BEFORE THE STATE OF ALASKA
COMMISSIONER OF HEALTH AND SOCIAL SERVICES

In the Matter of:	)	
	)	OAH Nos. 13-0306-MDS and 13-0781-MDS
L D	)	(Consolidated)
	)	HCS Case Nos.
	)	Medicaid ID No.

COMMISSIONER'S DECISION

After due deliberation, for the reasons set forth in this decision, and in accordance with AS 44.64.060(e)(3), AS 44.64.060(e)(4), and AS 44.64.060(e)(5), by delegation from the Commissioner of the State of Alaska Department of Health and Social Services, the undersigned declines to adopt the proposed decision of the Administrative Law Judge (ALJ) as issued, and instead modifies and revises that decision and the disposition of the case as set forth below.

I. Introduction

L D receives Medicaid Personal Care Assistant (PCA) services. The Division of Senior and Disabilities Services (Division) reduced Ms. D's PCA services, and then denied a subsequent service plan amendment request.[1] Ms. D requested a hearing to contest the Division's decision as to the amount of PCA time allowed for assistance with transfers, locomotion, and toilet use, and its decision denying her amendment request for additional PCA time for range of motion exercises, walking, and foot care which had been prescribed by her doctor.

This decision concludes that the Division's scoring of the level of assistance required by Ms. D to perform her activities of daily living was correct in the areas of locomotion and toilet use, but that Ms. D requires additional assistance with transfers. Also, the frequency with which services are provided should be increased in the areas of transfers, locomotion, and toilet use.[2] However, the Division was correct to deny Ms. D's service plan amendment request (seeking additional PCA time for daily range of motion exercises and walking, and weekly foot care, prescribed by Ms. D's physician) because Ms. D failed to demonstrate a material change in her condition to justify the amendment. Accordingly, the Division's decision reducing Ms. D's PCA services is affirmed in part

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[1] This decision deals with two separate cases which were consolidated for hearing. Exhibits were marked and submitted by the Division in each case, prior to consolidation, numbered as A, B, C, etc. When the cases were later consolidated, there became two sets of exhibits marked in the same way. To avoid confusion, the exhibits in 13-0306-MDS have been left with their original markings (A, B, C, etc.), while the corresponding exhibits in 13-0781-MDS have been remarked as AA, BB, CC, etc.

[2] Ms. D is allowed PCA time for eight assisted transfers per day, seven assisted instances of locomotion per day, and eight assisted toilet uses per day.

and reversed in part, and its decision denying Ms. D's subsequent service plan amendment request is affirmed.

II. Facts

A. Ms. D's Diagnoses and Relevant Medical History

Ms. D is 57 years old.[3] She lives with her husband in a small, one level ground floor apartment.[4] She has current diagnoses of multiple sclerosis (MS), degenerative disk disease with spinal stenosis, pain secondary to the spinal stenosis, osteoporosis, migraine headaches, high blood pressure, and urinary incontinence secondary to her MS.[5]

According to C E, M.D., because MS involves damage to the nerve cells in the brain and spinal cord, it causes balance and coordination problems.[6] Because Ms. D has these balance and coordination problems, she is at high risk for falls. In turn, when she falls, she is at high risk of breaking a bone due to her osteoporosis. Over the past 10-15 years Ms. D has suffered about seven bone fractures due to falls. One or two of these falls have resulted in hospitalization. Ms. D has fallen while trying to transfer between surfaces five to ten times since 2011, but as of the hearing of July 26, 2013 she has not fallen since her January 2013 assessment.[7] Most of the falls have occurred at night when Ms. D's PCA is off-duty.

Dr. E testified that Ms. D's MS affects the nerves which move the muscles and can significantly impair motor function and can cause incontinence.[8] Ms. D also frequently has bad headaches.[9] The symptoms of MS can change drastically from day to day. There are "flares," after which people will sometimes regain function, but sometimes not.

Ms. D's husband, S D, testified that, over the years, Ms. D has had a series of three implanted "pain pumps" to administer medications to relieve pain.[10] In September 2012 the third of these pain pumps needed to have its batteries changed. However, a problem arose, the pump was removed, and it became necessary to order a new pump. Following this event Ms. D got a bacterial infection which required hospitalization. The wound where the pain pump was removed was not healed until December 2012. The pain pump was not replaced because it was felt that it caused Ms. D to be over-medicated.

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3 Exs. E1, EE1.
4 K B hearing testimony.
5 C E, M.D. hearing testimony.
6 All facts found in this paragraph based on Dr. E's testimony unless otherwise stated.
7 Remainder of paragraph based on K B's testimony.
8 Dr. E's hearing testimony.
9 K B's hearing testimony.
10 All facts found in this paragraph based on S D's testimony unless otherwise stated.

