

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

In the Matter of:)	
)	
S X)	OAH No. 13-1432-MDS
)	HCS Case No.
_____)	Medicaid ID No.

DECISION

I. Introduction

The issue in this case is whether the State of Alaska Division of Senior and Disabilities Services (DSDS or Division) correctly assessed the amount of Medicaid Personal Care Assistant (PCA) services for which Mr. S X is eligible. The Division decreased Mr. X's PCA services from 48.25 hours per week to 2.75 hours per week effective October 9, 2013.¹

At hearing it was determined that the Division had mistakenly believed that Mr. X was receiving chore services through the Medicaid Home and Community-Based Waiver Services Program in addition to his PCA services. Based on this misunderstanding, the Division originally found Mr. X to be ineligible for PCA assistance with his Instrumental Activities of Daily Living (IADLs) because, under the applicable regulations, he was not entitled to both chore services through the waiver services program *and* assistance with IADLs under the PCA program. At hearing, however, it was determined that Mr. X does not receive chore services through the waiver program, and is therefore eligible for PCA assistance with his IADLs. It was agreed at hearing that the Division would issue an amended notice regarding the amount of PCA time to be awarded to Mr. X for assistance with his IADLs, and that Mr. X would have new hearing rights as to that specific determination.

Resolution of the issue regarding Mr. X's IADLs left transfers, dressing, and toileting as the only activities as to which the appropriate amount of PCA time remained in dispute. This decision concludes, based on the evidence in the record, that Mr. X is eligible for additional PCA services in the areas of transfers, dressing, and toileting. Accordingly, the Division's decision as to these particular Activities of Daily Living (ADLs) is reversed. However, Mr. X did not contest the Division's findings with regard to the rest of the assessment, and the Division's decision is therefore affirmed in all other respects.

¹ Ex. D1.

II. Facts

A. Mr. X's Medical Diagnoses

Mr. X is 70 years old² and weighs 138 pounds.³ He lives with his friend and PCA D C, and two other people, in a private two-story home equipped with a stair glide.⁴ Mr. X's primary medical diagnoses are alcohol-induced persistent dementia, chronic obstructive pulmonary disease (COPD), and urinary incontinence.⁵ His secondary diagnoses are unspecified alcohol dependence NEC/NOS, ataxia, convulsions NEC, mild dementia, hyponatremia, hypertension, and tobacco abuse.⁶ Although Mr. X's diagnoses indicate cognitive problems, the Division's most recent assessment states that doctor's notes from 2010 indicate he is capable of self-directing his PCA services, that he has not signed a power-of-attorney, and that he makes his own decisions.⁷ According to notes from the Division's most recent assessment, doctor's notes dated October 23, 2012 state that Mr. X has had no changes in cognition, and no major changes in his health, since the doctor last saw him ten months before.⁸

B. The Division's Findings From its 2009 and 2013 Assessments⁹

Mr. X was previously assessed as to eligibility for PCA services on June 2, 2009.¹⁰ Based on his 2010 assessment, Mr. X was found to require the following levels of assistance with his ADLs:¹¹ bed / body mobility - required extensive one-person physical assistance; transfers - required extensive one-person physical assistance; locomotion - required limited one-person physical assistance; dressing - required extensive one-person physical assistance; eating - independent, requiring set-up help only; toilet use - required extensive one-person physical assistance; personal hygiene - required limited one-person physical assistance; and bathing - required extensive one-person physical assistance. At the same 2009 assessment, Mr. X was found to require the following levels of assistance with his IADLs:¹² independent with difficulty as to telephone use and finance management (scored 1/2), and totally dependent with light meal

² Ex. E1.

³ Ex. E23.

⁴ Exs. E1, E2.

⁵ Ex. E3.

⁶ Ex. E3.

⁷ Ex. E30.

⁸ Ex. E3.

⁹ To avoid unnecessary repetition, Mr. X's and Ms. C's testimony regarding Mr. X's functional abilities and limitations is set forth in the Discussion portion of this decision, below.

¹⁰ Exs. F1 - F17.

¹¹ Exs. F3 - F4.

¹² Ex. F12.

preparation, main meal preparation, light housework, routine housework, grocery shopping, and laundry (each scored 3/4).

