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

In the Matter of:	)	
	)	
E C	)	OAH No. 13-0438-MDS
	)	Agency No.

REVISED DECISION

I. Introduction

E C receives personal care assistant (PCA) services through the Division of Senior and Disability Services under 7 AAC 125.010-199.[1] The Division reassessed Ms. C's functional abilities and determined that she was eligible for 26.25 hours of assistant services weekly. Ms. C filed an appeal.

The assigned administrative law judge conducted a telephonic hearing on June 27, 2013. Ms. C participated and Gerry Johnson represented the Division. Ms. C asserted that she is eligible for assistance with body mobility, and that she needs more frequent assistance for transfers, locomotion, toileting and dressing than the Division assessed.

Ms. C, her care coordinator (L S), a representative of her personal care attendant services provider (F D), and her daughter (K Q) testified on behalf of Ms. C. Marianne Sullivan, R.N., who conducted the reassessment, testified on behalf of the Division.

The administrative law judge issued a proposed decision concluding that the Division correctly determined that Ms. C is ineligible for assistance with body mobility, but that it had understated the frequency of Ms. C's need for assistance with transfers, locomotion and toileting and the degree of assistance she needs for wheelchair locomotion and dressing. The Division filed a proposal for action asserting that (1) transfers occurring outside of the bathroom prior to or after toileting are included in the activity of toileting,[2] that (2) to provide personal care assistance time for transfers and locomotion occurring incidental or ancillary to accessing a medical appointment would duplicate services provided by an escort,[3] and that (3) the frequency of transfers as determined in the proposed decision (12 per day) was excessive, because it included four transfers per day for instances at night when Ms. C gets out of bed to alleviate pain, while also awarding transfers for instances in which she gets out of bed to toilet.[4] The

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1 *See* AS 47.07.045.

2 Proposal at 3-7, *citing* In Re V.W, OAH No. 12-0957-MDS (Commissioner of Health and Social Services 2013). *See id.*, at 12, item (1).

3 Proposal at 9-11. *See id.* at 9, notes 11 & 12 and at 12, items (3) and (4).

4 Proposal at 8. *See id.* at 12, item (2).

Commissioner returned the case to the administrative law judge to reconsider the proposed decision in light of Division's arguments with respect to the latter two points,[5] and to prepare a revised decision.

The revised decision concludes that under the facts of this case, the time allowed for escort services did not include physical assistance for transfers and locomotion outside the residence, and that a total of 12 transfers per day is not excessive.

II. Facts[6]

E C was assessed in 2009 by Lourdes S. Kulykivskyi, R.N.[7] The Division of Senior and Disability Services determined that she entitled to 56 hours per week of PCA services.[8] A service plan incorporating that level of services was prepared.[9] Ms. C was reassessed in 2010 by Carol Montgomery[10] and in 2011 and 2012 by Marianne Sullivan, R.N.[11] Due to pending litigation and the revision of the applicable regulations governing the program, the Division suspended any reductions in the number of authorized hours of PCA services from 2010-2012.[12] Therefore, Ms. C's service plan was not amended in 2010-2012, notwithstanding that there were substantial changes in her assessed need for PCA services. New regulations went into effect on January 26, 2012.[13]

Ms. Sullivan reassessed Ms. C on February 1, 2013.[14] Present at the time of the assessment were her care coordinator, L S, and her daughter and personal care attendant, K Q.[15] At the time of the assessment, Ms. C was 79 years old and she was living with her adult child in

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5 The Commissioner's Order Returning Case did not direct the administrative law judge to reconsider the Proposed Decision in light of the Division's first point, which was that by counting transfers occurring outside the bathroom, the Proposed Decision was inconsistent with In Re V.W. As the commissioner explained in In Re N.D., OAH No. 13-0565-MDS, at 4-5 (Commissioner of Health and Social Services 2013), there is no inconsistency between In Re V. W. and In Re N.D., or between either of those cases and the Proposed Decision. In Re V.W. holds that transfers on and off a toilet are included in the ADL of toileting. In Re N.D. holds that transfers occurring outside of a bathroom are not included in the ADL of toileting. The proposed decision in this case followed those holdings.

6 The facts as set forth in this section of the Revised Decision are unchanged from the Proposed Decision. The Division did not request any changes to those findings.

7 Ex. F.

8 *See* Ex. F, p. 17; Ex. D, p. 2.

