 2008, were reduced overall from the PCA service hours allowed her in 2007. The Claimant, however, only objected

¹ The parties did not indicate how many PCA service hours had been previously provided to the Claimant.

to the time allowed in her June 20, 2008 PCA service plan for the following categories of PCA services: body mobility, transfers, medication and vital signs, and toileting.

The issues are therefore:

1. Was the Division correct when it provided the Claimant with Body Mobility positioning assistance of 56 minutes per week (2 times per day, 4 minutes each time, 7 days per week)?
2. Was the Division correct when it provided the Claimant with Transfer assistance of 140 minutes per week (5 times per day, 4 minutes each time, 7 days per week)?
3. Was the Division correct when it provided the Claimant with no Medication and vital sign testing assistance?
4. Was the Division correct when it provided the Claimant with Toileting assistance of 70 minutes per week (2 times per day, 5 minutes each time, 7 days per week)?

FINDINGS OF FACT

1. The Claimant is a [REDACTED] year old woman (date of birth [REDACTED]). (Ex. E, p. 1) Her health conditions include diabetes, myocardial infarction, "Achilles pain, knee pain, [short term memory] loss, hypothyroidism, obesity, arthritis, depression, [coronary artery disease], anxiety, and Hypercholesterolemia." *Id.* She is 5'8" tall and weighs 430 pounds. (Ex. E, p. 8)

2. [REDACTED] is a registered nurse employed by the Division. She visited the Claimant in her home on June 20, 2008. The purpose of her visit was to assess the Claimant's continued need for PCA services. The Claimant, her son, her care coordinator [REDACTED], and her PCA [REDACTED], were present for the June 20, 2008 assessment. (Ex. E, p. 1)

3. On June 20, 2008, Ms. [REDACTED] prepared a written assessment of the Claimant's needs for PCA services. Her written assessment, the 2008 PCA service plan, and testimony regarding her June 20, 2008 meeting with the Claimant, the Claimant's son, Ms. [REDACTED], and Ms. [REDACTED] contain the following:

- a. She took the 2007 PCA service plan with her to the Claimant's June 20, 2008 assessment meeting. ([REDACTED] testimony) She went over it line by line during the June 20, 2008 assessment meeting. *Id.*
- b. The 2007 PCA service plan did not provide for body mobility assistance. (Todd testimony)
- c. Ms. [REDACTED] asked if the Claimant required assistance positioning herself in bed. The Claimant's PCA told Ms. [REDACTED] the Claimant required help

positioning in bed twice daily. As a result, Ms. [REDACTED] added body mobility positioning assistance of 2 times per day, 4 minutes each time, 7 days per week to the Claimant's June 20, 2008 PCA service plan. ([REDACTED] testimony; Ex. E, pp. 3, 17)

- d. The Claimant requires assistance in her transfers from her bed and her computer chair. She does not require assistance in sitting down at her computer chair, merely in transferring up from her computer chair. She has a lift recliner, and does not need assistance in her transfers to/from the lift recliner. Ms. [REDACTED] observed the Claimant's transfers. The June 20, 2008 PCA service plan provided the Claimant with transfer assistance 5 times per day, 4 minutes each time, 7 days per week. ([REDACTED] testimony, Ex. E, pp. 3, 17)
 - e. The Claimant told Ms. [REDACTED] that she could take her own medicines. ([REDACTED] testimony) The written assessment states that the Claimant needs assistance with her BiPap application, that she can administer her own MTX injections, and that she can check her own blood sugar levels. (Ex. E, p. 2)
 - f. The Claimant's 2007 service plan provided the Claimant with toileting assistance 4 times per day. ([REDACTED] testimony) Ms. [REDACTED] observed the Claimant go to and from the bathroom herself and asked the Claimant if she still required toileting assistance, and the Claimant told her that she needed assistance cleaning herself after a bowel movement, which occurred twice daily. ([REDACTED] testimony; Ex. E, p. 4) Ms. [REDACTED] said the Claimant did not require help transferring to and from the toilet because she has an elevated toilet seat. (Todd testimony; Ex. E, p. 14)
4. Ms. [REDACTED] is the Claimant's care coordinator. She was present at the assessment. She testified as follows:
- a. The Claimant is not disputing the amount of time required for body mobility assistance, although the Claimant's PCA thinks body mobility assistance takes closer to 6 minutes each occurrence rather than the 4 minutes allotted. The issue is one of the number of time the Claimant is allowed body mobility assistance. Ms. [REDACTED] said the Claimant is in and out of bed more than twice daily, and that body mobility assistance was requested for 4 times daily, rather than the 2 times allowed.
 - b. The Claimant does need assistance with her transfers out of the lift chair because she needs to be stabilized after getting up.
 - c. The Claimant received Medication assistance in the 2007 PCA service plan of 2 minutes once per day. This was eliminated in the 2008 PCA service plan. Ms. [REDACTED] said the Claimant cannot take the lid off of her

