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

In the Matter of)	
)	
██████████,)	OHA Case No. 11-FH-2029
)	
Claimant.)	Agency No. ██████████
_____)	

FAIR HEARING DECISION

STATEMENT OF THE CASE

Mr. ██████████ (Claimant) was assessed on January 13, 2011 for Personal Care Assistant (PCA) program services through the Senior and Disabilities Services (SDS) Division of the Department of Health and Social Services.¹ (Ex. A, p. 2; Ex. E) On January 13, 2011, Assessor ██████████ completed a PCA Authorized Services Plan. (Ex. F) On January 19, 2011, Claimant was notified that he had been approved to receive 1.5 hours of PCA services per week and was provided a copy of the Consumer Assessment Tool (CAT) (Ex. E) and the Personal Consumer Assessment Tool Authorized Services Plan (Ex. F).² (Ex. A, p. 2; Ex. D). On January 24, 2011, Claimant requested a Fair Hearing because he disagreed with the hours he had been approved to receive. (Ex. C)

This office has jurisdiction pursuant to 7 AAC 125.180(c) and 7 AAC 49.010.

A hearing was begun on May 4, 2011. Claimant attended telephonically, represented himself and testified on his behalf. Mr. ██████████, Project Coordinator for Consumer Direct appeared telephonically and testified on behalf of Claimant. Mr. ██████████, Medical assistance Administrator with the Division, attended the hearing in person, and testified on behalf of the Division. Health Program Managers Ms. ██████████ and Ms. ██████████ appeared telephonically and testified on behalf of the Division. Ms. ██████████, attended telephonically as an observer for the Division. The hearing was continued to June 22, 2011 for Claimant's benefit.

¹ The acronym "PCA" is used routinely to mean Personal Care Assistant and Personal Care Assistance Services Program. (Ex. D, p. 1; *see also* 7 AAC 125.090).

² The acronym PCAT means personal care assessment tool (PCAT). 7 AAC 125.010(a); 7 AAC 125.199(9), (10). The PCAT includes the Consumer Assessment Tool (CAT) and the PCAT Authorized Services Plan. 7 AAC 125.199(11). *See also* 7 AAC 125.020.

On June 22, 2011, Claimant again attended the hearing telephonically and testified in his own behalf. Mr. [REDACTED] also again attended telephonically and testified on behalf of Claimant. In addition, Claimant's caregiver, Ms. [REDACTED], attended telephonically and testified on behalf of Claimant. The Division was represented in person by Mr. [REDACTED] and by Ms. [REDACTED] who testified telephonically on behalf of the Division.

All offered exhibits were admitted. The evidentiary record closed on June 22, 2011.

ISSUE

On January 13, 2011, was the Division correct when it found Claimant eligible for 1.5 hours of Personal Care Assistance services?

FINDINGS OF FACT

The following facts were established by a preponderance of the evidence:

1. Claimant is an unemployed 42 year old single male living in a first floor apartment of a four-plex, by himself, in central Anchorage. (Ex. E, pp. 1, 3; Claimant's testimony) Claimant's apartment consists of a living room, bathroom, kitchen, and two bedrooms. There is carpeting throughout the home except the kitchen and bathroom. ([REDACTED] testimony)
2. Claimant is 5 feet 9 inches tall and weighs 162 pounds. (Ex. E, p. 9) Claimant's father lives in Anchorage and visits him "not often."³ (Ex. E, p. 2; Ex. M, p. 2) Claimant's son lives in the area and visits him "limitedly." (Ex. M, p. 2) Claimant reports his diagnosed health conditions are retinopathy, neuropathy, and gastro paresis. (Ex. E, p. 3) Claimant's doctor reports neuropathy, osteoarthritis and diabetes mellitus 1.⁴ (Ex. E, p. 3)
3. On January 13, 2011, Claimant was assessed to determine if he needed personal care assistance services (PCA). (Ex. E) Claimant's assessment was conducted by the Division of Senior and Disabilities Services (Division) assessor Ms. [REDACTED] h (assessor). (Ex. E, p. 1; Ex. A, p. 2) During the assessment, Claimant was accompanied by Mr. [REDACTED], Program Coordinator for Consumer Direct and Ms. [REDACTED], also of the Consumer Direct agency, and [REDACTED]. (Ex. E, p. 2; Ex. M, p. 1)
4. On January 13, 2011, assessor [REDACTED] applied the Consumer Assessment Tool (CAT) to evaluate Claimant's need for Personal Care Assistant (PCA) services. (Ex. E) Also on January 13, 2011, the assessor concluded Claimant's PCAT Authorized Services Plan. (Ex. F) Claimant was assessed to be eligible for 1.5 hours of PCA services per week. (Ex. F, p. 5; Ex. D)
5. On January 19, 2011, the Division sent Claimant a letter informing him he had been approved for 1.5 hours of PCA services per week as per the service plan it attached to the letter. (Ex. D)

³ During the hearing, Claimant received a telephone call from his father. (Claimant's testimony)

⁴ The assessor noted she questioned Claimant's nutritional choices in light of his uncontrolled diabetes and suggested he consult with a dietitian. (Ex. E, p. 9).

