

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

In the Matter of)
)
C K)
_____)

OAH No. 13-1328-MDS
Agency No.

DECISION

I. Introduction

C K was receiving 31.5 hours per week of personal care assistance (PCA) services when he was reassessed in 2013. Based primarily on a reassessment visit on May 8, 2013, the Division of Senior and Disabilities Services (Division) decided on September 5, 2013 that his PCA services would be reduced to 3.75 hours per week. Some of the reduction resulted from regulatory changes since his prior assessment or from errors in the prior assessment; other components of the reductions related to what the Division perceived as improvements in Mr. K’s condition. Mr. K requested a hearing, focusing his appeal on seven very specific aspects of the hours calculation.

After a two-month delay that the parties agreed upon, Mr. K’s hearing was held on January 8, 2014. Mr. K’s PCA, C U L, assisted him at the hearing. Mr. K testified on his own behalf. Also testifying were Victoria Cobo, who wrote the reduction decision for the Division, and Amanda McCrary, RN, who conducted the most recent assessment visit for the Division. Korean interpreters D Z and N L translated the proceedings.

The Division’s assessment of and provision for Mr. K’s PCA service needs was largely correct at the time of the decision made on September 5. However, the Division failed to justify two of the adjustments it made. When these two adjustments are reversed, the September 5 decision must be revised upward to yield approximately six hours per week of PCA time.

II. The PCA Service Determination Process

The Medicaid program authorizes PCA services for the purpose of providing “physical assistance with activities of daily living (ADLs), physical assistance with instrumental activities of daily living (IADLs), and other services based on the physical condition of the recipient”¹ Accordingly, “[t]he department will not authorize personal care services for a

¹ 7 AAC 125.010(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.”²

The Division uses the Consumer Assessment Tool, or “CAT”, as a methodology to score eligibility for the PCA program, and the amount of assistance, if any, that an eligible person needs to perform ADLs, IADLs, and the other covered services.³ In general, if certain levels of assistance are required, the regulations prescribe a fixed number of PCA minutes to be assigned per instance of that activity.

As a gateway to eligibility for PCA services, the CAT evaluates a subset of the ADLs and IADLs. If a person requires some degree of hands-on physical assistance with any one of the these ADLs or IADLs, then the person is eligible for PCA services. Once eligibility is established, time for additional ADLs and IADLs, as well as certain other covered services, can be added to the PCA authorization. In Mr. K’s case, there is no dispute that he needs hands-on help with some of the gateway ADLs and IADLs. This case is about whether time should be awarded additional time for one ADL (toileting) and for several other potentially covered services beyond the ADLs and IADLs.

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.⁴ The CAT numerical coding system for ADLs has two components. The first component is the *self-performance code*. These codes rate how capable a person is of performing a particular ADL. The possible codes are **0** (the person is independent⁵ and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance⁶); **3** (the person requires extensive assistance⁷); **4** (the person is totally dependent⁸).

² 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.*

³ See 7 AAC 125.024(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900.

⁴ Ex. E, pp. 6 – 11.

⁵ 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.

⁶ 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.”

⁷ 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.”

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).⁹

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).¹⁰

The codes assigned to a particular ADL 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, he would receive 22.5 minutes of PCA service time each time he was bathed.¹¹ 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.

For covered services beyond assistance with ADLs and IADLs, specific rules apply that will be discussed below.

III. Background Facts

C K is a 61-year-old gentleman living at home with his wife.¹² He suffers from end-stage renal disease, Type-II Diabetes and a variety of other concerns.¹³ At all times relevant to this decision, he has required dialysis three times a week. Beginning sometime during the last couple of months of 2013, he began to suffer from a severe infection in his only seeing eye.¹⁴

Mr. K was receiving more than 31 hours of PCA services in early 2013 based on an assessment conducted in 2010 and regulations that had been in effect prior to 2013. Amanda McCrary, a Division nurse, made a visit to reassess Mr. K's PCA service needs on May 8, 2013. She recorded the assessment visit in the CAT. Her findings, coupled with recent regulatory

⁸ According to 7 AAC 125.020(a)(3), dependent as to an ADL, or dependent as to and IADL, "means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity."