Mr. X was most recently assessed for PCA eligibility by Amanda McCrary, R.N. of DSDS on May 22, 2013.¹³ Ms. McCrary found Mr. X to be pleasant and cooperative at the time of the assessment.¹⁴ Mr. X told Ms. McCrary that his memory was "fair."¹⁵ Mr. X had difficulty raising his arms over his head, and could reach behind his back with his right arm but not his left.¹⁶ He was able to almost touch his feet using each arm separately, but not when using both arms together.¹⁷

Ms. McCrary's assessment is recorded and coded on the Consumer Assessment Tool or "CAT." The codes or scores referenced below are those assigned by Ms. McCrary based on the assessment. Ms. McCrary found that Mr. X has the following abilities and limitations with regard to his Activities of Daily Living (ADLs):¹⁸

Body Mobility / Bed Mobility:¹⁹ Ms. McCrary reported that she observed that Mr. X has a regular bed with no assistive devices. Ms. McCrary reported that Mr. X told her he "can move around in bed pretty good," and does not require assistance to get in or out of bed (scored 0/0 - independent).

Transfers:²⁰ Ms. McCrary reported that she was told by Mr. X that he uses a 4-pronged cane to get up by himself and requires no physical assistance with transfers. Ms. McCrary reported she observed Mr. X stand using his cane in his right hand (scored 0/0).

Locomotion (walking):²¹ Ms. McCrary reported that she was told by Mr. X that he walks with the aid of a cane and is able to go up and down the outside stairs as long as he holds onto the railing, goes slowly, and stops to rest. Ms. C reported that Mr. X's adult day services provider escorts Mr. X to the outside stairs and walks behind him as he climbs the steps. Ms. McCrary reported that she observed Mr. X walking slowly, with a shuffling gait, using his cane, and that Mr. X is independent with the use of his stair glide on the interior staircase (scored 0/0).

¹³ Ex. E.

¹⁴ Exs. E4, E30.

¹⁵ Ex. E4.

¹⁶ Ex. E4.

¹⁷ Ex. E4.

¹⁸ Exs. E6 - E12. Although only the ADLs of transfers, dressing, and toileting are at issue in this case, the assessment's findings as to the other ADLs are reported here because the ability (or inability) to perform one ADL is often an indicator of the ability (or inability) to perform a different ADL.

¹⁹ All references in this paragraph are based on Ex. E6 unless otherwise stated.

²⁰ All references in this paragraph are based on Ex. E6 unless otherwise stated.

²¹ All references in this paragraph are based on Ex. E7 unless otherwise stated.

Dressing:²² Ms. McCrary reported that she was told by Mr. X that he is able to dress and undress himself without physical assistance. Ms. McCrary reported that she observed that Mr. X was dressed in jeans and a button-front shirt for the assessment (scored 0/0).

Eating:²³ Ms. McCrary reported that she was told by Mr. X that he recently had all of his natural teeth removed and was fitted with dentures, but that he can still feed himself, has no problems swallowing, and eats a regular diet.

Toileting:²⁴ Ms. McCrary reported that she was told by Mr. X that he is continent of stool but incontinent of urine, that he wears adult diapers at all times, and that he is able to change them himself. Ms. McCrary reported that she observed that Mr. X's bathroom is right next to his bedroom, and that adult diapers were stocked in both rooms (scored 0/0).

Personal Hygiene:²⁵ Ms. McCrary reported that she was told by Mr. X that he can perform his own personal hygiene, and that Ms. C confirmed this. Ms. McCrary reported that she observed Mr. X to be clean and well groomed at the time of the assessment (scored 0/0).

Bathing:²⁶ Ms. McCrary reported that she was told by Ms. C that she lets Mr. X do as much as he can, helps as little as possible, and only washes those areas which he cannot reach by himself. Ms. McCrary reported that she observed that Mr. X is unable to reach his feet during the functional assessment, and that his bathroom was equipped with a regular tub, grab bars, a shower chair, and a hand-held showerhead (scored 3/2).

The assessment of May 22, 2013 also scored Mr. X as follows with regard to his Instrumental Activities of Daily Living (IADLs):²⁷ independent as to telephone use and finance management (scored 0/0); requires physical assistance as to light meal preparation (scored 2/2); and totally dependent as to main meal preparation, light housework, routine housework, grocery shopping, and laundry (each scored 3/4).

C. Relevant Procedural History

The Division performed the assessment at issue on May 22, 2013.²⁸ On September 30, 2013 the Division notified Mr. X that his PCA service level was being reduced from 48.25 hours per

²² All references in this paragraph are based on Ex. E8 unless otherwise stated.

²³ All references in this paragraph are based on Ex. E9 unless otherwise stated.

²⁴ All references in this paragraph are based on Ex. E9 unless otherwise stated.

²⁵ All references in this paragraph are based on Ex. E10 unless otherwise stated.

