

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

In the Matter of )  
 )  
 B C )  
\_\_\_\_\_ )

OAH No. 13-1284-MDS  
Agency No.

**DECISION**

**I. Introduction**

B C was receiving 38 hours per week of personal care assistance (PCA) services. On April 30, 2013, the Division of Senior and Disabilities Services (Division) re-assessed her need for physical assistance and concluded that, effective August 28, 2013, Ms. C was no longer eligible to receive PCA services.<sup>1</sup>

Ms. C appealed and a hearing *de novo* was held October 21, 2013. Ms. C disagreed with some, but not all, of the Division's scoring of her need for physical assistance with certain activities. The areas of dispute are: locomotion, dressing, eating, bathing, meal preparation, medication, documentation, range of motion, and walking.

Because the Division proposed terminating benefits previously granted, it had the burden of proving at the hearing that Ms. C was no longer eligible.<sup>2</sup> The hearing provided an opportunity to obtain a fuller picture of Ms. C's abilities and needs as of August 28, 2013. The Division's scoring of the activities of locomotion, medication, documentation, and range of motion is affirmed. The Division's scoring of the activities of dressing (assessed 0/0, should be 0/1), bathing (assessed 1/1, should be 2/2), eating (assessed 0/0, should be 0/1), meal preparation (assessed 8/8, should be 3/4), house work (no score provided, should be 3/4), remaining independent activities of daily living (assessed 2/3, should be 3/4), and walking (assessed as not requiring physical assistance, should be approved for a one person physical assist) is reversed. The Division should recalculate Ms. C's PCA time in accordance with this decision and change her scores to accurately reflect her PCA needs.

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<sup>1</sup> Ex. D.  
<sup>2</sup> 7 AAC 49.135.

## 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 . . . .”<sup>3</sup> 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.”<sup>4</sup>

The Division uses the Consumer Assessment Tool or “CAT” to determine the level of physical assistance that an applicant or recipient requires performing ADLs and IADLs.<sup>5</sup> A functional assessment is performed as part of the CAT.<sup>6</sup>

The functional assessment asks the recipient to perform certain tasks, such as touching hands over a person’s head, placing arms behind their back, touching their feet while sitting, and standing from a sitting position with crossed arms at the chest.<sup>7</sup> They are asked to draw a clock, which is aimed at not only testing cognitive skills, but also fine motor skills.<sup>8</sup> Ms. C could perform all but standing from a sitting position. As explained by Ms. C, she requires use of her arms to push up from a chair to a standing position.

The ADLs measured by the CAT are bed 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.<sup>9</sup>

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. The possible codes are **0** (the person is independent<sup>10</sup> and requires no help or

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

<sup>4</sup> 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.*

<sup>5</sup> See 7 AAC 125.020(a) and (b).

<sup>6</sup> Ex. E. p. 4.

<sup>7</sup> Testimony of Michelle Russell-Brown.

<sup>8</sup> Testimony of Russell-Brown.

<sup>9</sup> Ex. E. pp. 6 – 11.

<sup>10</sup> 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.

oversight); **1** (the person requires supervision); **2** (the person requires limited assistance<sup>11</sup>); **3** (the person requires extensive assistance<sup>12</sup>); **4** (the person is totally dependent<sup>13</sup>). 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).<sup>14</sup>

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).<sup>15</sup>

The CAT also codes certain activities known as “instrumental activities of daily living” (IADLs). These are light meal preparation, main meal preparation, house work, grocery shopping, and laundry.<sup>16</sup>

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 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).<sup>17</sup>

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**

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<sup>11</sup> 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.”

<sup>12</sup> 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.”

<sup>13</sup> According to 7 AAC 125.020(a)(3), dependent as to an ADL, or dependent as to an IADL, “means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity.”

<sup>14</sup> Ex. E. p. 18.

<sup>15</sup> Ex. E. p. 18.

<sup>16</sup> Ex. E. p. 26.

<sup>17</sup> Ex. E. p. 26.

(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).<sup>18</sup>

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.<sup>19</sup> 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.

Finally, there are activities requiring a prescription before they are authorized for PCA services. These include range of motion (ROM), documentation, and walking/simple exercise. The amount of time allowed for each prescriptive activity is determined by the prescription.

### **III. Background Facts**

B C is a 71-year-old lady who suffers from an array of conditions that make it difficult for her to stand for more than a few minutes or walk more than a few steps before she loses her breath. These conditions include: congestive heart failure, chronic airway obstruction, rhinitis, thoracic aneurysm, hypertension, and paralysis of a lower limb accompanied by pain and incontinence.<sup>20</sup> She can propel her own wheelchair and, with difficulty, use a walker. After a few steps in her walker she is winded. Ms. C testified that she suffers from vertigo for which there is no verification of diagnosis. She is independent with toileting.

