

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

In the Matter of	)	
	)	
U T	)	OAH No. 13-1440-MDS
_____	)	Agency No.

**DECISION**

**I. Introduction**

U T has been receiving personal care assistant (PCA) services since 2011. The Division of Senior and Disabilities Services (Division) notified her on September 11, 2013 that her PCA services would be terminated, based primarily on information gathered in an assessment visit conducted four months earlier. Ms. T requested a hearing.

The hearing convened on November 27, 2013, but had to be suspended by agreement because Ms. T and her assistant had not received the Division’s exhibits. Because of limitations in the availability of Division hearing representatives, it was not possible to reconvene until January 14, 2014. Ms. T participated in person in that session, assisted by C (K) Z. Most proceedings were translated by Lao interpreter Sam Siam, although at times Ms. T and her assistant chose to communicate directly in English. Shelly Boyer-Wood represented the Division of Senior and Disabilities Services. Peter Ndenderoh, the assessor, testified for the Division. Ms. T and Mr. Z testified on Ms. T’s behalf. The record remained open until January 31, 2014 so that the parties could submit billing or medical records relating to Ms. T’s seizure history.

After weighing the evidence, the administrative law judge concludes that the Division’s determination that Ms. T was no longer eligible for PCA services was correct at the time of the decision made on September 11, 2013. Accordingly, it is upheld.

**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>1</sup> Accordingly, “[t]he department will not authorize personal care services for a recipient if the

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<sup>1</sup> 7 AAC 125.010(a).

assessment shows that the recipient only needs assistance with supervision, cueing, and setup in order to independently perform an ADL or IADL.”<sup>2</sup>

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.<sup>3</sup> 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 specific ADLs of transfers, locomotion, eating, toilet use, dressing, or bathing, or any one of the specific IADLs of meal preparation (either light or main meals), housework (either light or routine housework), grocery shopping, or laundry, then the person is eligible for PCA services. However, if a person is independent or only requires non-hands-on assistance (oversight, supervision, cueing, setup) with all of these specific ADLs and IADLs, the person is not eligible for PCA services regardless of whether he or she may require hands-on physical assistance with ADLs or IADLs other than the specific ones used to determine eligibility.<sup>4</sup>

PCA services can also be authorized for a few additional functions beyond direct performance of ADLs and IADLs, such as escort to medical appointments. However, these additional services are never available if the person has been determined to fall below the level for services in every one of the gateway ADL and IADL categories.<sup>5</sup>

### III. Background Facts

U T is a 41-year-old lady of Laotian background who has had limited education.<sup>6</sup> Her primary diagnoses are seizure disorders, both epileptic and non-epileptic.<sup>7</sup> There is also some cognitive impairment or intellectual disability which seems apparent to a firsthand observer, and which is documented in the medical records,<sup>8</sup> although not expressly noted in the CAT. She

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<sup>2</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>3</sup> See 7 AAC 125.024(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900.

<sup>4</sup> See Ex. E, p. 31 (part of the CAT, adopted by reference in 7 AAC 125.024(a)(1) and 7 AAC 160.900).

<sup>5</sup> See *id.*

<sup>6</sup> Ex. E, p. 1.

<sup>7</sup> Ex. E, p. 3.

<sup>8</sup> T medical records submission of Jan. 16, 2014.

lives with her boyfriend (Mr. Z) and her young son, who was evidently born in 2010 and thus would have been about three at the time of the Division’s most recent assessment visit.

This case turns in large part on two assessment visits, which by good fortune were performed by the same assessor, Peter Ndenderoh. Mr. Ndenderoh was a thoughtful and credible witness at the hearing and did a careful job of explaining why his impression of Ms. T’s needs had changed from one assessment to the next.

The first assessment took place on June 23, 2011. At that time, Ms. T was experiencing minor seizures at least three times a week. During the aftermath of these seizures, she needed hands-on help with most ADLs and IADLs, and for this reason Mr. Ndenderoh gave her “some [PCA] time” for these activities even though she was fairly proficient with physical activities during the assessment visit itself.<sup>9</sup>

The assessment visit that led to the decision at issue in this appeal took place on May 17, 2013. By that time, her seizure disorders were much more effectively managed by medication, with Ms. T reporting that she had experienced no seizures in the last year.<sup>10</sup> Ms. T exhibited physical abilities to the assessor that were equal to or better than those observed firsthand in 2011. She completed all physical tests with ease. She sat on the floor, and was able to stand from that position unassisted with a child in her arms and go to the bedroom carrying the child, then return to the room and resume her seat on the floor.<sup>11</sup> Since she appeared capable of all activities when observed firsthand, and she appeared to be having no seizures that would alter this situation from time to time during a given week, Mr. Ndenderoh came to the opinion that she no longer required PCA services.<sup>12</sup> The Division formally reached that conclusion in a decision dated September 11, 2013.<sup>13</sup>

During the hearing, Ms. T and Mr. Z contended that Ms. T is still suffering from seizures. The record was kept open after the hearing for submission of medical records concerning any seizures that may still have been occurring in the year before the decision to terminate PCA services. These records can be summarized as follows:

7/13/12	Ms. T & Mr. Z deny that she is having seizures.
8/28/12	Having some “spells.” Medication adjusted.
12/12/12	No seizures since August 2012.

