

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

In the Matter of)	
)	OAH No. 13-1174-MDS
L Y)	Agency No.
_____)	

DECISION

I. Introduction

L Y’s functional abilities were reassessed on April 17, 2013. Based on that assessment, the Division of Senior and Disabilities Services (division) reduced her PCA services from 45.75 hours per week to 24.5 hours per week. Ms. Y appealed that determination.

A hearing was held on September 26, 2013. Ms. Y was represented by her son, K U, who has been granted a durable power of attorney to act for Ms. Y.¹ The division was represented by its lay representative, Angela Ybarra. Based on the evidence presented, Ms. Y is entitled to additional time for PCA services.

II. Facts

Ms. Y was 81 years old when the division’s Consumer Assessment Tool was used to evaluate her functional abilities.² She is partially paralyzed from a stroke in 2008.³ She is also diagnosed with several other conditions, including diabetes and kidney disease.⁴ She recently suffered a second stroke, and was admitted to the hospital on September 20, 2013.⁵

III. Discussion

A. PCA Program

The purpose of the PCA program is to provide 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[.⁶]

¹ Page 55 of 58 of documents submitted by facsimile on September 26, 2013. The division had received these documents earlier, but they arrived at the Office of Administrative Hearings from U Care Services at the start of the hearing. These documents have been labeled as Exhibit 1, and the page numbers in the facsimile header will be used in this decision to identify the relevant pages. The cover page is not numbered.

² Exhibit E 1.

³ Testimony of Mr. U; Exhibit E 3.

⁴ Exhibit E 3.

⁵ Exhibit 1, page 22.

⁶ 7 AAC 125.010(a).

The division uses the Consumer Assessment Tool (CAT) to assess the level of assistance needed.⁷ The amount of time allotted for that assistance is determined by the Personal Care Assistance Service Level Computation.⁸ This document shows the amount of time allotted for each ADL or IADL depending on the level of assistance needed for each task.

The division may change the number of hours of allotted PCA time if there has been a material change in the recipient's condition.⁹ When, as in this case, the division wishes to reduce the amount of allotted time, the division has the burden of proving a change of condition justifying that reduction.¹⁰

B. Ms. Y's Assessment

The CAT was administered to Ms. Y by a registered nurse, Michelle Russell-Brown, on April 17, 2013, and Ms. Y was notified of the division's determination in a letter dated August 9, 2013.¹¹ Mr. U questioned the division's computations in several areas,¹² each of which is addressed below.

1. Body Mobility

Ms. Y had previously been allowed 168 minutes per week of PCA services to assist her with body mobility.¹³ Body mobility refers to positioning or turning a person in a bed or chair. The applicable regulation states that PCA services may be allowed for "positioning or turning in a bed or chair, if the recipient is nonambulatory[.]"¹⁴ Time for this activity is typically limited to nonambulatory individuals because a person who can walk can be expected to be able to reposition herself in a bed or chair.¹⁵

Although the regulation states that time is allowed for body mobility *if the recipient is nonambulatory*, that does not mean that time may never be allowed for an ambulatory recipient. The regulation listing covered services says that it "includes" the items identified. When a regulation uses the word "includes," it is interpreted as though it was followed by

⁷ 7 AAC 125.020(b).

⁸ 7 AAC 125.024(1).

⁹ 7 AAC 125.026(a). Time may also be reduced if the recipient was receiving time for services that are no longer authorized because of a change in regulation. 7 AAC 125.026(d)(3)(C).

¹⁰ 7 AAC 49.135.

¹¹ Exhibit D.

¹² Exhibit 1, pages 2 and 3..

¹³ Exhibit D 2.

¹⁴ 7 AAC 125.030(b)(1).

¹⁵ Testimony of Ms. Russell-Brown. See 7 AAC 125.040(a)(4) (excluding from covered care services a "task that the department determines could reasonably be performed by the recipient").

the phrase, “but not limited to.”¹⁶ Thus, the covered services that may be provided are not limited to the specifically enumerated items in 7 AAC 15.030(b).

In this case, Mr. U testified that his mother needed assistance with body mobility. Ms. Russell-Brown agreed that Ms. Y was unable to turn herself in bed without physical assistance from another person.¹⁷ She also found that Ms. Y had no right hand grip strength, and weak left hand grip, stating that she was unable to hold or manipulate a pencil.¹⁸ Thus, the reason that time is typically not allowed for body mobility for an ambulatory person – because such individuals normally can reposition themselves – is not applicable here. The CAT evaluation confirms that Ms. Y cannot reposition herself. The division did not meet its burden of proving that time for body mobility should be eliminated completely.

The division concluded that Ms. Y needed assistance with body mobility two times each day, or 14 times per week.¹⁹ This is a reasonable amount because Ms. Y would also have an opportunity to change her body position during transfers, dressing, locomotion, and other activities.²⁰ Because she had a self performance score of 2 for bed mobility on the CAT, Ms. Y should receive 2.5 minutes each time she is assisted with body mobility, for a total of 35 minutes per week.

