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

In the Matter of:	)	
	)	
E O. D	)	OAH No. 14-0565-MDS
	)	Agency No.

DECISION

I. Introduction

E O. D has received Medicare Choice Waiver services and personal care assistance since 2011. He was reassessed in 2014. The Division of Senior and Disability Services determined that he was no longer eligible for Choice Waiver services, and Mr. D appealed.

The assigned administrative law judge conducted a telephonic hearing on October 31, 2014. Mr. D participated and testified and was assisted by his care coordinator, M J. Mr. D and his wife testified, as did Ms. J. Victoria Cobo represented the division. Marianne Sullivan, R.N., who conducted assessments in 2012-2014, testified on behalf of the division.

II. Facts

A. Background Information

E O. D is 55.[1] Mr. D lives with his wife, K D, in a single level residence in Alaska.[2] Mr. D's primary diagnosis is multiple sclerosis (MS).[3] He had a first episode of MS in 2000, a second, more severe episode in 2009, and a third episode in 2011.[4] Mr. D was assessed in 2011 by Laurie Vandenburg, R.N., and was found eligible for Choice Waiver and PCA services.[5]

Mr. D was reassessed by Marianne Sullivan, R.N., in 2014. At that time, he had a secondary diagnosis of seizure disorder,[6] and additional current diagnoses of radiculopathy,[7] incontinence,[8] and tremor,[9] and prior diagnoses of PLMD (periodic limb movement disorder),[10]

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1 Ex. E, p. 1.

2 Ex. E, p. 1.

3 Ex. F, pp. 63-66 (2/6/14, 11/7/12, 3/7/11, 2/16/11; J. C M.D.).

4 2/22/2011, p. 3. *See* Ex. F, p. 4 (first attack in 2001, untreated; second attack in 2009).

5 2/22/2011.

6 Ex. F, pp. 63, 66 (2/6/14, 11/7/12; J. C M.D.).

7 Ex. F, pp. 63, 66 (2/6/14, 11/7/12; J. C M.D.). Radiculopathy has been defined as "disease of the nerve roots." Dorland's Illustrated Medical Dictionary at 1405 (27th ed. 1988) (hereinafter, "Dorland's"). *See also*, Taber's Cyclopedic Medical Dictionary at 1665 (17th ed. 1993) (hereinafter, "Taber's") ("Any diseased condition of the roots of spinal nerves."). R.N. Sullivan, citing a November 7, 2012 diagnosis by Dr. C, listed a diagnosis of neuralgia. Ex. E, p. 3. However, the verification of diagnosis by Dr. C on that date does contain that diagnosis. *See* Ex. F, p. 66. Neuralgia has been defined as "paroxysmal pain which extends along the course of one or more nerves." Dorland's at 1126. *See also*, Taber's at 1294 ("Severe sharp pain along the course of a nerve.").

8 Ex. F, pp. 63, 66 (2/6/14, 11/7/12; J. C M.D.). R.N. Sullivan noted a diagnosis of urinary incontinence. *See* Ex. E, p. 3 (11/7/12, J. C).

9 Ex. F, pp. 63, 66 (2/6/14, 11/7/12; J. C, M.D.). Tremor has been defined as "an involuntary trembling or quivering." Dorland's at 1748. *See also*, Taber's at 2032 ("A quivering, esp. continuous quivering of a continuous

ataxia,[11] hypertension (high blood pressure),[12] and emphysema/COPD.[13] R.N. Sullivan noted in the 2014 assessment a diagnosis of convulsions,[14] and in a prior assessment, retinopathy,[15] neuropathy[16] and traumatic brain injury.[17]

Mr. D's history includes multiple fractures on at least a half dozen occasions as a child and young adult, including, in 1967-1984, to both ankles, both femurs, fingers on both hands, his jaw, pelvis, left and right ribs, and skull.[18] Diagnostic imaging shows that Mr. D has foraminal and canal stenosis, with neuropathy at both ulnar nerves, resulting in frequent severe migraine headaches.[19] His MS is stable, with variable symptoms which may include loss of vision, balance or equilibrium difficulty, pain, nausea, bladder incontinence, and muscle spasms.[20] Mr. D has some short term memory issues, but is generally well oriented. Mr. D's wife has his power of attorney and assists him in making decisions,[21] but he is capable of making decisions for himself and he does not require professional nursing assistance.

