

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

In the Matter of )

L D )  
\_\_\_\_\_ )

OAH No. 13-1187-MDS  
Agency No.

**REVISED DECISION AFTER REMAND**

**I. Introduction**

L D has several medical conditions. Her medical conditions limit her activity, but she can still do many activities of daily living independently. In 2012, she was assessed as eligible for Personal Care Assistance services based largely on her inability to do certain tasks around the home without help. In 2013, she was reassessed, and the new assessment found that because she did not need physical support to accomplish the covered tasks, she was no longer eligible for services. Ms. D appealed the denial, and the evidence showed that although Ms. D has improved since 2012, she still needs physical assistance to accomplish certain covered tasks.

An initial proposed decision was issued on October 8, 2013, reversing the decision that Ms. D was no longer eligible for services. The Executive Director of the Office of Rate Review, Jared Kosin, remanded the case to the Officer of Administrative Hearings to reopen the record for consideration of proposed alternatives for achieving the activity of walking for exercise and to correct an error in the time allotted for personal care assistance on the activity of light housekeeping. Ms. D then withdrew her request for services on the activity of walking for exercise. Under this revised decision, the decision of the Division of Senior and Disability Services is reversed, and Ms. D is eligible for limited personal care assistance services as described in this decision.

**II. Facts**

L D is a 59-year-old woman who lives alone in a home outside of No Name. She has been diagnosed with a variety of medical conditions, including type II diabetes, chronic pain, hypertension, a disc disorder, arthritis, and some psychological issues.<sup>1</sup> Ms. D takes several medications, including strong medications for her pain.<sup>2</sup>

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<sup>1</sup> J testimony; Exhibit E at 3.

<sup>2</sup> J testimony; Exhibit E at 20.

About one year ago, Ms. D was living in a house that was in a state of disrepair.<sup>3</sup> Her church determined that she should have better living conditions, and the group was able to provide Ms. D with a new home.<sup>4</sup> The move was very stressful for Ms. D, and her doctors increased her medications at the time of the move.<sup>5</sup> Since that time, her medications have been reduced.<sup>6</sup>

Ms. D is generally able to perform most of her activities of daily living (ADLs) without receiving significant hands-on assistance. For example, Ms. D can feed herself, dress herself, bathe, do personal hygiene tasks, and use the toilet without assistance. She is somewhat unsteady when she walks, but she can walk around her home using a cane or using the furniture to steady herself. She has bruises on her legs from bumping into the furniture, but that problem can likely be addressed by changes in furniture layout.<sup>7</sup>

With regard to whether Ms. D can transfer herself in and out of her bed, this question is difficult to address because Ms. D does not sleep in her bed. Her bed is not comfortable for her and she sleeps instead in an overstuffed chair.<sup>8</sup> Although on most days, Ms. D can get in and out of the chair, on some days, her pain keeps her from getting out of her make-shift bed unless she receives assistance.<sup>9</sup> Q J, a friend of Ms. D who has known her for 20 years and who served as her Personal Care Assistant (PCA) during the past year, testified that she requires assistance to transfer in or out of her bed (chair) about twice a day one day per week.<sup>10</sup>

In giving testimony about Ms. D's need for assistance, Mr. J stressed that Ms. D wants to do tasks without assistance, and that his goal as her PCA was to facilitate her being able to do tasks independently. In walking outside the house, for example, there was testimony that on occasion Ms. D could walk outside with her cane. Yet, Mr. J described her as a fall risk, and testified that he had caught her and prevented her from falling about 12 times last year.<sup>11</sup> Ms. D admitted that she when she was walking outside the home she would try to walk independently, but she would grab the arm of the person helping her when she lost her balance.<sup>12</sup> Laura

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<sup>3</sup> J testimony.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Wilbanks testimony.

<sup>8</sup> D testimony. Ms. D explained that her bed "is not kind to my back." *Id.*

<sup>9</sup> J testimony.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> D testimony.

Wilbanks, the program manager for the PCA agency Access Alaska, testified that Ms. D should never walk outside unaccompanied during the winter because she would be at increased risk of a fall during winter conditions.<sup>13</sup>

With regard to activities around the house, Ms. D also wants to do her own light housework around the home, and she does sweep the floor and clean the bathrooms.<sup>14</sup> Ms. D admitted, however, that her sweeping left dirt on the floor.<sup>15</sup> Both she and Mr. J testified that she is not capable of taking out the garbage, and apparently her current practice is to allow garbage to accumulate for about a month before she asks Mr. J to take it out.<sup>16</sup> Mr. J testified that the garbage should be removed more frequently.<sup>17</sup> Ms. D tries to do her own laundry, but she cannot do it without help—Mr. J has to transfer the wet clothes from the washer to the drier because Ms. D cannot handle the weight of the wet clothes.<sup>18</sup> Mr. J testified that she does laundry about once per month; in his opinion it should be done once per week.<sup>19</sup> Testimony also indicated that Ms. D will wash her own dishes, but both Mr. J and Ms. Wilbanks, testified that they believe Ms. D has suffered from food-borne illnesses caused by unsanitary dishes and utensils.<sup>20</sup>