²⁶ All references in this paragraph are based on Ex. E11 unless otherwise stated.

²⁷ Ex. E26.

²⁸ Ex. E.

week to 2.75 hours per week effective October 9, 2013.²⁹ Mr. X requested a hearing to contest the Division's reduction of his PCA services on October 7, 2013.³⁰

Mr. X's hearing was held on January 13, 2014. Mr. X and his friend and PCA, Ms. C, attended the hearing, jointly represented Mr. X, and testified on his behalf. Angela Ybarra attended the hearing and represented the Division. Sam Cornell, R.N. and Victoria Cobo attended the hearing and testified for the Division. Amanda McCrary, R.N. participated in the hearing by phone and testified for the Division. The record closed at the end of the hearing.

III. Discussion

A. The PCA Program - Overview

The Medicaid program provides personal care assistant (PCA) services to eligible persons: "[t]he purpose of personal care services is to provide to 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 . . . "³¹ [emphasis added]. 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."³²

B. Alaska's PCA Program - Use of the Consumer Assessment Tool (CAT)

The Department conducts an assessment for PCA services using the Consumer Assessment Tool or "CAT."³³ The goal of the assessment process is to determine the level of physical assistance that an applicant or recipient requires in order to perform their activities of daily living (ADLs) and instrumental activities of daily living (IADLs).³⁴ The CAT seeks to make the assessment process more objective by attempting to standardize the assessment of an applicant or recipient's functional impairment.³⁵

The ADLs coded or scored by the CAT are body mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room), locomotion (between levels), locomotion (to access

²⁹ Ex. D1.

³⁰ Ex. C.

³¹ 7 AAC 125.010(a).

³² 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.*

³³ 7 AAC 125.020(b). The CAT has been adopted into DHSS regulations by reference. *See* 7 AAC 160.900(d)(6).

³⁴ *See* 7 AAC 125.010(a).

³⁵ Ex. E.

apartment or living quarters), dressing, eating, toilet use, personal hygiene, personal hygiene-shampooing, and bathing.³⁶ In addition, the CAT codes or scores five other ADL-like activities which are not technically ADLs. These are medication, vital signs / glucose levels, dressings / bandages / oxygen, sterile wound care, and documentation.

The CAT's 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 (ADL). The possible codes are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance³⁷); **3** (the person requires extensive assistance³⁸); **4** (the person is totally dependent³⁹). There are also codes that are not treated as numerical scores for purposes of calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).

The second component of the CAT's coding system is the *support code*. These codes rate the degree of assistance that a person requires for a particular activity of daily living (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 that do not add to the service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).

Under the PCA regulations in effect prior to January 26, 2012, the Division would provide a recipient with time for a particular ADL based on *the assessor's perception of how much time would reasonably be required* (up to a maximum level specified by regulation) *to perform the activity at issue*.⁴⁰ However, in January 2012 the PCA regulations were amended to implement a new system in which the self-performance code and support code for the specific activity *automatically dictate* the amount of PCA time awarded.⁴¹

³⁶ See Division of Senior and Disability Services' *Personal Care Assistance Service Level Computation* (accessed online at <http://www.hss.state.ak.us/dsds/pca/documents/PCA%20Service%20Computation.pdf>) (accessed December 17, 2013); see also Exs. B34 - B36.

³⁷ 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 AAC 125.020(a)(1).

³⁸ 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." 7 AAC 125.020(a)(2).

³⁹ Total dependence for an ADL or an IADL "means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity." 7 AAC 125.020(a)(3).

⁴⁰ See former regulations 7 AAC 43.750, 7 AAC 43.751, 7 AAC 43.752, and 7 AAC 43.755.

⁴¹ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart.

C. *Applicable Burden of Proof and Standard of Proof*

In this case, because the Division is seeking to reduce existing PCA services (services which Mr. X is now receiving), the Division has the burden of proving, by a preponderance of the evidence, that Mr. X's need for PCA services has decreased to the extent asserted.⁴²