B. Ms. D's Functional Limitations as Explained by her Doctor, her Husband, and her PCA[11]

Ms. D's shoulder, wrists, and pelvis have limited range of motion due to her previous fractures.[12] Her doctor prescribed daily range of motion exercises for her,[13] but she cannot balance well enough to perform the range of motion exercises on her own. If Ms. D went to a physical therapist, the therapist would help balance her. However, Ms. D's doctor thinks it is better for her to perform the exercises at home with her PCA if possible. To be effective, each physical therapy session needs to be at least 15 minutes long.

Ms. D's prescribed exercises involve standing or sitting while performing arm exercises using resistance bands, and walking for about 15 minutes in the hall of her apartment building once a day.[14] She stands half the time and sits half the time while doing the exercises. When Ms. D performs standing exercises, her PCA must steady her.

K B testified that she has been Ms. D's PCA since 2011.[15] She generally works Monday through Friday from 8:00 a.m. to 4:00 p.m. She testified that Ms. D generally sleeps twice each day: once overnight, waking in the morning, and once at 1:00 p.m., waking in the late afternoon. In addition, Ms. D usually lies down in bed when she is having one of her frequent headaches. Ms. B estimates that she helps Ms. D out of bed four to five times per day. Ms. D can get herself out of bed, but only with great difficulty - it may take her up to 10 minutes to get up.

When performing transfers, Ms. B usually holds Ms. D's hands and pulls her up.[16] Sometimes Ms. B must push Ms. D from behind to get her up. In moving Ms. D from a sitting position to a standing position, Ms. B must generally support about one third of Ms. D's weight. However, the amount of assistance required can change from day to day, and even within the same day. Sometimes only a little weight bearing assistance is needed; sometimes a great deal of weight bearing assistance is needed. Ms. B estimates that, at the time of the assessment, Ms. D needed weight bearing assistance about once per day.

As to frequency of transfers, Ms. B must help Ms. D from her bed to the living room or kitchen table in the morning.[17] During the day Ms. D usually sits either in a lift chair in the living

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[11] To avoid unnecessary repetition, some evidence pertaining directly to contested CAT scores is omitted from this section and discussed in the appropriate subsection of the "Discussion" section (Section III, below).

[12] All facts found in this paragraph are based on Dr. E's testimony unless otherwise stated.

[13] Exs. FF3, FF4. The prescription covers range of motion exercises, walking, and foot care.

[14] All facts found in this paragraph based on K B's testimony.

[15] All facts found in this paragraph based on K B's testimony.

[16] All facts found in this paragraph based on K B's testimony.

[17] All facts found in this paragraph based on K B's testimony.

room, or in a chair at the kitchen table. Ms. B must help Ms. D get up from the kitchen chair four to five times per day. If Ms. D goes somewhere outside using her wheelchair, Ms. B must help her out of the wheelchair; this usually happens once per day. At lunch time Ms. B must sometimes help Ms. D from her lift chair to the kitchen table and back. At nap time Ms. B must help Ms. D get back to her bed.

Ms. D is usually able to locomote by herself one or two times per day during the period that Ms. B is on duty (8:00 a.m. - 4:00 p.m.). [18] However, her balance is poor. Ms. B usually tries to take Ms. D on a short walk once a day, to get the mail or go to the building's lounge, in order for Ms. D to get some exercise. When Ms. B sees that Ms. D is about to get up and walk, she tries to provide assistance to prevent falls. She steadies Ms. D using her arms. Also, Ms. D usually gets leg cramps three or four times per week. When she gets a cramp, Ms. B must assist her or get the walker.

Ms. B testified that, although Ms. D has a motorized wheelchair, she cannot use it inside her 750 square foot apartment because there is not enough room.[19] If Ms. D is having a good day, she has lunch at the No Name. The No Name is about 1.5 blocks from Ms. D's apartment. To get there she either takes a van or uses her motorized wheelchair. Ms. B must help her get to the wheelchair. Ms. B estimates that she must provide hands-on weight bearing assistance with locomotion about five times per day.

Ms. B estimates that Ms. D uses the toilet five to six times per day during the period Ms. B is on duty (8:00 a.m. to 4:00 p.m.).[20] Ms. D takes a medication in the morning which causes her to need to urinate more frequently. Ms. D cannot always get her walker into the small bathroom. At these times Ms. B must walk behind Ms. D to steady her. Ms. D can usually get off the toilet by herself using the grab bars. However, Ms. D has problems with her fine motor skills due to her multiple sclerosis. Accordingly, she sometimes needs help pulling up her clothes and buttoning buttons. Ms. D always requires some form of assistance with toileting while Ms. B is on duty.