Ms. D can prepare her own breakfast and she does not eat lunch.<sup>21</sup> She can prepare her main meal without assistance if she limits her diet to frozen food that can be prepared in a microwave, such as frozen burritos.<sup>22</sup> Ms. Wilbanks testified that Ms. D could theoretically prepare a meal that required handling and preparation of food, for example, chopping vegetables, but she could only do it with great difficulty, and it would take her at least two to three hours because she cannot stand for more than a few minutes at a time.<sup>23</sup> Mr. J testified that because she is diabetic, Ms. D needs a varied diet with lots of fruits and vegetables, and that for her to have that diet, he must extensively help her prepare the main meal or just do it himself.<sup>24</sup>

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<sup>13</sup> Wilbanks testimony.

<sup>14</sup> D testimony; J testimony.

<sup>15</sup> D testimony.

<sup>16</sup> J testimony.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Wilbanks testimony; J testimony. Ms. Wilbanks has made two site visits to Ms. D's home—once before Ms. D moved, and once in September 2013 shortly before the hearing.

<sup>21</sup> D testimony.

<sup>22</sup> Exhibit E at 9; J testimony; Wilbanks testimony.

<sup>23</sup> Wilbanks testimony.

<sup>24</sup> J testimony.

Ms. D is not capable of grocery shopping or attending medical appointments without assistance.<sup>25</sup> Mr. J takes her grocery shopping about once a month.<sup>26</sup> To meet her other grocery needs, he picks up groceries for her occasionally.<sup>27</sup> He takes her to medical appointments about four times per year.<sup>28</sup> Mr. J explained that Ms. D has difficulty meeting, understanding, and dealing with people.<sup>29</sup> At the hearing, Ms. D described herself as sometimes “not a very sane person.”<sup>30</sup>

Whether these facts will qualify Ms. D for PCA services will depend on how Ms. D is assessed under a standardized assessment format, called the Consumer Assessment Tool (CAT). Under the CAT, the division assessor will assign numerical scores for several activities of daily living (ADLs)—tasks like walking, eating, and so on—and for several instrumental activities of daily living (IADLs)—tasks like cooking, housework, and so on. Scores are divided into two categories, a “self-performance” score, and a “support” score. (The meaning of the score received is defined differently for ADLs than for IADLs). To the extent that this decision discusses actual numerical scores, they will be reported in the format x/y, where x is the self-performance score, and y is the support score. As a general matter, PCA minutes are assigned for scores that show that the recipient needs actual hands-on assistance to accomplish the ADL or IADL. Scores that show independence or need for only supervision, set-up help, or cueing will not qualify for assistance.<sup>31</sup>

In April 2012, Ms. D was assessed under the CAT, and found to qualify for personal care assistance for transfers, meal preparation, housework, grocery shopping, laundry, and locomotion for accessing medical appointments.<sup>32</sup> Ms. D was reassessed by Elena Mitchell on April 18, 2013. Ms. Mitchell is not a nurse, but she was trained in how to administer the CAT.<sup>33</sup> Ms. Mitchell found that Ms. D was either independent, or at most required only supervisory/set

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<sup>25</sup> J testimony.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> D testimony.

<sup>31</sup> For a full explanation of how the CAT is scored, and what the numerical scores mean for ADLs and IADLs, see, for example, *In re LB*, OAH No. 12-406-MDS at 7-8 (2012 Comm’r Health and Soc. Serv.) available at <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/PCA/MDS120406.pdf>.

<sup>32</sup> Exhibit F.

<sup>33</sup> Burnett testimony.

up/cueing assistance in all ADLs and IADLs.<sup>34</sup> Therefore, Ms. Mitchell determined that Ms. D was not eligible for PCA services.<sup>35</sup>

Ms. D testified that on the day of the assessment she did her best to be ready for Ms. Mitchell.<sup>36</sup> She got up, took a dose of medication, and then bathed.<sup>37</sup> Before Ms. Mitchell arrived, Ms. D took her evening dose of medication.<sup>38</sup> Ms. D indicated that her good performance on the day of the assessment was due at least in part to the extra medication.<sup>39</sup> Mr. J attended the assessment, although he arrived late. He testified that Ms. D was unusually animated that day, and under a rush of adrenaline.<sup>40</sup> He believes that Ms. D took the extra dose of medication early so that she could endure the assessment.<sup>41</sup> He stated that the assessment was skewed and inaccurate.<sup>42</sup>

On August 12, 2013, the division notified Ms. D that starting August 22, 2013, she would no longer be eligible for PCA services. Ms. D requested a fair hearing on the determination, and a telephonic hearing was held on October 1, 2013. Ms. Angela Ybarra presented the case for the division, and Mr. J assisted Ms. D in presenting her case.

