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

In the Matter of	)	
	)	
H T	)	OAH No. 15-0611-MDS
	)	Agency No.

DECISION

I. Introduction

The Division of Senior and Disabilities Services denied H T's requested respite care benefits for plan year May 10, 2015 – May 9, 2016. Ms. T appealed. The evidence at hearing showed that the caregiver for Ms. T for whom the respite services were being provided, P C, did not provide or assist with both activities of daily living and instrumental activities of daily living for Ms. T. Because he does not do both, he does not meet the definition of a primary unpaid caregiver, and Ms. T is not eligible for respite service benefits for him. Therefore, the Division's decision denying respite services is affirmed.

II. Facts

H T is a 75-year-old resident of No Name. She lives in an apartment with her daughter M. Another daughter, Z, lives nearby with her husband, P C. Ms. T suffers from chronic renal failure. A stroke has left her with left-sided weakness, and she is forgetful and confused. She spends much of her time in a wheelchair. Accordingly, her plan of care provides for 24-hour supervision.

Nights are restless for Ms. T. She suffers from sciatic pain and frequently wakes during the night from the pain. When this occurs, M will stay up all night with her.[1] Even on good nights, Ms. T's plan-of-care calls for M to get up with her every two hours to use the bathroom.[2] In addition, during the day, M provides assistance with Ms. T's activities of daily living, including dressing, toilet use, bathing, hygiene, and medications.[3]

Ms. T is Medicaid-eligible. She receives 10 hours of home and community-based waiver services and 20 hours of personal care assistance services.[4] M provides the paid PCA services. Z provides the paid chore waiver services.

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1 Division Exhibit E at 7.
2 T Exhibit (24 hour care calendar).
3 *Id;* Division Exhibit E at 7.
4 Division Exhibit D at 3.

In addition to the services Ms. T receives from her daughters, her plan-of-care calendar shows that P also provides some coverage so that Ms. T has someone to provide care as needed for all 24 hours in a day. According to the care calendar in the record, P provides five hours of service on a typical Sunday. In the morning, he will take Ms. T to church. Later, after her nap, he will take her outside if the weather permits. If not, they have family time. During these five hours, P is the primary provider of Ms. T's personal care needs.[5]

P also provides care on at least some weekdays. The calendar submitted as an exhibit for this record shows P providing three hours of care, from 3:00 p.m. to 6:00 p.m., for each Wednesday. During this time, he sits with Ms. T, reads the bible, and takes her outside if the weather permits. He provides for her care needs, which may include taking her to the bathroom, helping her up, and assisting her to use the toilet.[6] Although he has outside employment, P is able to provide this care because he works as a part-time carpet installer. His hours are variable and unpredictable.[7]

The calendar also shows that Z provides five hours of respite care on Wednesdays.[8] During those hours, Z provides for Ms. T's care, and the primary unpaid care provider is able to get a break from his or her responsibility. Because respite benefits are only available to provide respite for an unpaid primary caregiver, the documentation reflects that Z is providing respite for P, who is not paid, and not for M, who is a paid PCA. The total hourly respite care that is provided is 10 hours per week.

In addition to the10 hours per week of hourly respite benefits that Ms. T receives on behalf of P, she has also received daily respite care of 14 days per year. In theory, the 10 hours of hourly respite care provides a short break during the daily care period; the daily respite provides a "vacation" for the caregiver to take a full day off from giving care.

Ms. T's plan of care must be reviewed and approved each year. In performing its annual review for the 2015-16 service year, beginning May 10, 2015, the Division of Senior and Disabilities Services approved the PCA and waiver services as requested. For the 2015-16 service year, however, the Division did not approve the respite care for P beyond two weeks of hourly respite (at 10 hours per week).[9] The only reason it approved the 20 hours of respite was apparently for notice reasons—it gave two weeks notice before it discontinued a benefit that had

5 T Exhibit (24 hour care calendar).
6 C testimony; T Exhibit (24 hour care calendar).
7 C testimony.
8 T Exhibit (24 hour care calendar).
9 Division Exhibit E at 1; Division Exhibit D at 1.

been received in the past. In the Division's view, P did not qualify for respite because he provided relatively little care for Ms. T. Therefore, it denied the request for 2000 units (500 hours) of hourly respite, and 14 days of daily respite.