According to Mr. D, when Ms. B leaves for the day at 4:00 p.m., his wife is usually still in bed.[21] Ms. D is alone from 4:00 p.m. to 5:00 p.m., when Mr. D gets home from work. Mr. D usually gets his wife out of bed for dinner. When Mr. D is with her, Ms. D usually uses the walker for locomotion, but Mr. D must constantly give hands-on assistance to guide Ms. D because she cannot steer the walker in a straight line. Ms. D's locomotion is wobbly, "like someone who has

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18 All facts found in this paragraph based on K B's testimony.
19 All facts found in this paragraph based on K B's testimony.
20 All facts found in this paragraph based on K B's testimony.
21 All facts found in this paragraph based on S D's testimony.

had too much to drink." Mr. D helps his wife from the living room to the kitchen, and to and from the toilet.

Mr. D testified that he uses the same transfer procedures with Ms. D as Ms. B does.[22] He estimates that 99% of Ms. D's transfers are assisted, and he often gives her weight bearing assistance with transfers. He must also help her get dressed.

With regard to toilet use, Mr. D helps his wife two to three times each evening before bed, once in the middle of the night, and once in the morning.[23] Thus, Mr. D assists his wife with toileting four to five times per day. Mr. D usually helps his wife to the bathroom, holding her from the front and walking backwards. When they reach the bathroom he helps her pull her pants down. He must sometimes help her clean herself. Ms. D has fallen several times in the bathroom. During these falls she has broken wallboard and the bathroom door.

Ms. D also requires assistance with foot care.[24] She cannot cut her own toenails or treat her own corns and calluses. The corns and calluses may require the use of bandages, toe separators, files, and/or pumice stones. Ms. D is not able to perform these activities independently. Ms. D's PCA checks her feet for sores and puts lotion on her feet.[25]

Dr. E testified that she has been Ms. D's physician for 25 years and is currently her primary treating physician.[26] She testified that Ms. D requires assistance with transfers both for safety reasons, and for actual weight bearing assistance. She also testified that Ms. D has experienced increased mobility recently due to removal of her "pain pump," but that she still requires assistance.

Ms. B testified that Ms. D has improved significantly as to her cognitive abilities since the removal of the "pain pump" in 2012, and has improved "somewhat" as to her functional abilities. Mr. D testified that since the "pain pump" was removed his wife has improved cognitively, but not functionally.

C. Ms. D's Functional Abilities as Determined by the CAT

On January 28, 2013 Ms. D was reassessed for continuing PCA eligibility by Division assessor Sam Cornell, R.N.[27] Ms. D's assessment was recorded and scored by Mr. Cornell on the Consumer Assessment Tool or "CAT."[28] Mr. Cornell found that Ms. D has the following functional

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22 All facts found in this paragraph based on S D's testimony.
23 S D's testimony.
24 All facts found in this paragraph are based on Dr. E's testimony unless otherwise stated.
25 K B's testimony.
26 Dr. E's testimony.
27 Exs. E, EE.
28 Exs. E, EE.

abilities with regard to the Activities of Daily Living (ADLs) of transfers, locomotion, and toilet use,[29] and assigned Ms. D the following CAT scores in those areas:[30]

Transfers: Mr. Cornell reported that Mr. D told him that his wife was doing better since her change in medication (*i.e.* removal of the "pain pump"). He reported he was told by Mr. and Ms. D that not all transfers were assisted, that many were merely supervised with no hands-on support, that Ms. D used the lift recliner, and that she had been falling on a weekly basis. Mr. Cornell reported that he observed Ms. D "come nearly to stand with hands crossed," that her strength and balance were fair, and that she transferred herself multiple times during the assessment (scored 2/2, frequency 4/7).[31]

Locomotion: Mr. Cornell reported that Mr. D told him that his wife was doing better since her change to oral pain medications. He reported that Mr. and Ms. D told him that Ms. D used a roller walker to move around inside the apartment and to go up to 75 feet down the hall of her apartment building; that she used an electric scooter for longer distances; and that she fell weekly but that no injuries were reported. Mr. Cornell reported that he observed that Ms. D's gait was slightly unsteady, that she "wall walked" (walked with her hands against the wall for support and guidance), and that Ms. D used her walker when he prompted her, at which time she was lead and steadied by her PCA. Mr. Cornell scored Ms. D's locomotion as 2/2, frequency 0/0, stating that his scoring was "largely driven by falls reported."[32]

Toileting: Mr. Cornell reported that Ms. D told him that she is sometimes incontinent, but less so following removal of the "pain pump;" that a toilet frame / grab-bar assisted her with transfers; that she needed help adjusting her clothes and with hygiene; that she was sometimes able to use the toilet unassisted; and that she needed to use the toilet about eight times per day. Mr. Cornell reported that he observed Ms. D being lead to the bathroom by her PCA, who walked with her "consumer hand to PCA arm," and that the PCA entered the bathroom with Ms. D (scored 2/2, frequency 6/7).[33]

D. Relevant Procedural History

On January 28, 2013 the Division performed an assessment to determine Ms. D's continuing level of need for PCA services.[34] On March 1, 2013 the Division notified Ms. D that her PCA

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[29] The only ADLs at issue in this case are transfers, locomotion, and toilet use, and so it is unnecessary to discuss Ms. D's other CAT scores.

