

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

In the Matter of)
)
 F T)
_____)

OAH No. 13-0928-MDS
Agency No.

DECISION

I. Introduction

F T was receiving between 18 and 19 hours per week of personal care assistance (PCA) services. The Division of Senior and Disabilities Services (Division) notified her on June 6, 2013 that her PCA services would be reduced to 3.75 hours per week. Ms. T requested a hearing.

After several re-schedulings, Ms. T’s hearing was held on September 23, 2013. Ms. T represented herself and testified on her own behalf. Angela Ybarra represented the Division. Also testifying were David Teague, who wrote the reduction decision for the Division, and K N of ResCare, who oversees Ms. T’s PCA.

The Division’s assessment of and provision for Ms. T’s PCA service needs was probably correct at the time of the decision made on June 6. Accordingly, it is upheld.

II. The PCA Service Determination Process

The Medicaid program authorizes PCA services for the purpose of providing “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”¹ Accordingly, “[t]he department will not authorize personal care 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.”²

The Division uses the Consumer Assessment Tool or “CAT” to determine the level of physical assistance that an applicant or recipient requires in order to perform ADLs and their IADLs.³ The ADLs measured by the CAT are bed mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room), locomotion (between levels), locomotion (to

¹ 7 AAC 125.010(a).

² 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.*

³ See 7 AAC 125.020(a) and (b).

access apartment or living quarters), dressing, eating, toilet use, personal hygiene, personal hygiene-shampooing, and bathing.⁴

The CAT numerical coding system has two components. The first component is the *self-performance code*. These codes rate how capable a person is of performing a particular activity of daily living (ADL). The possible codes are **0** (the person is independent⁵ and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance⁶); **3** (the person requires extensive assistance⁷); **4** (the person is totally dependent⁸). There are also codes which are not used in calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).⁹

The second component of the CAT scoring system is the *support code*. These codes rate the degree of assistance that a person requires for a particular ADL. The possible codes are **0** (no setup or physical help required); **1** (only setup help required); **2** (one-person physical assist required); **3** (two or more person physical assist required). Again, there are additional codes which are not used to arrive at a service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).¹⁰

The CAT also codes certain activities known as "instrumental activities of daily living" (IADLs). These are light meal preparation, main meal preparation, housework, grocery shopping, and laundry.¹¹

The CAT codes IADLs slightly differently than it does ADLs. The *self-performance codes for IADLs* are **0** (independent either with or without assistive devices - no help provided); **1** (independent with difficulty; the person performed the task, but did so with difficulty or took a great amount of time to do it); **2** (assistance / done with help - the person was somewhat involved in the activity, but help in the form of supervision, reminders, or physical assistance was

⁴ Ex. E, pp. 6 – 11.

⁵ A self-performance code of 0 is classified as “[I]ndependent – No help or oversight – or – Help/oversight provided only 1 or 2 times during the last 7 days.” See Ex. E, p. 6.

⁶ According 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.”

⁷ According 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.”

⁸ According to 7 AAC 125.020(a)(3), dependent as to an ADL, or dependent as to and IADL, “means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity.”

⁹ Ex. E, p. 18.

¹⁰ Ex. E, p. 18.

¹¹ Ex. E, p. 26.

provided); and **3** (dependent / done by others - the person is not involved at all with the activity and the activity is fully performed by another person). There is also a code that is not used to arrive at a service level: **8** (the activity did not occur).¹²

The *support codes* for IADLs are also slightly different than the support codes for ADLs. The support codes for IADLs are **0** (no support provided); **1** (supervision / cueing provided); **2** (set-up help); **3** (physical assistance provided); and **4** (total dependence - the person was not involved at all when the activity was performed). Again, there is an additional code that is not used to arrive at a service level: **8** (the activity did not occur).¹³

The codes assigned to a particular ADL or IADL determine how much PCA service time a person receives for each occurrence of a particular activity. For instance, if a person were coded as requiring extensive assistance (code of 3) with bathing, she would receive 22.5 minutes of PCA service time each time she was bathed.¹⁴ Even if the Division agrees that the amount of time provided by the formula is insufficient for a particular PCA recipient's needs, the regulations do not provide the Division with the discretion to change the amounts specified by the formula.