The Division sent the letter denying respite care on May 5, 2015. On May 15, 2015, Ms. T appealed the denial, and requested a fair hearing.[10] A hearing was held on August 4, 2015. The hearing was interpreted into Russian. P, who is Ms. T's power of attorney, represented Ms. T, assisted by D E with No Name Homecare. Laura Baldwin presented the case for the Division.

III. Discussion

Under the department's regulations, respite services up to the maximum time limit will be approved "if they provide alternative caregivers, regardless of whether the services are provided in the recipient's home or at another location, to relieve (1) primary unpaid caregivers, including family members and court-appointed guardians."[11] In the regulations that were effective on May 5, 2015, when the denial letter was sent, the term "primary caregiver" was defined as follows:

> (9) "primary caregiver" means an individual
>
> (A) that lives in
>
> (i) the same unlicensed residence as a recipient and provides care for a recipient; or
>
> (ii) a different residence and provides care for a recipient in the recipient's unlicensed residence; and
>
> (B) assists with or provides the care described as activities of daily living in 7 AAC 125.030(b) and instrumental activities of daily living in 7 AAC 125.030(c).[12]

In P's view, he provides care to Ms. T. He is not paid for this care. Therefore, he qualifies for respite services. The Division, on the other hand, raises two arguments to support its decision denying respite. First, it asserts that respite services would duplicate services already provided under PCA and waiver. Second, it asserts that P is not a primary caregiver because the only services he provides to Ms. T are familial comfort services. In the Division's view, he is a good son-in-law, but not a caregiver. Therefore, it concludes, he does not qualify for respite services. These arguments are addressed below.

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[10] Division Exhibit C.

[11] 7 AAC 130.280(a)(1).

[12] 7 AAC 130.319(9) (May 6, 2015). The regulation was amended effective July 1, 2015. The parties agree that the regulation that was in effect on May 5, 2015, governs the outcome of this hearing.

A. Would respite services duplicate services provided under PCA benefits and chore waiver benefits?

The Division notes that Ms. T is already receiving 20 PCA hours and 10 chore waiver hours of benefits per week. It asserts that respite services would duplicate this 30 hours of services. Ms. E, on behalf of Ms. T, disputed this reasoning. She noted that the hours of services, if added together, only constitute 30 hours per week. Given 16 waking hours per day, that leaves 82 hours per week in which Ms. T needs someone to keep an eye on her and provide services. The care calendar in the record shows that no duplication of services occurs.

The Division appears to be arguing that Ms. T's PCA plan provides for all of her need for assistance for ADLs. Under this view, to the extent that the PCA plan does not provide assistance, it must be because Ms. T is capable of doing the ADL independently. Therefore, it would follow, anyone else providing an ADL service would be "duplicating" the service provided under the PCA plan.

This argument could only work if the Division were to require Ms. T's PCA to mete out the 2.85 hours of paid PCA service per day over the 16 waking hours per day so that the client always had a PCA available when the client needed assistance with an ADL. In reality, of course, that is not how the system works—if it were, no client could ever qualify for respite services because respite services would always duplicate the PCA or chore waiver services. Thus, Ms. E is correct that the 30 hours of PCA and chore waiver services do not occupy the field of services needed by Ms. T. If P and the respite services provider each provide some ADL services during the 82 hours per week that no paid PCA is providing services, no duplication occurs.

B. Is P an unpaid primary caregiver?

At the hearing, when asked what services he provided, P, through the interpreter, responded, "I help her to lift her from the chair to sit down on the chair. To support. Everything. . . . I help her to go to toilet and many things. . . . And to go to church and to come back. She needs help."[13] The Division argued that P did not meet the definition of primary caregiver because in truth, he is not a caregiver. He simply is providing family time. Ms. E asserted that in addition to family time, P also helps Ms. T up out of a chair, and helps with toileting—both of which are activities of daily living. In her view, the regulation speaks only of assisting with or

[13] C testimony.

providing activities of daily living and instrumental activities of daily living. Therefore, she concludes, P qualifies.