An initial proposed decision was issued on October 8, 2013, reversing the decision that Ms. D was no longer eligible for services. One of the covered activities under the initial decision was walking for exercise. Based on the testimony at the hearing, the initial decision found that walking for exercise would have to be done out-of-doors, and would require PCA services. The Division filed a proposal for action that did not contest that Ms. D was eligible for services, but did identify alternative ways for Ms. D to complete the activity of walking for exercise. Under these alternatives, Ms. D would not need the services of a PCA to complete this activity. In addition, the Division identified an error in the original order regarding the personal care assistance time needed for the activity of light housekeeping. The Executive Director of the Office of Rate Review, Jared Kosin, remanded the case to the Office of Administrative Hearings

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<sup>34</sup> Exhibit E.

<sup>35</sup> *Id.*

<sup>36</sup> D testimony.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; J testimony. Ms. D at first said that on the she had taken her evening dose in the morning. Mr. J clarified that she took her morning dose in the morning and then took her evening dose early before Ms. Mitchell arrived. J testimony.

<sup>39</sup> *Id.*

<sup>40</sup> J testimony.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

to reopen the record for consideration of proposed alternatives for walking for exercise and to correct the error in the time allotted for PCA services for light housekeeping. After remand, a status conference was held on November 25, 2013, and at a telephonic conference on November 29, 2013, Ms. D withdrew her request for personal care assistance for the activity of walking for exercise.

### **III. Discussion**

Ms. Mitchell, the assessor for the division who came to Ms. D's house on April 18, 2013, and filled out the CAT for Ms. D, no longer works for the division. She has moved out of state, and was not available to testify at the hearing or to explain the facts or the reasons for her assessment. The division argued that without Ms. Mitchell's testimony, the assessment should be accepted as true and correct. Yet, the purpose of this hearing is to determine whether any errors were made in the assessment. Even the most skilled assessors can sometimes make errors or overlook a condition.

Here, the testimony of Mr. J, Ms. D, and Ms. Wilbanks helped flesh out the picture of Ms. D's ability to perform activities of daily living and instrumental activities of daily living. Each of these witnesses had first-hand knowledge of Ms. D and her physical limitations. The witnesses presented their testimony frankly and without exaggeration—if anything, they emphasized Ms. D's ability to act independently whenever possible. The only witness for the Division, Teresa Burnett, presented and explained the CAT, but she has never seen Ms. D, and does not have first-hand knowledge of Ms. D's physical limitations.

Ms. Burnett is a Registered Nurse, and she has experience in applying the CAT.<sup>43</sup> She testified that an assessor should take into account whether an individual is having an unusually good or bad day on the day of assessment.<sup>44</sup> She agreed that if an individual had taken additional medication on the day of the assessment, it could affect how the person presents, and an assessor should take that into account when scoring the CAT.<sup>45</sup> Here, the evidence showed that on the day of the assessment, Ms. D had taken her evening pain medication early in order to

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<sup>43</sup> Burnett testimony.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

be in condition to receive Ms. Mitchell. Nothing in the CAT indicates that Ms. Mitchell was aware of this fact or took it into account when assessing Ms. D.<sup>46</sup>

Ms. D admits she can do many tasks independently, and does not contest many of the findings made by Ms. Mitchell. In general, based on the testimony of Mr. J, Ms. D has improved since the previous assessment and it appears that she can do many tasks independently (some only with great difficulty), but she needs physical assistance from Mr. J for certain tasks to be done completely and to maintain a healthy and sanitary living environment. Therefore, for many of the IADLs Ms. D should score a 1/3—*independent with difficulty/physical assistance was provided*—which is reduced from the 2/3 score in the 2012 assessment.<sup>47</sup> The analysis of the contested issues is as follows:

1. Transfers. Although Ms. D can usually get up on her own, Mr. J testified that on days in which her pain flared, he had to physically assist Ms. D in transferring out of and back into her “bed” (meaning the overstuffed chair in which she slept). He stated that this occurred once per week. Based on the testimony, Ms. D needs limited one person physical assist in transfers from bed to standing and back two times per week. The ADL for transfers should have been scored 2/2 twice per week.

2. Walking for exercise. Ms. D has a prescription to walk for 30 minutes two times per day seven days per week.<sup>48</sup> Ms. D agreed that at this time she does not need personal case assistance services from the Division to accomplish this activity, and no time will be allotted for this activity.