[30] Exs. E6 - E12 and EE6 - EE12; see 7 AAC 125.199(1).

[31] Exs. E6, EE6.

[32] Exs. E7, EE7.

[33] Exs. E9, EE-9.

[34] Exs. E, EE.

service level was being reduced from 35.75 hours per week to 10.75 hours per week effective March 11, 2013.[35] Ms. D requested a hearing on this issue on March 4, 2013;[36] this hearing request was assigned OAH case number 13-0306-MDS.

On March 13, 2013 Ms. D submitted a Change of Information form (COI) to the Division seeking to amend her PCA service plan by increasing her PCA services based on a prescription and recommendation from her treating physician.[37] On April 24, 2013 the Division denied Ms. D's PCA service plan amendment request.[38] Ms. D requested a hearing on this issue on May 8, 2013;[39] this hearing request was assigned OAH case number 13-0781-MDS.

Ms. D's two PCA cases were consolidated on June 4, 2013, and her hearing was held on June 24 and July 26, 2013. Ms. D was represented by attorney Goriune Dudukgian. Ms. D listened to the hearing by phone but did not testify. S D, K B, and Dr. C E testified by phone on Ms. D's behalf. The Division was represented by attorney Alex Hildebrand. Sam Cornell, R.N., Teresa Burnett, R.N., and Suzanne Mittlestadt testified on the Division's behalf. The record closed at the end of the July 26th hearing.

The original proposed decision in this case was issued on September 3, 2013. On September 16, 2013 the Division filed a Proposal for Action (PFA), and on September 17, 2013 the proposed decision and the Division's PFA were forwarded to the Executive Director of the Office of Rate Review for his action.[40] On September 25, 2013 the Executive Director returned the case to the administrative law judge with specific instructions on three issues. The instructions were:

1. To reconsider the number of transfers which should be provided to Ms. D in her PCA service plan reduction case (13-0306-MDS).

2. To reconsider the issues in the service plan amendment case (13-0781-MDS) (those issues being whether to increase Ms. D's PCA services as to range of motion exercises, walking, and foot care), this time placing the burden of proof on Ms. D.

3. To reconsider the conclusion in Ms. D's service plan amendment denial case (13-0781-MDS) that the Division's denial letter did not properly deny Ms. D's amendment request based on 7 AAC 125.026(d)(1) (i.e. did not assert that there had been no material change in Ms. D's condition), and that the Division therefore waived this argument.

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35 Ex. D1.
36 Ex. C.
37 Ex. FF.
38 Ex. DD.
39 Ex. CC.
40 The Commissioner of Health and Social Services has delegated final decision-making authority in cases of this type to the Executive Director of the Office of Rate Review.

A status conference was held on October 7, 2013 during which the parties requested the opportunity to submit briefs on the issues raised in the Division's PFA. Ms. D's brief was filed on October 22, 2013, and the Division's brief was filed on November 5, 2013, at which time the record closed. The ALJ issued his proposed Revised Decision on November 12, 2013. The applicable regulations do not allow parties to submit PFAs when a revised (post-remand) decision is issued. Accordingly, following issuance of the ALJ's proposed Revised Decision, the case became ripe for action by the Commissioner.

III. Discussion

A. The PCA Program - Overview

The purpose of the Medicaid personal care services program is provide assistance to the elderly, people with disabilities, and individuals with chronic or temporary conditions so that they can remain in their homes and communities.[41] Federal Medicaid law allows personal care services to be provided by states through either of two avenues.[42] First, since 1975 states have had the option of offering personal care services as a Medicaid optional State plan benefit.[43] States that provide personal care services through State plans must comply with the general Medicaid program requirements outlined in section 1902 of the Social Security Act.[44] Second, since 1981 states have also been allowed to provide personal care services through the Medicaid Home and Community-Based Waiver Services Program.[45] States providing personal care services via waiver programs must adhere to the terms of the application approved by the federal Centers for Medicare & Medicaid Services (CMS).[46]

Alaska's PCA regulations state that the PCA program is designed "to provide to a recipient *physical assistance* with activities of daily living (ADLs), *physical assistance* with instrumental activities of daily living (IADLs), and other services based on the *physical condition* of the recipient..."[47] [emphasis added]. Accordingly, "[t]he department will not authorize personal care

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41 *See* Social Security Act § 1905(a)(24), codified at 42 USC 1396d(a)(24); *see also* 42 CFR 440.167 (defining personal care services).