D. *How Much PCA Time is Mr. X Eligible to Receive in this Case?*

Initially, it is important to remember that the PCA regulations underwent significant revisions between Mr. X's prior (2009) and current (2013) assessments, and these amendments are partly responsible for the decrease in his current level of PCA services. Under the *old* PCA regulations and the *old* PCA assessment tool that existed when Mr. X was previously assessed in 2009, the assessor was allowed to award as much time as the assessor thought the applicant/recipient reasonably needed to perform an ADL, up to certain specified limits, *regardless of the person's self-performance code*.⁴³ Now, however, the amount of PCA time awarded is set automatically based on the applicant / recipient's self-performance code.⁴⁴ For example, a CAT code of three as to non-mechanical transfers (a transfer that uses hands-on assistance but does not use an assistive device such as a lift) gives a recipient 3.75 minutes of PCA time *regardless of the actual amount of time it takes to perform the transfer*; a CAT code of four as to non-mechanical transfers gives a recipient 5 minutes of PCA time *regardless of the actual amount of time it takes to perform the transfer*.⁴⁵

As indicated in Section I, above, resolution of the issue regarding Mr. X's IADLs left transfers, dressing, and toileting as the only activities as to which the appropriate amount of PCA time remains in dispute. These three ADLs will be discussed in the order stated above.

1. Transfers

For the ADL of transferring, PCA time is allowed when a person requires physical assistance to move between one surface and another (including to or from a bed, chair, or wheelchair), and/or when a person requires physical assistance to move from a lying or sitting

⁴² See 42 CFR 435.930, 2 AAC 64.290(e), 7 AAC 49.135, and *Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

⁴³ See former regulations 7 AAC 43.750, 7 AAC 43.751, 7 AAC 43.752, and 7 AAC 43.755. The former "per unit" maximum time allowances for ADLs were as follows: body mobility - up to 5 minutes; transfers - up to 5 minutes; locomotion - up to 10 minutes; dressing and undressing - up to 15 minutes; bathing - 15 to 30 minutes; toilet use - 5 to 12 minutes per use; personal hygiene/grooming - up to 20 minutes per day.

⁴⁴ See Division of Senior and Disability Services' *Personal Care Assistance Service Level Computation* at Exs. B34 - B36.

⁴⁵ *Id.*

position to a standing position.⁴⁶ Ms. McCrary reported that she was told by Mr. X that he uses a 4-pronged cane to get up by himself and requires no physical assistance with transfers. Ms. McCrary reported she observed Mr. X stand using his cane in his right hand. Based on this information the Division found that Mr. X is independent as to transfers (CAT score 0/0).

On the other hand, Mr. X's friend and PCA, D C, testified at hearing that:

- (a) She was with Mr. X at the time of the assessment and does not believe he made the statements regarding his ability to transfer attributed to him by the nurse-assessor.
- (b) Because she lives with Mr. X, she is able to observe him seven days per week.
- (c) Mr. X's mobility and functional abilities have decreased, rather than increased, since his last assessment.
- (d) Mr. X cannot get out of bed by himself. She must pull him up into a sitting position. Once in that position, Mr. X stands by pushing up with his cane with one hand, and by being pulled up by Ms. C with his other hand.
- (e) Mr. X requires weight-bearing physical assistance with transfers four to five times per week.

If Ms. McCrary's testimony is found to be true, the Division's assessed score of 0/0 stands. If Ms. C's testimony is found to be true, Mr. X's score must be revised to 3/2. Ms. McCrary's hearing testimony appeared to be honest and unbiased. However, the length of time she spent with Mr. X at the assessment was comparatively brief, and neither her assessment nor her testimony contained much detail. Ms. C's testimony is potentially biased because of her friendship and PCA relationship with Mr. X. However, her testimony was spontaneous and fairly detailed, and also appeared to be honest.

In cases where (as here) the testimony is conflicting, but each side appears credible, the burden of proof becomes determinative. In this case the Division bears the burden of proving that Mr. X requires less assistance with transfers now than he did at the time of his prior assessment. The Division did not carry its burden. Accordingly, Mr. X's CAT scores as to transfers should remain the same as they were at the time of his prior assessment (CAT score 3/2; frequency eight times per day).

⁴⁶ 7 AAC 125.030(b)(2).

2. Dressing and Undressing

For the ADL of dressing, PCA time is allowed for the donning, fastening, unfastening, and removal of the recipient's street clothing, support hose, or prosthesis.⁴⁷ The Division found Mr. X to be independent with dressing (CAT score 0/0). Ms. McCrary reported that she was told by Mr. X that he is able to dress and undress himself without physical assistance. Ms. McCrary reported that she observed that Mr. X was dressed in jeans and a button-front shirt for the assessment. Based on this information the Division found Mr. X to be independent as to dressing / undressing (scored 0/0).

On the other hand, Mr. X's friend and PCA, D C, testified at hearing that:

- (a) She was with Mr. X at the time of the assessment and does not believe he made the statements regarding his ability to dress himself attributed to him by the nurse-assessor.
- (b) Mr. X cannot dress himself. He only has two fingers on one of his hands. He sits at the end of his bed and she dresses him. This includes his adult diaper, his shirt, and his pants.