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<sup>46</sup> Mr. J also testified that Ms. D’s pain medication had been reduced, which made it even harder for Ms. D to perform the ADLs and IADLs on which she needs assistance. The division argued that the reduction in medication was a change of circumstances that occurred after the assessment. Supplemental evidence was provided after the hearing, however, regarding Ms. D’s pain medication. This evidence showed that her Tylenol 4 was reduced from “up to 8/day” (January 9, 2013) to “6/day” on April 4, 2013. See Routine Medication Record (Family Medical Center, Delta Jct.). Ultimately, the question of when her medication was reduced is not material because this decision does not turn on whether the reduction in medication caused Ms. D’s need for assistance. The more important point is that Ms. D had taken extra medication on the day of the assessment and the evidence shows that Ms. D is more impaired than acknowledged in the assessment.

<sup>47</sup> Exhibit F at 26. Scoring an IADL at 1/3 is unusual because a self-performance score of one means that the recipient can perform the task independently with great difficulty, and a support code of three means that physical assistance was provided. The *Personal Care Service Level Computation* form, however, clearly contemplates a possible score of 1/3 for IADLs, and where that score is used here it recognizes the improvement Ms. D has made while still acknowledging the need for physical support if the tasks are going to be accomplished.

<sup>48</sup> Exhibit E at 5.

3. Escort assistance to access appointments is permitted if based on documented routine medical or dental appointments.<sup>49</sup> Ms. D's evidence showed that Ms. D needs assistance to access medical appointments and the division did not present any evidence to the contrary.<sup>50</sup> The CAT should be amended to reflect four routine medical appointments per year and Ms. D will receive services based on four appointments per year at two hours per appointment.

4. Main meal preparation. The assessment determined that Ms. D did not need assistance in food preparation, citing as evidence the fact that Ms. D is able to microwave a burrito.<sup>51</sup> The testimony established that Ms. D cannot remain standing long enough to prepare a meal and would need assistance to prepare a meal that was more complex.<sup>52</sup> The law describes "the IADL of main meal preparation" as "the preparation, serving, and cleanup in the recipient's home of one meal per day that is essential to meet the health needs of the recipient."<sup>53</sup> Mr. J argued that a diabetic must have a meal with fresh fruit and vegetables. That argument is sound, although Mr. J did not establish that he was qualified to discuss what is essential for Ms. D's health. Ms. Burnett was the most qualified witness at the hearing, but she did not comment on Ms. D's diet. Here, Ms. D was found to need assistance in main meal preparation in 2012, and the burden of proof is on the division to show that she no longer needs this assistance.<sup>54</sup> The division presented no testimony on this question, and has not met its burden of proof. Ms. D will receive a score of 2/3 for seven days per week on the IADL of main meal preparation.<sup>55</sup>

5. Light housekeeping. The testimony established that although Ms. D would do some elements of housekeeping independently, she did not do them well, and her house could be unsafe and unsanitary as a consequence. For trash removal, she cannot do the activity at all. She therefore needs assistance and will score a 1/3 on this activity for once per week.

6. Laundry. Ms. D is at best independent with great difficulty and physical support is provided to do this task. She will score a 1/3 on this activity for once per week.

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<sup>49</sup> *Personal Care Service Level Computation*, adopted by reference in 7 AAC 160.900; available at <http://dhss.alaska.gov/dsds/Documents/pca/PCA%20Service%20Computation.pdf>.

<sup>50</sup> *See In re OS*, OAH No. 12-0941-MDS at 5 (2013 Comm'r Health and Social Services) (awarding PCA services for accessing medical appointments to recipient who could walk inside without assistance but needed assistance to walk outside).

<sup>51</sup> Exhibit E at 9.

<sup>52</sup> J testimony; Wilbanks testimony.

<sup>53</sup> 7 AAC 125.030 (c)(2)..

<sup>54</sup> 7 AAC 49.135.

<sup>55</sup> *See In re OS*, OAH No. 12-0941-MDS at 7 (applicant who could not remain standing long enough to prepare main meal scored 2/3).



7. Shopping. Ms. D needs physical assistance to shop and will score a 1/3 on this activity for once per week.

#### **IV. Conclusion**

The evidence establishes that because of her pain and limitations, Ms. D needs assistance to accomplish one activity of daily living, several instrumental activities of daily living, and certain additional covered services. The assessment did not take into account that Ms. D had accelerated her medication on the day of the assessment, and the assessment concluded that Ms. D had more skills and independence than she does. Therefore, the division's decision that Ms. D is ineligible for PCA services is reversed, and this decision is remanded to the division to issue a new PCA Service Level Authorization Letter consistent with this decision.

DATED this 29<sup>th</sup> of November, 2013.

By: Signed  
Stephen C. Slotnick  
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 7<sup>th</sup> 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.]