6. Ms. [REDACTED] assessment, as documented on the Consumer Assessment Tool (CAT), noted the following about Claimant's abilities, generally:
- a. He was able to draw a clock and remember one item out of three after five minutes delay. (Ex. E, p. 4)
 - b. He was unable to cross his hands across his chest and stand up. (Ex. E, p. 4)
 - c. He was functionally able to touch his hands over his head and behind his back; he had a strong grip in both hands. (Ex. E, p. 4)
 - d. Claimant uses a cane on his right side because of "intermittent neuropathy in lower limbs mainly" right leg. (Ex. E, p. 4)
 - e. He receives no therapeutic therapies and does not need "hands-on" assistance for mobility or foot care. (Ex. E, p. 5)
 - f. He does not need help with his medications. (Ex. E, p. 12)
 - g. Claimant receives no professional nursing services, treatments, therapies (Ex. E, pp. 13-15)
 - h. Claimant had no cognitive difficulties with the exception that he may experience "some difficulty in new situations only" in relation to daily decision making. (Ex. E, p. 16) Claimant had no indicators of depression, anxiety or sadness. (Ex. E, p. 25)
 - i. Claimant exhibits no problem behaviors. (Ex. E, p. 17) He manifests no problems with mood, loss of interest, sleep disturbances. (Ex. E, p. 25)
 - j. He takes 10 medications and self-administers insulin and glucoscan. (Ex. E, p. 20)
 - k. Claimant's hearing is adequate, he uses no communication devices and is able to make himself understood and understand other. (Ex. E, p. 22)
 - l. Claimant has no nutritional problems in terms of chewing, swallowing, tasting foods, food allergies, needing mechanically altered or therapeutic diet, or of following such a diet. (Ex. E, p. 23)
 - m. He has no difficulties of incontinence, and had no accidents or danger of falling due to unsteady gait or balance when standing. (Ex. E, p. 23)
 - n. Claimant has no special needs in relation to oral or dental health, and skin or feet. (Ex. E, p. 24)
 - o. Claimant does not have a needed bath bench, grab bars, hand-held shower, hospital bed, grabber, and hand-held urinal. (Ex. E, p. 27)
 - p. He has a cane and is independent with its use. (Ex. E, p. 27)

7. Ms. [REDACTED] assessment, as documented on the Consumer Assessment Tool (CAT), noted the following about Claimant's abilities concerning each Activity of Daily Living (ADL):

a. Claimant is independent and needs no physical help or set-up help (a score of zero (0) for both self-performance and for support) for the following:

1. bed mobility and transfers from place to place; (Ex. E, p. 6) ("he sleeps in a sleeping bag on the floor or in a recliner. Full mobility reported. Stated doesn't always need cane but uses it for transfer... depending on fatigue or pain level.)
2. locomotion (Ex. E, p. 7)
3. dressing (Ex. E, p. 8)
4. eating; using the toilet (Ex. E, p. 9)
5. personal hygiene (Ex. E, p. 10)
6. bathing (Ex. E, p. 11)
7. preparing and administering medications (Ex. E, p. 20)
8. hearing, communicating, understanding, or vision (Ex. E, p. 22)
9. remaining continent (Ex. E, p. 23)
10. maintaining his balance (Ex. E, p. 23)

b. Claimant was coded a "3" for his need for intramuscular injection 5-6 days per week in the section "professional nursing services." (Ex. E, p. 13) His self-administered insulin and glucoscan was noted. (Ex. E, p. 20)

c. Claimant was coded with a "0" for his activities of daily living "physical functioning/structural problems." (Ex. E, p. 18-19)

8. Ms. [REDACTED] assessment, as documented on the CAT, noted the following about Claimant's abilities concerning each Instrumental Activities of Daily Living (IADL):

a. Claimant was independent and needed no support in meal preparation, financial management, laundry, and transportation. (Ex. E, p. 26) Claimant was coded 0 in self performance and in support for each of these activities. (Ex. E, p. 26)

b. Claimant was "independent with difficulty" and was provided "physical assistance" in completing light and routine housework and grocery shopping: Claimant was coded a 1 in self performance and a 3 in support for each of these three tasks. (Ex. E, p. 26)

9. On January 18, 2011, the assessor summarized the coded results of the assessment which resulted in a coding of "1" based on the code of "3" he received in "Section A, Nursing Services" due to his daily insulin injection. (Ex. E, p. 29) Claimant was determined not to meet a nursing facility level of care. (Ex. E, p. 29)

10. On the summary assessment of Claimant's eligibility for personal care services, Claimant's scores of "independent with difficulty" (1 in self performance) and "physical assistance provided" (3 in support) for light and routine housework, and grocery shopping, resulted in a score of "1", meaning that he was functionally eligible for Personal Care Assistant Services. (Ex. E, p. 31)

11. On the Personal Care Assessment Tool Authorized Services Plan, the assessor determined Claimant was should receive the following:

Service	Number of times per day	Minutes per time	Days per week	Total minutes per week
Documentation	1	3	1	3
Housework – light	1	45	1	45
Shopping	1	30	1	30
Escort	1	3	1	3
Total				1hr 21 min.*

* This amount apparently was rounded to 1.5 hours total services per week. (Ex. F, p. 5)

