

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

In the Matter of)
)
 Q M) OAH Nos. 14-1047-MDS, 14-1143-MDS
) Agency Nos.
_____)

DECISION

I. Introduction

Q M was participating in the Medicaid Home and Community-Based Waiver program (Waiver Program). She was reassessed by Senior and Disability Services (SDS) and found to be no longer eligible. In addition, SDS reduced the amount of authorized Personal Care Assistance (PCA) services from 38 hours a week to ten hours a week. Ms. M appealed both decisions.

Hearings were held on September 26, 2014 and November 28, 2014.¹ SDS was represented by a lay advocate, Victoria Cobo. Ms. M was represented by L Y, Ms. M's brother who has been granted a power of attorney to act on her behalf. Mr. Y testified in support of Ms. M's need for increased services and continued participation in the Waiver Program. The proceedings were interpreted from English to Hmong and from Hmong to English.

Based on the evidence presented, Ms. M remains eligible for the Waiver Program. In addition, the reduction in PCA services is upheld in part and reversed in part.

II. Facts

Ms. M was reassessed by Registered Nurse Scott Chow for her continued eligibility in the Waiver Program and for the amount authorized PCA services on January 14, 2014.² She was 31 years old at that time, and diagnosed with infantile cerebral palsy, developmental disorder, mixed receptive-expressive language disorder, neurofibromatosis, and acquired equinovarus deformity.³

¹ The hearings were held before Administrative Law Judge Rebecca L. Pauli. This case was subsequently reassigned to ALJ Jeffrey A. Friedman, who has reviewed the entire record, including listening to the hearing recordings.

² Exhibit E. SDS submitted an Exhibit A – F in each of these cases. Exhibits B and E are identical for both the Waiver case and the PCA case. Where necessary, the other exhibits will be identified by the abbreviated OAH case number.

³ Exhibit E2 and E4. Ms. M had also recently received a diagnosis of functional quadriplegia. Exhibit E4. However, Mr. Y testified that she had weakness in her limbs but could still use them. In addition, SDS was unable to find any medical records to support that diagnosis. Chadwick testimony; Chow testimony. It is more likely true that this diagnosis was an error.

On June 10, 2014, SDS notified Ms. M that it would be reducing her PCA services from 38 hours a week to ten hours a week.⁴ SDS determined that Ms. M was no longer eligible for the Waiver Program, and she was notified of this determination on July 2, 2014.⁵

III. Discussion

A. Medicaid Home and Community-Based Waiver Program

An adult with a physical disability is eligible to receive benefits under the Waiver Program if he or she meets the eligibility requirements, including requiring the level of care that is normally provided in a nursing facility.⁶ If eligible, the program pays for services that allow the recipient to stay in his or her home – or in an assisted living home – rather than move into a nursing facility. The level of care that is provided in a nursing facility is described by regulation. Skilled nursing facility services are defined in 7 AAC 140.515.⁷ Intermediate care facility services are defined in 7 AAC 140.510.⁸

SDS determines whether an applicant requires nursing facility level of care services by conducting an assessment.⁹ For older adults or adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and 515, and incorporates the results of the Consumer Assessment Tool (CAT).¹⁰ The CAT is an evaluation tool created by the Department of Health and Social Services, and the January 29, 2009 version of that tool is adopted by reference in 7 AAC 160.900(d)(6).

Once an individual has qualified to participate in the Waiver Program, certain requirements must be met before he or she can be removed from that program. Specifically, the individual must have had an annual assessment, the assessment must find that the individual has materially improved, and the assessment must have been reviewed by an independent qualified health professional.¹¹ For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska and qualified to assess adults

⁴ Exhibit D (14-1047).

⁵ Exhibit D (14-1143).

⁶ 7 AAC 130.205(d)(2).

⁷ Generally, skilled nursing services are the observation, assessment, and treatment of an unstable condition provided by or under the supervision of qualified technical or professional personnel. 7 AAC 140.515(a)(3).

⁸ Intermediate care services consist of observation, assessment, and treatment of a stable condition where the treatment where the recipient does not need skilled nursing services. 7 AAC 140.510.

⁹ 7 AAC 130.213.

¹⁰ 7 AAC 130.213(4). SDS typically also looks at available medical reports or other evidence related to the recipient's need for services.