⁹ Ex. E, p. 18.

¹⁰ Ex. E, p. 18.

¹¹ 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.

¹² Ex. E, p. 1.

¹³ Ex. E, p. 3.

¹⁴ Ex. 1, 2.

changes, resulted in a reduction of Mr. K's PCA services to 3.75 hours per week.¹⁵ In general, Ms. McCrary found Mr. K to be cognitively more alert and physically stronger than he had been found to be in 2010.

Mr. K has not broadly attacked Ms. McCrary's reassessment, but has disagreed with the results of the reassessment in seven very specific respects. C U L listed the areas of disagreement at the beginning of the hearing, enabling the Division to focus its evidence on those items. 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.

IV. Discussion

In this case, in which the Division is seeking to reduce a benefit a citizen is already receiving, the Division has the overall burden to prove, by a preponderance of the evidence,¹⁶ facts that show the citizen's level of eligibility has changed.¹⁷ In the context of PCA services, the showing required of the Division is that the recipient has had a "material change of condition."¹⁸ The Division can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs,¹⁹ 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.²⁰

In particular areas where Mr. K seeks to add services that were not previously provided, Mr. K has the burden of proof.²¹

A. Toileting

Mr. K believes additional time should have been awarded for the ADL of toileting. The 2013 assessment reduced the frequency of assistance for this activity from 56 times per week to only eight, which resulted in a large reduction in PCA time.²²

The assessor explained that Mr. K cannot have PCA assistance merely because of visual impairment; he must have a need for physical help with the activity. The assessor nonetheless

¹⁵ Ex. D.

¹⁶ Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

¹⁷ 7 AAC 49.135.

¹⁸ 7 AAC 125.026(a). This is a term of art that encompasses not only changes in the patient's situation, but also changes in regulations affecting the authorized level of services. See 7 AAC 125.026(d).

¹⁹ 2 AAC 64.290(a)(1).

²⁰ 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.

²¹ 7 AAC 49.135.

²² See Ex. D, p. 6.

felt that Mr. K sometimes does need physical assistance with toileting, giving him a score of 2/2 in this area. The assessor apparently believed Mr. K needed physical assistance four times per day, two days per week.²³ She did not really explain her assessment of frequency, except to observe (in a more general context) that Mr. K needs some physical help with transfers and the like on dialysis days.²⁴

The focus of Mr. K's disagreement with the assessment regarding toileting is that he is now essentially blind. This condition, however, did not develop until after the decision under review was rendered. The decision was rendered in September, and the eye infection that has greatly reduced his vision developed later in the year. If he needs additional services as a result of the eye infection, Mr. K will need to submit a change of information form under 7 AAC 125.026; the September decision cannot be reversed based on a condition that did not exist when it was made.

That being said, the Division's explanation for reducing the frequency to four times per day on two days per week is not internally consistent. If it is true that Mr. K generally does not need physical assistance with activities such as toileting, but does need assistance on dialysis days, then the appropriate number of days per week would be three (the number of dialysis days). Moreover, the Division did not explain why the number of toilet visits per day should be reduced from eight to four. The Division showed only that Mr. K does not need toileting assistance on non-dialysis days; it did not address or prove anything else. Bearing in mind the Division's burden of proof, the proper outcome is to provide toileting assistance eight times per day, three days per week, or 24 times per week in total. This adds 96 minutes per week to the total PCA time.²⁵

B. Eating

At the beginning of the hearing, Mr. C said that due to Mr. K's blindness, "even eating" requires help. This is an area where Mr. K had previously been awarded no PCA services,²⁶ and the 2013 decision simply continued that situation. Hence, to prevail at the hearing in this area, it was Mr. K's burden to show a need for these services.²⁷ However, he never addressed the matter

²³ Ex. E, p. 9.

²⁴ Testimony of Amanda McCrary.

²⁵ See Ex. D, p. 6: total time for toileting would go from 48 minutes to 144 minutes.

²⁶ Ex. D, p. 6.