9 *See* former 7 AAC 43.751(a)(3) (repealed 2/1/2010).

10 Ex. G.

11 Ex. H (2012); Ex. I (2011).

12 Hearing Statement of D. Day; Ex. D, p. 2. *See generally*, Baker v. State, Department of Health and Social Services, 191 P.3d 1005 (Alaska 2008). The Baker litigation was concluded by a settlement agreement on February 27, 2012. Baker v. State, Department of Health and Social Services, Superior Court No. 3AN-06-10871CI.

13 *See* 7 AAC 125.010-.199.

14 Ex. E, p. 2.

15 Ex. E, p. 2.

a single level apartment in No Name.[16] She was five feet, five inches tall and weighed 200 pounds.[17]

Ms. C suffers from a variety of ailments, including breast cancer, hypertension, heart disease,[18] diabetes mellitus, joint disease,[19] chronic obstructive pulmonary disease (emphysema),[20] rheumatoid arthritis, peripheral neuropathy,[21] peripheral edema,[22] and hypothyroidism.[23]

To treat her peripheral edema, Ms. C has been prescribed diuretics which result in a need for her to empty her bladder significantly more frequently than normal.[24] Her conditions have left her extremely unsteady; she requires a walker or a quad cane with arm support for ambulation but remains at a high risk for falls.[25] She uses supplemental oxygen, 24 hours a day.[26] Her arthritis and joint disease are progressive, resulting in a decrease in her functional abilities over time.[27] At the time of the reassessment, she was unable to touch her hands behind her back, or to place her hands across her chest and stand up;[28] while sitting, she could flex forward to touch her mid-shin, but no farther;[29] she could not stand up from a seated position in a stuffed chair without substantial hands on assistance;[30] and she had a significant loss of functional ability in her hands.[31] Ms. C sleeps in a standard bed.[32] She is unable to lift her legs

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16 Ex. E, p. 1.

17 Ex. F, p. 5; Ex. E. p. 24.

18 Ms. C's diagnoses include congestive heart failure, coronary artery disease, arteriosclerotic heart disease, and atrial fibrillation. *See* Ex. E, p. 3; Woods Letter (4/24/2013).

19 Ms. C's diagnoses include inflammatory arthropathy, rheumatoid arthritis, degenerative joint disease and generalized osteoarthritis. Ex. E, p. 3; Woods Letters (4/242013; 6/24/2013). Inflammatory arthropathy is defined as "a disease of a joint of inflammatory origin." Dorland's Illustrated Medical Dictionary (27th Ed.), at 149. The prefix "poly" indicates the condition extends to many joints. *Id*., p. 1328. Rheumatoid arthritis is defined as "a chronic systemic disease, primarily of the joints, usually polyarticular, marked by inflammatory changes in the synovial membranes and articular structures and be atrophy and rarefaction of the bones." *Id*., p. 147. Osteoarthiritis is defined as "noninflammatory degenerative joint disease occurring chiefly in older persons…". *Id*., p. 1197.

20 Dr. Woods diagnosed "COPD/emphysema". Ex. E, p. 3. COPD is an abbreviation for chronic obstructive pulmonary disease. Dorland's Illustrated Medical Dictionary (27th ed. 1988) at 379.

21 Woods Letter (4/24/2013).

22 Woods Letters (4/24/2013; 6/24/2013).

23 Ex. E., pp. 3, 22; Woods Letter (4/24/2013).

24 Woods Letters (4/24/2013; 6/24/2013); Testimony of E. C, K. Q.

25 Woods Letter (4/24/2013); Testimony of K. Q. *See* Ex. E, p. 3 ("Falls reported").

26 Woods Letter (4/24/2013).

27 Woods Letter (4/24/2013).

28 Ex. E, p. 4.

29 Ex. E, p. 4.

30 Ex. E, p. 6.

31 Woods Letter (6/24/2013). Notwithstanding the loss of functional ability in her hands, her hand strength is reportedly "strong." *See* Ex. E, p. 4.

while lying in bed and she cannot position her upper body on the pillows provided for her daytime comfort.[33] Ms. C is unable to walk, even with assistance, outside of the home to access medical appointments. Rather, she uses a manual wheelchair, which she is unable to self-propel; for medical appointments, she is totally dependent on the physical assistance of another person to propel her wheelchair.[34]