Mr. U argued for more time for this activity each week, but the division has adopted the specific time amounts for each task shown in Exhibit B 34. Only that specific time amount may be awarded for each body mobility adjustment.

2. *Transfers*

Transferring is the movement to and from a bed, chair, wheelchair, and moving from a sitting or lying position to a standing position.²¹ Ms. Y was given a self-performance score of 3, meaning she requires extensive assistance with transfers.²² This is the same score she received in 2010.²³ However, the frequency of transfers dropped from ten per day

¹⁶ AS 01.10.040(b); *see* Drafting Manual for Administrative Regulations, page 56 (<http://law.alaska.gov/pdf/manuals/DraftingManual-AdminRegs.pdf>) indicating that the use of the phrase “but is not limited to” is not needed in a regulation because it is already implied by AS 01.10.040(b).

¹⁷ Exhibit E 6.

¹⁸ Exhibit E 4.

¹⁹ Exhibit D 6.

²⁰ Testimony of Ms. Russell-Brown.

²¹ 7 AAC 125.030(b).

²² Exhibit E 6.

²³ Exhibit F 6.

to three times per day.²⁴ Ms. Russell-Brown testified that there had been no change in Ms. Y's condition related to how often she needed a transfer. Instead, she testified that in her professional opinion, the prior CAT had been overscored. She indicated on the CAT that Ms. Y only sits in her wheelchair during the day. If so, she would not need to transfer to a different chair or couch. Mr. U, however, testified that his mother did not only sit in her wheelchair and that she liked to sit in different chairs during the day. He argued for ten transfers per day.²⁵ While the prior CAT may have been overscored, the division did not meet its burden of proving that the frequency should be reduced to only three transfers per day. Ms. Y is entitled to receive assistance with transfers six times per day, seven days per week.

Mr. U also argued that Ms. Y should be allowed 7 minutes per transfer. However, a person who needs extensive assistance is only allowed 3.75 minutes per transfer.²⁶

3. *Locomotion*

Ms. Y needs extensive assistance to walk.²⁷ The division only allowed assistance with walking one time per day because Ms. Y only does her prescribed walking exercise one time per day.²⁸ However, locomotion also includes how a person moves while in a wheelchair.²⁹ Ms. Russell-Brown testified that Ms. Y is unable to propel her wheelchair on her own. Ms. Y can only use her left hand, so at best she could only propel herself in a circle. But given the weakness in her hand, even that is questionable. The division has not met its burden of proving that the frequency of assistance with locomotion should be reduced from ten times per day³⁰ to once a day. Ms. Y should be allowed assistance with locomotion ten times per day. She is entitled to receive 7.5 minutes of PCA services each time she receives assistance.³¹

²⁴ Exhibit E 6; Exhibit F 6.

²⁵ Exhibit 1, pages 2 – 3.

²⁶ Exhibit B 34.

²⁷ Exhibit E 7.

²⁸ Exhibit E 7; Testimony of Ms. Russell-Brown.

²⁹ Exhibit E 7.

³⁰ Exhibit F 7.

³¹ Exhibit B 34.

4. Toileting

Ms. Y is incontinent and needs extensive assistance with toileting.³² She was allowed assistance four times per day because that is the standard amount given to nursing home residents.³³ Mr. U testified that Ms. Y needs toileting assistance more often than that. She needs assistance when she wakes up each morning. In addition, receiving toileting assistance every three hours until bed time is reasonable. This would allow her to receive assistance a total of six times per day. Because she needs extensive assistance, she is allowed 11.25 minutes of assistance each time.³⁴

5. Personal Hygiene

Ms. Y was scored as needing limited assistance with her personal hygiene.³⁵ In 2010, she was scored as needing extensive assistance.³⁶ Personal hygiene consists of washing and drying the face and hands, nail care, skin care, mouth and teeth care, brushing and combing hair, shaving, and shampooing hair if done separately from bathing.³⁷ According to the notes in the most recent CAT, the only personal hygiene task Ms. Y is capable of performing is washing her hands with set up help.³⁸ The division has not met its burden of proving that Ms. Y has had a material change in her ability to perform personal hygiene tasks. Ms. Y still needs extensive assistance with this activity. Because she needs extensive assistance, she is allowed 15 minutes per day of PCA services for personal hygiene activities.³⁹

6. Bathing

Bathing is defined as taking a full-body bath or shower, or a sponge bath, along with any transfers in and out of the bath or shower.⁴⁰ In 2010, Ms. Y was scored as needing extensive assistance from two people for bathing, and was allowed 7 baths per week.⁴¹ In

³² Exhibit E 9.
³³ Testimony of Ms. Russell-Brown.
³⁴ Exhibit B 34.
³⁵ Exhibit E 10.
³⁶ Exhibit F 10.
³⁷ 7 AAC 125.030(b)(7).
³⁸ Exhibit E 10.
³⁹ Exhibit B 34.
⁴⁰ 7 AAC 125.030(b)(8).
⁴¹ Exhibit F 11.

