

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

In the Matter of)
)
 N D)
_____)

OAH No. 13-0565-MDS
Agency No.

DECISION

I. Introduction

N D disagrees with the amount of time the Division of Senior and Disabilities Services’ (division) authorized for her Medicaid Personal Care Assistant (PCA) services. Previously, Ms. D received 40 hours of PCA services per week; after her recent re-assessment, her PCA services were reduced to 29.75 hours per week. The reduction is due to the division’s assessment of the frequency with which Ms. D performs certain activities of daily living (ADLs). A review of the record and prior decisions reveal that the division has understated the frequency of certain ADLs because of its misinterpretation of a prior Commissioner of Health and Social Services’ decision, and, in turn, the division’s attempt to broaden the application of its misinterpretation. When assessed under the evidence and the rules and regulations applicable to the PCA program, the division has understated Ms. D’s frequency for three ADLs: transfer (non-toilet related), locomotion, and bathing. It correctly assessed toileting and escort services. The division’s decision is reversed in part, and affirmed in part with instructions to recalculate the number of authorized minutes of PCA services in accordance with this decision.

II. Facts

1. N D and the Personal Care Assistance Assessment.

N D is a 79 year-old Hmong woman who suffers primarily from dementia and left-sided paralysis as a result of strokes and other vascular disorders.¹ She also has short term memory issues. The division assessed her cognitive skills for daily decision-making as “moderately impaired.”² This means that Ms. D makes poor decisions and requires cues and supervision.³

¹ Exhibit E at 3. Testimony of Z U.

² Exhibit E at 16.

³ *Id.* at 16.

Ms. D's medical and financial decisions are made by her daughter, Z U, who has been granted power of attorney.⁴

Ms. D's physical condition requires she receive assistance with her activities of daily living (ADLs) such as getting out of bed, toileting, and bathing. She receives physical assistance with the activities through Medicaid's PCA services. PCA services are intended to provide "physical assistance with activities of daily living (ADL), physical assistance with instrumental activities of daily living (IADL), and other services based on the physical condition of the recipient."⁵

PCA recipients are assessed annually to determine what physical assistance is required to perform an ADL (performance) and how often physical assistance is required (frequency). Ms. D's 2013 assessment was conducted by Susan Findley, RN. Ms. U was not present at the assessment. Ms. D's care coordinator, E T, and Ms. D's son and PCA provider, A U, were present. The division's Hmong interpreter was also present.

The annual assessment measures a recipient's functional impairment using the division's Consumer Assessment Tool (CAT).⁶ The CAT is the division's effort to objectively quantify how physically capable a person is to self-perform ADLs, as well as how much physical assistance the person requires while performing the ADL. There are eight defined ADLs: Bed Mobility, Transfers, Locomotion, Dressing, Eating, Toileting, Personal Hygiene, and Bathing.⁷ The CAT assigns a numerical score based on the amount of physical assistance required by Ms. D. This "performance score" in turn determines how much time will be approved for the particular task.

The time allocation for each service is determined by regulation,⁸ as shown in the division's Personal Care Assistance Service Level Computation form, which is incorporated by reference in the PCA program regulations.⁹ For example, a person who needs one attendant to provide limited physical assistance with the ADL of eating will receive 7.5 PCA minutes per meal. If the person eats three meals a day, 7 days a week, that person will have a frequency score of 21, resulting in 157.5 PCA minutes per week, or 22.5 PCA minutes per day. If that

⁴ *Id.* at 3.

⁵ 7 AAC 125.010(a).

⁶ Exhibit E.

⁷ 7 AAC 125.030(b).

⁸ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart.

⁹ 7 AAC 125.024(a)(1); 7 AAC 160.900(d)(29); see also Exhibit B pages 34 – 36.

same person requires one person to provide extensive physical assistance to perform the task, he or she will receive 11.25 PCA minutes per meal. If a person requiring extensive assistance eats three meals a day, 7 days a week, then he or she will have a frequency score of 21, resulting in 236.25 PCA minutes per week for the ADL of eating, or 33.75 PCA minutes per day.