Ms. Sullivan used the Consumer Assessment Tool (CAT) to record the results of her assessment. Using the Personal Care Assistance Service Level Computation chart in conjunction with the CAT, the Division calculated Ms. C's need for PCA services as 26.25 hours weekly.[35] Under the new regulations, even with no changes to the prior assessment, Ms. C's previously allotted time for PCA services, 56.0 hour, would have been reduced to approximately 50.75 hours per week.[36]

III. Discussion

The Department of Health and Social Services is authorized to provide eligible persons with personal care services in the recipient's home.[37] The Division provides compensation for personal care services in the form of physical assistance, based on an assessment of the recipient's ability to perform specified activities of daily living (ADL) and instrumental activities of daily living (IADL).[38] The assessment is conducted using the Consumer Assessment Tool (CAT),[39] a form created by the Department of Health and Social Services to evaluate an individual's ability to care for himself or herself.[40]

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[32] Testimony of K. Q. Ms. Sullivan noted that Ms. C may be eligible for a semi-electric bed through the Waiver program.

[33] Testimony of K. Q.

[34] Testimony of K. Q.

[35] Ex. D, p. 1. The Personal Care Assistance Service Level Computation chart (hereinafter, PCA Service Computation chart), revised as of 3/20/2012, may be viewed online at the webpage noted by the Division at Ex. D, p. 1. It is an official document incorporated by reference into the Division's decision; accordingly, it is considered part of the record for purposes of the hearing. *See* 7 AAC 125.024(a)(1); 7 AAC 160.900(d)(29).

[36] This amount has been calculated based on the frequencies and self performance/support scores provided at Ex. D, p. 6, in conjunction with the PCA Service Computation chart.

[37] AS 40.07.030(b).

[38] *See* 7 AAC 125.010, -.020, .030. 7 AAC 125.030(a) provides that compensation will be paid "for the personal care services identified in this section." 7 AAC 125.030(b) provides that "[p]ersonal care services include the following types of physical assistance[,]" and goes on to list eight specific ADL's with forms of personal service assistance. A regulation that lists items as "included", without specifying that other items are excluded, means "included, but not limited to." *See* AS 01.10.040(b). 7 AAC 125.030(a) limits compensation items to those "identified" in §30. Arguably, this means that only those items expressly listed in 7 AAC 125.030(b) are compensable. Absent a claim by Ms. C that a specific type of activity or assistance that is not expressly mentioned in the regulation is compensable, it is not necessary to consider whether to interpret the regulation to that effect.

[39] 7 AAC 125.020(b); 7 AAC 160.900(d)(6).

[40] *See generally*, http://dhss.alaska.gov/dsds/Documents/docs/cat-pcatOnlineFlyer.pdf (accessed June 19, 2013).

One section of the CAT covers the individual's physical abilities with respect to eight specified ADL's: body mobility, transfers, locomotion, dressing, eating and drinking, toileting, personal hygiene, and bathing.[41] Individuals are given two scores reflecting their ability to perform these activities, one for their ability to perform the activity (self-performance), and the other for the degree of assistance they require (support). A score of two zeros indicates the individual performs the activity independently (self-performance) with no setup or physical help (support). Increasing inability to perform and need for assistance result in progressively higher scores of one to four.[42] The Division will provide a specified amount of time for PCA assistance with each ADL, depending on the scores provided and the frequency with which the activity occurs, in accordance with the Personal Care Assistance Service Level Computation form devised for that purpose.[43]

At the hearing, Ms. C identified (1) body mobility, (2) transfers, (3) locomotion, (4) toileting, and (5) dressing as the ADL's as to which the assessment was incorrect. The proposed decision concluded that Ms. C is ineligible for personal care assistance with body mobility, because she is ambulatory. It also concluded that the Division had understated the frequency with which Ms. C needs assistance with transfers, locomotion, and toileting, and that it had understated the level of assistance she needs for wheelchair locomotion and dressing. The Commissioner directed the administrative law judge to reconsider the proposed decision with respect to two issues raised by the Division in its Proposal for Action: (1) the number of transfers and locomotion provided for accessing medical appointments; and (2) the number of transfers provided for night time pain respite.