The Division is correct that P does not provide a significant level of services. In commonsense terms, he is not the "primary" provider of care—that would be M. And applying again a commonsense filter, the level of care he provides does not appear to be so burdensome as to require relief through respite care. Once again, M, who shoulders the laboring oar both night and day, would meet that commonsense standard, but not P. Ms. E is correct, however, that the regulation does not incorporate these commonsense standards. The regulation does not require that an unpaid caregiver meet a minimum number of hours of service, or a provide a minimum percentage of the total service provided, in order to qualify as a primary caregiver.

Yet, upon close examination, 7 AAC 130.319(9) does, in one sense, mandate a minimum level of service to qualify as a primary caregiver. Under this regulation, to qualify as a primary caregiver, a caregiver must assist or provide both an activity of daily living *and* an instrumental activity of daily living. A caregiver who provides or assists with only ADLs, or only IADLs, will not qualify as a primary caregiver. Alaska courts have frequently noted that when two requirements are separated by the word "and" (not the word "or"), both requirements must be met to qualify.[14] That means P must provide or assist with both ADLs and IADLs to qualify for respite services.

As noted above, P does provide or assist with the ADLs of transfers and toilet use. The question here, however, is whether he assists with or provides IADLs. Under the regulation cross-referenced by 7 AAC 130.319(9), IADLs are identified as follows:

> (c) Personal care services include the following types of physical assistance provided to a recipient who is 18 years of age or older so that the recipient may complete an IADL:
>
> (1) for the IADL of light meal preparation, the preparation, serving, and cleanup in the recipient's home of any meal that is essential to meet the health needs of the recipient and that is not the main meal of the day, subject to the limitations of (f) of this section;
>
> (2) for the IADL of main meal preparation, the preparation, serving, and cleanup in the recipient's home of one main meal per day that is essential to meet the health needs of the recipient, subject to the limitations of (f) of this section;

[14] *See, e.g., City & Borough of Juneau v. Thibodeau*, 595 P.2d 626, 634 (Alaska 1979) (noting that when two requirements for variance are "phrased in the conjunctive form" courts have required applicant for variance to satisfy both prongs of the requirement), overruled on other grounds by *State v. Alex*, 646 P.2d 203 (Alaska 1982).

(3) for the IADL of light housekeeping,

(A) picking up, dusting, vacuuming, and floor-cleaning of the living spaces used by the recipient;

(B) cleaning of the kitchen and dishes used for preparation of the recipient's meals;

(C) cleaning of any bathroom used by recipient;

(D) making the recipient's bed;

(E) trash removal;

(F) service animal care;

(4) for the IADL of laundering,

(A) changing a recipient's bed linens;

(B) in-home or out-of-home laundering of a recipient's bed linens and clothing;

(5) for the IADL, of shopping, shopping in the vicinity of a recipient's residence, not including the cost of transportation, for

(A) groceries and other household items required for the health and maintenance of the recipient, including items used by the recipient and other occupants of the recipient's residence; and

(B) prescribed drugs and medical supplies required by the recipient.[15]

Put succinctly, IADLs are household chores. No evidence in this record indicates that P provides assistance with Ms. T's household chores. He takes her outside and to church. During some time periods, he provides or assists with her ADLs. He does not, however, take her shopping, clean her house, remove her trash, prepare her meals, or do her laundry. Nor does any evidence indicate that he assists with these activities. Because he does not provide, or assist with, both ADLs and IADLs, P does not qualify as a primary unpaid caregiver for Ms. T. Therefore, Ms. T is not eligible for respite services.

IV. Conclusion

The Division's decision denying respite service benefits to Ms. T for benefit year May 10, 2015 – May 9, 2016, is affirmed.

DATED this 19th of August, 2015.

By: *Signed*
Stephen C. Slotnick
Administrative Law Judge

[15] 7 AAC 125.030(c).

Adoption

The undersigned, by delegation from 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 17th day of September, 2015.

By: *Signed*
Name: Jared C. Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS

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