12. Claimant supplied documentation in support of his claim he should be determined eligible for more PCA service time. (Exs. G, K, L, N, O) Claimant informed Dr. [REDACTED] and Dr. [REDACTED] that he was asking them to write letters on his behalf for the purpose of obtaining PCA services. (Claimant’s testimony) The medical documentation includes:

a. Dr. [REDACTED], M.D., wrote on February 17, 2011 concerning Claimant’s symptoms and need for additional time, including “he is getting one and a half hours of personal care attendant, and with his disabilities, that should be increased.” (Ex. G, p. 1) On March 31, 2011, Dr. [REDACTED] supplied a copy of Claimant’s handwritten note “advocating for PCA services” and noted, “I have not observed these specific complaints and therefore cannot corroborate them.” (Ex. K, p. 2) Claimant’s handwritten note is dated February 16, 2011. (Ex. K, p. 3)

b. Dr. [REDACTED], D.O. wrote on February 28, 2011 identifying his care of Claimant for “peripheral neuropathy of the lower and upper extremities, lower back pain, and diabetic neuropathy.” (Ex. I, p. 3) Dr. [REDACTED] letter identified medication Claimant is taking. (Ex. I, p. 3) On April 4, 2011, Dr. [REDACTED] Medical Assistant wrote a letter stating the “letter in question is and was only intended to show what medications the patient is taking and why he has been prescribed these medications.” (Ex. N, p. 2)

c. A three page printout of Claimant’s visits to his medical providers between October 5, 2009 through and including February 2, 2011. (Ex. L) This document establishes that during 2010 Claimant was provided medical assistance as follows:⁵

1. Dr. [REDACTED], once during each month of January, May, July, September, November and December;

⁵ Omitted from this recitation are the non-regular medical events identified in Exhibit L as: a visit to a doctor concerning “unspecified hypothyroid” in March 2010; Claimant’s August 2010 emergency department treatment for “drug withdrawal syndrome”; Claimants September 2010 emergency department treatment for “impaired fasting glucose”; Claimant’s emergency treatment in November 2010 for “hypoglycemia”; and Claimant’s emergency treatment in December 2010 for “painful respiration.” (Ex. L) Exhibit O, pertaining to a low blood sugar event on May 12, 2011 (well after the January 13, 2011 assessment) was considered for its indication that Claimant seems to require emergency services periodically as a consequence of his uncontrolled diabetes mellitus resulting in hypoglycemia. (Ex. O).

2. Dr. [REDACTED], once during each month of February, March (twice), May, June, September, October, November, and December;
3. Dr. [REDACTED], chiropractic doctor, once in January, February, June and July, twice in April, and four times in May;
4. Liberty Medical Services (for diabetes related supplies) in December 2009, April 2010, July 2010, August 2010 and November 2010;

13. Claimant supplied written notes produced by Consumer Direct Personal Care, a “Medicaid-approved provider agency,” which describes Claimant’s circumstances. (Ex. M) The notes pertain to the January 13, 2011 assessment attended by [REDACTED], and Claimant. (Ex. M, p. 1) The notes inform the reader that Claimant has trouble with shopping and would like help, takes the bus, manages his own medications, has pain when he moves and dresses. (Ex. M) The notes inform the reader that Claimant is unsteady on his feet and is unable to do housework or laundry because of weakness. (Ex. M)

14. Claimant supplied his letter requesting additional authorized PCA time as follows (Ex. I, p. 2):

Service	Number of times per day	Minutes per time	Days per week	Total minutes per week
Medical escort	-	20	1	20
Outside locomotion for medical escort	-	10	1	10
Dressing	1	5	3	15
Shopping	-	60	1	60
Light housework	-	30	1	30
Laundry	-	30	1	30
Light meals	2	10-15	7	140-210
“Monthly pain medical assistance”	-	45-60	.25	11.25-15
Medication assistance	4	3-15	5	60-300

15. During the hearing, Claimant repeatedly emphasized his need for personal assistance services because his medical condition makes him physically weak and he suffers from the side effects of his pain medications. (Claimant’s testimony)

16. Claimant testified that complications of his diabetes, including neuropathy, results as follows:

- a. A complication he has from diabetes type 1 has resulted in damage to his nerve muscles. This makes him weak and he tires easily with physical activity. For example, doing laundry, dishes, walking, going to the bathroom, or doing chores like cleaning the bathroom, vacuuming, and dusting wears him out. Claimant does his laundry by exiting

his apartment and entering a laundry room through a separate door on the same floor as his apartment.

b. When shopping, he walks slowly so he uses the cart as a walker so he can go faster and it is just as good as using the mobile carts. He struggles to get his shopping items into a cab or a vehicle because he tires easily from lifting the heavy items and walking.

c. Claimant suffers from low blood sugar and has autonomic neuropathy, which means his internal organs do not function properly. Therefore, he cannot eat much at one sitting without getting a blockage, which results in vomiting. He is afraid of vomiting, because then he doesn't know which medications have actually been absorbed by his body, and so he eats small portions.

d. He feels unsafe, especially outside the home, because his blood sugar problem can cause him to pass out suddenly. If someone is with him more often, his fear is diminished. Then he would be able to take more insulin and could eat more if he were less fearful.

e. When he relaxes at night, he feels more pain. He takes valium at night to sleep and oxycodone to help with the "break-through" pain. When he walks, the pain worsens.

f. At the time of the assessment, Claimant was independent but was very slow. Since then, his physical health has gotten worse and his doctors say it will continue to worsen.

g. He goes to his pain doctor about every 3.5 weeks and sees Dr. [REDACTED] about once a month; the appointments generally are one to two weeks apart. He takes the bus or a cab and it takes about 10 minutes to get to Dr. [REDACTED] office. (Ex. M, p. 1) When he sees a doctor he usually also goes to the pharmacy and gets his medications re-filled, because it's a great strain on his body to leave the house and go shopping.

h. Claimant has walked two and one-half blocks to his doctor's office. When he walks there, he has pain from doing so. He also has taken the bus to that office from his house.

i. Claimant would like assistance in preparing his insulin pump and setting up his insulin supplies because his finger tips get numb and he has trouble with the little parts of the machine.

j. On cross-examination, Claimant agreed that he was able to do all of his tasks but stated he needed assistance with heavy items and with task completion.

