

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

In the Matter of:)
)
 N J) OAH No. 13-1052-MDS
) Agency No.
_____)

DECISION

I. Introduction

N J was receiving Medicaid PCA services. The Division of Senior and Disabilities Services (Division) notified her that her PCA services were being terminated.¹ Ms. J requested a hearing.

Ms. J's hearing was held on August 29, 2013. Ms. J represented herself and testified on her own behalf. Angela Ybarra represented the Division

This decision concludes that Ms. J's physical condition and functioning were not accurately measured by the Consumer Assessment Tool because she was assessed on a day when she does not receive dialysis treatment, and because the assessment did not take into account the fact that Ms. J is a poor historian. As a result, the Division failed to meet its burden of proof and the Division's termination of her PCA services is reversed.

II. Facts

Ms. J is 60 years old. She lives alone. Her primary language is Spanish, but she also speaks English.² She has diagnoses of hypertension, high cholesterol, depression, congestive heart failure, renal related hyperparathyroidism, end stage renal disease, diabetes, and a seizure disorder.³ She has dialysis three days per week, Monday, Wednesday, and Friday.⁴ She had a kidney transplant, which failed.⁵ Her doctor's notes, dated April 1, 2013, indicate that a bilateral nephrectomy (kidney removal) and another kidney transplant are being considered.⁶

Ms. J was receiving PCA services based upon an April 2010 assessment that found she required extensive assistance with regard to transfers, toilet use, and bathing; that she required

¹ Ex. D.
² Ex. E, pp. 1, 3.
³ Ex. E, pp. 3, 21; Ex. 6, p. 29.
⁴ Ms. J testimony; Ex. E, pp. 3, 21.
⁵ Ms. J testimony.
⁶ Ex. 6, p. 31.

limited assistance with locomotion and dressing; and that she was dependent upon others for her light and main meal preparation, light and routine housework, shopping, and laundry.⁷

Denise Kichura, an R.N. with the Division, reassessed Ms. J to determine her continuing eligibility for PCA services.⁸ She was originally scheduled to assess Ms. J on a day when Ms. J had dialysis. Ms. Kichura is a certified dialysis nurse. From her experience with dialysis patients, she knew that it is very common for them to feel sick on days they receive dialysis. Ms. Kichura rescheduled Ms. J's assessment visit for a non-dialysis day, although Ms. J said it was okay to come on the originally scheduled day. Ms. Kichura went to Ms. J's home on Tuesday, April 2, 2012, a non-dialysis day. She spent an hour and forty-five minutes with Ms. J conducting the assessment.⁹

Ms. Kichura's assessment is recorded and scored on the Consumer Assessment Tool or "CAT." Ms. Kichura found, as recorded on the CAT, that Ms. J was independent with regard to body mobility, transfers, toilet use, locomotion, and dressing, required supervision for bathing, and that she was independent with regard to light and main meal preparation, light and routine housework, shopping, and laundry.¹⁰ The Division determined, based upon the April 2, 2013 CAT, that Ms. J did not qualify for continued PCA services.¹¹

In the CAT, Ms. Kichura recorded that Ms. J told her that she had made empanadas, including making the dough, and baked them for dinner, without assistance. Ms. J told her that she cooks by herself about three times per week.¹² However, Ms. J lives in a studio apartment with a very limited kitchen: she has a coffee maker, a microwave, a counter electric grill, a hot plate that she does not use because it fell and burned the floor once, and does not have an oven.¹³ In other words, it would not be possible for Ms. J to bake an empanada. When questioned about making an empanada, Ms. J was confused and said at one time "a long time ago" she made them, and then said that her PCA helped her make them "because everything is ready."¹⁴

Ms. J has an enlarged kidney that limits her ability to bend. She has a fistula from her dialysis that limits her ability to perform basic tasks. She cannot urinate and fluid builds up in

⁷ Ex. F, pp. 18 – 19, 26, 31.

⁸ Ex. E.

⁹ Ms. Kichura testimony.

¹⁰ Ex. E, pp. 18 – 19, 26.

¹¹ Ex. D; Ex. E, p. 31.

¹² Ex. E, p. 9.

¹³ Ms. J testimony.