¹¹ AS 47.07.045(b)(1) – (3).

with physical disabilities.¹² Material improvement for an adult with physical disabilities is defined as

no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for waiver services.^[13]

Based on this definition, a “material improvement” determination is focused on whether the individual currently qualifies for the Choice Waiver program rather than on any specific changes in functional limitation or cognitive impairment since a prior assessment.¹⁴

B. The PCA Program

The purpose of the PCA program

is to provide a recipient physical assistance with activities of daily living (ADL), physical assistance with instrumental activities of daily living (IADL), and other services based on the physical condition of the recipient[.^{15]}

SDS uses the CAT to help assess the level of assistance needed.¹⁶ The amount of time allotted for needed assistance is determined by the Personal Care Assistance Service Level Computation chart.¹⁷ The Service Level Computation chart shows the amount of time allotted for each ADL or IADL depending on the level of assistance needed for each task.

The different levels of required assistance are defined by regulation and in the CAT.¹⁸ For each ADL or IADL, there is a self-performance code and an assistance code. For ADLs, the self-performance code describes the type of assistance needed, and the assistance code describes whether the assistance is set up help only, cueing only, or physical assistance from one or two people. With ADLs, Supervision is defined as oversight, encouragement, or cueing three or more times a week, with physical assistance no more than two times a week.¹⁹ Limited Assistance is defined as requiring direct physical help or guidance from another individual three

¹² AS 47.07.045(b)(2)(B).

¹³ AS 47.07.045(b)(3)(C).

¹⁴ *In re E H*, OAH No. 13-1000-MDS (Commissioner of Health and Social Services 2013), page 3, available at <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS131000%20Superior%20Court%20appeal%20pending.pdf>. SDS uses the CAT for this determination since the CAT measures both the need for nursing home placement and the individual’s ability to function in the home setting.

¹⁵ 7 AAC 125.010(a).

¹⁶ 7 AAC 125.020(b).

¹⁷ 7 AAC 125.024(1).

¹⁸ The July 29, 2009 version of the CAT has been adopted by reference, 7 AAC 160.900(d)(6), and therefore the definitions in the CAT have the same effect as a regulation.

¹⁹ Exhibit E6.

or more times a week, with weight-bearing support no more than two times a week.²⁰ Extensive Assistance is defined as requiring direct physical help with weight-bearing support at least three times a week, or full assistance without any involvement from the recipient at least three times a week, but not all of the time.²¹ Full Assistance means the recipient has to rely entirely on the caretaker to perform the activity.²² To receive PCA time for ADLs, the applicant must have a performance code of at least 2 (limited assistance).²³

For IADLs, the performance code describes whether the individual can perform the activity independently, independently with difficulty, needs assistance, or is dependent on others to perform the activity.²⁴ The support code describes whether the support is in the form of supervision or cueing, set up help, physical assistance, or total performance by others.²⁵ To receive PCA time for IADLs, the applicant must have a performance code of at least 2 (independent with difficulty), and a support code of at least 3 (physical assistance).²⁶

C. Burden of Proof

SDS has the burden of proving by a preponderance of the evidence that Ms. M is no longer eligible for the waiver program. It also has the burden of proof for each ADL, IADL, or other service for which it is seeking to reduce PCA services. However, for any service for which Ms. M seeks an increase in services, she has the burden of proving she qualifies for that increase.²⁷

D. Eligibility for Waiver Program

Ms. M was previously assessed for Waiver eligibility on October 5, 2012.²⁸ At that time, she had memory problems, and was unable to recall the current season, location of her room, names or faces, or where she was.²⁹ She had moderately impaired decision making skills, and needed cueing or supervision.³⁰ She received a score of 13 in section C4B of the CAT, which measures cognition.³¹

²⁰ 7 AAC 125.020(a)(1); Exhibit E6.

²¹ 7 AAC 125.020(a)(2); Exhibit E6.

²² 7 AAC 125.020(a)(3); Exhibit E6.

²³ Exhibit B34 (Service Level Computation chart).

²⁴ Exhibit E26.

²⁵ *Id.*

²⁶ Exhibit B34.

²⁷ 7 AAC 49.135.

²⁸ Exhibit F (14-1143).

²⁹ Exhibit F16 (14-1143).