Ms. C lives with her husband, N C, in a ground floor apartment. He works fulltime. Since Ms. C's PCA services were terminated, he has had to come home during the day to be there when she eats because it is easy for her to choke on food.<sup>21</sup>

Ms. C was initially assessed in 2010, resulting in authorization of 38 hours of PCA services. Michelle Russell-Brown, R.N. made a visit to reassess Ms. C's PCA service needs on April 30, 2013. She recorded the assessment visit in the CAT. The Division reviewed Ms.

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<sup>18</sup> Ex. E. p. 26.

<sup>19</sup> 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.

<sup>20</sup> Ex. E. p. 3.

<sup>21</sup> Testimony of Ms. and Mr. C. Testimony of D J, PCA to Ms. C.

Russell-Brown's observations and her written recollection of what Ms. C said during the assessment. The scoring of the CAT, coupled with recent regulatory changes, resulted in termination of Ms. C's PCA services.<sup>22</sup>

Ms. C understood that she would lose some PCA time, but was surprised when she received the August 28, 2013 determination letter terminating services.<sup>23</sup> When she requested a fair hearing, Ms. C had the option to continue PCA services at 38 hours per week until a final decision was issued. She declined, because if the Division's termination was affirmed, the Cs would be obligated to pay the Division for those services and this they could not afford to do.

On September 16, 2013, Ms. C was taken to the emergency room, where they diagnosed her with congestive heart failure. On October 16, 2013, her provider ordered range of motion exercises, documentation of vital statistics and walking for exercise. No change of information has been submitted because she does not receive services.

#### **IV. Discussion**

##### ***A. Evidence to be Considered***

In this case, in which the Division is seeking to reduce a benefit a person is already receiving, the Division has the burden to prove, by a preponderance of the evidence,<sup>24</sup> facts that show the person's level of eligibility has changed.<sup>25</sup> The Division can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs,<sup>26</sup> 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.<sup>27</sup>

The record contains evidence that was created and obtained after the date of the assessment decision, August 28, 2013. The post-decision evidence consists of Ms. C's healthcare provider's October 15, 2013 letter to No Name Senior Care prescribing ROM,

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<sup>22</sup> Ex. D.

<sup>23</sup> Testimony of Mr. and Ms. C.

<sup>24</sup> Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

<sup>25</sup> 7 AAC 49.135.

<sup>26</sup> 2 AAC 64.290(a)(1).

<sup>27</sup> 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.

documentation of vital signs and walking exercises for Ms. C, as well as information concerning a September 16, 2013 hospital visit and recent diagnosis.<sup>28</sup>

The administrative law judge and the final decision maker can consider new evidence that tends to establish whether the individual was eligible at the time of the original denial determination, regardless of whether the Division had access to the evidence.<sup>29</sup> The October letter corroborates many of the observations recorded in the CAT and testimony regarding Ms. C's physical abilities at the time of assessment up through the assessment decision. It also contains information that confirms a December 27, 2012 prescription for walking that was not approved. Finally, the proximity in time of the termination decision to the emergency room visit and congestive heart failure diagnosis arguably reflect on Ms. C's condition prior to termination. For these reasons the October letter is relevant evidence tending to establish whether Ms. C was eligible, and it will be considered.

Ms. C disagrees with the results of her reassessment for the ADLs of locomotion in home, dressing, bathing, and eating. She also disagrees regarding the IADLs involving meal preparation, medication, and documentation. For those activities requiring a prescription, she believes she should be allowed PCA time for ROM, documentation, and walking as prescribed. 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.

### ***B. Locomotion***

In the context of this case, locomotion is the ability to move around a single floor, with or without assistive devices. Ms. C had previously been assessed as requiring extensive one-person physical assistance (self-performance code 3, assistance code 2) with locomotion 42 times per week.<sup>30</sup> In her new assessment, she was coded as being independent with locomotion.<sup>31</sup>

Ms. C uses a walker and wheelchair. The assessment's evaluation of her ability to move without physical assistance was based upon the assessor's observation of Ms. C standing in her walker and taking a few steps, after which Ms. C was out of breath.<sup>32</sup> Ms. C uses her wheelchair

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<sup>28</sup> This letter is not identified by an exhibit number but is referred to as the "October Letter."

