

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

In the Matter of:)
)
 N U) OAH No. 13-1439-MDS
) Agency No.
_____)

DECISION

I. Introduction

N U was receiving Medicaid PCA services. The Division of Senior and Disabilities Services (Division) notified her that her PCA services were being terminated.¹ Ms. U requested a hearing.

Ms. U's hearing was held on November 27, 2013. Ms. U represented herself and testified on her own behalf. Angela Ybarra represented the Division.

This decision concludes that Ms. U's physical condition and functioning were not accurately measured by the Consumer Assessment Tool. As a result, the Division failed to meet its burden of proof and the Division's termination of Ms. U's PCA services is reversed.

II. Facts

Ms. U is 47 years old.² She has diagnoses of an abnormal gait, pain in limb, sinusitis, and a history of a malignant neoplasm of the endocrine glands.³ Her diagnoses also include a Rathke cyst in 2010; Ms. U had brain surgery where the cyst was removed.⁴

Ms. U was receiving PCA services based upon a May 2012 assessment that found she required supervision with eating due to chewing and swallowing issues (self-performance code 1, support code 2);⁵ that she required limited one person assistance with bathing transfers (self-performance code 2, support code 2);⁶ and that she required physical assistance for her light and main meal preparation, light and routine housework, shopping, and laundry (self-performance code 2, support code 3).⁷ That assessment noted there was no grab bar in the bathroom.⁸

¹ Ex. D.
² Ex. E, p. 1.
³ Ex. E, pp. 3.
⁴ Ex. E, p. 3; U testimony.
⁵ Ex. F, pp. 9, 23.
⁶ Ex. F, p. 11.
⁷ Ex. F, pp. 26, 31.
⁸ Ex. F, p. 27.

Peter Ndenderoh, a Division employee, reassessed Ms. U on June 3, 2013 to determine her continuing eligibility for PCA services.⁹ Ms. U met him outside her home on June 3, 2013. This was the same residence where she lived during her 2012 assessment. She was using a cane to walk from outside the home into the home. He saw her walk within the home without using a cane, observed her sitting down onto a couch and move herself while on the couch, and saw her touch her feet while in a sitting position. He did not see her bend over while she was in a standing position. Mr. Ndenderoh asked Ms. U about her other functional capabilities and was told that she could bathe herself along, with her other activities of daily living. He observed a grab bar in the bathroom. He testified that Ms. U told him that she needed supervision with shopping, housework, laundry and main meal preparation. Ms. U told him she had issues with choking while eating.¹⁰

Mr. Ndenderoh's assessment is recorded and scored on the Consumer Assessment Tool or "CAT." Mr. Ndenderoh concluded, as recorded on the CAT, that Ms. U did not require assistance with either eating or bathing (self-performance code 0, support code 0), and that she was able to independently perform the tasks of light and main meal preparation, light and routine housework, shopping, and laundry with difficulty, requiring only set-up assistance (self-performance code 1, support code 2).¹¹ The Division determined, based upon the June 2013 CAT, that Ms. U no longer qualified for continued PCA services.¹²

Ms. U has had leg weakness and balance issues ever since she had brain surgery. She uses a cane outside her home. Inside her home, she does not use a cane for walking. Instead, she leans upon furniture and walls for support. She can stand for 15 minutes at a time. She has been through physical therapy to attain that level of standing. She is currently on a break from physical therapy. She continues to have choking issues while eating, which requires supervision. She cannot bend while standing or she would "end up on [her] face." She cannot stand long enough to prepare a main meal. She can take something light from the oven such as a pizza, but if it requires two hands to lift, she does not have that capability. There is no grab bar in the bathtub that she can grab on to for transfers, only the towel bar where you can hang a washrag.¹³ Ms. U has a doctor's note, dated October 15, 2013 – two weeks after the Division's October 1,

⁹ Ex. E.

¹⁰ Ndenderoh testimony; Ex. E, pp. 4 – 12.

¹¹ Ex. E, pp. 18 – 19, 26.

¹² Ex. D; Ex. E, p. 31.

¹³ U testimony.