³⁰ *Id.*

³¹ Exhibit F17 (14-1143). Higher scores indicate poorer cognition ability than lower scores.

Based on Ms. M's memory and cognition scores, she received one point for nursing needs in section NF3 of the CAT scoring page.³² Because she received this point, it was necessary to look at Ms. M's need for assistance in the five "shaded" ADLs.³³ Because she needed at least limited assistance with two of those ADLs, she was eligible to participate in the Waiver Program.³⁴

In the 2014 CAT, Mr. Chow found that Ms. M continued to need limited assistance with the shaded ADLs of transfer and toilet use.³⁵ He concluded, however, that Ms. M's memory and cognitive abilities had improved, and she was not given any points for nursing needs on the CAT scoring page.³⁶

Assuming the shaded ADLs were properly scored, Ms. M would qualify for the Waiver Program if SDS has not proven by a preponderance of the evidence that her memory and cognition have improved. The evidence supporting improved memory and cognition comes from the 2014 CAT and Mr. Chow's testimony that he completed the assessment to the best of his ability based on his observations and what he was told during the assessment.

Mr. Chow noted in the CAT that Ms. M was observed to "have a flat affect and did not respond to questions or instructions."³⁷ She could not draw a clock and could not recall three items in five minutes.³⁸ However, in section C of the CAT, Mr. Chow noted that Ms. M had no memory problems, could recall the current season, location of her room, names or faces, and where she is.³⁹ Mr. Chow scored her decision making skills as unimpaired.⁴⁰

SDS has not claimed that the 2012 CAT was incorrectly scored, and it did not provide any evidence to suggest why Ms. M's memory and cognition would have improved since the prior CAT. Significantly, Mr. Chow indicated in the CAT that Ms. M did not respond to any of

³² Exhibit F30 (14-1143).

³³ Exhibit F30 (14-1143), section NF6. The shaded ADLs are bed mobility, transfers, locomotion, eating, and toilet use. *See* Exhibit E19.

³⁴ Exhibit F30(14-1143).

³⁵ Exhibit E19.

³⁶ Exhibit E30.

³⁷ Exhibit E5.

³⁸ *Id.*

³⁹ Exhibit E17.

⁴⁰ *Id.*

his questions. It would be difficult for an assessor to reach any conclusions as to Ms. M's memory and cognition without responses to the assessor's questions.⁴¹

While it is certainly possible for individuals to improve their memory and cognition, it was SDS's burden to prove that Ms. M had in fact improved. The evidence presented in this case was insufficient to establish an improvement. Accordingly, Ms. M should have received one point for nursing needs in section NF3 of the CAT scoring page. Because SDS concluded that Ms. M needed limited assistance in two of the shaded ADLs, Ms. M is eligible to participate in the Waiver Program.

E. Authorization for PCA Services

SDS significantly reduced the amount of PCA services authorized for Ms. M. Ms. M argued for increased services. Each disputed service type is discussed below.

1. Transfers

Transferring is the act of moving between surfaces, such as standing up from a chair.⁴² Ms. M was scored as needing limited assistance with transfers.⁴³ Mr. Chow noted "PCA reports helping her to stand up by pulling her up from under the arms because she has trouble with her clubbed left foot."⁴⁴ The act of pulling someone up requires the use of weight-bearing support.⁴⁵ This meets the definition of extensive assistance, so based on Mr. Chow's notes, Ms. M should have received a score of 3 for this ADL. In addition, there was no explanation provided for reducing the frequency of transfers from six times a day.⁴⁶ Ms. M should be authorized extensive assistance with transfers, six times a day, for a total of 42 times each week.⁴⁷

2. Locomotion

Locomotion is defined as the manner in which a person moves between rooms on the same floor, including moving in a wheelchair. Ms. M was scored as needing set up help only. Mr. Chow wrote that Ms. M "was observed to ambulate with her cane on the previous

⁴¹ In an earlier assessment dated February 2, 2012, the assessor noted that Ms. M did not understand verbal instructions, communicated by gestures, and did not comprehend day to day activities, needs, or safety risks. Exhibit F4 (14-1047). At that time, she had moderately impaired decision making skills. Exhibit F16 (14-1047).

⁴² Exhibit E6.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *In re K T-Q*, OAH No. 13-0271-MDS (Commissioner of Health and Social Services 2013), page 4.