When Mr. D was assessed in 2011, his bathroom had a hand held shower but lacked a bath bench or grab bars.[22] He did not have a recliner-lift chair, gait belt, lifeline, or wheelchair.[23] He had just obtained a walker for use in locomotion.[24] He was subject to frequent falls.[25] He was taking five different medications for his ailments.[26]

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nature" or "An involuntary movement of a part or parts of the body resulting from alternate contractions of opposing muscles.").

[10] Ex. F, pp. 64 (2/16/11, 3/7/11; J. C, M.D.). PLMD is the excessive involuntary contraction of limbs while sleeping. *See* ICD-9 327.51.

[11] Ex. F, pp. 64 (2/16/11, 3/7/11; J. C, M.D.). Ataxia has been defined as "failure of muscular coordination; irregularity of muscular action." Dorland's at 160-161 (27th ed. 1988). *See also*, Taber's at 166 ("Defective muscular coordination, esp. that manifested when voluntary muscular movements are attempted."). *See* ICD-9 781.3.

[12] Ex. F, pp. 64, 65 (2/16/11, 3/7/11; J. C).

[13] Ex. F, pp. 64, 65 (2/16/11, 3/7/11; J. C). COPD is an acronym for chronic obstructive pulmonary disease. Dorland's at 379; Taber's at 448. It is a progressive condition of the lungs that results in shortness of breath. *See* http://www.nhlbi.nih.gov/health/health-topics/topics/copd/ (accessed November 24, 2014). Emphysema is one such condition. *See* http://www.nlm.nih.gov/medlineplus/emphysema.html (accessed November 24, 2014).

[14] Ex. E, p. 3. The note refers to a November 7, 2012 diagnosis by Dr. C. However, the November 7, 2012 verification of diagnosis submitted by Dr. C does not include that diagnosis. *See* Ex. F, p. 66.

[15] 1/20/12, p. 3.

[16] 1/20/12, p. 3.

[17] 1/20/12, p. 21.

[18] Ex. F, p. 6.

[19] Ex. F, pp. 3, 9 (5/23/13, Dr. T).

[20] *See* Ex. F, p. 4.

[21] E. D testimony.

[22] 2/22/11, p. 27.

[23] 2/22/11, p. 27.

[24] 2/22/2011, pp. 7, 27.

[25] 2/22/11, pp. 7, 8, 11, 23.

[26] 2/22/2011, p. 20. Copzxone is prescribed for MS.

By 2013, Mr. D obtained a recliner-lift chair with a seatbelt, a wheelchair, and a lifeline,[27] and his bathroom was equipped with a bath bench and grab bars.[28] At the time of his assessment in 2014, he had added a gait belt and a commode.[29] He continued to be susceptible to falls,[30] but fell only about once a week, not as frequently as previously.[31] His list of medications had expanded to 16, including medications for MS, mood stabilization, muscle spasms, hypertension, pain, nausea, constipation, incontinence and migraine headaches.[32]

Mr. D fatigues easily. His seizure disorder results in frequent "pausing" episodes, in which he freezes in place and is nonresponsive, but does not (when standing) fall.[33] He has limited range of motion in his lower extremities and his balance is poor. He can turn himself in bed, sometimes with assistance from his wife.[34] He requires weight bearing physical assistance at least once or twice a week for transfers, toileting, dressing and bathing.[35]

Mr. D began seeing a physical therapist in January, 2014. He was evaluated on January 8, and his lower extremity functional scale rating was 23 out of 80.[36] The therapist's plan of care was for treatment two or three times per week for 10-12 weeks, with the goal of reaching a score of 37 out of 80 on the lower extremity functional scale.[37] Mr. D began treatment on January 9 and visited the therapist eleven times in the ensuing four weeks ending February 5.[38] Over that time, Mr. D progressed, gaining in confidence and stability while walking and standing.[39] However, his therapist continued to provide stand by assistance during gait treatment, and occasional contact guard assistance during exercises.[40] At the end of January, his therapist revised his plan of care to provide treatment one or two times per week, to continue for another six to eight weeks.[41]

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27 1/20/12, p. 27; 3/1/13, pp. 4, 6 ("Reports Care Coordinator purchased airplane style safety strap for lift recliner to prevent from falling out of chair.").