A. Transfers and Locomotion While Accessing Medical Appointments

The proposed decision included time for six transfers and four locomotions for each medical appointment. The Division's Proposal for Action argues all transfers and locomotion associated with a medical appointment "should have been included within the time provided for

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41 Ex. E, pp. 6-11. *See* 7 AAC 125.030(b)(1)-(8). The CAT terminology does not precisely track the regulatory language for each ADL. For one example, the ADL of "body mobility" is described in the regulation as positioning or turning in a bed or a chair, while the CAT uses the term "bed mobility" and omits any reference to a chair. *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.

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

43 7 AAC 125.024(a)(1); 7 AAC 160.900(d)(29).

locomotion to access medical appointments and escort time for medical appointments."[44] The Division argues that locomotion for accessing medical appointments should be limited to the two locomotions for that purpose awarded by the assessor to "cover…the locomotions from Ms. C's home to the transport vehicle."[45] The Division argues that any other locomotion, and all transfers, associated with a medical appointment is provided as part of escort services.[46]

7 AAC 125.030(b)(3)(A) provides that locomotion includes "walking with support...outside the home to keep a medical or dental appointment." 7 AAC 125.030(b)(2)(A) defines a transfer as "moving between one surface and another, including to and from a…wheelchair." Escort services fall within the scope of 7 AAC 125.030(d)(9), which states that personal care services include "travelling with the recipient to and from a routine medical or dental appointment."

Locomotion, by definition, is limited to time when the recipient is walking with support, and transfers involve movement from one surface to another. Accordingly, locomotion and transfers clearly do not include time when the recipient is seated in the transport vehicle, travelling to a medical appointment. Equally clearly, escort services do include the time that a recipient is seated in the transport vehicle. Reading all three regulations together, and limiting each to its clearly stated scope, locomotion, transfers, and escort services are three distinct and mutually exclusive categories. The Division's argument is that rather than reading the three regulations as describing three distinct and mutually exclusive activities that, taken together, would cover an entire journey, one should read the term "travelling," as used in 7 AAC 125.030(d)(9), to mean that part of the journey from the time that Ms. C arrives in her wheelchair at the transport vehicle, through when she is seated in the wheelchair after exiting the vehicle upon her return to her residence. Reading the regulation in this fashion, escort services would include not only the passive activity of being present while Ms. C is seated in the transport vehicle, but also all physical assistance that may be provided to Ms. C from her arrival at the transport vehicle through being seated in her wheelchair upon return from the appointment.

Both readings are plausible. It is not necessary to make a dispositive ruling as to which interpretation is the correct one, however, because even if one were to interpret 7 AAC 125.030(d)(9) as the Division does, in this particular case it is clear that the time allowed for

[44] Proposal at 2. *See id.*, at 8-11.
[45] Proposal at 9.
[46] Proposal at 10.

escort services did not include the transfers and locomotion outside the residence associated with Ms. C's medical appointments.

The time allowed for escort services is not fixed by the PCA Service Computation chart. In the absence of any fixed time for escort services, the PCA Service Computation chart provides ample flexibility to include sufficient time for escort services to account for all the discrete instances of transfer and locomotion that occur in a single trip to a particular medical provider. Under the Division's proposed interpretation of the regulations, if the time allowed for escort services reflects the actual time spent while accompanying the recipient from home to the provider and back (including all associated transfers and locomotions), and in addition time spent conferring with the provider, then it would be unnecessary to provide additional time for transfers and locomotions occurring during the course of the trip.

That is not what occurred in this case, however. The Division allowed 30 minutes of escort time for each medical appointment.[47] In the 2010-2012 assessments, it allowed 40,[48] 60,[49] and 30[50] minutes, respectively, for the same activity. There is no indication in the record as to how these times were calculated. Ms. C lives in No Name, and her primary care provider is in No Name.[51] In common experience, it would likely take 30 minutes to drive roundtrip from Ms. C's residence in No Name to the provider's office in No Name and back again. Allowing the time allowances in the PCA Service Computation chart for transfers and locomotion, an additional 25 minutes of escort time outside the residence would be needed to account for those activities, in addition to the passive activity of accompanying Ms. C for the 30 minutes she is seated in the transport vehicle travelling to and from No Name.[52] A conference with the medical provider would likely add 5 minutes to the escort's time. Thus, applying the time allowances provided in the PCA Service Computation chart, if the physical assistance provided for those transfers and locomotion had been included as escort services, the total time required for escort services would be 60 minutes for each trip, rather than the 30 minutes provided. In that light,