Ms. D agrees with the support scores assigned to her by the division, extensive assistance, but disagrees with the frequency assigned for five of the ADLs. These ADLs are transfers, locomotion, toileting, bathing, and escort.¹⁰

2. Summary of Testimony.

Ms. U testified that she believes the assessment is incorrect. Her mother has cognitive issues, and, as the person with power of attorney, Ms. U believes she should have been present at the assessment. Mr. U is Ms. D's primary PCA provider. He provided sworn testimony that Ms. D bathes once a day, transfers six times a day, ambulates eight times a day, and toilets seven times a day. He confirmed the agency's observation regarding his mother's mental state, testifying that his mother is absent-minded and not aware of things. He testified that his mother does spend time in bed, but if she is having a good day she is not always in bed. Ms. Findley performed Ms. D's 2013 assessment. Her testimony was consistent with the narratives she recorded on Ms. D's 2013 CAT.¹¹

III. Discussion

1. Assessing Frequency to Avoid Duplicating ADLs.

The primary issue in this appeal is whether the ADL of toileting includes the act of transferring out of bed, and the act of walking down the hall, when those acts are done for the purpose of using the toilet. If these two acts are incidental to toileting, then the division was correct to not award additional frequency for the transfer and locomotion assistance that Ms. D received as she was preparing to use the toilet. If, however, they are separate acts, then additional time must be allowed because Ms. D requires assistance to get out of bed and to walk down the hall.

Answering this question requires a close analysis of the PCA regulations, and of the CAT, as revised January 29, 2009, and the Personal Care Assistance Service Level Computation,

¹⁰ June 25, 2013, letter from Z U to Division (Letter).

¹¹ Exhibits E4 - E19; *see also* 7 AAC 125.199(1). Escort services are not considered to be an ADL, but for purposes of this decision escort services are included.

as revised March 20, 2012, both of which are incorporated by reference into the PCA regulations.¹² It also requires analysis of a prior decision, *In re V. W.*, which discusses how frequency scores should be assessed for toileting and transfers and locomotion associated with toileting.¹³

In *In re V. W.*, the recipient, V.W., was a paraplegic who struggled with incontinence and toileting difficulties. He was totally dependent on assistance for transfers, and required limited assistance for locomotion in the house. The division found that V.W. transferred twice a day, from his bed to his wheelchair, and back again.¹⁴ He transferred ten additional times per day from his wheelchair to the toilet.¹⁵ The division did not provide any frequency for either of these ADLs because it determined transfers and locomotion were included under the ADL of toileting. V.W. appealed both of these issues.

The decision in *V. W.* determined that the transfers from the wheelchair to the toilet were incidental to toileting, and did not provide any additional time for those transfers.¹⁶ The decision looked closely at the regulatory description of the service provided under the ADL of “toilet use”¹⁷ and the explanation of toileting in the CAT’s description of “toileting.”¹⁸ Both include references to transfers and moving to/from or on/off the toilet. The CAT’s description of the ADL of transfer excluded transfers to/from or on/off the toilet. Because a transfer incidental to toileting is included in the time allotted for toileting, time provided for a transfer would be an “award of duplicate PCA time, under separate ADLs, for the performance of the same activity.”¹⁹ *V. W.* reached the same conclusion for the ADL of dressing, when the assistance for dressing was provided solely for the purpose of incontinence care, because the regulation provided that: “incontinence care” and “adjustment of clothing” were included within the ADL of toileting.²⁰ Thus, duplication of services will be found only when the plain language of the regulation includes the service at issue. Because the regulation includes the transfer to/from and

¹² 7 AAC 160.900(d)(6), (29).

¹³ *In re V. W.*, OAH No. 12-0957-MDS (February 25, 2013) (Commissioner of Health and Social Services).

¹⁴ *Id.* at 10.

¹⁵ *Id.*

¹⁶ *Id.* at 1-2.

¹⁷ For the ADL of toilet use, PCA time is provided for “*moving to and from the toilet*, commode, bedpan, or urinal; *transfers on and off a toilet* or commode; general hygiene care of a colostomy, ileostomy, or external catheter . . . or other routine incontinence care.” 7 AAC 125.030(b)(6)(A), (B) (emphasis added).

¹⁸ The CAT describes toilet use as “[h]ow person uses the toilet room (or commode, bedpan, urinal); *transfers on/off toilet*, cleanses, Des pad, manages ostomy or catheter, adjusts clothes.” Exhibit E at 9 (emphasis added).

¹⁹ *Id.* at 2.