2013, Ms. Y was still scored as needing extensive assistance, but from only one person, and with a frequency reduced to two times per week.⁴²

Ms. Russell-Brown testified that the prior finding of a need for two people to assist with bathing was, in her professional opinion, incorrect and that one person physical assistance was all Ms. Y needs. The notes in the 2013 CAT, Exhibit E 11, describe assistance from one person, and nothing in Mr. U's testimony indicated a need for assistance from two people.

Ms. Russell-Brown also testified that the reduced frequency to twice a week was based on what Mr. U reported to her. Ms. Russell-Brown's notes do not indicate that she was told Ms. Y only bathes twice a week. Mr. U testified that that Ms. Y bathes daily. This is reasonable given her incontinence. The division has not met its burden of proving that the frequency of bathing should be reduced to twice a week. Ms. Y was correctly scored as needing extensive assistance with bathing from one person. The frequency, however, should have been seven times per week.

7. Light Meal Preparation

Ms. Y is totally dependent on others for meal preparation. She had been receiving 210 minutes per week of PCA time for this activity. In her most recent assessment, this time was completely removed because she is able to have her meals prepared for her through the home and community-based waiver program.⁴³ PCA service time is not allowed when meal preparation is already provided through the waiver program.⁴⁴ This PCA service time was properly removed because it would duplicate what is being provided through a different program.

8. Documentation

The time allowed for documentation was reduced because of a change in regulations.⁴⁵ The amount of time permitted is now based on the individual's personal hygiene score. As discussed above, Ms. Y should have been scored as needing extensive

⁴² Exhibit E 11.

⁴³ Exhibit D 3.

⁴⁴ 7 AAC 125.030(f)(1).

⁴⁵ Exhibit D 4.

assistance with her personal hygiene. She is entitled to receive PCA services 7.5 minutes per day to assist her with documentation.⁴⁶

9. Escort Time

Escort time was set based on the number of Ms. Y's doctor appointments.⁴⁷ Ms. Russell-Brown testified that escort services "stops at the car" and does not include driving time, and that ten minutes per escort should be enough to get someone into the doctor's office.⁴⁸

Escort services are defined by regulation as traveling with the recipient to and from a routine medical or dental appointment outside the recipient's home and conferring with medical or dental staff during that appointment.^[49]

The amount of time set for escort services should be based on documented routine appointments, be consistent with the CAT, and should meet the identified needs of the recipient.⁵⁰ The CAT documented a need for escort services.⁵¹ She was allowed time for four doctor visits per year,⁵² which is consistent with Mr. U's testimony that she sees her doctor every three months. However, ten minutes per visit is not sufficient to travel to and from the appointment, and confer with medical staff during the appointment. Mr. U testified that it takes at least 60 minutes each visit, depending on traffic. That is a more realistic estimate of Ms. Y's need for escort services. Ms. Y is entitled to receive escort services for 240 minutes per year, which is 4.62 minutes per week.⁵³

IV. Conclusion

Ms. Y contested the division's reduction of her PCA time. While some of the changes from the prior year were appropriate, the division did not meet its burden of

⁴⁶ Exhibit D 7.

⁴⁷ Exhibit D 4.

⁴⁸ Testimony of Ms. Russell-Brown.

⁴⁹ 7 AAC 125.030(d)(9).

⁵⁰ Exhibit B 36.

⁵¹ Exhibit E 27.

⁵² Exhibit D 4.

⁵³ 60 minutes X 4 times per year = 240 minutes per year. 240 minutes per year divided by 52 weeks per year = 4.62 minutes per week.

proving that all of the reductions were correct. The division must recalculate Ms. Y's PCA services based on the findings and conclusions described above.

Dated this 1st day of October, 2013.

Signed

Jeffrey A. Friedman
Administrative Law Judge

ADOPTION OF PROPOSED DECISION WITH REVISIONS

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) as the final administrative determination in this matter with the following revision to section III B 1:

Department regulation 7 AAC 125.030 describes the personal care services the Department will pay for. This regulation specifically limits payment for the service of positioning or turning in a bed or a chair to situations where “the recipient is nonambulatory.”⁵⁴ Ms. Y is ambulatory. She is, therefore, not eligible to receive PCA services for the ADL of body mobility, positioning or turning in a bed or chair. The proposed decision is adopted in all other respects.

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 13th day of November, 2013.

By: *Signed*

Jared C. Kosin
Executive Director
Office of Rate Review

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

⁵⁴ 7 AAC 125.030(b)(1)(A).