47 Ex. E, p. 5 (CAT p. 5).
48 Ex. G, p. 4.
49 Ex. I, p. 5.
50 Ex. H, p. 5.
51 *See e.g.*, Ex. F, p. 2; Letter 4/24/2103 (Dr. Woods).
52 These are the transfer between the wheelchair and the vehicle outside the residence (2 x per appointment, and locomotion between the residence and the vehicle (2 x per appointment), and between the vehicle and the office (2 x per appointment). The time allowed would be 2 x 2.5 minutes for transfers, and 4 x 5 minutes for locomotion, for a total of 25 minutes per appointment.

under the facts of this case, it is clear that time provided for escort services in the assessment did not include time for transfers and locomotion outside the residence.

B. Activities of Daily Living

(1) Body Mobility

7 AAC 125.030(b)(1) states that personal care services for the activity of body mobility include "positioning or turning in a bed or chair, if the recipient is nonambulatory." Ms. Sullivan assessed Ms. C as needing limited assistance in 2012 and 2013, after assessing her as needing extensive assistance in 2011.

The evidence as to the degree to which Ms. C needs assistance in this activity is mixed. In 2010 she needed weight bearing support in order to lift and position her upper body on pillows while in bed,[53] and in 2011 she had bed sores.[54] However, in 2012 she reported that she was able to turn herself in bed, she was able to reposition herself in a chair, and she had no bedsores.[55] In 2013, she remained free of bed sores.[56] Mr. D testified that due to the edema in her feet and lower extremities Ms. C is unable to lift her legs while in bed. It may not be necessary to determine to what degree Ms. C needs assistance in positioning or turning her body while in a bed or chair, however, because the Division contends that Ms. C is ambulatory, and thus not entitled to assistance for body mobility, regardless of whether she needs assistance.[57]

The term "nonambulatory" has not been defined for purposes of the PCA program. In common understanding, to be ambulatory is to be able to walk.[58] Ms. C is not able to ambulate effectively, that is, she cannot, even using an assistive device such as a walker, walk a block or over a rough surface. However, she is not entirely unable to ambulate. She was observed by Ms. Sullivan to "locomote w/quad cane right hand and daughter holding onto left arm for support."[59] In short, she can walk with assistance. When she walks, she is at risk of falling. But for purposes of determining the need for assistance with changing position in a bed or chair, the risk

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53 Ex. G, p. 6.

54 Ex. I, p. 6 ("Stage II decubitis sacrum"), p. 25.

55 Ex. H, p. 6.

56 Ex. E, p. 25.

57 Ms. C was provided assistance for body mobility under the service plan put into effect in 2009, and was continued in 2010 and 2011, even though Ms. C was ambulatory. *See* Ex. F, p. 4 (2009); Ex. G, p. 6 (2010); Ex. I, p. 6 (2011). The regulation in effect at the time of the 2009 assessment provided for compensation for "physical assistance with positioning or turning a nonambulatory patient in a bed or chair." Former 7 AAC 43.752(a)(1)(E) (repealed 2/1/2010).

58 *See* Dorland's, p. 57 ("walking or able to walk"); Webster's Ninth New Collegiate Dictionary (1990), p. 77 ("able to walk about and not bedridden").

59 Ex. E, p. 6. Ms. C reported she gets around by using the quad cane and shuffling her feet, as her daughter holds onto her other arm. Ex. E, p. 7.

of a fall while walking is irrelevant. Ms. C is properly considered ambulatory for purposes of the activity of body mobility.[60] Because she is ambulatory, she is not eligible for body mobility assistance, regardless of her actual need for assistance in positioning or turning her body while in a bed or chair.

(2) Transfers

7 AAC 125.030(b)(2) states that personal care services for transferring include physical assistance for "moving between one surface and another, including to and from a bed, chair, or wheelchair" and for "moving from a lying or sitting position to a standing position."[61] In each of her assessments, Ms. C was scored as needing extensive assistance with transfers, with a one person physical assist.[62] The frequency was assessed at 12 times per day in 2009 (Ms. Kulykivskyi), eight times per day in 2010 (Ms. Montgomery), and four times per day in 2011-2013 (Ms. Sullivan).[63] Ms. C did not dispute the scoring, but asserted that the frequency of her need remains as it was in 2009, 12 per day.