18. Claimant's PCA, Ms. [REDACTED], testified:

a. She assists Claimant one hour and 15 minutes per week, once a week, and he is always very tired when she sees him.

b. He uses a cane at all times when she sees him.

c. She cleans the kitchen but she cannot see that he has eaten and therefore asks him to confirm he has eaten. She does the dishes.

d. She cleans the bathroom, vacuums, and empties the trash. She never has done his laundry.

e. If he has to do errands, she takes him to the store and to get his medicines.

f. She does not need to give Claimant hands-on physical assistance and never has assisted him with dressing, or undressing.

19. Claimant testified that if he had an additional three (3) hours per week of Personal Care Assistance (PCA) he would be able to get most of his chores done. He is asking for extra help with the instrumental activities of daily living of cleaning, shopping and laundry. In addition, Claimant is seeking assistance setting up his insulin pump and infusion set up because the ends of his fingers are numb and he can't handle the small parts when setting up these items.⁶ He needs help with that once every four to five days. Claimant seeks assistance with transportation. (Claimant's testimony)

20. Ms. [REDACTED], Health Program Manager for the Division, testified, in part:

a. The PCA program does not allow standby or monitoring assistance to help people feel safer;

b. Claimant became eligible for PCA services because his medical condition supported his need for assistance only with his Instrumental Activities of Daily Living (IADL). Claimant's only unmet needs were IADL related housekeeping and shopping.

c. Claimant received three minutes per week of escort assistance because of a "system program logic" technical error and is not actually eligible for escort assistance because he does not have any functional deficit causing him to need an escort. Claimant is capable of self-transportation (Exhibit E, p. 26) and was scored a "0/0" in locomotion, transfers, and walking. Claimant testified he can, and does, rely on family, friends, and public transportation. Although Claimant was provided escort time in his service plan by mistake, the Division would not "take that away."

d. Claimant was eligible for 30 PCA minutes for shopping because he can do some of the shopping he needs, and just needs assistance.

e. Claimant was determined eligible for 45 minutes light housekeeping because he is functionally capable of doing his own cleaning and can spread out the housekeeping tasks throughout the days of the week to accommodate his fatigue. In comparison, 90 minutes is provided for housekeeping for a quadriplegic

⁶ At the hearing it this was referred to as Claimant's categories of "monthly pain medical assistance" and "medication assistance." See Finding of Fact 14.

f. Claimant did not get PCA assistance for preparing light meals because he was independent with meals when assessed and admits to needing small meals. He is not dependent on someone to set up meals for him and there was no reason why he would not be capable of doing own meals.

g. Claimant's desire for "monthly pain medical assistance" and "medication assistance" requested in Exhibit I, page 2, was not given because this appears to be Claimant seeking help with his monthly pain management and insulin pump management. This is not within the scope of the PCA program as per regulation 7 AAC 125.040, because this regulation specifically excludes care and maintenance of intravenous equipment, such as an insulin pump and infusion equipment.

h. If Claimant's request is not related to care and maintenance of intravenous equipment, the maximum time for full medication administration is 4 minutes and his request is excessive. In addition, medication assistance is not appropriate for Claimant because he can walk to get his medication (at home) and because drawing up and injecting insulin is not an activity allowed in the PCA program.

PRINCIPLES OF LAW

In proceedings concerning an initial application, the burden is on the applicant. *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

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). "Where one has the burden of proving asserted facts by a preponderance of the evidence, he must induce a belief in the minds of the [triers of fact] that the asserted facts are probably true." *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 495 (Alaska 2003) (quoting *Saxon v. Harris*, 395 P.2d 71, 72 (Alaska 1964)).

Authority of the Office of Hearings and Appeals

Alaska Regulation 7 AAC 49.170 describes the "[l]imits of the hearing authority" as relates to Fair Hearings. It states:

Except as otherwise specified in applicable federal regulations and 7 AAC 49.160, the role of the hearing authority is limited to the ascertainment of whether the laws, regulations, and policies have been properly applied in the case and whether the computation of the benefit amount, if in dispute, is in accordance with them.

The Personal Care Assistance Program

The purpose of Personal Care Assistance services is:

"to enable an individual...whose needs would otherwise result in placement in a general acute care hospital or nursing facility ... to remain at home or prevent job loss." 7 AAC 125.010.