For the reasons discussed above in the context of transfers, the testimony of Ms. McCrary and Ms. C also appears to be equally credible as to dressing. Accordingly, the burden of proof again becomes determinative. The Division bears the burden of proving that Mr. X requires less assistance with transfers now than he did at the time of his prior assessment. The Division did not carry its burden. Accordingly, Mr. X's CAT scores as to dressing should remain the same as they were at the time of his prior assessment (CAT score 3/2; frequency two times per day).

3. Toilet Use

For the ADL of toilet use, PCA time is limited by regulation to time spent moving to and from the toilet, transfers on and off the toilet, general hygiene care of a colostomy, ileostomy, or external catheter, and inserting and removal of a nonmedicated suppository, digital stimulation, or other routine incontinence care.⁴⁸ The CAT's definition of "toilet use" is somewhat broader, encompassing post-toileting hygiene and clothing adjustments.⁴⁹ Ms. McCrary reported that she was told by Mr. X that he is continent of stool but incontinent of urine, that he wears adult diapers at all times, and that he is able to change them himself. Ms. McCrary reported that she observed

⁴⁷ 7 AAC 125.030(b)(4).

⁴⁸ 7 AAC 125.030(b)(6). For reasons that do not appear in the record, the regulation does not cover assisting the recipient with necessary personal hygiene after using the toilet. The PCA regulation for personal hygiene, 7 AAC 125.030(b)(7), likewise fails to cover these necessary activities.

⁴⁹ The CAT form defines toilet use as "[h]ow person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, *cleanses* . . . manages ostomy or catheter, *adjusts clothes*" (Ex. E9, emphasis added).

that Mr. X's bathroom is right next to his bedroom, and that adult diapers were stocked in both rooms. Based on this information the Division found Mr. X to be independent as to toilet use (scored 0/0).

On the other hand, Mr. X's friend and PCA, D C, testified at hearing that:

- (a) She must always assist Mr. X with walking into the bathroom.
- (b) Mr. X only has two fingers on one hand, and usually carries a cane in the other, so he needs help with buttons and zippers and pulling down his pants.
- (c) Once inside the bathroom, there are grab-bars by the toilet, and if Mr. X just needs to urinate, he can hold onto the grab bars and urinate without PCA assistance.
- (d) When Mr. X needs to sit down on the toilet, he can usually do so by holding onto the grab-bars. However, Ms. C must help lower him down about three times per week.
- (e) Ms. C must usually perform post-toileting hygiene for Mr. X.
- (f) Ms. C must help change Mr. X's briefs when they are wet.

For the reasons discussed above in the context of transfers, the testimony of Ms. McCrary and Ms. C also appears to be equally credible as to toileting. The burden of proof again becomes determinative. The Division bears the burden of proving that Mr. X requires less assistance with toileting now than he did at the time of his prior assessment. The Division did not carry its burden. Accordingly, Mr. X's CAT scores as to toileting should remain the same as they were at the time of his prior assessment (CAT score 3/2; frequency 12 times per day).

D. Has the Division Proven a Material Change in Mr. X's Condition?

In cases where (as here) the Division seeks to decrease a recipient's PCA services, the Division must demonstrate that there has been a material change in the recipient's condition since the recipient's last assessment.⁵⁰ When Mr. X's June 2, 2009 PCA assessment is compared with his current (May 22, 2013) assessment in the areas of transfers, dressing, and toileting, the preponderance of the evidence (discussed above) indicates that Mr. X's functional abilities in these areas remain essentially unchanged. Accordingly, 7 AAC 125.026's "change in condition" requirement is not satisfied here.

IV. Conclusion

Mr. X is eligible for additional PCA services in the areas of transfers, dressing, and toileting. Accordingly, the Division's decision as to these particular Activities of Daily Living (ADLs) is

⁵⁰ 7 AAC 125.026(a), (d).

reversed. However, Mr. X did not contest the Division's findings with regard to the rest of the assessment, and the Division's decision is therefore affirmed in all other respects.⁵¹

DATED this 10th day of February, 2014.

Signed _____
Jay Durych
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 19th day of February, 2014.

By: *Signed* _____
Name: Jay D. Durych
Title: Administrative Law Judge, DOA/OAH

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

⁵¹ As discussed at the beginning of this decision, Mr. X's Instrumental Activities of Daily Living are being addressed by the parties themselves outside the context of this case.