



### III. Discussion

#### A. *The 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[.<sup>3</sup>]

The division uses the CAT to help it assess the level of assistance needed.<sup>4</sup> The amount of time allotted for needed assistance is determined by the Personal Care Assistance Service Level Computation.<sup>5</sup> The Service Level Computation chart shows the amount of time allotted for each ADL or IADL depending on the level of assistance needed for each task.

The different levels of assistance are defined by regulation and in the CAT.<sup>6</sup> Supervision is defined as oversight, encouragement, or cueing three or more times a week, with physical assistance no more than two times a week.<sup>7</sup> Limited Assistance is defined as requiring direct physical help or guidance from another individual three or more times a week, with weight bearing support no more than two times a week.<sup>8</sup> Extensive Assistance is defined as requiring direct physical help with weight bearing support at least three times a week, or full assistance without any involvement from the recipient at least three times a week, but not all of the time.<sup>9</sup> Full assistance means the recipient has to rely entirely on the caretaker to perform the activity.<sup>10</sup>

The division may change the number of hours of allotted PCA services if there has been a material change in the recipient's condition.<sup>11</sup> When, as in the 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.<sup>12</sup> Because the division notified Mr. C of its decision on August 16,

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<sup>3</sup> 7 AAC 125.010(a).

<sup>4</sup> 7 AAC 125.020(b).

<sup>5</sup> 7 AAC 125.024(1).

<sup>6</sup> The July 29, 2009 version of the CAT has been adopted by reference, 7 AAC160.900(d)(6), and therefore the definitions in the CAT have the same effect as a regulation.

<sup>7</sup> Exhibit E6.

<sup>8</sup> 7 AAC 125.020(a)(1); Exhibit E6.

<sup>9</sup> 7 AAC 125.020(a)(2); Exhibit E6

<sup>10</sup> 7 AAC 125.020(a)(3); Exhibit E6.

<sup>11</sup> 7 AAC 125.026(a).

<sup>12</sup> 7 AAC 49.135.

2013, his condition on that date is used when determining the amount of services he is eligible to receive.<sup>13</sup>

**B. Body Mobility**

The first ADL for which the division reduced PCA services was for body mobility. Under the current regulations, time is only allowed for assisting a person in positioning or turning in bed or in a chair if the recipient is not ambulatory.<sup>14</sup> On December 11, 2013, during a visit to his doctor, Mr. C was still able to ambulate on his own.<sup>15</sup> Because Mr. C is ambulatory at least some of the time, he is not eligible for PCA services for the ADL of body mobility.

**C. Transfers**

The ADL of transfers refers to moving between surfaces, such as moving to or from a bed or a chair.<sup>16</sup> The division determined that Mr. C had improved from needing extensive assistance to needing only limited assistance with transfers.<sup>17</sup> Ms. J and Ms. D both testified that they had to lift Mr. C during transfers. However, their testimony did not always distinguish between Mr. C's condition on the date of the hearing, and his condition on August 16, 2013, when the decision was made. Ms. J noted that Mr. C's condition has been deteriorating over time.<sup>18</sup>

In completing the CAT, Ms. Sullivan wrote

Has lift chair, participant reports able to operate controls. Caregiver reports unable to follow directions. Assistance to transfer in/out of bed and provides hands on assistance to complete transfer from lift recliner. POA stood by to provide hands on assistance to pull client . . . to standing position.<sup>[19]</sup>

Pulling a client to a standing position is weight bearing assistance. In addition, Ms. J testified more fully about how she completes the transfer from the lift recliner. She explained that the recliner only got Mr. C part of the way up and that she needed to lift him

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<sup>13</sup> See *In re T.C.*, OAH Case No. 13-0204-MDS (Commissioner of Health and Social Services 2013), page 7 (notice sent to recipient is the decision under review), available at <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf>

<sup>14</sup> 7 AAC 125.030(b)(1)(A).

<sup>15</sup> Neurology Follow Up Visit/Progress Note from December 11, 2013 office visit submitted on behalf of Mr.

C.

<sup>16</sup> 7 AAC 125.030(b)(2).

<sup>17</sup> Exhibit D2. The division did, however, increase the frequency from four transfers per day to six. Exhibits E6 and F6. Based on the preponderance of the evidence, this increase in frequency is appropriate.

<sup>18</sup> His neurologist, Dr. Troxel, also noted a "progressive cognitive decline with progressive decrease in ability to perform ADLs." Letter dated November 1, 2013.

<sup>19</sup> Exhibit E6.

to finish the transfer.<sup>20</sup> She also explained that he cannot support his own weight; he needs someone to hold him up. Based on this testimony, and the notes in the CAT, Mr. C needs weight bearing assistance to transfer at least three times in a seven day period. Accordingly, the division has not met its burden of proving a material change of condition to justify a reduction in services for this ADL.