Ms. Sullivan testified that she reduced the number of transfers from 12 (in the existing service plan, based on the 2009 assessment) to four (2013) because, as the evidence established, due to the progressive nature of her conditions Ms. C was spending more time in bed or seated and was less frequently transferring from one surface or position to another.[64] She assessed a need for four transfers daily based on Ms. Q's statement that she tried to get her mother up to eat a meal three times a day.[65]

Ms. Q testified she provides 12 transfers per day in addition to transfers on and off a bed or chair preparatory to toileting.[66] Ms. C asserted that in addition to transfers at meal times, she needs assistance for transfers at least twice each night, when due to pain she moves from her bed to a chair.[67]

It is undisputed that Ms. Q tries to get her mother up to eat a meal three times daily. Absent evidence to the contrary, it may reasonably be inferred that each mealtime involves two transfers: (1) a transfer out of a bed or chair to a standing position prior to locomoting into the

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60 7 AAC 125.030(b)(1). Ms. C has not argued that the term "body mobility" as used in 7 AAC 125.030(b)(1) extends to any activities that are not specifically mentioned in the regulation. *See* note 38, *supra*.

61 7 AAC 125.030(b)(2)(A), (B).

62 Ex. F. p. 4 (2009); Ex. G, p. 6 (2010); Ex. I, p. 6 (2011); Ex. H, p. 6 (2012); Ex. E, p. 6 (2013).

63 *Id.*

64 Testimony of M. Sullivan.

65 Testimony of M. Sullivan.

66 Testimony of K. Q.

67 Testimony of E. C.

dining area; and (2) a transfer out of the dining chair to a standing position. Thus, on every day when Ms. C gets up for three meals per day, there are six associated transfers (42 per week).[68] Moreover, absent evidence to the contrary, it may reasonably be inferred that each doctor's appointment involves six transfers: (1) from a bed or chair in the apartment, into a wheelchair; (2) out of the wheelchair and into a transport vehicle; (3) out of the transport vehicle and into the wheelchair prior to locomoting to the doctor's office; (4) out of the wheelchair and into the transport vehicle for the return trip; (5) out of the transport vehicle and into the wheelchair prior to locomoting back to the apartment; and, finally, (6) out of the wheelchair and into a bed or chair at the apartment. Finally, for each occasion on which Ms. C uses the toilet, there would have been a transfer out of a bed or chair prior to entering the bathroom, and a transfer back into a bed or chair after exiting the bathroom.[69] Ms. C is frequently incontinent, however, and episodes of incontinence (while considered toileting) by definition do not necessarily involve a transfer in order to get to the bathroom.[70]

Assuming two or three meals and six toiletings per day and one medical appointment per week (the frequencies assessed by Mr. Cornell), and assuming that Ms. C transfers before and after each of those activities, the total weekly number of transfers would be 35 + 84 + 6 = 125 (about 18 per day), excluding any transfers associated with occasions at night when Ms. C gets out of bed in order to alleviate pain but does not toilet. Taking into consideration that Ms. C is often incontinent (and may not use the bathroom on those occasions) it may be that the appropriate number of transfers is less than 18 per day. But Ms. C did not ask for an increase in the frequency of transfers, and because the Division did not prove that the frequency should be decreased, the frequency may not be reduced even if (as the Division argues in its proposal) no time should be provided for night time transfers other than for toileting.

(3) Locomotion

7 AAC 125.030(b)(3) states that personal care services for locomotion include physical assistance for "walking with the support of a[n assistive device] or manual wheelchair (i) between locations in the recipient's home; or (ii) outside the home to keep a medical or dental

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[68] Ms. S testified that the activity of eating does not include transfers and locomotion associated with eating. Thus, it is not duplicative.

[69] After the Proposed Decision in this case was issued, the commissioner issued a final decision In Re N.D., OAH No. 13-0565-MDS (Commissioner of Health and Social Services 2013). That case establishes that transfers occurring outside of the bathroom are not included in toileting. *See* note 5, *supra*.