28 1/20/12, p. 27.

29 Ex. E, p. 27.

30 Ex. E, p. 23. *See also* 3/1/13, p. 3.

31 *See, e.g.*, Ex. F, p. 3 (5/23/13, Dr. T: "There have been no recent falls"); J. D testimony.

32 *See* 1/20/12, p. 20; 3/1/13, p. 20; Ex. E, p. 20.

33 M. J testimony. *See also* Ex. F, pp. 19, 32.

34 E. D testimony (0:39).

35 *See* Ex. E, p. 18.

36 Ex. F, p. 47.

37 Ex. E, p. 48.

38 *See* Ex. E, pp. 52-58.

39 *See* Ex. E, p. 50. Ms. J testified that on bad days, Mr. D was unable to participate in physical therapy. M. J testimony (0:44). However, nothing in the therapist's notes indicates a failure to participate. *See* Ex. F, pp. 51-58.

40 *See* Ex. E, p. 50.

41 Ex. F, p. 50.

III. Discussion

A. Overview of the Choice Waiver Program

The purpose of the Choice Waiver program is to enable eligible persons to choose to receive home and community-based waiver services, such as help with household chores[42] and respite for unpaid caregivers,[43] as an alternative to institutional care.[44] An adult with a physical disability may be found eligible to receive services under the Choice Waiver program if he requires the level of care that is provided in a nursing facility.[45]

The division determines whether an applicant requires nursing facility level of care services based on the results of an assessment using the department's Consumer Assessment Tool (CAT), a thirty-one page form devised for that purpose.[46] One section of the CAT covers the individual's physical abilities with respect to specified self-care tasks (activities of daily living, or ADLs), such as getting in and out of bed, moving about, dressing, eating, bathing, using a toilet, and grooming.[47] Individuals are given a score reflecting their ability to perform these activities (self-performance). A score of zero indicates the individual performs the activity independently. Increasing inability to perform and need for assistance result in progressively higher scores of one to four.[48]

A person may be considered eligible for Choice Waiver services based on a need for professional nursing services,[49] or therapy at least five times a week.[50] Mr. D does not contend that he meets either of those conditions. However, there are two other pathways that might be

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42 7 AAC 130.245.

43 7 AAC 130.280.

44 *See* 7 AAC 130.200; www.dhss.alaska.gov/dsds/Documents/pdfs/SDS_MedWaiverBrochure.pdf (accessed October 17, 2103).

45 7 AAC 130.205(d)(4)(B).

46 7 AAC 130.215(4).

47 *See* Ex. E, pp. 6-12, 18-19. The CAT is also used for purposes of compensation for personal care assistance provided under the Medicaid program. *See* 7 AAC 125.030(b)(1)-(8). The CAT terminology does not in every case precisely track the regulatory language used to describe ADLs. For one example, the ADL of "body mobility" concerns how a nonambulatory person positions or turns in a bed or a chair, while the CAT uses the term "bed mobility", omits any reference to a chair, and includes ambulatory persons. *Compare*, 7 AAC 125.030(b)(1), *with* Ex. E, p. 6. For another, for the ADL of "toileting", the CAT expressly includes how the recipient "adjusts clothes", and the regulation does not mention that action. *See* In Re V.W. at *2, OAH No. 12-0957-MDS (Commissioner of Health and Social Services 2013); *compare* 7 AAC 125.030(b)(6) *with* Ex. E, p. 9. Regardless of these differences, it is the CAT, not the regulations at 7 AAC 125.030(b)(1)(8), that governs eligibility for the Choice Waiver program.

48 A score of five indicates verbal assistance is provided; a score of eight indicates the activity did not occur within the past seven days.