2013 termination letter, which states “patient has great difficulty standing for more than 15 mins at a time.”¹⁴

F B is a good friend of Ms. U, who has known her for 12 years. Ms. B has worked as a PCA for the past six years, but has not worked for Ms. U as a PCA. Ms. B assists Ms. U, but not on a paid basis. She has observed that Ms. U needs assistance bathing, which includes set up help (bath chair, running water), and transferring in and out of the bathtub. Ms. U has stability and balance problems that require her to lean on someone to transfer in and out of the tub. She, however, does not need to be lifted in and out of the tub. There is no grab bar in the tub. Ms. B has gone shopping with Ms. U at least 10 times in the past year. Her observation is that Ms. U cannot bend over to pick items from the lower shelves. She has similarly observed that Ms. U cannot bend to pick up a laundry basket, but could transfer limited laundry items from one unit to another in a stacked washer/dryer combination unit. Her observation on cleaning is that Ms. U is physically limited to the amount of housekeeping she can perform, and cannot handle items such as a full size vacuum. Similarly, Ms. U can only do limited cooking: she can only do a little bit of cooking and then has to sit down.¹⁵

III. Discussion

A. The PCA Program - Overview

The Medicaid program provides personal care assistance services (PCA) 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”¹⁶ [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.”¹⁷

¹⁴ Ex. 2.

¹⁵ B testimony.

¹⁶ 7 AAC 125.010(a).

¹⁷ 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.*

The Department conducts an assessment to determine eligibility for PCA services, and the amount of those services if eligible, using the Consumer Assessment Tool or "CAT."¹⁸ 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).¹⁹ The CAT seeks to make the assessment process more objective by attempting to standardize the assessment of an applicant or recipient's functional impairment.²⁰

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 apartment or living quarters), dressing, eating, toilet use, personal hygiene, personal hygiene-shampooing, and bathing.²¹ The CAT also codes or scores certain activities known as "instrumental activities of daily living" (IADLs). These are light meal preparation, main meal preparation, light housework, routine housework, laundry, and shopping.²²

If a person receives self-performance codes of 2, 3, or 4 and support codes of 2, 3, or 4 with regard to any of the ADLs of transfers, locomotion, eating, toilet use, dressing, or bathing, then the person is eligible to receive PCA services.²³ Alternatively, if a person receives self-performance codes of 1, 2, 3, or 4 and support codes of 3 or 4 with regard to any of the IADLs of light meal preparation, main meal preparation, light housework, routine housework, grocery shopping, or laundry, then the person is eligible to receive PCA services.²⁴

B. Is Ms. U Eligible to Receive PCA Services Based Upon Her Need for Assistance With Either Her ADLs or Her IADLs?

The salient question is whether Mr. Ndenderoh accurately assessed Ms. U's condition to determine her eligibility for PCA services. In this case, in which the Division is seeking to end a benefit a citizen is already receiving, the Division has the burden to prove facts that show the citizen is now ineligible for the program.²⁵

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

¹⁹ See 7 AAC 125.010(a).

²⁰ Ex. E.

²¹ Ex. E, pp. 6 – 11.

²² Ex. E, p. 26.

²³ Ex. E, p. 31.

²⁴ *Id.*

²⁵ 7 AAC 49.135.

Ms. U is not challenging the entire assessment. She has limited her challenges to eating, bathing, main meal preparation, grocery shopping, and house cleaning. Each of these will be addressed in sequence.

1. Eating

It is undisputed that Ms. U can feed herself. In 2012, she was found to require one-person supervision while eating due to choking issues (self-performance code 1, support code 2).²⁶ In 2013, Ms. U reported continued choking problems to the assessor Mr. Ndenderoh, who noted them on the CAT, but did not indicate that she had choking or swallowing problems in Section K3 of the CAT, and coded her as being independent in eating (self-performance code 0, support code 0). There was no evidence presented that Ms. U's choking condition had improved. The explanation provided by the Division was that there had to be a supporting doctor's statement in order for Ms. U to receive eating assistance due to choking/swallow hazards. However, this requirement is not contained in either the applicable regulation, 7 AAC 125.030(5)(C), nor is it contained in the "Personal Care Assistance Service Level Computation," which is adopted by regulation, and reads "A recipient is eligible for **supervised eating and drinking** if Nutritional Problems with chewing or swallowing is checked in Section K.3.a."²⁷ Section K.3.a of the CAT does not contain the requirement that there be a physician's supporting statement.²⁸ Because Ms. U had been previously coded on her 2012 CAT as requiring one-person supervision while eating due to choking issues, which was also noted in Section K.3.a., the Division has the burden of proof to demonstrate that she no longer has choking issues that require supervision. The Division has not met its burden on this point. Accordingly, Ms. U should have been assessed as requiring one-person supervision (self-performance code 1, support code 2) on eating due to choking issues.