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<sup>9</sup> Ex. F; direct testimony of Ndenderoh at 41:15ff.

<sup>10</sup> *E.g.*, Ex. E, p. 6.

<sup>11</sup> Ex. E; direct testimony of Ndenderoh at 14:00-28:00.

<sup>12</sup> *Id.* at 35:00.

<sup>13</sup> Ex. D.

5/10/13	Seen by same neurology center for other issues (related to car accident). No reference to ongoing seizures; medications left the same.
8/5/13	Came to same neurology center after having two seizures in two days. Told to continue with medication plan and call if any further seizures.
10/8/13	Same neurology center: “U has not had a seizure since her last visit in 5/10/2013.”

These last two entries are contradictory, but it seems likely that the final entry simply contains a date error in referring to the date of the last visit; Ms. T’s last visit was actually 8/5/13, and the notation presumably is intended to record that she had not had any more seizures since then. It is reasonable to conclude that Ms. T had two seizures during one isolated two-day period in the year preceding the termination decision.

#### **IV. Discussion**

In this case, in which the Division is seeking to reduce a benefit a citizen is already receiving, the Division has the burden to prove, by a preponderance of the evidence,<sup>14</sup> facts that show the citizen’s level of eligibility has changed.<sup>15</sup> The Division can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs,<sup>16</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>17</sup>

##### **A. ADLs**

There is no real dispute in this case that, when she is not suffering from the aftereffects of a seizure, Ms. T is wholly independent with each of the six ADLs used to determine eligibility for PCA services: transfers, locomotion, dressing, eating, toilet use, and bathing. Mr. Ndenderoh’s observations and physical tests in May of 2013 showed total independence in these areas, and the testimony and the ALJ’s direct observations bore this out.

In 2011, Ms. T suffered three or more seizures per week, which left her tired, weak, and incontinent for a time after they occurred.<sup>18</sup> The CAT methodology focuses on the frequency

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<sup>14</sup> Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

<sup>15</sup> 7 AAC 49.135.

<sup>16</sup> 2 AAC 64.290(a)(1).

<sup>17</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.

<sup>18</sup> Direct testimony of Mr. Ndenderoh.

with which a person needs help with a particular activity over a seven-day period.<sup>19</sup> Because of this week-long focus, it was possible and appropriate to award PCA time for Ms. T's intermittent need for physical assistance with ADLs and IADLs over the course of a week.

By 2013, Ms. T's seizures had not quite gone away, but they had become very infrequent. In fact, in the whole year before the decision being reviewed in this case, she had one isolated relapse, consisting of a pair of seizures over a two-day period. This does not equate to a need frequency of even once per week, and it cannot justify ongoing PCA services on a weekly basis.

### ***B. IADLs***

Ms. T is not wholly independent with the IADLs used to determine eligibility for PCA services. She continues to require assistance with meal preparation, housework, grocery shopping, and laundry, because her cognitive limitations mean that a family member or companion must accompany, direct, or set up for her at times. However, this kind of non-physical assistance does not make her eligible for PCA assistance under the CAT methodology.<sup>20</sup> As was the case with ADLs, her need for assistance would be higher in the aftermath of a seizure, but her seizures are now too infrequent to make this need a weekly occurrence.

### ***C. Other Activities***

Because Ms. T does not require physical assistance with any of the gateway ADLs or IADLs, she does not qualify for PCA services as a whole, and she therefore is not eligible for PCA time for any other activity.<sup>21</sup> The scoring process for awarding PCA time terminates if the assessment methodology yields no time for the gateway ADLs or IADLs.

Moreover, the only additional activities for which PCA time is being terminated by this decision are oxygen maintenance, range of motion exercises, and escort to medical appointments. Oxygen therapy and range of motion exercises are only covered if they are prescribed.<sup>22</sup> Ms. T does not currently have a prescription for oxygen maintenance or range of motion exercises.<sup>23</sup> Even if she were eligible for PCA services overall, she would not receive PCA time for those two activities.

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<sup>19</sup> See, e.g., Ex. E, p. 18.

<sup>20</sup> See 7 AAC 125.020(e).

<sup>21</sup> See Ex. E, p. 31 (part of the CAT, adopted by reference in 7 AAC 125.024(a)(1) and 7 AAC 160.900).

<sup>22</sup> 7 AAC 125.030(d)(6); 7 AAC 125.030(e).

<sup>23</sup> Exhibit E, pp. 5, 15. It is not clear that she ever had a prescription for oxygen maintenance, but for reasons not made clear in the record, some time had been awarded for this item in 2011. Ex. D, p. 13.

**V. Conclusion**

The Division has demonstrated that Ms. T did not qualify for PCA services at the time the decision to terminate her services was made. The decision is affirmed.

DATED this 24<sup>th</sup> day of March, 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 11<sup>th</sup> day of April, 2014.

By: *Signed* \_\_\_\_\_  
Signature  
Christopher Kennedy \_\_\_\_\_  
Name  
Administrative Law Judge \_\_\_\_\_  
Title

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