[70] *See* Ex. E, pp. 9, 24. In Re V.W, OAH No. 12-0957-MDS (Commissioner of Health and Social Services 2013. *See* note 5, *supra*.

appointment." In each of her assessments, Ms. C was scored, as she was for transfers, as needing extensive assistance with locomotion, with a one person physical assist.[71] The frequency was assessed at ten times in 2009, eight times in 2010, and four times per day in 2011-2013.[72]

Ms. Sullivan testified that she reduced the frequency of locomotion from ten (2009) to four (2013) for the same reason that she reduced the frequency of transfers: because, due to the progressive nature of her conditions, and as reported by Ms. Q, Ms. C was spending more time in bed or seated, and was less frequently locomoting from one location to another.[73] Ms. Sullivan testified she set the frequency of locomotion assists to match the frequency of transfers. Ms. C asserted that her need for assistance in locomotion remains as it was in 2009 (ten per day).

Each mealtime involves two changes of location, or locomotion: (1) locomotion into the dining area; and (2) locomotion out of the dining area. Assuming, as with transfers, Ms. C gets up for meals two or three times a day on average, this is five locomotions per day, or 35 per week. In addition, each doctor's visit involves four episodes of locomotion: (1) from the apartment to the transport vehicle; (2) from the transport vehicle into the doctor's office; (3) from the doctor's office back to the transport vehicle; and (4) from the transport vehicle back into the apartment. Thus, for any week with a medical appointment, Ms. C needs four additional episodes of locomotion per week.

Assuming two or three meals a day and 38 annual medical appointments, the total weekly number of episodes of locomotion would be $35 + 3$[74] $= 38$, or approximately six per day.[75]

In addition to the frequency of locomotion, the level of assistance provided during locomotion to and from doctor's appointments was addressed at the hearing. Ms. Sullivan scored Ms. C as needing limited assistance while in a wheelchair. In fact, Ms. C is completely dependent on her personal care attendant for locomotion while in a wheelchair: she has neither the arm strength nor the stamina to self-propel the wheelchair at all. Because she is totally

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71 Ex. F, p. 4 (2009); Ex. G, p. 7 (2010); Ex. I, p. 7 (2011); Ex. H, p. 7 (2012); Ex. E, p. 7 (2013).

72 *Id*. 7 AAC 125.060(b)(6)(D).

73 Testimony of M. Sullivan.

74 38 x 4 = 152; 152 ÷ 52 = 2.92.

75 The weekly total of 38 is equivalent to 5.42 per day. The figure of six locomotions per day will accommodate occasional additional meals more than the assumed number of two or three (2.5) per day.

Ms. C did not argue that locomotion to a bathroom for successful toileting should be included as locomotion. Thus, this decision does not address whether locomotion to a bathroom for successful toileting is within the scope of 7 AAC 125.030(b)(6)(A), which includes "moving to and from a toilet" within the scope of toileting. In In Re V.W., OAH No. 12-0957-MDS (Commissioner of Revenue 2013), the commissioner ruled that a transfer to a standing position associated with incontinence care is included in toileting, but did not address locomotion and adopted the administrative law judge's decision with respect to that activity.

dependent for locomotion in a wheelchair, she is entitled to ten minutes of PCA service for each episode of locomotion during her visits to a doctor.[76]

(4) Toileting

Ms. C's primary objection to the assessment concerned the frequency of toileting. Ms. Sullivan assessed Ms. C as requiring assistance for toileting six times a day, seven days a week.[77] Previously, Ms. C was assessed as requiring assistance 12 times per day in 2009,[78] eight times per day in 2010 and 2011 (Ms. Sullivan),[79] and six times per day in 2012 (Ms. Sullivan).[80]

Ms. Sullivan testified that an average person toilets four times per day (once per six hours), and that Ms. C used the toilet once during the two-hour course of the assessment. Ms. Sullivan testified that she assessed a need of six times daily to accommodate the increased frequency of toileting associated with the use of diuretics.

Ms. C treats her edema with diuretics that, according to Dr. Woods, her treating physician, "cause an excessive need to toilet"[81] such that her "need to toilet can occur as often as twenty or more times a day."[82] Dr. Woods asserted that in the course of Ms. C's monthly 45-mimute appointments, she often uses the bathroom more than three times.[83] Both Ms. Q and Mr. D testified that Ms. C toileted four times during the course of the assessment.[84] Ms. S testified that Ms. C toilets typically every 15 or 20 minutes when Ms. S visits.[85]

As the treating physician, Dr. Woods' description of the effect of the diuretics is the most probative evidence of Ms. C's condition. Moreover, Ms. Sullivan's observation of the frequency of toileting based on a single assessment is less persuasive than Dr. Woods' observation of frequency based on multiple regular monthly appointments. In addition, Ms. Sullivan testified that Ms. C was not present at the beginning of the assessment and that she left before it concluded; thus it is possible that she failed to observe all of the toileting that occurred during the course of the assessment. In any event, a single episode of toileting during a two hour period