2. Bathing

In 2012, the Division found that Ms. U required limited one-person assistance with bathing (self-performance code 2, support code 2). Its 2013 assessment found that she was independent in bathing (self-performance code 0, support code 0). The 2013 assessment and Mr. Ndenderoh's testimony specifically stated that there were grab bars in the tub. However, the

²⁶ Ex. F, pp. 9, 23.

²⁷ "Personal Care Assistance Service Level Computation Level" (emphasis in original). See Ex. B, p. 34. It is adopted by reference in regulation 7 AAC 160.900(d)(29).

²⁸ See Ex. E, p. 23.

2012 assessment, which was conducted at the same residence, specifically states there are no grab bars. Ms. U and Ms. B both testified there were no grab bars. Ms. B, who is not Ms. U's PCA, but who works as a PCA and is familiar with Ms. U's care needs, testified that Ms. U needs non-weight bearing assistance to get in and out of the tub. Consequently, the weight of the evidence compels a conclusion that the assessment incorrectly found that Ms. U was independent with regard to bathing. The Division had the burden of proof on this point and did not meet it. Ms. U should have been coded as requiring limited one-person assistance with bathing (self-performance code 2, support code 2).

3. Instrumental Activities of Daily Living (Shopping, Light Housework, Laundry, Main Meal Preparation).

Ms. U was assessed in 2012 as requiring physical assistance for her light and main meal preparation, light and routine housework, shopping, and laundry (self-performance code 2, support code 3). The 2013 assessment found she was able to independently perform the tasks of light and main meal preparation, light and routine housework, shopping, and laundry with difficulty, requiring only set-up assistance (self-performance code 1, support code 2). Ms. U is not challenging the finding on light meal preparation. Instead, she is challenging the findings on main meal preparation, housework, shopping, and laundry.

Ms. U's disagreement on these areas is based upon her argument that she cannot stand for longer than 15 minutes at a time, and her inability to bend while in a standing position. The weight of the evidence supports Ms. U's position. Ms. U has a physician's letter stating that she has great difficulty standing more than 15 minutes at a time. Ms. U and Ms. B both testified that Ms. U could not bend while standing. In contrast, Mr. Ndenderoh saw Ms. U bend while sitting. He did not observe Ms. U attempting to bend while in a standing position. An ability to bend is critical for full performance of tasks such as doing laundry, house cleaning, and shopping. Bending and the ability to stand affect whether a person can prepare a main meal. The weight of the evidence compels a finding that Ms. U is not able to perform the activities of preparing a main meal, laundry, house cleaning, and shopping independently but with difficulty. She still requires physical assistance with these tasks and cannot do them by herself. The Division had the burden of proof on this point, and did not meet it. Accordingly, Ms. U should have been coded as requiring physical assistance (performance code 2, support code 3) with these IADLs.

IV. Conclusion

The Division sought to terminate Ms. U's PCA services based upon her 2013 assessment, as recorded on the CAT. The Division had the burden of proof to demonstrate that Ms. U no longer qualified for those services. As discussed above, the Division should have coded Ms. U as continuing to require supervision for eating due to choking issues. It should have coded her as continuing to require limited one-person physical assistance (self-performance code 2, support code 2) with bathing. It should have coded her as continuing to require physical assistance (self-performance code 2, support code 2) with main meal preparation, housework, laundry, and shopping. This coding qualifies Ms. U for continued PCA services.²⁹ The Division did not meet its burden of proof and its termination of Ms. U's PCA services is reversed.

DATED this 10th day of December, 2013.

Signed _____
Lawrence A. Pederson
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 24th day of December, 2013.

By: *Signed* _____
Name: Lawrence A. Pederson
Title: Administrative Law Judge

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

²⁹ See Ex. E, p. 31.