42 *See* LeBlanc, Tonner, and Harrington, *State Medicaid Programs Offering Personal Care Services*, Health Care Financing Review, Volume 22, Number 4 (summer 2001), accessed on line on October 30, 2013 at http://www.cms.gov/Research-Statistics-Data-and-Systems/Research/HealthCareFinancingReview/downloads/01summerpg155.pdf.

43 *Id.*

44 *Id.*

45 *See* Section 2176 of the Omnibus Budget Reconciliation Act (OBRA) of 1981, which created Section 1915(c) of the Social Security Act, now codified at 42 USC 1396n(c).

46 *See* article by LeBlanc, Tonner, and Harrington, cited above.

47 7 AAC 125.010(a).

services for a recipient if the assessment shows that the recipient only needs assistance with supervision, cueing, and setup in order to independently perform an ADL or IADL."[48]

B. Alaska's PCA Program - Use of the Consumer Assessment Tool (CAT)

The Department conducts an assessment for PCA services using the Consumer Assessment Tool, or "CAT."[49] The goal of the assessment process is to determine the level of physical assistance an applicant or recipient requires in order to perform their activities of daily living (ADLs) and instrumental activities of daily living (IADLs).[50] The CAT seeks to make the assessment process more objective by standardizing the assessment process.[51] The ADLs scored by the CAT are body mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room), locomotion (between levels), locomotion (to access living quarters), dressing, eating, toilet use, personal hygiene, personal hygiene-shampooing, and bathing.[52]

The CAT's numerical coding system has two components. The first component is the *self-performance score.* These scores rate how capable a person is of performing a particular activity of daily living (ADL). The possible CAT scores for ADLs are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance[53]); **3** (the person requires extensive assistance[54]); **4** (the person is totally dependent[55]). There are also codes that are not treated as numerical scores for purposes of calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).

The second component of the CAT scoring system is the *support score*. These scores rate the degree of assistance that a person requires for a particular activity of daily living (ADL). The possible scores are **0** (no setup or physical help required); **1** (only setup help required); **2** (one

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[48] 7 AAC 125.020(e). This regulation defines "cueing" as "daily verbal or physical guidance provided to a recipient that serves as a signal to the recipient that the recipient needs to perform an activity;" "setup" as "arranging items for use or getting items ready for use so that the recipient can independently perform an ADL or IADL;" and "supervision" as "observing and giving direction, as needed, so that the recipient can independently perform an ADL or IADL." *Id.*

[49] 7 AAC 125.020(b). The CAT has been adopted into DHSS regulations by reference. *See* 7 AAC 160.900(d)(6).

[50] *See* 7 AAC 125.010(a).

[51] Ex. E.

[52] Exs. E6 - E12. The CAT also codes or scores certain activities known as "instrumental activities of daily living" (IADLs), but IADLs are not at issue in this case.

[53] Pursuant to 7 AAC 125.020(a)(1), limited assistance with an ADL "means a recipient, who is highly involved in the activity, receives direct physical help from another individual in the form of guided maneuvering of limbs, including help with weight-bearing when needed."

[54] Pursuant to 7 AAC 125.020(a)(2), extensive assistance with an ADL "means that the recipient is able to perform part of the activity, but periodically requires direct physical help from another individual for weight-bearing support or full performance of the activity."

[55] Pursuant to 7 AAC 125.020(a)(3), dependent as to an ADL, or dependent as to an IADL, "means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity."

person physical assist required); **3** (two or more person physical assist required). Again, there are additional codes that do not add to the service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).

C. Burden of Proof

In the service level reduction case (13-0306-MDS), the Division is seeking to reduce Ms. D's benefits, and it therefore bears the burden of proof as to issues associated with the reduction of benefits.[56] In the service plan amendment denial case (13-0781-MDS), Ms. D is seeking to increase her PCA services as to range of motion exercises, walking, and foot care. Accordingly, Ms. D bears the burden of proof as to those issues.[57]

D. Were Ms. D's ADLs Scored Correctly?

At hearing, Ms. D's counsel stated that the only matters he was contesting were the CAT scores for transfers (both extent of assistance and frequency of assistance), locomotion (frequency only) and toilet use (frequency only), and the Division's denial of PCA time for the daily range of motion exercises, walking, and foot care prescribed by Dr. E.[58] Accordingly, this decision will address only those issues.