¹⁴ Ms. J testimony at 1:47:00 – 1:47:52.

her body between dialysis sessions, which limits her functioning, especially over the weekends. On dialysis days, she can only go home and lie down. She sometimes needs PCA assistance to get out of bed on dialysis days.¹⁵

III. Discussion

A. *The PCA Program - Overview*

The Medicaid program provides personal care services (PCA) to eligible persons: "[t]he purpose of personal care services is to provide to a recipient *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" ¹⁶ [emphasis added]. 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." ¹⁷

The Department conducts an assessment to determine eligibility for PCA services, and the amount of those services if eligible, using the Consumer Assessment Tool or "CAT."¹⁸ The goal of the assessment process is to determine the level of physical assistance that an applicant or recipient requires in order to perform their activities of daily living (ADLs) and instrumental activities of daily living (IADLs).¹⁹ The CAT seeks to make the assessment process more objective by attempting to standardize the assessment of an applicant or recipient's functional impairment.²⁰

The ADLs coded or scored by the CAT are body mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room), locomotion (between levels), locomotion (to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, personal hygiene-shampooing, and bathing.²¹ The CAT also codes or scores certain activities

¹⁵ Ms. J testimony.

¹⁶ 7 AAC 125.010(a).

¹⁷ 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.*

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

¹⁹ *See* 7 AAC 125.010(a).

²⁰ Ex. E.

²¹ Ex. E, pp. 6 – 11.

known as "instrumental activities of daily living" (IADLs). These are light meal preparation, main meal preparation, light housework, routine housework, laundry, and shopping.²²

B. Is Ms. J Eligible to Receive PCA Services Based Upon Her Need for Assistance With Either Her ADLs or Her IADLs?

The salient question is whether Ms. Kuchira accurately assessed Ms. J's condition to determine her eligibility for PCA services. In this case, in which the Division is seeking to end a benefit a citizen is already receiving, the Division has the burden to prove facts that show the citizen is now ineligible for the program.²³

The assessment on which the Division based the proposed termination in this case is fatally flawed, however, because it was conducted on a non-dialysis day. Ms. Kuchira, in an attempt to make the assessment process easier upon Ms. J, rescheduled the assessment from a dialysis day to a non-dialysis day. However, Ms. J has dialysis three days per week, which impairs her functioning on those days. Her functional capability on those days is critical for determining what degree of assistance she requires. For instance, with regard to the activities of daily living, requiring either limited assistance (self-performance code of 2) or extensive assistance (self-performance code of 3) with any of the specified activities of daily living would qualify Ms. J for PCA services.²⁴ The assessment of Ms. J on a non-dialysis day skewed the results of the assessment.

The other item that stood out in the assessment was that Ms. J reported she made and baked empanadas for herself. Making an empanada involves a number of physical tasks: making dough, forming the dough, making the filling, stuffing the dough with the filling, and then cooking the empanada. It requires a fair amount of physical dexterity. Ms. Kichura took Ms. J's statement at face value. However, Ms. J could not have made an empanada because she does not have an oven in which to bake an empanada. Ms. J is therefore a poor historian who exaggerates her capabilities.

The assessment did not accurately reflect Ms. J's abilities to function because it was performed on a non-dialysis day. In addition, it relied upon Ms. J's statements regarding her ability to function, when Ms. J is a poor historian. Because the assessment is not accurate, it is inadequate to support a conclusion that Ms. J's functional capability in her ADLs and her IADLs

²² Ex. E, p. 26.

²³ 7 AAC 49.135.

²⁴ See Ex. E, p. 31.

has improved to the point that she no longer qualifies for PCA services. The Division had the burden of proof and has not met it.

IV. Conclusion

The Division did not meet its burden and its termination of Ms. J's PCA services is reversed. The Division is certainly entitled to reassess Ms. J's eligibility for PCA services, and if Ms. J disagrees with the result of that reassessment, she may request a new fair hearing.

DATED this 19th day of September, 2013.

Signed _____
Lawrence A. Pederson
Administrative Law Judge

Adoption

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

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

DATED this 3rd day of October, 2013.

By: *Signed* _____
Name: Lawrence A. Pederson
Title: Administrative Law Judge

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