⁴⁶ See Exhibit F6 (14-1047).

⁴⁷ Ms. M requested seven transfers each day, but there was no testimony to support an increase in frequency.

assessment and her brother stated there were no changes to her functional abilities.”⁴⁸ However, the prior assessor also said

PCA stated that Q needs the use of her cane and hands on support to walk both in/out of her home d/t L club foot/poor balance and weakness. Q was able to hold her cane in her rt hand and she was supported on her L side by her PCA. Q is unable to put her L foot flat on the floor when she walks.^[49]

Ms. M did demonstrate an ability to walk with her cane in the prior assessment, but only with hands-on support from another person. Ms. M had previously been scored as needing limited assistance, and SDS has not shown that she is now able to walk without that level of assistance.⁵⁰

There is evidence that Ms. M now uses a wheelchair, but the evidence does not establish whether this is by personal choice, or due to a complete inability to walk. Nor does the evidence establish whether Ms. M is capable of propelling the wheelchair without assistance once she is in the chair. Ms. M has not established a need for extensive assistance with either walking or propelling a wheelchair. Thus, she has not shown a need for extensive assistance.

Ms. M would also need limited assistance to access medical appointments. She has nine appointments each year.⁵¹ Her service level authorization should be adjusted to provide for that assistance.

3. *Dressing*

SDS found that Ms. M did not need assistance with getting dressed because she was able to hold her cane while standing, and could grab a pen and piece of paper.⁵² In the prior assessment, SDS found that Ms. M needed limited assistance with dressing because of her cognitive abilities, and because of her poor grip and coordination on the left side of her body.⁵³ She had a weak grip in her left hand.⁵⁴ This is consistent with Mr. Y’s testimony that she had weakness with one hand.

It is reasonable to conclude that someone who has difficulties using her left hand would need assistance with dressing. SDS has not met its burden of showing an improved ability to dress herself without assistance. At the same time, Ms. M has not met her burden of showing a need for an increase in assistance with this ADL.

⁴⁸ Exhibit E7.

⁴⁹ Exhibit F7 (14-1047).

⁵⁰ Limited assistance should be allowed at the prior frequency of six times a day, seven days a week.

⁵¹ Exhibit E5.

⁵² Exhibit E8.

⁵³ Exhibit F8 (14-1047).

⁵⁴ Exhibit F4 (14-1047).

4. *Eating*

In the previous assessment, Ms. M was found to need oversight and supervision while eating.⁵⁵ In the current assessment, she was found independent with this ADL.⁵⁶ Under the PCA program, neither score would result in authorization of PCA services for this ADL.⁵⁷ Accordingly, new ruling is made here as to whether the score should have been reduced.

Ms. M argued for an increase in this score, but the evidence presented does not show that she needs anything more than supervision and cueing while eating.

5. *Toileting*

Ms. M was scored as needing limited assistance with toileting. Toileting includes how the person uses the toilet, and transfers on or off of the toilet.⁵⁸ Mr. Chow wrote that her brother “reports helping her off of the toilet and with cleaning.”⁵⁹ Help with transferring off of the toilet could include weight-bearing support, which would explain why Ms. M was previously scored as needing extensive assistance.⁶⁰ Because Ms. M needs weight-bearing assistance with other transfers, it is reasonable to conclude she would need weight-bearing assistance with these transfers at least three times a week. In any event, SDS has not shown she does not need assistance with these transfers. Thus, SDS has not met its burden of proving a reduction in the level of assistance for this ADL. She should have received a self-performance score of three for toileting.

6. *Personal Hygiene*

SDS found Ms. M to be independent with her personal hygiene.⁶¹ She had previously been scored as needing limited assistance because of her poor coordination and grip in her left hand.⁶² Because Ms. M did not participate in the functional assessment, Mr. Chow had a limited opportunity to observe Ms. M’s range of motion, grip, and fine motor skills. He did, however, observe Ms. M use her right hand to grip her cane.⁶³ He also observed her grab a pen and paper.⁶⁴ The prior assessment focused on Ms. M’s poor left hand coordination. The proper

⁵⁵ Exhibit F9 (14-1047).

⁵⁶ Exhibit E9.

⁵⁷ Exhibit B34.

⁵⁸ Exhibit E9.