49 Ex. E, p. 29 (NF. 1(a)-(c)). *See* Ex. E, pp. 13-14 (A(1)-(10), (13)).

50 Ex. E, p. 29 (NF.1 (d)). *See* Ex. E, p. 14 (A(11)-(12)).

open to him.[51] Mr. D will be considered eligible if: (1) he scores three or higher on at least three of five specified ADLs;[52] or (2) he scores two or higher on at least two of those ADLs[53] and, in addition,[54] receives physical therapy three or four times a week.[55] To terminate Mr. D's Choice Waiver services, the division must prove that neither of these alternative pathways to eligibility is open to him.

B. Mr. D Is Ineligible for Choice Waiver Services

1. Mr. D Does Not Need Extensive Assistance for Specified ADLs

A person may eligible for Choice Waiver services if he receives a score of three or higher on at least three of five specified ADLs: bed mobility, transfers, locomotion, eating and toileting.[56] A score of two indicates a person requires limited assistance to perform an ADL, and a score of three indicates a need for extensive assistance.

The CAT describes limited assistance as:

> Person highly involved in activity; received physical help in guided maneuvering of limbs, or other nonweight-bearing assistance 3+ times – or Limited assistance (as just described) plus weight-bearing 1 or 2 times during last 7 days.[57]

Extensive assistance is described as:

> While person performed part of activity, over last 7-day period, help of following type(s) provided 3 or more times:
> Weight-bearing support
> Full staff/caregiver performance during part (but not all) of last 7 days.[58]

As may be seen, under these definitions a person who needs weight bearing assistance may be considered to require limited assistance or extensive assistance. Under the CAT, the two levels are distinguished depending on the frequency of the need for weight-bearing assistance: if weight bearing assistance is needed three or more times a week, the assistance is scored as

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51 Mr. D does not claim to need professional nursing services (NF.2a, c, d), to be cognitively moderately impaired (NF.3c), or to exhibit problem behavior (NF.4a), which are two other pathways to Choice Waiver eligibility.

52 *See* Ex. E, p. 29 (NF.1e).

53 Ex. E, p. 29 (NF. 6, NF. 7).

54 Ex. E, p. 29 (NF.2, NF. 3, NF.4).

55 *See* Ex. E, p. 14 (#11a), p. 30 (NF. 2b). Speech or language therapy, occupational therapy, and respiratory therapy are also qualifying therapies. *Id.*

56 *See* Ex. E, p. 29 (NF.1e).

57 Ex. E, pp. 6-9. *See also* 7 AAC 125.020(a)(1) ("a recipient, who is highly involved in the activity, receives direct physical help…in the form of guided maneuvering of limbs, including help with weight-bearing when needed.").

58 Ex. E, pp. 6-9. *See also*, 7 AAC 125.020(a)(2) ("recipient is able to perform part of the activity, but periodically requires direct physical assistance from another individual for weight-bearing support or full performance of the activity").

extensive assistance.[59] Weight-bearing assistance occurs when the assistant supports part (more than a minimal amount, but not most or all) of the recipient's weight and the recipient would be unable to complete the activity without that support.[60]

Mr. D is ineligible under this pathway if he does not require extensive assistance in at least three of the five specified ADLs. At the hearing, Mr. D did not claim to require extensive assistance for body mobility.[61] Thus, to establish that he is ineligible under this pathway, the division needed to prove that he does not require extensive assistance with any two of the activities of transfers, locomotion, eating or toileting.

a. Transfers

The CAT describes transfers as "[h]ow a person moves between surfaces – to-from bed, chair, wheelchair, standing position ([e]xclud[ing] to-from bath/toilet)[.]"[62]

Mr. D was scored as requiring extensive assistance in 2011, and as requiring limited assistance every year since.

When assessed in 2014, Mr. D reported needing assistance to get on and off the lift recliner, and in and out of bed, and his wife reported he used a gait belt for all transfers.[63] Mr. D testified that he has good days and bad days, typically about three bad days per week, and that on good days he could do "a lot" on his own.[64] In their testimony, neither Mr. D nor his wife specifically described the nature of the assistance provided for transfers.