III. Background Facts

F T is a 52-year-old lady who has suffered an accident with damage to her spine, as well as a cerebral aneurism. She has other difficulties as well, including significant arthritis and depression.¹⁵

Ms. T lives with her mother, who receives services under Medicaid's Older Alaskan or Adult with a Physical Disability Waiver program, more commonly known as the Waiver Program. (Ms. T is planning to move out, and if she goes through with that plan, she will need to bring that change to the Division's attention.)

Ms. T was receiving more than 18 hours of PCA services in early 2013 based on an assessment conducted in 2009 and regulations that had been in effect prior to 2013. Rae Norton, then a Division employee, made a visit to reassess Ms. T's PCA service needs on March 12,

¹² Ex. E, p. 26.

¹³ Ex. E, p. 26.

¹⁴ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart contained at Ex. B, pp. 34 - 36.

¹⁵ Ex. E, F; testimony of Ms. T.

2013. She recorded the assessment visit in the CAT. Her findings, coupled with recent regulatory changes, resulted in a reduction of Ms. T's PCA services to 3.75 hours per week.¹⁶

Ms. T reports that she has a new diagnosis of diabetes, with the disease having been identified "a couple of months" prior to the hearing¹⁷ (which would be after the Division made its decision at issue in this case). This diagnosis was not reported to the Division prior to the hearing and had not been considered in the assessment and decision process. Ms. T and the person in her PCA agency responsible for overseeing her care recognize that a verification of diagnosis needs to be submitted to the Division so that it can take the diabetes into account in the future.¹⁸

Ms. T has disagreed with the results of her reassessment for the ADLs of transfers, locomotion in home, and dressing. She also disagreed regarding the IADLs involving housework, shopping, and meal preparation.¹⁹ Each area of disagreement is addressed below. The portions of the assessment and the associated PCA time awards that are not in dispute will not be discussed.

IV. Discussion

In this case, in which the Division is seeking to reduce a benefit a citizen is already receiving, the Division has the burden to prove, by a preponderance of the evidence,²⁰ facts that show the citizen's level of eligibility has changed.²¹ The Division can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs,²² including such sources as written reports of firsthand evaluations of the patient. The relevant date for purposes of assessing the state of the facts is, in general, the date of the agency's decision under review.²³

A. Transfers

Transfers are movements between surfaces, such as from a bed to a chair. Ms. T had previously been assessed as requiring extensive one-person physical assistance (self-performance

¹⁶ Ex. D.

¹⁷ Testimony of Ms. T.

¹⁸ Testimony of Ms. T and Ms. N.

¹⁹ See Ex. 1.

²⁰ Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

²¹ 7 AAC 49.135.

²² 2 AAC 64.290(a)(1).

²³ See 7 AAC 49.170; *In re T.C.*, OAH No. 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013) (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf>). The Division's argument in this case that the relevant date is the date of the assessment visit is rejected.

code 3, assistance code 2) in transfers four times per week.²⁴ In her new assessment, she was coded as being independent with transfers apart from the need for set-up help (self-performance code 1, assistance code 1).²⁵ The assessment's evaluation of her transferring ability was based upon the assessor's observation of her being able to get up from the kitchen chair and her report that she sometimes needs supervision when standing from a low crouch, but stands independently most of the time.²⁶ A person who needs only set-up help with transfers, but no actual physical assistance, is not eligible to be awarded any PCA time for that activity.²⁷

Ms. T disagreed with this aspect of the assessment, but she did not provide any evidence to contradict the assessor's observations. Neither she nor her witness, Ms. N, testified about transfers, and there was no documentary evidence casting doubt on what the assessor learned and observed firsthand. It is therefore more likely than not that, as of the time of the decision under review, Ms. T did not need a level of assistance with transfers that would justify PCA time for that activity.