²⁷ 7 AAC 49.135.

any further in presenting his case, and he did not carry his burden. It should be noted that mere visual impairment is not, by itself, sufficient to show a need for physical assistance with eating.

C. Dialysis

Mr. K believes he should have been awarded four to five hours, three times per week, as escort times in connection with his dialysis.²⁸ Escort services are included among the PCA services that may be provided. Escort includes, but is not limited to

Travelling 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.²⁹

The assessor concluded, based on her interview and observations, that Mr. K needed hands-on physical assistance with locomotion to appointments in connection with his dialysis visits.³⁰ She awarded 30 minutes per week for this assistance.³¹ Mr. K also receives transportation to dialysis through another program. Mr. K's request is for escort time beyond the hands-on assistance with locomotion to and from the transport vehicle.

Escort time in the PCA program is generally provided for a narrow purpose relating to cognition; in order to qualify for Medical Escort, a person must require, not merely transport, but someone to confer with the medical or dental staff on his behalf.³² Mr. K previously received just over two hours per week of escort time. Ms. McCrary's assessment document and testimony presented a reasoned explanation for the elimination of escort time: she found that Mr. K is now cognitively able to make decisions on his own. Mr. K did not present any evidence to contradict her assessment or reasoning in this area.

D. Weekly Family Doctor Visit

Mr. K contends that he should have been awarded PCA escort time for one visit to his family physician per week. As with the dialysis visits, the basis for elimination of escort time was reasonable, and no contrary evidence has been presented.

²⁸ Opening statement of issues by Mr. L.

²⁹ 7 AAC 125.030(d)(9).

³⁰ Testimony of Ms. McCrary at 1:25:50.

³¹ Ex. D, p. 6. This time comes through 7 AAC 125.030(b)(3)(A)(ii). Mr. K's nurse practitioner now believes, perhaps because of his recent blindness, that Mr. K ought to have an hour of assistance for each dialysis visit to help him get to and from the transport vehicle. Ex. 2. The nurse practitioner did not testify, and provided little written explanation for his opinion on this issue. If Mr. K's situation has changed since September such that he now needs additional help getting to and from the transport vehicle, he can use the change of information process to present that additional need to the agency.

³² 7 AAC 125.030(d)(9); *see also In re E.K.*, OAH No. 13-1750-MDS (Comm'r of Health & Soc. Serv. 2014), at 5 & n.17.

E. Blood Pressure and Blood Sugar Testing

Mr. K feels that he should have been awarded time for blood pressure and blood sugar checks.³³ However, time can only be awarded for these items if there is a current prescription for them to occur.³⁴ On account of the blindness resulting from the infection of his one good eye, Mr. K now has a prescription for assistance with blood pressure and blood sugar monitoring three times per day.³⁵ However, this prescription was written on December 30, 2013, long after the decision under review in this appeal had been rendered. If he needs assistance with the services prescribed in the December 30 prescription, Mr. K should submit a change of information form with the documentation required in 7 AAC 125.026(b)(1); the agency will then be able to adjust the authorized level of service, if appropriate, beginning at the time of the prescription. A December prescription does not, however, provide a basis to overturn a September decision setting Mr. K's authorized PCA hours beginning in September.

F. Walking and Range of Motion Therapy

Mr. K contends that PCA time should have been allowed for walking and range of motion exercises.³⁶ As was the case with blood pressure and glucose monitoring, however, time can only be awarded for these items if there is a current prescription for them to occur.³⁷ Mr. K's prescription for walking had lapsed by the time of the 2013 decision,³⁸ and he does not seem ever to have had a prescription for range of motion exercises. On account of the blindness that developed after the decision as a result from the infection of his one good eye, Mr. K now has a prescription for assistance with one of these activities, walking.³⁹ However, he obtained this prescription on December 30, 2013, nearly four months after the decision under review. As noted above, if he needs assistance with the services prescribed in the December 30 prescription, Mr. K should submit a change of information form with the documentation required in 7 AAC 125.026(b)(1), and the agency will then be able to adjust the authorized level of service, if appropriate, beginning at the time of the prescription. A December prescription is not a basis to invalidate a September decision setting Mr. K's authorized PCA hours beginning in September.