R.N. Sullivan's notes state that she observed Mr. D at the physical therapist's office transfer to a standing position and back to a chair, without assistance, but that he needed assistance to transfer into a vehicle.[65] R.N. Sullivan's observations describe an absence of weight bearing assistance for transfers to and from a chair, and do not specifically describe

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[59] *See, e.g.*, Ex. E, p. 6. The difference, under the regulatory definitions, is a matter of degree. *See* In Re E.C., OAH No. 13-0438-MDS, at 13-14 (Commissioner of Health and Social Services 2014); In Re V.H., OAH No. 12-0559-MDS, at 9 (Commissioner of Health and Social Services 2012).

[60] *See* In Re O.D., at 6, OAH No. 13-0856-MDS (Commissioner of Health and Social Services 2013) (weight-bearing "encompasses partial weight-bearing and is *not* limited to bearing all of the client's weight.") (emphasis in original); In Re K. T.-Q., at 4, OAH No. 13-0271-MDS (Commissioner of Health and Social Services 2013) ("more than a minimal amount of weight….not…most of the recipient's weight").

[61] E. D testimony (0:30). Mr. D did assert that he sometimes needs assistance from his wife to turn in bed. E. D testimony (0:38). *See also* Ex. F, p. 50 ("Pt. reports that he has noticed improved ease with transfers and rolling over in bed.").

[62] *See* Ex. E, p. 6 (CAT, p. 6). See also 7 AAC 125.030(b)(2)(A), (B) ("moving between one surface and another, including to and from a bed, chair, or wheelchair" and "moving from a lying or sitting position to a standing position.").

[63] Ex. E, p. 6.

[64] E. D testimony (0:33).

[65] Ex. E, p. 30.

weight-bearing assistance for the transfer into a vehicle. Given R.N. Sullivan's observation, and in the absence of a specific description by any witness of weight-bearing assistance for any transfers, the division has established that Mr. D does not require extensive assistance for transfers.

b. Locomotion

The CAT describes locomotion as "[h]ow [a] person moves between locations in his/her room and other areas on the same floor. If in wheelchair, self-sufficiency once in chair."[66]

Mr. D was scored as requiring limited assistance in 2011 and 2012, and supervision only in 2013 and 2014.

Mr. D uses a single point cane when walking in the home. There is ample evidence that his various conditions make him unsteady on his feet. Mr. D testified that his assistant stands by to provide assistance if needed.[67] This is consistent with the report of his physical therapist that, after a month of physical therapy and notwithstanding Mr. D's improved confidence and stability, Mr. D continued to require stand by assistance for locomotion, and occasional contact guard assistance during standing exercises.[68]

Mr. D generally wears a gait belt. A gait belt has handles that enable an assistant to provide support in the event of a stumble or loss of balance. The assistant may stand by (stand by assistance) or may keep a hand on the gait belt (contact guard assistance) to ensure a quick response in the event of a problem. Either form of assistance, with or without a gait belt, may on occasion constitute weight bearing assistance: a tottering person may need only non-weight bearing balance assistance, but a falling person may need weight bearing assistance.[69]

The division characterized the assistance provided to Mr. D for locomotion as no more than supervision, based on the therapist's reference to stand by assistance. This was mistaken, because, as explained above, stand by assistance may take the form of weight bearing, if the assistant intervenes to prevent a fall (which is the purpose of stand by assistance). In the absence of any testimony that Mr. D's assistants do not at least once a week intervene to prevent a fall by

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66 Ex. E, p. 7. *See also* 7 AAC 125.030(b)(3)(A) ("walking with the support of a walker, cane, gait belt, braces, crutches, or manual wheelchair").