prescription bottles due to her arthritis. She said the Claimant has medications that were not listed in the PCAT, including Januvia for diabetes, heart medications, and water pills. She further said most of the Claimant's medications needed to be taken twice a day, and that she required medication assistance twice per day.

5. [REDACTED] is the Claimant's PCA. She was present at the assessment. She testified as follows:

- a. The Claimant is a large woman, who is also stiff. She is difficult to move.
- b. It takes between 6 to 7 minutes to position the Claimant in bed once she has transferred into the bed.
- c. Due to the Claimant's size and stiffness, it is difficult to move her. It takes multiple attempts to get her out of a chair. It can take up to 3 minutes to transfer her.
- d. The Claimant takes water pills and has to go to the bathroom between 5 and 6 times per day. She sometimes requires assistance to get into the bathroom and seating on the toilet, and getting up from the toilet. It depends on how stiff she is on a particular day. It takes between 4 to 5 minutes to transfer her onto and from the toilet. She also requires assistance cleaning herself a minimum of twice per day.

6. The Claimant testified as follows:

- a. Her medical condition has not changed since her last assessment, except that her arthritis is moving into her lower back, which is causing hip pain.
- b. She did not recall telling the assessor how many times she needed help positioning in bed.
- c. She sometimes needs help getting out of her lift chair, depending on how stiff she is.
- d. She did not recall telling the assessor she could take her medications without assistance.
- e. She has days when she needs help getting up from the toilet.
- f. When she was assessed, she was having a good day. She did not think it was fair to base her assessment when she has a good day.

PRINCIPLES OF LAW

This case involves a change in the amount of PCA services the Claimant is authorized to receive. When the Division reduces the amount of benefits, the Division has the burden of proof² by a preponderance of the evidence.³ Conversely, if the Division has increased the amount of assistance for a particular item, and the Claimant feels the increase is not sufficient, the Claimant would have the burden of proof on that particular item.

The PCA program is designed to assist Medicaid recipients with physical assistance with personal care and limited domestic chores in their homes, when the alternative would be placement in a medical or assisted living facility, or loss of the Medicaid recipient's job. 7 AAC 43.750; 7 AAC 43.752.

The allowed PCA services are determined based upon the PCA assessment tool (PCAT) approved by the Division. 7 AAC 43.751. The PCAT is specifically adopted as part of the PCA regulations by reference. 7 AAC 43.751(a).

The PCAT contains a list of maximum times allowed for specified service activities. The times allowed for the service activities involved in this case are as follows:

| <u>Category</u> | <u>Time Allowance</u> |
|-----------------|--------------------------|
| Body Mobility | Up to 5 minutes. |
| Transfer | Up to 5 minutes. |
| Medication | 4 minutes. |
| Toilet Use | 5 to 12 minutes per use. |

(Ex. E, pp. 17 – 19) “These allowances reflect the maximum time normally allowed to accomplish the listed tasks. . . . If these times are not sufficient when considered in light of a consumer’s extraordinary circumstances as identified by the Authorized Agent in the general information section, the Authorized Agent may make an adjustment commensurate to the circumstances.” *PCAT Authorized Service Plan* (Ex. E, p. 20)

ANALYSIS

The issues in this case are whether the Division was correct in its allotment of time for the Claimant in four specific activities of daily living: bed mobility, transfers, medication assistance, and toileting. Each will be addressed below.