1. Transfers

PCA time is allowed for transfers when a person requires physical assistance to move between one surface and another (including to or from a bed, chair, or wheelchair), or when a person requires physical assistance to move from a lying or sitting position to a standing position.[59] The Division found that Ms. D requires limited assistance from one person for transfers (CAT score 2/2).[60] Ms. D asserts that she requires extensive assistance from one person for transfers (CAT score 3/2).[61]

The dividing line between limited assistance and extensive assistance with transfers is whether the recipient was receiving weight bearing assistance two times per week or (instead) three times per week.[62] Weight bearing assistance has been defined as

> supporting more than a minimal amount of weight. It does not require that the assistant bear most of the recipient's weight, but instead that the recipient could not perform the task without the weight bearing assistance.[63]

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56 *See* 42 CFR 435.930, 2 AAC 64.290(e), 7 AAC 49.135, and *Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

57 *Id.*

58 *See* closing statement of Ms. D's counsel during July 26, 2013 hearing at approx. 2:34:40 - 2:35:20.

59 7 AAC 125.030(b)(2).

60 Exs. E6, EE6.

61 *See* closing statement of Ms. D's counsel during July 26, 2013 hearing.

62 Exs. E6, EE6.

The score assigned by the assessor implies that Ms. D needs weight bearing assistance no more than twice per week. However, Ms. D's PCA testified that, at the time of the assessment, Ms. D received weight bearing assistance with transfers about once per day (7 times per week). Mr. D's testified that his wife "often" needed weight bearing assistance.

Mr. Cornell noted in the CAT that he was told “not all transfers were assisted” and that many were merely supervised. This is not inconsistent with the testimony of the PCA that she needs weight bearing assistance once per day. Nor is it inconsistent with Mr. D’s testimony that his wife “often” needs weight bearing assistance, or that she had improved since the change in her medication. Nothing in the CAT suggests that Ms. D does not need weight bearing assistance some of the time; the only question is how often she needs that level of assistance. The preponderance of the evidence demonstrates that Ms. D requires weight bearing assistance with transfers at least three times per week, and that this ADL should have been scored as requiring extensive one-person assistance (a CAT score of 3/2, resulting in 3.75 minutes per transfer).[64]

With regard to frequency, there are no notations on the CAT to show why the assessor found that Ms. D requires assistance with transfers four times per day.[65] At hearing, Mr. Cornell testified that he assigned a frequency of four because "sometimes she needs assistance, sometimes she does not." On the other hand, Ms. B's testimony was very specific and describes at least 10, and arguably up to 14, assisted transfers each day.[66] Ms. B's specific testimony, based on two years of service as Ms. D's PCA, is likely to be more accurate than an educated guess by the assessor based on a short period of observation.[67]

The Division has noted that, as Ms. D's PCA, Ms. B has a financial incentive to inflate the level and frequency of assistance required by Ms. D. It cannot be denied that this financial incentive creates a *potential* for bias. However, Ms. B's testimony is generally consistent with and

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

64 *See* PCA score-to-minutes formula reproduced at Ex. D8. While Ms. D only needs limited assistance with some of her transfers, the Department’s regulations, CAT, and formulas for calculating PCA time do not provide for a mixed calculation. If a recipient needs extensive assistance at least three times per week, then he or she receives 3.75 minutes of PCA time for each transfer, including those that only require limited assistance. Similarly, if a recipient only needs extensive assistance twice per week, he or she would receive 2.5 minutes of PCA time for each transfer, including those that require extensive assistance.

65 Exs. E6, EE6.

66 See Section II(B) at pages 3-4, above. Mr. D's testimony indicates that he performs additional assisted transfers. However, his testimony was not specific as to the *number* of assisted transfers he performs each day. Accordingly, increasing Ms. D's frequency of transfers based on her husband's testimony would be unduly speculative. Also, Ms. D originally asserted that she requires eight assisted transfers per day (56 per week), so it would not be appropriate to increase frequency in excess of that amount, even though an increased frequency might be supported by the evidence.

67 This is not meant to criticize Mr. Cornell in any way. Rather, it is simply a problem inherent in the PCA (and waiver services) assessment process.

corroborated by the testimony of Dr. E and Mr. D. Accordingly, the preponderance of the evidence indicates that Ms. B's testimony was not influenced by the potential for financial gain.

In summary, the preponderance of the evidence indicates that Ms. D is eligible for 10 assisted transfers per day, and this was the number awarded by the original proposed decision in this case. However, in the Division's Proposal for Action, and in the post-hearing briefing, it was noted that, during opening argument, Ms. D's counsel requested only 56 assisted transfers per week (i.e. eight per day). Ms. D's counsel did increase the requested frequency of assisted transfers during his closing argument. However, absent extraordinary circumstances not present here, the Division was entitled to rely on the number of assisted transfers requested by Ms. D at the outset of the case. Accordingly, Ms. D is allowed PCA time for eight assisted transfers per day.