²⁰ *Id.*

on/off the toilet, and the services of incontinence care/clothing adjustment, within the scope of toileting services, duplication of services would occur if the transfer and dressing that took place during the toileting process were included as part of toileting.

V. W.'s finding regarding locomotion affirms this principle. The final decision in V.W. increased the frequency for locomotion assistance that had been awarded by the division. The decision specifically noted that the increased frequency count included locomotion to the bathroom.²¹ Thus, assistance that occurred outside of the bathroom was not considered incidental to toileting.

The ADL of locomotion is described in the regulation as walking with support between locations in the recipient's home.²² This action is not duplicated by the ADL of toileting, which does not reference walking or locomotion.²³ If locomotion to and from the toilet were treated as incidental to the ADL of toileting, locomotion would be incidental to any other ADL that required the recipient move to a different location to perform the ADL. For example, no time would be provided for locomotion preparatory to bathing or eating. The plain language of the CAT as incorporated into the regulations, and the regulation indentifying PCA services, do not contemplate locomotion as an ADL incidental to toileting or any other ADL.

The plain language of the ADL of toileting is limited to moving to/from or transferring to/from and on/off the toilet.²⁴ It does not include the ADL of locomotion. The ADL of toileting starts at the end of the locomotion to the room in which the toilet or commode is located (if the person is not already in that room), when the actions of moving to and transferring onto the toilet begin. The demarcation for the end of the ADL of toileting is the start of the ADL of locomoting.

2. Transfers

To score the ADL of transfer, the assessor must capture the assistance required (performance) and the amount of times per day, days per week (frequency) that Ms. D moves

²¹ *Id.* at 3.

²² 7 AAC 125.030(b)(3).

²³ *Compare* 7 AAC 125.030(2) (the ADL of transferring references "moving" between surfaces) *with* 7 AAC 125.030(6) (the ADL of toileting references "moving" to and from the toilet, etc. and transfers on and off a toilet) *with* 7 AAC 125.030(3) (the ADL of locomotion is "walking" with support).

²⁴ 7 AAC 125.030(b)(6).

between surfaces such as “to/from bed, chair, wheelchair, standing position (excluding to/from bath and toilet).”²⁵

Ms. Findley observed Ms. D to “use cane and son to come to stand, her feet were badly everted until she put her weight on them; so she can bear very little weight standing; she cannot come to sit from supine nor can she transfer without hands-on help.”²⁶ Ms. D requires extensive assistance. Although a transfer to/from or on/off the toilet surface is incidental to toileting, as discussed above, when the transfer is to perform an intervening ADL, *ie*: locomote, the transfer is an independent ADL and as such receives its own frequency score.

Therefore, the division’s scoring of the CAT is incorrect. The division under-assessed the frequency with which Ms. D transferred each week because it did not include Ms. D’s transfer from her bed to her day bed, regardless of whether she stops to toilet on the way. The division should have counted that transfer and the transfer to the day bed. Similarly, every time she gets up to locomote to the bathroom and back to bed, each transfer is counted. Ms. D toilets four times a day in addition to her morning toilet. She does not receive a transfer for her morning toilet because that transfer occurs when she gets out of bed to move to the day bed. Therefore, Ms. D should be assessed a frequency score of 12 transfers per day, seven days a week for a weekly total transfer score of 84.²⁷

3. Locomotion

The ADL of locomotion captures how a “person moves between locations in his/her room and other areas on the same floor, if in wheel chair, self-sufficiency once in chair.”²⁸ Ms. Findley reported that she was told Ms. D has a wheelchair but prefers not to use it and no wheelchair was observed in the home. Also, during the assessment Ms. D explained that she is trying to strengthen her limbs so she has her son help her rather than use a wheelchair. The division characterized her failure to use a wheel chair as a personal choice.

Ms. Findley observed Ms. D use her cane with her right hand. She noted that Ms. D ambulates “very poorly, leaning into and onto her son, cane of very little use, [Ms. D] was not bearing very much of her own weight at all, just enough to plant her feet flat on the ground, she

²⁵ Exhibit E at 6.

²⁶ *Id.*

²⁷ Two in the morning (from bed to locomote and locomote to day bed), eight associated with toileting (four from bed to locomote and four from locomote to bed) and two in the evening (day bed to locomote and locomote to bed.)