² “Ordinarily the party seeking a change in the status quo has the burden of proof.” *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985)

³ Preponderance of the evidence is the normal standard of proof in an administrative proceeding. *Amerada Hess Pipeline v. Alaska Public Utilities Comm'n*, 711 P.2d 1170, n. 14 at 1179 (Alaska 1986). Preponderance of the evidence is defined as “[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black’s Law Dictionary 1064 (5th Ed. 1979)

It should first be noted this case requires a credibility determination. The nurse assessor was very direct, forthright, and not evasive. She stated in her testimony she took the Claimant's 2007 PCA assessment, went over it line by line, and that her assessment was based upon her visual observation of the Claimant as well as statements made by the Claimant, her care coordinator, and her PCA.

In contrast, the Claimant, the care coordinator, and her PCA slightly contradicted each other in their testimony, provided self serving testimony, and the Claimant had a lack of recollection on specific items. It should also be noted that the Claimant explained her functionality on the day of the assessment as it having been a good day. Overall, the nurse assessor was more credible than the Claimant, her care coordinator, or her PCA.

1. Body Mobility

Bed mobility was not provided for in the 2007 PCA service plan. It was added in the 2008 PCA service plan, twice daily, for 4 minutes each occurrence, 7 days per week. Because this is an increase in services, the Claimant has the burden of proof to demonstrate that the increase in body mobility assistance was not adequate.

There are two areas of dispute here. The first is the amount of times per day body mobility assistance is needed. The assessor said she asked how many times the Claimant needed help daily positioning herself in bed, and that the PCA told her twice daily. At hearing, the care coordinator, not the PCA, said the Claimant needed help 4 times daily. As is noted above, the assessor was credible. Her testimony on this point is accepted. The Claimant is found to require bed mobility assistance twice daily.

The second area of dispute is the amount of time required for each event of body mobility assistance. At hearing, the care coordinator said that 4 minutes, the amount of time allotted by the assessor, was sufficient time. The PCA contradicted her and said the Claimant required 6 to 7 minutes. There was no showing the Claimant had extraordinary needs in the category, to justify going above the 5 minute benchmark set out in the PCAT. *See PCAT Authorized Service Plan* (Ex. E, pp. 17, 20) The 4 minute time amount as allotted by the assessor is found to be adequate.

The Claimant did not meet her burden of proof on this issue. Bed mobility assistance shall remain at the level set forth in the 2008 PCA service plan of 2 times per day, 4 minutes each time, 7 days per week.

2. Transfers

The 2008 PCA service plan provided for 5 daily transfers with 4 minutes allowed per transfer. The 2007 PCA service plan was not introduced into evidence, nor was there any testimony as to whether the 2008 PCA service plan transfer allotment was an increase or a decrease. Because the nurse assessor made a point of stating where an increase in

benefits had occurred (body mobility), by inference this was a decrease. The Division would therefore have the burden of proof on this item.

The only testimony on the amount of time required for a transfer came from the Claimant's PCA, who said a transfer took 3 minutes. Because this was less than the 4 minutes allowed, the 4 minutes provided per transfer is found to be sufficient.

The dispute comes with regard to the number of daily transfers allowed. Although no testimony was specifically presented on the number of transfers required, the Claimant said she sometimes needed help getting out of the lift chair. The care coordinator said the Claimant needed to be stabilized after getting out of her lift chair.

On the other hand, the assessor observed the Claimant to transfer in and out of her lift chair. She also said the Claimant did not need assistance in sitting down at her computer chair, but did need assistance in rising from the computer chair.

The Claimant did not deny the assessor's observation, but just explained it as her having a good day. The assessor can only complete a PCA service plan based upon the assessment. The credible evidence, consisting of the assessor's testimony and her contemporaneously written assessment, show the Claimant was capable of sitting in and getting up from her lift chair without assistance, and needed assistance getting up from her computer chair – when the assessment was performed. The Claimant did not otherwise challenge the amount of transfers allowed per day.

The Division met its burden of proof on this issue. Transfers shall remain at the level set forth in the 2008 PCA service plan of 5 times per day, 4 minutes each time, 7 days per week.

3. Medication

The 2008 PCA service plan did not allow the Claimant any time for Medication assistance. The Claimant's care coordinator's undisputed testimony was that the 2007 PCA service plan allowed the Claimant Medication assistance on a daily basis, once per day for 2 minutes. Because the 2008 PCA service plan provides for a decrease in Medication assistance, the Division has the burden of proof on this issue.