2. Locomotion

For the ADL of locomotion, PCA time is allowed when a person requires assistance with walking (whether with the support of a walker, cane, gait belt, braces, crutches, or manual wheelchair), either between different locations in the recipient's home, or outside the home to keep a medical or dental appointment; PCA time is also allowed when walking and simple exercises have been prescribed by a physician.[68] The Division found that Ms. D requires limited assistance from one person for locomotion (CAT score 2/2), and Ms. D does not assert that she requires more than limited assistance with locomotion. Rather, she challenges only the frequency of assisted locomotion found by the Division (0/0).[69]

Mr. Cornell testified at hearing that he assigned a frequency of zero because, in his view, the assistance that Ms. B provided to Ms. D for locomotion was basically just supervision. However, this is inconsistent with the fact that Ms. D received a self-performance score of two (limited assistance). Also, Ms. B testified that she must provide hands-on, weight bearing assistance with locomotion about five times per day. Finally, Mr. D testified that, even though Ms. D usually uses a walker when he is at home, he must still provide hands-on assistance to guide her because she cannot move in a straight line by herself. Mr. D's testimony describes at least two instances of assisted locomotion per day, excluding locomotion associated with toilet use.[70] Accordingly, the preponderance of the evidence indicates that Ms. D requires assisted locomotion seven times per day (49 times per week).

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[68] 7 AAC 125.030(b)(3).

[69] Exs. E7, EE7.

[70] See Section II(B) at pages 3-4, above. It is probable that Mr. D assists his wife with locomotion more than two times per day. However, as with his testimony regarding frequency of transfers, his testimony as to frequency of assistance with locomotion was not specific as to the number of assists he performs each day. Accordingly, increasing Ms. D's frequency of assisted locomotion beyond seven times per day would be unduly speculative.

3. Toilet Use

For the ADL of toilet use, PCA time is limited by regulation to time spent moving to and from the toilet, transfers on and off the toilet, general hygiene care of a colostomy, ileostomy, or external catheter, and inserting and removal of a non-medicated suppository, digital stimulation, or other routine incontinence care.[71] The CAT's definition of "toilet use" is somewhat broader, encompassing post-toileting hygiene and clothing adjustments.[72]

The Division found that Ms. D requires limited one-person assistance with toilet use (CAT score 2/2),[73] and uses the toilet (with limited assistance) six times per day. Ms. D does not dispute that she requires limited one-person assistance with toilet use, but asserts that she requires limited assistance with toilet use eight times per day.

Mr. Cornell reported he was told at the assessment that Ms. D used the toilet about eight times per day, and that some of these events were unassisted. Based on this information, Mr. Cornell's estimate of six assisted toilet uses per day appears reasonable. However, Dr. E testified that MS can cause incontinence, and Ms. D takes a medication in the morning which causes her to need to urinate more frequently. These facts support a greater frequency of toilet use. Also, both Ms. B and Ms. D testified that Mr. Cornell sometimes "cut them off" and prevented them from providing input during the assessment because he wanted to get the information directly from Ms. D.[74] This may have prevented Ms. D's husband and PCA from providing relevant information regarding her frequency of toilet use.

Ms. B testified that Ms. D uses the toilet five to six times per day during the period she is on duty (8:00 a.m. to 4:00 p.m.), and that, on each occasion, Ms. D requires limited assistance. Mr. D indicated that he assists his wife with toileting four to five times per day, and that he usually helps her to the bathroom, helps her pull her pants down, and sometimes helps her clean herself. Mr. D's testimony implies that his wife sometimes uses the toilet unassisted when her PCA is not there, and this is consistent with the assessor's findings. However, Ms. B's testimony and Mr. D's testimony was credible and indicates that Ms. D usually requires assistance with toileting nine to 11 times per day. However, Ms. D only seeks PCA time for eight assisted toilet uses per day. Accordingly, the preponderance of the evidence proves that Ms. D is entitled to the eight assisted toilet uses per day (56 per week) for which she has requested PCA time.

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71 7 AAC 125.030(b)(6).

72 The CAT form defines toilet use as "[h]ow person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, cleanses . . . manages ostomy or catheter, adjusts clothes" (Ex. E9, emphasis added).

73 Exs. E9, EE9.

74 Ms. D's husband and PCA were credible witnesses, and their testimony on this point went un-rebutted.

4. Amendment Request: Range of Motion Exercises, Walking, and Foot Care

Before turning to the specific facts of this case, it is appropriate to review 7 AAC 125.026, the regulation governing PCA service plan amendment requests (also known as "Changes of Information" or "COIs"). The regulation provides in relevant part:

> (a) If the department confirms that a recipient has had a material change in condition, the department may increase, reduce, or terminate services or the number of hours of service authorized under 7 AAC 125.010 - 7 AAC 125.199.
> . . . .
>
> (d) For purposes of this section, a material change in condition is confirmed if the department had determined in its records that . . . . (1) the recipient's medical condition has changed since the last assessment . . . .