On August 12, 2009, the Department of Health and Social Services, Division of Senior and Disabilities Services (Division) interpreted the purpose of the Personal Care Assistance program to include eligibility for PCA services if an individual has a particular need for assistance in relation to any single Activity of Daily Living (ADL) or any single Instrumental Activity of Daily Living (IADL). Director's Program Memo of August 12, 2009. (Ex. H) The Division administers its interpretation of regulation 7 AAC 125.010 as authorizing eligibility for PCA services to an individual who receives at minimum a score of "2" in self performance and "2" in physical assistance/support for any single ADL or who receives at minimum a score of "1" in self-performance and "3" in physical assistance/support for any single IADL. (Ex. H)

The determination whether an individual is eligible for PCA services is the result of an assessment conducted using the Personal Care Assessment Tool (PCAT). 7 AAC 125.020. The PCAT consists of two primary parts: 1) a Consumer Assessment Tool (CAT) and 2) a PCAT Authorized Services Plan. 7 AAC 125.020(a)(1), (2); 7 AAC 125.199(11).

An individual may be determined eligible for the Department to pay for personal care services, which are reimbursed by Medicaid. 7 AAC 125.030. An individual may be eligible for "assistance with the recipient's activities of daily living (ADL)" such as physical assistance with basic personal hygiene, bladder and bowel, eating, transferring and moving in a bed or chair. 7 AAC 125.030(a)(1). An individual may be eligible for "assistance with a recipient's instrumental activities of daily living (IADL)" such as light housekeeping, laundering bed linen and clothing, meal planning and preparation, shopping and some additional services. 7 AAC 125.030(a)(2), (3). One additional covered service is "physical assistance with the use and minor maintenance of respiratory equipment and prescribed oxygen." 7 AAC 125.030(a)(3)(D). Also covered is physical assistance with a prescribed walking or exercise plan and assistance with travel to and from routine medical and dental appointments. 7 AAC 125.030(a)(3)(G), (H).

Certain actions are excluded from Personal Care Assistance services⁷ and are identified in Alaska regulation 7 AAC 125.040. Actions for which PCA services are excluded are:

- 1) actions an individual can reasonably perform by himself (7 AAC 125.040(a)(4));
- 2) invasive body procedures, including injections of medications, insertion or removal of catheters, ... medication administration, and care and maintenance of intravenous equipment (7 AAC 125.040(a)(2));
- 3) chore services in the home (7 AAC 125.040(a)(3));
- 4) a task that requires a sterile technique or procedure (7 AAC 125.040(a)(7));
- 5) supervision, monitoring, cueing, social visitation, general monitoring for equipment failure (7 AAC 125.040(a)(11));
- 6) IADL's if another relative, caregiver of the recipient, community or volunteer agency, ... is capable of or responsible for the provision of the IADL services (7AAC 125.040(a)(13)(B));

⁷ The regulation phrases the prohibition as services which are not "reimbursable under Medicaid." 7 AAC 125.040(a)

Alaska Regulation 7 AAC 125.199(7) defines “immediate family member of the recipient” as “a relative of the recipient with a duty to support the recipient under state law.”

Standard of Review

On questions of law involving agency expertise, the Court uses the “reasonable basis” test. *Beers, Inc., v. Robison*, 708 P.2d 65, 68 (Alaska 1985) quoted in the Superior Court case of *Terra Smith v. State of Alaska, Department of Health and Social Services* (3AN-10-12367)(Superior Court appellate review of a Department of Health and Social Services decision).

In *Beers*⁸, the Alaska Supreme Court made clear that when a case does not concern ““statutory interpretation or other analysis of legal relationships about which the courts have specialized knowledge and experience,”” and the courts therefore are “at least as capable of deciding [the] question as an administrative agency,” the “reasonable basis test is applied” in reviewing the agency’s action. *Beers* at 68. The Court followed established precedent that the reasonable basis test is applied when a case involves “administrative expertise as to either complex subject matter or fundamental policy formulations” and cited *Kelly v. Zamarello*, 486 P.2d 906, 916-918 (Alaska 1971). The Court declared that under the reasonable basis standard of review, an agency decision is “upheld where it has substantial support in the record or a reasonable basis in law.” *Beers* at 68.

Duty of Support

Alaska Statute 25.20.030 clearly states that “[e]ach parent is bound to maintain the parent’s children when poor and unable to work to maintain themselves. Each child is bound to maintain the child’s parents in like circumstances.”

ANALYSIS

I. Issue

Claimant requested a Fair Hearing asserting the Division erred in finding him eligible for only 1.5 hours of Personal Care Assistance services. Claimant sought additional time for a) medical escort; b) outside locomotion for medical escort; c) dressing; d) shopping; e) laundry; f) light housework; g) light meals; h) monthly pain medical assistance; i) medication assistance. Therefore, the issue in this case is whether the Division was correct, on January 19, 2011, when it found Claimant eligible for 1.5 hours of Personal Care Assistance services based on the PCAT of January 13, 2011?

II. Burden of Proof, Standard of Proof

In proceedings concerning an initial application, the burden is on the applicant. *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985). Because Claimant is applying for the Medicaid funded Personal Care Assistance services, Claimant has the burden of proving he is eligible for the public assistance he seeks.

⁸ The *Beers* case concerned the validity of a cease and desist order applied to the electrical installation at a small boat harbor because the contractor performing the installation was licensed for outside linework wiring but not inside wiring.

The standard of proof in an administrative proceeding is a “preponderance of the evidence,” unless otherwise stated. *Amerada Hess Pipeline Corp. v. Alaska Public Utilities Com’n*, 711 P.2d 1170, 1179 n. 14 (Alaska 1986). Claimant must prove he is eligible for the services he seeks by a preponderance of the evidence.