<sup>29</sup> *In re T.S.*, OAH No. 12-0911-MDS at 8 – 9 (Comm'r of Health & Soc. Serv. 2013) (discussing the nature of a *de novo* hearing as required by regulation and ability to bring in new evidence bearing on the condition at the time of assessment and whether the assessment correctly reflected condition or eligibility).

<sup>30</sup> Ex. D. p. 6.

<sup>31</sup> Ex. E. p. 7.

<sup>32</sup> Ex. E. p. 7.

without assistance. A person can be independent for locomotion, even if required to use a walker, wheelchair, or other assistive device to locomote, if they can do so without assistance once they have reached the assistive device.

Ms. C disagreed testifying that she needs someone to be there because she is afraid of falling. D J, Ms. C's PCA, corroborated Ms. C's statement that she needs standby assistance after four to five steps.<sup>33</sup> Locomotion is not a standby activity.

The evidence on locomotion establishes it is more likely true than not true that, at least at the time of the Division's decision, Ms. C was independent in locomotion within the home with the benefit of a wheelchair.

### *C. Dressing*

Dressing is how a person puts on, fastens, and takes off all items of street clothing. Ms. C had previously been assessed as requiring extensive one-person physical assistance (self-performance code 3, assistance code 2) in dressing 14 times per week.<sup>34</sup> In her new assessment, she was coded as independent with this activity.<sup>35</sup> The assessment's evaluation of her dressing ability was based upon the assessor's observation that Ms. C was able to complete relevant areas of the functional assessment without assistance and Ms. C's statement that she can change her own underwear, socks, and dresses.<sup>36</sup>

Ms. C disagrees with the scoring for dressing because the assessor failed to take into account her vertigo, which interferes with her ability to balance and dress.<sup>37</sup> Mr. C described how he helps Ms. C dress. Her inability to stand for any period of time and the ease with which she is winded precludes her from getting clothing out of the closet. But the type of assistance required is more likely than not set-up help (self-performance code 1, assistance code 1). A person who needs only set-up help with dressing, but no actual physical assistance, is not eligible to be awarded any PCA time for that activity.<sup>38</sup>

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<sup>33</sup> October Letter.

<sup>34</sup> Ex. D. p. 6.

<sup>35</sup> Ex. E. p. 8.

<sup>36</sup> Ex. E. p. 8; Russell-Brown Testimony.

<sup>37</sup> Testimony of A. C.

<sup>38</sup> See, e.g., Ex. B. p. 34.

#### ***D. Bathing***

Bathing involves how a person cleanses their full body and transfers in and out of the tub/shower.<sup>39</sup> Ms. C had previously been assessed as requiring extensive one-person physical assistance (self-performance code 3, assistance code 2) in bathing 7 times per week.<sup>40</sup> In her new assessment she was coded as requiring supervision, not physical assistance, with this activity.

Mr. and Ms. C testified that Mr. C assists her in and out of the tub or the shower each day. They described how he pulls her up to a standing position so she can exit the shower, or he helps her out of the tub. Their testimony was credible. The type of assistance described is consistent with Ms. C's physical limitations. It is more likely true than not that Ms. C requires a one person physical assist limited to transfers. Therefore, the appropriate score for this activity is a one person help with transfers seven times a week.

#### ***E. Eating***

Eating involves how a person eats and drinks regardless of skill. Ms. C had previously been assessed as independent with setup help only (self-performance code 0, assistance code 1).<sup>41</sup> In her new assessment, she was coded as independent with this activity.<sup>42</sup> Ms. C does not have teeth, but will be getting dentures. She can feed herself, but cannot prepare meals.

The assessor wrote that Ms. C reported that she had "no chewing or swallowing issues."<sup>43</sup> Ms. C adamantly disagrees. The Cs and Ms. J testified that Ms. C was prone to choking. This happens no more than twice a year.<sup>44</sup> The first time it happened the episode ended with her at the emergency room. Now her PCAs are trained in what to do once she starts choking and how to help calm her back down.<sup>45</sup> Ms. C also has a Life Alert which has been used in these instances. The choking is not a regular event, but it happens often enough that Mr. C is so concerned he leaves work to be home when she eats. Ms. J described that, when Ms. C starts choking, she calms her down. There was no mention of physical intervention.

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<sup>39</sup> Ex. E. p. 11.

<sup>40</sup> Ex. D. p. 6.

<sup>41</sup> Ex. D. p. 6.

<sup>42</sup> Ex. E. p. 8.

<sup>43</sup> Ex. E. p. 9.