67 E. D testimony (0:32).

68 Ex. F, p. 50.

69 In Re J.C., at 12 (OAH No. 13-0533-MDS (Commissioner of Health and Social Services 2013) ("Use of a gait belt does not necessarily reflect weight bearing assistance, as it can be used to assist in maintaining balance rather than to bear weight."). *See, e.g*, In Re F.C., OAH No. 13-1528 (Commissioner of Health and Social Services 2013) (gait belt used "to help lift [F.C.] when standing or sitting"; concluding weight bearing assistance provided for transfers); In Re O.P., at 7, OAH No. 13-0054-MDS (Commissioner of Health and Social Services 2013) (assistant using gait belt to "steady" client is not providing weight bearing assistance).

providing some degree of weight bearing assistance, the division did not prove that Mr. D needs less assistance for this activity than he did in 2011.

c. Eating

The CAT describes eating as "[h]ow [a] person eats and drinks regardless of skill."[70] Assessors are instructed to describe "type of assistance, assistive devices used, diet, meal preparation, and problems with chewing/swallowing, if applicable."[71]

Mr. D suffers from tremors, and occasionally drops food from a utensil. However, he has sufficient fine motor control to use a knife, fork and spoon, to place food on the fork or spoon, and lift utensils to his mouth. Given his functional ability, and the absence of any chewing, swallowing or aspiration issues, the division established that he does not require extensive assistance to perform this activity.

2. Mr. D Does Not Receive Therapy Three Times Weekly

As explained above, a person is considered eligible for nursing facility level of care services if he scores two or higher on at least two of the five specified ADLs[72] and, in addition, receives therapy three or four times a week.[73]

Mr. D's therapist's records are included in the agency record. They show that Mr. D was first evaluated on January 8, and began receiving treatment on January 9. He had subsequent treatments on January 14, 16, 17, 20, 22, 24, 27, 29, and 31, and on February 5 and 7. A scheduled treatment on February 10 was cancelled, according to the therapist's records, to accommodate the division's assessment scheduled for that date.[74]

Mr. D's plan of care originally called for therapy two to three times a week, for 10-12 weeks.[75] The plan was amended on January 29, to provide therapy one to two times per week, for an additional six to eight weeks.[76] Consistent with the original plan, Mr. D participated in therapy three times a week through January 29 (a total of 9 visits in the first three weeks of treatment). Consistent with the amended plan, he participated in therapy two times per week in the next two weeks, through February 10 (including the cancelled session on February 10).

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70 Ex. E, p. 9. *See also* 7 AAC 125.030 ("(A) feeding through a feeding tube; (B) enteral feeding; (C) supervising the eating and drinking of a person who has swallowing, chewing, or aspiration difficulties.").

71 Ex. E, p. 9.

72 Ex. E, p. 29 (NF. 6, NF. 7).

73 *See* Ex. E, p. 14 (#11a), p. 30 (NF. 2b). Speech or language therapy, occupational therapy, and respiratory therapy are also qualifying therapies. *Id.*

74 Ex. F, p. 53.

75 Ex. F, p. 48.

76 Ex. F, p. 50.

That Mr. D was receiving three therapy sessions per week through January 29 does not mean that he continued to receive the same quantity thereafter. The therapist's amended plan of care and record of treatment establishes that after January 29, therapy was provided less than three times a week. On the effective date of the division's initial decision to terminate waiver services, and thereafter, Mr. D was receiving less than three sessions of therapy per week.

IV. Conclusion

The division established that Mr. D does not require weight bearing assistance at least three times per week for bed mobility, transfers, or eating. It therefore correctly denied eligibility for Choice Waiver services based on his functional ability.[77] Because Mr. D is not receiving physical therapy three times per week, he is ineligible under the alternative pathway. Accordingly, the division's decision to terminate his Choice Waiver services is sustained.

DATED December 4, 2014.

Signed
Andrew M. Hemenway
Administrative Law Judge

Adoption

The undersigned, by delegation from of the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 23rd day of December, 2014.

By: *Signed*
Signature
Andrew M. Hemenway
Name
Administrative Law Judge
Title

[This document has been modified to conform to the technical standards for publication.]

[77] Because the division established that Mr. D does not require extensive assistance with transfers or eating, and he did not claim to require extensive assistance with bed mobility, he is ineligible for Choice Waiver services regardless of whether the division correctly scored him as requiring only supervision for locomotion, and only limited assistance for toileting. Nothing in this decision precludes Mr. D from requesting an amendment to his service level authorization for personal care assistance, based on the evidence presented and the findings made in this case.