***D. Locomotion***

The division determined that Mr. C improved from needing extensive assistance to limited assistance when walking. Ms. Sullivan testified that there was an alarm system installed in the house to notify Mr. C's caretakers if he got up and started wandering. She concluded that since he was wandering, he could locomote on his own.<sup>21</sup> As noted above, Mr. C was able to walk a short distance on his own at his doctor's office in December. The question for this hearing, however, is not whether he can sometimes walk on his own, but whether Mr. C frequently needs hands on assistance with locomotion and, if so, how much assistance he needs.

The division agrees that Mr. C does need limited assistance with locomotion at least three times a week.<sup>22</sup> Ms. J has asserted that he needs weight bearing assistance. She testified that she has to push him while in the wheel chair because he does not know how to do that for himself, or she has to hold up his weight while he walks because he no longer knows how to hold up his own weight. She explained that she frequently moves him in the wheel chair, which would be full caregiver performance of that task. If this occurs some, but not all of the time during a seven day period, then it constitutes extensive assistance.<sup>23</sup> If Mr. C needs weight bearing assistance at least three times in a week, that also establishes a need for extensive assistance.<sup>24</sup> Weight bearing assistance means supporting more than a minimal amount of weight where the recipient would be unable to perform the task without that assistance.<sup>25</sup> The preponderance of the evidence in this case is that, as of August 16, 2013, Mr. C needed extensive assistance as defined by the CAT. The division did not meet

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<sup>20</sup> Ms. D testified that she and Ms. J working together have to use all their strength to pull him up.

<sup>21</sup> Ms. J testified that the alarms have been in place for several years. Wandering used to be a problem, but is not currently a problem.

<sup>2222</sup> He was given a self-performance score of 2, which indicates a need for non weight bearing assistance at least three times in a seven day period. Exhibit E7.

<sup>23</sup> Exhibit E7 (definition of Extensive Assistance in CAT).

<sup>24</sup> Exhibit E7.

<sup>25</sup> *In re K T-Q*, OAH No. 13-0271-MDS (Commissioner of Health and Social Services 2013), page 4.

its burden of proving a material change in his condition to justify a reduction in PCA services for locomotion.

***E. Locomotion for Medical Appointments***

The division also found that Mr. C needed only limited assistance with locomotion for attending medical appointments.<sup>26</sup> As with his other locomotion activities, the division has not met its burden of proving a material change of condition to justify the reduction of services for this ADL.

***F. Dressing***

The division determined that Mr. C had improved, and now only needed limited assistance with dressing.<sup>27</sup> In the CAT, Ms. Sullivan noted that Mr. C was unable to follow simple instructions.<sup>28</sup> Ms. J agreed that Mr. C's difficulty in dressing himself was based, at least in part, on his inability to understand what he was supposed to do, or how he should do it. Regardless of why he can't dress himself, the parties agree that he needs assistance to perform this ADL. The question, again, is whether he needs weight bearing assistance. Ms. J testified that she would have Mr. C sit in a chair while she dressed him. However, he would still need to lift up to put on pants. Since he is unable to stand from a sitting position without weight bearing assistance, he may not be able to be able to lift himself enough to get dressed without weight bearing assistance. Although he has apparently had some occupational and physical therapy since his last assessment,<sup>29</sup> the division did not present any medical records or other evidence to show whether his OT/PT was successful. Where the evidence points equally to two possible results, the result is determined by which party has the burden of proof. It is the division's burden to prove that the reduction in time is appropriate, and the division has not met its burden as to this ADL.

***G. Eating***

The division did not allow Mr. C any PCA time for eating. Ms. J testified that Mr. C is able to eat independently, but he needs to be supervised because he tends to overfill his mouth, which causes a choking risk. A person is allowed 45 minutes per day for supervised eating if the CAT indicates he or she has problems with chewing or swallowing as shown in

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<sup>26</sup> Exhibit E7.

<sup>27</sup> Exhibit E8.

<sup>28</sup> Exhibit E8.

<sup>29</sup> Testimony of Ms. Sullivan; Exhibit F5.

Section K.3.a of the CAT.<sup>30</sup> That box on the CAT is checked.<sup>31</sup> Accordingly, the division erred in not allowing time for supervised eating.

#### ***H. Toileting***

The division did not change the time allotted for the ADL of toileting, but Ms. J testified that Mr. C needed more assistance with this activity. Ms. D testified that she is there for about four hours each day, and during that time Mr. D needs toileting at least three times, usually more. Ms. J wasn't specific as to the frequency of toileting, but testified that she has to change him multiple times each day because of Mr. C's incontinence. Based on the preponderance of the evidence, Mr. C needs extensive assistance with this ADL at least six times each day.