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

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

The evidence establishes that it is more likely than not that Ms. C has occasional instances of choking while eating which require some form of assistance. The assistance described was not physical assistance to eat. This would be coded on the CAT with a self-performance code of 1, because she only requires supervision and occasional non-weight bearing physical assistance.

***F. IADLS***

Ms. C testified she needs physical assistance with IADLs. Ms. C had previously been assessed as totally dependent for meals, shopping, house work and laundry.<sup>46</sup> In her new assessment, she was coded as being involved and requiring physical assistance with shopping and laundry; there was no score for house work; and meal preparation was scored as not occurring in the week leading up to the assessment evaluation.<sup>47</sup>

Ms. C has difficulty standing. She has difficulty exerting herself for even the simplest of tasks. She discussed eating and there was nothing in the testimony of either party that would support an 8/8 score for meals. It is unclear why house work was not scored. It is more likely true than not that Ms. C is dependent on others to complete IADLs.

Even though her scores are sufficient for PCA services, Ms. C cannot be awarded any time for IADLs at this time. This is because a department regulation, 7 AAC 125.040(a)(13)(B), prohibits reimbursement for PCA services to assist with IADLs when the spouse is capable of providing these services. It is undisputed that Ms. C resides in the same residence as her husband, who is capable of providing these services.

***G. Medication***

Medication involves assisting the recipient with the administration of medication. Ms. C had been previously assessed as needing help with the administration/preparation of her medication with a frequency of 35 times per week.<sup>48</sup> She testified that she required extensive assistance to administer her own medication. The Division responded, noting that Ms. C had fine motor skills, because she was able to use a writing device (pen or pencil) without difficulty and her grasp was noted to be “strong.”<sup>49</sup> Ms. C is independent in her wheelchair and transfers independently. She explained how she uses her arms to push her up to a standing position from

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<sup>46</sup> Ex. D. p. 6.

<sup>47</sup> Ex. E. p. 26.

<sup>48</sup> Ex. D. p. 6.

<sup>49</sup> Ex. E. p. 4.

sitting. The Division has presented evidence to establish that it is more likely than not that Ms. C can administer her own medicine.

#### ***H. Documentation, Range of Motion, and Walking***

Assistance for these items may be provided if the recipient has an order from a health care provider. The October 15, 2013 letter meets this requirement. Unfortunately, prescribed items such as these require evidence that they were prescribed prior to August 28, 2013.

The assessment decision references a December 27, 2012 prescription for walking exercise.<sup>50</sup> The prescription was not included as part of the record. The Division explained in its assessment decision that it would not approve PCA time for the prescribed activity of walking because Ms. C was independent with walking using a walker.

Ms. C is independent with locomotion because of her use of a wheelchair, not a walker. Ms. C has a difficult time maintaining her balance. She is also in pain when standing. The October 16, 2013 letter prescribes walking and emphasizes the need for standby assistance. Walking for exercise is not the same as walking to locomote. The testimony supports a finding that, for Ms. C to get the intended benefit of walking for exercise, she would more likely than not require weight bearing assistance to keep her moving and supported. The record does not persuade the administrative law judge that it is more likely than not that, without physical assistance, Ms. C is capable of complying with her prescribed walking for exercise.

The remaining prescribed activities, documentation and ROM, were not prescribed prior to August 28, 2013. These items should be requested through a change of information.

#### **V. Conclusion**

The Division's assessment of Ms. C's needs for PCA assistance appears, more likely than not, to have been correct at the time the assessment decision was made for locomotion, medication, documentation, and ROM. The Division's scoring of the activities of dressing (assessed 0/0, should be 0/1), bathing (assessed 1/1, should be 2/2), eating (assessed 0/0, should be 0/1), meal preparation (assessed 8/8, should be 3/4), house work (no score provided, should be 3/4), remaining IADLs (assessed 2/3, should be 3/4), and walking (assessed as not requiring physical assistance, should be approved for a one person physical assist) is reversed and the Division should re-calculate Ms. C's PCA time in accordance

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<sup>50</sup> Ex. D, p. 4.

with this decision. For those ADLS and IADLs where the scoring does not result in PCA service time, it is important that the CAT accurately capture Ms. C's needs and abilities. Ms. C is encouraged to update the Division about any new diagnoses, prescriptions, or new care needs that have developed since August 28, 2013.

DATED this 25<sup>th</sup> day of November, 2013.

*Signed* \_\_\_\_\_  
Rebecca L. Pauli  
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 4<sup>th</sup> day of December, 2013.

By: *Signed* \_\_\_\_\_  
Signature  
Rebecca L. Pauli  
Name  
Administrative Law Judge  
Title

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