⁵⁹ *Id.*

⁶⁰ Exhibit F9 (14-1047).

⁶¹ Exhibit E10.

⁶² Exhibit F10 (14-1047).

⁶³ Exhibit E7.

⁶⁴ Exhibit E8.

focus should have been on whether Ms. M can perform her hygiene with only her right hand. Mr. Chow concluded that she could do so, and Ms. M did not provide any convincing evidence to rebut that conclusion. SDS has met its burden of proof to reduce time allowed for this ADL.

7. *Bathing*

Bathing is the task of taking a bath or shower, and transferring into or out of the tub or shower.⁶⁵ In her recent assessment, Ms. M was given a self-performance score of 2, which indicates a need for physical assistance with transferring to or from the tub or shower.⁶⁶ In her previous assessment, she was scored as needing assistance with both transfers and washing.⁶⁷ She needed help washing due, in part, to her lack of coordination and range of motion.⁶⁸

Mr. Chow found that Ms. M had sufficient range of motion to wash herself because the prior assessment found no limitations to her range of motion.⁶⁹ That, however, is not an accurate description of the prior assessment. The prior assessment did find insufficient range of motion to wash herself. SDS has not met its burden of proving a reduction for this ADL.

8. *IADLs*

In the prior assessment, SDS found that Ms. M was fully dependent on others to perform meal preparation, housework, grocery shopping, and laundry.⁷⁰ In the more recent assessment, SDS found she could perform all of these tasks with difficulty, and needed physical assistance with main meal preparation, routine housework, grocery shopping, and laundry.⁷¹

SDS did not present sufficient evidence to justify the reduction in services for any of the IADLs. It is possible that Ms. M could participate and assist in some of these activities, but SDS did not prove that ability by a preponderance of the evidence. This is especially true given Ms. M's lack of coordination and strength in her left hand, and her overall cognitive ability.

9. *Escort Service*

SDS removed PCA time for escort services. Escort services may be allowed for traveling to and from a routine medical or dental appointment, and conferring with the medical or dental

⁶⁵ Exhibit E11.

⁶⁶ *Id.*

⁶⁷ Exhibit F11 (14-1047).

⁶⁸ *Id.*

⁶⁹ Exhibit E11.

⁷⁰ Exhibit F26 (14-1047).

⁷¹ Exhibit E26. The CAT distinguishes between light housework and routine housework, but the applicable regulation combines both into one category; light housekeeping. 7 AAC 125.030(c)(3).

staff at the appointment.⁷² Presumably, this time was removed based on Mr. Chow's conclusion that Ms. M did not have any cognitive problems. Ms. M is primarily non-verbal, has poor memory, and impaired cognition. SDS did not meet its burden of justifying a reduction in time for this service.

10. Prescribed Exercises

Ms. M had previously been authorized 630 minutes a week for range of motion and walking exercises.⁷³ Time for these exercises are allowed if they are prescribed by a physician, physician assistant, or advanced nurse practitioner.⁷⁴ Time for these exercises was disallowed because Ms. M did not have a current prescription.⁷⁵ A current prescription is required to receive time for these exercises. SDS correctly reduced Ms. M's PCA services due to the lack of a current prescription.⁷⁶

IV. Conclusion

SDS did not meet its burden of proving an improvement in Ms. M's memory and cognitive ability. Because Ms. M has some needs related to her memory and cognition, and because she needs physical assistance with at least two of the shaded ADLs, Ms. M remains eligible for the Waiver Program.

SDS failed to meet its burden of proving a reduction in PCA services for some, but not all of the reductions it proposed. Ms. M's service level authorization should be recalculated based on the findings discussed above.

Dated this 5th day of August, 2015.

Signed

Jeffrey A. Friedman
Administrative Law Judge

⁷² 7 AAC 125.030(d)(9).

⁷³ Exhibit D12 (14-1047).

⁷⁴ 7 AAC 125.030(e).

⁷⁵ Chadwick testimony.

⁷⁶ Ms. M did submit a new prescription dated July 21, 2014. That is after the date of SDS's decision reducing PCA services. SDS's decision was correct as of the date it was made. Any new prescription should be submitted with a Change of Information form.

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 19th day of August, 2015.

By: Signed
Signature
Rebecca L. Pauli
Name
Administrative Law Judge
Title

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