76 *See* PCA Service Level Computation, p. 1.
77 Ex. E, p. 9.
78 Ex. F, p. 5.
79 Ex. G, p. 9 (2010); Ex. I, p. 9 (2011).
80 Ex. H, p. 9.
81 Woods Letter (4/24/2013).
82 Woods Letter (6/24/2013).
83 Woods Letter (6/24/2013).
84 Testimony of F. D; Testimony of K. Q.
85 Testimony of L. S.

is entirely consistent with a toileting frequency of 12 per day (once in each two hour period).[86] The frequency assigned by Ms. Sullivan of six times per day, while 50% greater than average, represents only two more toileting trips daily than average, which is scarcely an amount that would be deemed "excessive", as Dr. Woods characterized the effect of Ms. C's diuretics, and which is inconsistent with the reports of Dr. Woods, Ms. Q, Ms. S and Ms. C as to the observed frequency of Ms. C's toileting needs. On balance the preponderance of the evidence is that Ms. C's need remains 12 times per day, as was established in her initial assessment.

(5) Dressing

Ms. C was assessed as needing extensive assistance from one person for dressing in 2009-2011.[87] In 2012 and 2013 Ms. Sullivan assessed a need for limited assistance for one person.[88] The frequency of assistance has been twice daily every year.

At the hearing, Ms. Q asserted that due to her mother's incontinence, she needs assistance with dressing more often than twice daily.

Under a prior decision of the commissioner, a person who needs assistance with dressing and undressing in connection with incontinence is not entitled to dressing assistance for that activity; rather, assistance for that activity is considered to be included in the activity of toileting.[89] Accordingly, the Division's assessment of frequency is sustained.

With respect to the reduction in service level from extensive in 2009-2011 to limited in 2012-2103 (notwithstanding the progressive nature of Ms. C's condition), Ms. Sullivan's notes for her assessments in 2012 and 2013 state that Ms. C reported a need for assistance and that in 2013 she stated, "I do as much as I can but I get so short of breath that my daughter will have to finish for me. I will raise up my arms or bring up my feet, but that's about it."[90]

Limited assistance means that "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."[91] Extensive assistance differs only by degree: it means "that the

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[86] Ms. Sullivan had previously assigned a frequency of eight times daily in 2011, after noting a single episode of toileting during that assessment. Ex. I, p. 9.

[87] Ex. F, p. 4 (2009); Ex. G, p. 8 (2010); Ex. I, p. 8 (2011).

[88] Ex. H, p. 8 (2012); Ex. E, p. 8 (2013).

[89] In Re V.W., at * 2-3, OAH No. 12-0957-MDS (Commissioner of Health and Social Services 2013).

[90] Ex. E, p. 8.

[91] 7 AAC 125.020(a)(1).

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."[92]

Ms. C is not highly involved in the activity of dressing, which is the basic standard for limited assistance. She requires weight bearing assistance to remain standing while dressing, and while standing she can do little more than to raise and lower her arms or feet. For a number of discrete tasks associated with dressing, such as zippering or buttoning, Ms. C is wholly unable, due to her rheumatic arthritis, to perform the activity at all. She regularly requires direct physical help for full performance of the activity of dressing. This constitutes extensive assistance within the meaning of 7 AAC 125.020(a)(2).

IV. Conclusion

The Division correctly determined that Ms. C is ineligible for personal care assistance with body mobility, because she is ambulatory. However, the Division understated her the frequency of her needs, as well as the level of assistance required for wheelchair locomotion and dressing. Ms. C's service plan shall be amended to reflect twelve transfers, six locomotions, and twelve toiletings daily, with extensive assistance for wheelchair locomotion outside the home to access medical appointments (three times per week) and for dressing.

DATED December 10, 2013.

Signed
Andrew M. Hemenway
Administrative Law Judge

[92] 7 AAC 125.020(a)(2). *See* In Re V.H., at *9, OAH No. 12-0559-MDS (Commissioner of Health and Social Services 2012).

Adoption

The undersigned by delegation from the Commissioner of Health and Social Services, adopts this revised 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 13th day of January, 2014.

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.]