B. Locomotion

In the context of this case, locomotion is the ability to move around a single floor, with or without assistive devices.²⁸ Ms. T had been previously assessed as requiring some physical assistance (self-performance code 2, assistance code 2) in locomotion within her home, twice a day, and had apparently received some PCA time as a result.²⁹ In her new assessment, she was coded as being independent with locomotion. The assessment's evaluation of her locomotion ability was based upon the assessor's observation of her walking in the home with no assistive device and with no apparent balance problems, but the assessor noted that she reported using a walker on bad days.³⁰ As noted previously, a person can be independent for locomotion even if required to use of a walker, wheelchair, or other assistive device.

Ms. T disagreed with the determination that she was independent in this area, testifying that she needs someone "in back of me" when walking with a walker. This would equate to non-weight-bearing physical assistance and could qualify her for some PCA time if needed frequently

²⁴ Ex. F, p. 3.

²⁵ Ex. E, p. 6.

²⁶ Ex. E, p. 6.

²⁷ *See, e.g.*, Ex. B, p. 34.

²⁸ There is no dispute in this case about locomotion outside the home, for which Ms. T was awarded some PCA time. There is also no dispute about multi-level locomotion, because Ms. T lives on a single level.

²⁹ Ex. F, p. 3. This amount of assistance would qualify for just over an hour of PCA time per week under current guidelines. *See* Ex. B, p. 34.

³⁰ Ex. E, p. 7.

enough. She provided, however, no evidence of how frequently she has needed this kind of help, and it is clear that—at least last spring—she did not always need it, given what the assessor observed firsthand. The evidence on this issue is limited, but as it stands now it is more likely true than not true that, at least at the time of the Division’s decision, Ms. T was independent in locomotion within the home with the benefit of a walker.

C. Dressing

Ms. T had been previously assessed as requiring some physical assistance (self-performance code 2, assistance code 2) with dressing, especially of the lower body.³¹ The new assessment states that she is independent (with cueing and oversight, score 1/1) in this activity.³² Ms. T listed this as an area of disagreement, but she did not provide any testimony or other evidence on the subject. Since the assessment is the only evidence in the record on this issue, the preponderance of the evidence favors the Division’s conclusion.

D. IADLS

Ms. T feels she needs help with IADLs, and indeed both her 2009 assessment and the most recent assessment gave her scores that would qualify her for assistance with shopping, housework, and meal preparation. Her most recent scores, when used with the appropriate frequencies, appear to support about six hours weekly for IADLs under current regulations.³³ This is by far the largest potential block of PCA time that is in dispute in this case.

Even though her scores are sufficient, Ms. T cannot be awarded any time for IADLs at this time. This is because a department regulation, 7 AAC 125.040(a)(13), prohibits reimbursement for PCA services to assist with IADLs when other recipients in the same residence receive IADL services under the Waiver Program. It is undisputed that Ms. T resides in the same residence (sharing most living spaces) with her mother, who is receiving these services under the Waiver Program. Moreover, at the time of the decision under review, there was no distinction between the IADL meal services being provided to the mother and to Ms. T, since Ms. T was not yet on a diabetic diet at that time and her mother was likewise not on a diabetic diet.³⁴

³¹ Ex. F, p. 3.

³² Ex. E, p. 8.

³³ See Ex. B, p. 34, and Ex. D, p. 8. Note that there is an error on Ex. D, p. 8 as to weekly frequency of main meal preparation; the number entered is inconsistent with Ex. D, p. 3.

³⁴ Testimony of Ms. T.

If Ms. T moves out of her mother's home, as she indicates she is planning to do, it is very important that she report this change to the Division. Likewise, she should report her diabetes diagnosis and any dietary prescriptions resulting from that diagnosis.

V. Conclusion

The Division's assessment of Ms. T's needs for PCA assistance appears, more likely than not, to have been correct at the time the decision was made. The award of hours therefore will not be disturbed at this time. Ms. T is encouraged to update the Division about any new diagnoses, new living arrangements, or new care needs that have developed since last June. Her PCA agency is also encouraged to be more diligent about reporting such changes in information.

DATED this 29th day of October, 2013.

Signed _____
Christopher Kennedy
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 12th day of November, 2013.

By: *Signed* _____
Name: Christopher M. Kennedy
Title: Administrative Law Judge

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