III. Standard of Review

A. Purpose of Medicaid PCA services.

The purpose of providing Personal Care Assistance services to individuals is:

“to enable an individual...whose needs would otherwise result in placement in a general acute care hospital or nursing facility ... to remain at home or prevent job loss.” 7 AAC 125.010.

Claimant is unemployed and living at his home. Therefore the purpose of providing PCA services to him can only be to prevent him from being unable to continue living at home and being required by his disabilities to move into a nursing facility or acute care hospital. Accordingly, Claimant, in general, is eligible for only those services which would prevent him from becoming a resident of a nursing facility or acute care hospital.

B. Application of standard of review.

In a case where administrative agency expertise is involved concerning complex subject matter or fundamental policy formulations, the agency’s decision is reviewed to determine whether there is substantial support in the record for its action or a reasonable basis in law. *Kelly v. Zamarello*, 486 P.2d 906, 916-918 (Alaska 1971). This is such a case.

First, the PCAT is a complex tool requiring a trained assessor to complete. Although it includes subjective judgment and discretion, the tool employs numerical coding systems for the evaluation of an individual’s physical and mental functional capacity. In addition, the PCAT “captures” substantial other relevant data about an individual’s circumstances in an effort to evaluate the entire life situation of an individual so that the individual’s need for Personal Care Assistance services can be determined and met.

In this case, the Consumer Assessment Tool (CAT) portion of the PCAT is comprised of 31 pages and numerically evaluates activities of daily living (ADL) and instrumental activities of daily living (IADL), using similar but different numerical systems. Exhibit E. In addition to the numerical evaluation, the evaluation contains brief notes concerning the individual’s particular attributes relative to the process being evaluated. For example, Claimant’s bed mobility was annotated (in part: “Full mobility reported.”), as was his ability to transfer (Stated doesn’t always need cane but uses it for transfer... depending on fatigue or pain level.”)

Second, the PCAT Authorized Services Plan (PCAT), also a portion of the PCAT, consists of 6 pages and includes a breakdown of the number of times per day, amount of time in minutes, number of days per week and total minutes per week for each service an individual has been determined eligible. (Exhibit F) The services plan also includes a brief description of what each service provides.

Therefore, understanding the PCAT requires considerable knowledge which places the review of an issue concerning PCA services within the category of “complex subject matter” subject to the reasonable basis test discussed in *Beers, Inc., v. Robison*, 708 P.2d 65, 68 (Alaska 1985) and in *Kelly v. Zamarello*, 486 P.2d 906, 916-918 (Alaska 1971).

Alaska Fair Hearing regulation 7 AAC 049.170 provides the role of the hearing authority is limited to the ascertainment of whether the laws, regulations, and policies have been properly applied in the case and whether the computation of the benefit amount, if in dispute, is in accordance with them.

Therefore, in this case, a Fair Hearing review of the agency’s action is not intended to substitute the reasoning of the assessor; it is intended to determine whether the agency had substantial factual support for the action it took and, alternatively, to determine if that action has reasonable basis in law and/or the law, regulations and policies were properly applied in the case. 7 AAC 49.170; *Beers, supra, Kelly, supra*.

In this case, there is no dispute that the Division’s action was within the scope of the laws, regulations and policies applicable to the PCA program.⁹ Consequently, the Fair Hearing review of this case is whether the Division had substantial factual support to determine that Claimant was eligible for 1.5 hours or more of PCA services and whether this determination was in accord with laws, regulations, and policies applicable to the PCA services program.

IV. The Division Had Substantial Facts on Which Basis to Find Claimant Eligible for PCA Services for Documentation, Housework, and Shopping.

The undisputed testimony is that Claimant is able to walk independently without hands-on physical assistance and is physically, functionally, independent, using a cane and at times not using a cane. It is undisputed that he does so freely but that he tires with the exertion and suffers pain after exertion. It is undisputed that Claimant is mentally capable of caring for himself and his affairs but suffers some fear in connection with the complications of his diabetes. Claimant described the complications of his diabetes primarily as: fatigue, neuropathy, pain, and inability to digest more than a small amount of food.¹⁰

The Division argued that Claimant’s independence and mobility precluded him from eligibility for services except for assistance with his housework and shopping. It is undisputed Claimant has done his laundry independently, although he finds it difficult and tiring. The Division’s assessor found Claimant eligible for 45 minutes per week for housekeeping services and 30 minutes per week for shopping and none for laundry. The Division supported these amounts of assistance with the fact that Claimant could do some housekeeping and laundry before becoming fatigued and that Claimant had all day in which to perform the tasks and, by implication, could pace himself in accomplishing them. The Division’s Health Program Manager argued that Claimant’s need for assistance with shopping was only with lifting items too heavy for him and therefore 30 minutes per week was adequate assistance.

⁹ But see Section V. concerning PCA escort services.