#### ***I. Personal Hygiene***

In the prior assessment, Mr. C was scored as needing extensive assistance with personal hygiene, twice a day for seven days a week.<sup>32</sup> The current assessment found that he only needs limited assistance, one time per day.<sup>33</sup> The ADL of personal hygiene includes washing the face and hands, nail care, skin care, mouth and teeth care, brushing and combing hair, and shaving.<sup>34</sup>

By regulation, personal hygiene is limited to a set number of minutes per day, regardless of when or how often the hygiene tasks occur.<sup>35</sup> Ten minutes per day are allowed for limited assistance, and 15 minutes per day for extensive assistance. Based on the definitions in the CAT, if Mr. C is able to perform part of the task himself each day, then he is eligible only for limited assistance, but if he needs his caretaker to perform the entire task at least one time a week, then he is eligible for extensive assistance.<sup>36</sup>

Ms. Sullivan testified that Mr. C had received occupational therapy to help him with using his upper body, and that because he had received this therapy, he no longer needed extensive assistance. No evidence was presented to show that the occupational therapy was successful and that Mr. C is now able to assist with his own personal hygiene activities each day. The division has not met its burden of proving a sufficient improvement in Mr. C's

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<sup>30</sup> Service Level Computation chart, Exhibit B34.

<sup>31</sup> Exhibit E25.

<sup>32</sup> Exhibit F10.

<sup>33</sup> Exhibit E10.

<sup>34</sup> 7 AAC 125.030(b)(7).

<sup>35</sup> Service Level Computation chart, Exhibit B34.

<sup>36</sup> Exhibit E10.

condition to justify a reduction from extensive assistance to limited assistance. However, the division did correctly reduce the frequency to one time per day to match the requirements of the regulation.

***J. Bathing***

Mr. C was scored as needing physical help with bathing.<sup>37</sup> He was given less time for this activity than previously because of a regulatory change that specifies an exact amount of time for this task.<sup>38</sup> The change in regulation constitutes a material change in circumstances justifying this reduction.<sup>39</sup> The division's reduction in time for this ADL is upheld.<sup>40</sup>

***K. Escort Time***

When appropriate, the division will pay for a personal care assistant to escort a recipient to medical appointments.<sup>41</sup> Escort time is calculated by totaling the amount of time spent each year on routine medical or dental appointments, and dividing by 52 weeks per year.<sup>42</sup> For Mr. C, this was calculated by assuming 12 medical appointments a year, each taking 40 minutes.<sup>43</sup>

Ms. J testified that Mr. C has medical appointments every week. Mr. C lives in No Name. Some of his medical appointments are nearby, but others are in Anchorage.<sup>44</sup> In addition to his neurologist, Dr. Troxel, Mr. C's eye doctor and dentist are in Anchorage.<sup>45</sup> The 12 visits per year documented on the CAT include two visits to Dr. Troxel, but no visits to the dentist or eye doctor.<sup>46</sup> The allocated escort time of 40 minutes for each visit to Anchorage is insufficient, as it would take more than that amount of time just to complete the roundtrip travel.<sup>47</sup> The other ten visits that are included in the CAT are for appointments

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<sup>37</sup> Exhibit E11.

<sup>38</sup> Service Level Computation chart, Exhibit B34.

<sup>39</sup> 7 AAC 125.026(d)(3)(C) (a material change exists if the recipient was receiving services that are no longer authorized by regulation).

<sup>40</sup> Ms. J's testimony suggests that Mr. C may now be totally dependent in this area. She did not meet her burden of proving that he was eligible for more time as of August 16, 2013. If Mr. C has continued to deteriorate since that date, the care coordinator may want to submit a change of information as to this ADL and possibly others.

<sup>41</sup> 7 AAC 125.030(d)(9).

<sup>42</sup> Service Level Computation chart, exhibit B36.

<sup>43</sup> Exhibit D4.

<sup>44</sup> Testimony of Ms. J.

<sup>45</sup> Testimony of Ms. J.

<sup>46</sup> Exhibit E5.

<sup>47</sup> He was allocated 60 minutes for each medical appointment in his last assessment, including those closer to home.

in the No Name area, but if it is assumed that the appointment itself lasts 30 minutes, and if it is further assumed that each appointment starts promptly with no waiting, then the allocated time only allows for five minutes travel each way.

Although some change from the previously allocated escort time may be appropriate, the division did not meet its burden of proof to establish that the allocated time should be only ten minutes per week to accommodate all of his medical appointments. Accordingly, Mr. C continues to be eligible for the amount of time previously provided for.

#### **IV. Conclusion**

The division's reduction of PCA services is partially upheld and partially reversed. The division should recalculate Mr. C's PCA time consistent with the discussion above. If Mr. C disputes the new calculation, he would have appeal rights as to that limited issue.

Dated this 16<sup>th</sup> day of January, 2014.

*Signed*

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Jeffrey A. Friedman

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 30<sup>th</sup> day of January, 2014.

By: *Signed*

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Name: Jeffrey A. Friedman

Title: Administrative Law Judge

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