The assessor testified the Claimant told her she did not need assistance in taking her medication. The Claimant does not recall that conversation. The care coordinator said the Claimant takes medications twice a day, including several medications not listed on her assessment. She further stated that the Claimant, due to her arthritis, cannot take the lids off of her medications, and needs assistance twice per day for this service. No evidence was presented that the Claimant needed any assistance in the actual act of taking the medications. No evidence was presented that the Claimant uses prepackaged medisets.

The care coordinator was credible on this point. Because of the amount of medications involved, and the Claimant's arthritic inability to open medication bottles herself, the

Claimant's 2008 PCA service plan is to be amended to include Medication assistance twice per day, for one minute each time, 7 days per week. This is the same total amount as provided in the 2007 PCA service plan.

4. Toileting

The 2007 PCA service plan provides the Claimant with toileting assistance 4 times per day 7 days per week.⁴ The 2008 PCA service plan provides the Claimant with toileting assistance 2 times per day for 5 minutes each occurrence 7 days per week. Because this is a decrease in services, the Division has the burden of proof.

The assessor stated the allotted toileting assistance was due to the Claimant needing assistance cleansing herself twice per day after a bowel movement. There was no dispute on this issue or in the amount of time involved.

The dispute involved the Claimant's toilet use for other than a bowel movement. The Claimant has a raised toilet seat. The assessor observed the Claimant go into and out from the bathroom without requiring assistance. The Claimant told the assessor she needed toileting assistance in cleansing herself.

The Claimant did not dispute the assessor's statement and observation; her response was that the day of the assessment was a good day. She stated sometimes she is stiff and and that there are days when she needs help in getting off of the toilet. The Claimant's PCA stated the Claimant takes a number of water pills and uses the bathroom frequently, and that she needs assistance getting on and off of the toilet.

Given the facts that the Claimant has a raised toilet seat, that the assessor observed the Claimant go to and from the bathroom without assistance, and the Claimant's statement to the assessor that she needed toileting assistance twice per day for cleansing purposes, the weight of the credible evidence demonstrates the Division has met its burden of proof on this issue. The fact the Claimant may have bad days when she requires more assistance than normal does not negate the validity of the assessment. Toileting assistance shall remain at the level set forth in the 2008 PCA service plan of 2 times per day, 4 minutes each time, 7 days per week.

CONCLUSIONS OF LAW

1. The Division was correct when it provided the Claimant with Body Mobility positioning assistance of 56 minutes per week (2 times per day, 4 minutes each time, 7 days per week).
2. The Division was correct when it provided the Claimant with Transfer assistance of 140 minutes per week (5 times per day, 4 minutes each time, 7 days per week).

⁴ No evidence was presented as to the amount of time allotted for each event of toileting assistance in the 2007 plan.

3. The Division was not correct when it provided the Claimant with no Medication and vital sign testing assistance in its 2008 PCA service plan. The 2008 PCA service plan is changed to allow the Claimant Medication assistance twice per day for 1 minute each occurrence, seven days per week, for the purpose of opening her medication bottles.
4. The Division was correct when it provided the Claimant with Toileting Assistance of 70 minutes per week (2 times per day, 5 minutes each time, 7 days per week).

DECISION

The Claimant's 2008 PCA service plan of care is to be revised as reflected in the Conclusions of Law above.

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, The Claimant has the right to appeal by requesting a review by the Director. To do this, send a written request directly to:

Director of the Division of Senior and Disabilities Services
Department of Health and Social Services
PO Box 110680
Juneau, AK 99811-0680

If the Claimant appeals, the request must be sent within 15 days from the date of receipt of this Decision. Filing an appeal with the Director could result in the reversal of this Decision.

DATED this 30th day of December, 2008.

Larry Pederson
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 30th day of December 2008, true and correct copies of the foregoing were sent to:
Claimant. Certified Mail, Return Receipt Requested.
[REDACTED], Hearing Representative
[REDACTED], Director
[REDACTED], Policy & Program Development
Joy Dunkin, Staff Development & Training

Al Levitre, Law Office Assistant I