¹⁰ As noted in Finding of Fact 12, footnote 5, Claimant visited the emergency room in August, September, November and December 2010 in conjunction with hypoglycemia/blood sugar events causing him to pass out or fall. (Ex. L) These events are exceptional events pertaining to Claimant’s regulation of his blood glucose sugar and not to his physical ability to walk. (Ex. L, Ex. O)

The Division's reasoning is substantially supported by the PCAT, the Claimant's testimony, and the Claimant's caregiver's testimony. In addition, facts in the evidentiary record of the hearing support the Division's action. For example, Claimant lives alone in a two bedroom apartment. The bathroom and kitchen are not carpeted. His present caregiver has assisted him with cleaning the bathroom and kitchen, vacuuming, and emptying the trash. A period of 45 minutes is not unreasonable to complete the necessary housekeeping to keep the apartment clean. This is especially so because Claimant physically is able to do such work, albeit he becomes tired by doing it. The award of 45 minutes housekeeping per week amounts to three hours per month to keep the apartment clean. Therefore, applying the reasonable basis test on review of the Division's action, there is substantial support in the evidentiary record, as well as the PCAT, for the Division's award of 45 minutes per week of housekeeping services and not more time.

Similarly, the Division's award of 30 minutes per week for assistance with shopping is supported by substantial facts and is reasonable. Claimant's testimony that he becomes fatigued when shopping and cannot lift certain heavy items into his shopping cart is undisputed. Therefore, Claimant is not unable to shop, he needs assistance only when lifting heavy items. The Division argued that 30 minutes per week was sufficient because Claimant could shop independently, but for the need for assistance with heavy items. The award of 30 minutes per week for shopping totals to two hours of shopping assistance per month. Applying the reasonable basis test, the Division's determination that Claimant was eligible for not more than 30 minutes of shopping assistance is substantially supported and reasonable.

The Division's award of three (3) minutes per week for PCA staff to document his or her work in order to be paid is supported as a requisite appurtenant to Claimant's receipt of PCA services.

V. The Division Did Not Have Reasonable Basis to Find Claimant Eligible for PCA Services for Escort.

PCA program regulation 7 AAC 125.030(a)(2)(H) identifies an additional covered service as including "assistance with travel to and from routine medical and dental appointments." Claimant argued he should be eligible for escort services under this regulation. Claimant seeks 20 minutes per week for "medical escort". (Exhibit I, p. 2) The Division's assessor awarded Claimant three (3) minutes per week for escort to travel to and from routine medical or dental appointments. Exhibit F, p. 5.

The Division's Health Program Manager testified this award of 3 minutes per week of time was due to a mistake and resulted from a "system program logic" technical error. She testified that Claimant is not eligible for escort assistance because he does not have any functional deficit causing him to need an escort. This is because Claimant is capable of self-transportation (Exhibit E, p. 26) and was scored a "0/0" in locomotion, transfers, and walking. The Health Program Manager also testified that although Claimant was provided escort time in his service plan by mistake, the Division would not "take that away."

Claimant's evidence is that he sees Dr. [REDACTED], Dr. [REDACTED] and Dr. [REDACTED] about once a month each. (Exhibit L, Finding of Fact 12) Also, Claimant testified that on occasion he has walked to one doctor's office and on other occasions has taken the bus or other vehicle to his medical appointments. It is undisputed that Claimant is independent in locomotion and is able to walk independently with a cane when fatigued. Claimant's testimony that when he walks to the point of fatigue he suffers pain is undisputed. It is also undisputed that Claimant walked to one of his two primary doctors, two and one-half blocks from his home, and also took public transportation to go to the doctor and did so

independently of assistance. Claimant does not need the physical assistance of a hand-on PCA caregiver to be able to walk or to take transportation to get to his medical appointments.

The Health Program Manager testified that PCA program policies provide that escort services are appropriate for persons who are either mentally incapacitated but sufficiently physically functional to walk or for persons who are unable to ambulate without physical, hands-on assistance. Claimant is neither of these types of persons. Claimant needs help getting to his medical appointments, not because he cannot walk, but because using public transportation or walking to appointments makes him very tired. Therefore, Claimant's physical functioning makes him not eligible for PCA escort services to his medical appointments at all. The Division erred in awarding Claimant 3 minutes of escort time.

The Health Program Manager's reasoning in awarding Claimant three minutes of escort time is not supported by a reasonable interpretation of the law and regulations. Awarding escort time to an individual who is not eligible merely because of a "system logic error" is not authorized by 7 AAC 125.030.

Therefore, the Division's award of escort time is not substantially supported by facts and has no reasonable basis in law¹¹. The Division's award of escort time for this reason is erroneous.¹²

VI. The Division Had Reasonable Basis to Find Claimant Not Eligible for Outside Locomotion, Dressing, Laundry, Light Meals, Monthly Pain Medical Assistance, and Medication Assistance.

As discussed above, Claimant's circumstances are such that he is fully independent with outside locomotion but he feels unsafe because he is afraid of passing out suddenly as a result of his diabetes. Claimant's fears are not bases on which the Division has lawful authority to find him eligible for PCA services; a PCA regulation excludes PCA services such as supervision, monitoring and cueing. 7 AAC 125.040(a)(11). Therefore the Division did not err in not finding Claimant eligible for locomotion assistance.

Claimant can and does dress himself, prepare his own meals, and do his own laundry. Claimant argues that he is slow and it is painful for him to dress, prepare meals and do laundry. Claimant testified he did his laundry by exiting his apartment and entering a laundry room through a separate door on the same floor as his apartment. Claimant has all day in which to do his laundry and shares the laundry facilities with only three other apartments. Claimant does not suffer from any form of incontinence. Claimant is not employed. There is substantial support in the record that Claimant can arrange his laundry work to complete it independently, without PCA services.