Under 7 AAC 125.026(a), there is a threshold that must be met before a change to a recipient's PCA service level authorization can be made by the Department. That threshold is the Department's confirmation "that [the] recipient has had a material change in condition." *Id.* The phrase "material change in condition" is defined, for purposes of the PCA program, by 7 AAC 125.026(d). Subsection (d) specifies four different situations which "confirm" that there has been a "material change in condition." These scenarios are:

> (1) the recipient's medical condition has changed since the last assessment;
>
> (2) the recipient's living conditions have changed since the last assessment, including an improvement in the physical living environment, supportive services, or caregiver services;
>
> (3) the recipient was receiving personal care services under a time-limited amendment to the recipient's personal care service level authorization, based on a prescription for foot care, walking and simple exercises, or range of motion or stretching exercises, and that amendment has expired; or
>
> (4) the recipient's PCA services are no longer authorized under 7 AAC 105 - 7 AAC 160 due to a regulation change.

Again, based on the language of 7 AAC 125.026(a), only if the department *first* confirms that a recipient has had a material change in condition, as defined by 7 AAC 125.026(d), can it then "increase, reduce, or terminate services or the number of hours of service authorized[.]"

In this case, Ms. D submitted a COI / PCA service plan amendment request in March 2013. The COI was supported by two documents from her physician. The first was a prescription stating that Ms. D "should continue with her PCA support for 8 [hours per day], 5 days per week" because

"[s]he has multiple sclerosis and multiple fractures from traumatic falls."[75] The second was a PCA service plan amendment form on which Dr. E prescribed the following:[76]

1. Two 15-minute sessions per day of physically-assisted range of motion exercises.
2. Two 15-minute sessions per day of physically-assisted walking exercises.
3. One 30-minute per week session of physically-assisted foot care.

On April 24, 2013 the Division issued a notice denying Ms. D's COI.[77] That notice is not a model of clarity. However, read as a whole, the notice did make a threshold determination under 7 AAC 125.026(a) that Ms. D had failed to demonstrate a material change in condition. The notice also explained *why* there had *not* been a material change in condition since the last assessment (*i.e.* Ms. D's COI requested walking and range of motion exercises, but she had been ambulatory and had "demonstrated full ROM at the time of assessment").

In summary, under 7 AAC 125.026(d), a material change in condition is confirmed if the department has determined that the recipient's medical condition has changed since the last assessment. In this case, the preponderance of the evidence does not indicate that Ms. D's medical condition changed between her January 2013 assessment and her March 2013 amendment request. Rather, the evidence shows only that the *treatments* prescribed by Ms. D's physician changed. A new prescription or treatment for a previously-existing medical situation does not create a material change in condition. Because Ms. D failed to prove, by a preponderance of the evidence, that a material change in condition occurred between the date of her assessment and the date of her amendment request, the Division was correct to deny Ms. D's PCA service plan amendment request pursuant to 7 AAC 125.026. Finally, because the Division was correct to deny Ms. D's service plan amendment request based on her failure to demonstrate a material change in condition as required by 7 AAC 125.026, it is not necessary to address the Division's argument, based on 7 AAC 125.040(a)(4), that the tasks for which the service plan amendment was sought could reasonably be performed by the recipient.

IV. Conclusion

The Division's scoring of the level of assistance required by Ms. D to perform her activities of daily living was correct as to locomotion and toilet use. However, Ms. D requires a higher level of assistance with transfers. In addition, the frequency with which services are provided should be

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[75] Ex. FF4. Ms. D did not, however, assert during these proceedings that she should actually receive 40 hours per week of PCA services based on her doctor's prescription. Accordingly, any claim based on that prescription is considered abandoned or waived.

[76] Ex. FF3.

[77] Ex. DD.

increased in the areas of transfers, locomotion, and toilet use.[78] However, the Division was correct to deny Ms. D's service plan amendment request (seeking additional PCA time for range of motion exercises, walking, and weekly foot care) because Ms. D failed to demonstrate a material change in her condition to justify the amendment. Accordingly, the Division's decision reducing Ms. D's PCA services is affirmed in part and reversed in part, and its decision denying Ms. D's subsequent service plan amendment request is affirmed.

APPEAL RIGHTS

This decision is the final administrative action in this proceeding. Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the date of this decision.

DATED this 6th day of January, 2014.

By: _____
Jared C. Kosin
Executive Director, Office of Rate Review
Department of Health and Social Services

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

[78] Ms. D is allowed PCA time for eight assisted transfers per day, seven assisted instances of locomotion per day, and eight assisted toilet uses per day.