²⁸ Exhibit E at 7.

was nearly being dragged” and taking just a few steps.²⁹ Ms. D received a 2/2 frequency score for a weekly frequency of four. While testifying, Ms. Findley changed the frequency score to 0/0 because she believed locomotion time was now included in the ADL of toileting. Therefore, the division sought to amend its service level authorization to no weekly minutes for this ADL.

The need for extensive assistance with the ADL of locomotion is corroborated by Ms. Findley’s observations. These observations support a finding that, even if Ms. D used a wheelchair, her physical abilities and limitations make it more probable than not that Ms. D could not propel the wheelchair and would require extensive assistance to locomote in the wheelchair. Therefore, a correct frequency score for locomotion is eleven times a day, or 77 times per week.³⁰

4. Toileting

This ADL of toileting captures how a person moves to and from the toilet, transfers on and off the toilet, general hygiene care, and routine incontinence care.³¹ Ms. Findley testified that those present at the assessment told her Ms. D uses adult incontinence products and cannot care for herself in this area. She does not get out of her day bed unless it is to go to the bathroom and even then she may not be in time. Ms. D does not wake at night for assistance. It was reported that Ms. D transfers from her bed in the morning, locomotes to her day bed and on the way will stop at the bathroom to be cleaned from the night before. Ms. Findley observed Ms. D needed “significant assist for transfer and locomotion. Ms. Findley scored a 5/7 (35 times a week) frequency score, resulting in 315 weekly minutes, or 9 minutes per toilet use. The family disagrees with the frequency score and believes a frequency 7/7 score, or 441 minutes per week, represents of Ms. D’s actual toileting frequency.

The division explained it calculated Ms. D’s score using its internal guidelines.³² Although these guidelines were not produced, the assessed frequency results in an ADL of toileting every four hours,³³ which is reasonable in this instance.

²⁹ *Id.*

³⁰ Eleven locomotions per day: from bed to toilet, from toilet to day bed, from day bed to toilet (four times), from toilet to day bed (four times), from day bed to bed.

³¹ Exhibit E at 9.

³² The guidelines were not offered into evidence.

³³ Six toilets per day, one every four hours. Because Ms. D does not get up at night, her toileting frequency is five times per day.

5. Bathing

The ADL of bathing assesses how much assistance a person needs taking a full-body bath/shower, including the transfers in and out of the tub or shower.³⁴ Ms. Findley wrote that Ms. D and Mr. U told her Ms. D bathes every other day. The only assessor observation recorded for this ADL was that Ms. D was “observed to need assist with ADLs as noted.”³⁵ She assigned Ms. D a 1/4 frequency score for 90 authorized minutes per week. The family disagrees with this frequency score and believes a frequency 1/7 score, or 157.5 minutes per week, represents Ms. D’s actual frequency rate.

It is undisputed that Ms. D is incontinent and sometimes soils herself. She sleeps in Depends and does not get up in the night. Mr. U testified that, contrary to the statement in the CAT, his mother bathes daily. His testimony regarding daily bathing is reasonable given that his mother is incontinent and soils herself. The division offered that the information regarding bathing was received from Mr. U and Ms. D. Ms. D suffers from dementia and can no longer conduct her own affairs. For this reason Ms. D’s testimony is given little weight. The division has not met its burden of proving that the assessor correctly scored the CAT.³⁶ Rather, the weight of the evidence supports a finding that it is more probable than not that Ms. D bathes once a day for a weekly frequency of seven.

6. Escort

Escort services fall under the category of services referred to as other personal care services.³⁷ Because Ms. D has granted her daughter power of attorney, she is not eligible for escort services. The division correctly assessed Ms. D’s eligibility to receive escort services.

IV. Conclusion

The division incorrectly scored Ms. D’s CAT as to frequency for the ADLs of transfers (non-toilet), locomotion, and bathing. The division correctly scored all other portions of the

³⁴ Exhibit E at 11.

³⁵ Exhibit E at 11.

³⁶ 7 AAC 49.135.

³⁷ 7 AAC 125.030(d)(9).

CAT. The division's decision is reversed in part and affirmed in part, with instructions to recalculate the number of authorized minutes of PCA services in accordance with this decision.

DATED this 31st day of July, 2013.

Signed _____
Rebecca L. Pauli
Administrative Law Judge

Adoption

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

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

DATED this 16th day of August, 2013.

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.]