The Division's CAT assessment amply documented that Claimant was independent in doing these tasks and Claimant's undisputed testimony was that he could do them but it was slow and painful for him. The Division's assessor determined that Claimant was not functionally impaired to the point that he needed PCA services for dressing, meal preparation or laundry.

¹² As shown in Finding of Fact 11, the Division's award of a total of 1.5 hours of PCA services does not agree with the total minutes awarded (1 hour 21 minutes). This discrepancy is unexplained in the record. If due to rounding, the reduction of Claimant's PCA service time by 3 minutes for escort services may not result in any diminution of the total time. The Division will need to correct Claimant's total time according to this Decision.

PCA services are for persons who cannot do the tasks and consequently would have to live in a nursing facility because they cannot do them. 7 AAC 125.010(a). Accordingly, the Division was correct to find Claimant not eligible for PCA services for these tasks because he can do them. Therefore the Division has met the reasonable basis test that Claimant is not eligible for PCA services for doing laundry and Claimant has failed to provide a preponderance of the evidence that he should have received PCA services for doing laundry, dressing or meal preparation.

Also, Claimant seeks PCA services for monthly pain medical assistance and medication assistance. At the hearing, Claimant testified his fingertips are sometimes numb and he needs assistance in preparing his insulin pump and infusion set up. The Division's Health Program Manager testified that it cannot award PCA services for this purpose according to Alaska regulation 7 AAC 125.040. This regulation expressly excludes medication administration and maintenance of intravenous equipment. 7 AAC 125.040(a)(2).

However, PCA regulation 7 AAC 125.030(a)(3)(B) provides that PCA services can provide "physical assistance with setup for diabetic testing and documentation." Claimant did not supply the preponderance of the evidence sufficient to overcome the Division's Health Care Manager's testimony that Claimant sought PCA services for his insulin pump and infusion set up and not for "diabetic testing and documentation." Therefore, not only did Claimant not meet his burden of proof but also the Division had reasonable basis in law for denying Claimant PCA services for the preparation of his equipment pertaining to the intravenous injection of insulin.

VII. Conclusion.

The purpose of providing PCA services to an individual is to enable him or her to live at home instead of a nursing facility or acute care hospital. 7 AAC 125.010. Claimant seeks additional PCA services to enable him to live more comfortably, to avoid or minimize his fatigue and pain, and to facilitate his daily life but provided no evidence that without additional PCA services he would have to live in a nursing facility or acute care hospital. Claimant is able to care for himself independently, albeit he is slow in movement and suffers from pain and the effects of pain medication.

The Division's determination that Claimant is eligible for 1.5 hours of PCA services for shopping, housework and documentation was substantially supported by the facts concerning Claimant's circumstances at the time of assessment on January 13, 2011, and results from a reasonable application of the law. Claimant has not met his burden of proving by a preponderance of the evidence that he is eligible for additional PCA services or that but for receipt of the services he seeks he would be required to live in a nursing facility or acute care hospital.¹³

¹³ Claimant has a father and a son living in Anchorage, each of whom visit and contact him. Finding of Fact 2. According to regulation 7 AAC 125.040(a)(13)(B) and 7 AAC 125.199(7), PCA services for IADL's are not allowed to an individual who has a relative "capable of or responsible for the provision of the IADL service." A relative of the recipient is one "with a duty to support the recipient under state law. 7 AAC 125.199(7)

Alaska Statute 25.20.030 clearly states that "[e]ach parent is bound to maintain the parent's children when poor and unable to work to maintain themselves. Each child is bound to maintain the child's parents in like circumstances." Therefore, Claimant's father and son, each, have a legal duty to support Claimant and to provide for his IADL needs as provided by 7 AAC 125.040(a)(13)(B).

Although the Division had substantial facts to support its determination that Claimant was physically eligible for PCA services, it may not have had reasonable basis in law (under 7 AAC 125.040(a)(13)(B) and 7 AAC 125.199(7)) to award

CONCLUSIONS OF LAW

1. Claimant did not prove by a preponderance of the evidence that he is eligible to receive more than 1.5 hours of PCA services for assistance with a) medical escort; b) outside locomotion for medical escort; c) dressing; d) shopping; e) laundry; f) light housework; g) light meals; h) monthly pain medical assistance; i) medication assistance; and j) documentation. 7 AAC 125.030.

DECISION

On January 19, 2011, the Division was correct when it found Claimant eligible for 1.5 hours of PCA services based on the PCAT assessment of January 13, 2011.

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. 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. 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


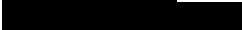
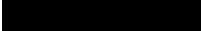
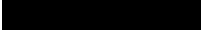
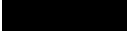
Dated August 18, 2011.

/signed/
Claire Steffens
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on August 18, 2011 true and correct copies of the foregoing were sent to:

Claimant, Certified Mail, Return Receipt Requested.
and to other listed persons (via e-mail), on August 19, 2011 as follows:

, Hearing Representative
, Director, DHCS
, Chief, Policy & Program Dev.
, Eligibility Technician I
, Staff Development & Training

/signed/

J. Albert Levitre, Jr., Law Office Assistant I

Claimant PCA services solely for IADL's. This issue was not raised by the Division during the Fair Hearing. Therefore, this Decision does not reach a conclusion whether operation of AS 25.20.030 results in a finding that the Division erred in awarding Claimant 1.5 hours of PCA services on January 19, 2011.