³³ Opening statement of issues by Mr. L.

³⁴ 7 AAC 125.030(d)(3); *In re K.M.*, OAH No. 13-1430-MDS (Dep't of Health & Soc. Serv. 2013) (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/PCA/MDS131430.pdf>).

³⁵ Ex. 2.

³⁶ Opening statement of issues by Mr. L.

³⁷ For range of motion, *see* 7 AAC 125.030(e). For walking, *see* Ex. E, p. 5 (part of the CAT, adopted by reference as a regulation in 7 AAC 160.900).

³⁸ Testimony of Amanda McCrary.

³⁹ Ex. 2.

G. Assistance with Medications

Mr. K seeks an award of PCA time to “take medications three times a day, at least.”⁴⁰ Mr. K had been receiving 28 minutes per week of PCA time for administration of medications. He was awarded no time in the most recent assessment. The agency had the burden to justify this change.

The agency did not carry its burden on this issue. With respect to oral medications, Mr. K was scored 2/2 in his most recent assessment, a score that the agency (correctly) took from his personal hygiene score.⁴¹ The agency’s policy is that “If your personal hygiene self-performance score is 2 and your support score is a 2 or 3, you will be authorized for . . . 2” minutes per medication administration.⁴² It is not clear why this policy was not followed. With respect to medications by injection, the agency declined to award time for the sole reason that, according to the testimony of the assessor, “a PCA cannot do an insulin injection.”⁴³ This may not be true in Mr. K’s case, because he was assessed as being able to self-direct his care.⁴⁴ While 7 AAC 125.040(a)(2) ordinarily precludes a PCA-administered injections from being reimbursable, 7 AAC 125.040(b) could be read to create an exception for consumer-directed injections of medications. In any event, the agency did not explain why this would not be so, and thus failed to prove that all time for administration of medications should be removed.

The amount of PCA time awardable to Mr. K for medication administration under current regulation and with his current frequency of administrations appears to be 42 minutes per week.⁴⁵

H. Material Change of Condition

As noted at the beginning of this section, PCA services can only be reduced if the recipient has had a “material change of condition.”⁴⁶ This threshold is defined by regulation, and the definition includes at least three circumstances that exist in this case:

- “the recipient’s medical condition has changed”⁴⁷ (here, it was shown persuasively that Mr. K is physically stronger than he was in 2010);

⁴⁰ Statement of Mr. L at hearing.

⁴¹ Ex. D, p. 7.

⁴² Ex. D, p. 8.

⁴³ Testimony of Ms. McCrary.

⁴⁴ Ex. E, p. 31, item CC 1.

⁴⁵ Two minutes three times per day, seven days per week.

⁴⁶ 7 AAC 125.026(a).

⁴⁷ 7 AAC 125.026(d)(1).

- a medical prescription for walking or range of motion exercises has not been renewed⁴⁸ (here, the prescription for walking had lapsed as of the time of the decision under review); and
- services being received are no longer authorized by regulation⁴⁹ (in this case, there is no dispute that regulations changes caused the a loss of PCA authorization in a variety of areas).

Accordingly, the threshold of “material change” has been met.

V. Conclusion

The Division’s assessment of Mr. K’s needs for PCA assistance appears, more likely than not, to have been largely correct at the time the decision was made. However, 96 minutes per week must be added for toileting, and 42 minutes per week must be added for administration of medications. The total minutes increases from 223 (3.75 hours) to 361 (6 hours). Mr. K is encouraged to update the Division about any new diagnoses, new living arrangements, or new care needs that have developed since last September.

DATED this 30th day of April, 2014.

Signed _____
 Christopher Kennedy
 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 14th day of May, 2014.

By: *Signed* _____
 Name: Christopher M. Kennedy
 Title: Administrative Law Judge

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

⁴⁸ 7 AAC 125.026(d)(3)(A).

⁴⁹ 7 AAC 125.026(d)(3)(C).