

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

In the Matter of)
)
 E D)
_____)

OAH No. 13-1478-MDS
Agency No.

DECISION

I. Introduction

Since 2009, E D had been approved for 44.75 hours of personal care services. The Division of Senior and Disabilities Services reassessed Mr. D on June 11, 2013, and determined that he is physically able to perform many of his activities of daily living. The Division determined that Mr. D qualified for 16.75 hours of personal care assistance services. Because Mr. D is physically capable of performing many tasks requiring gross motor movements, most aspects of the Division’s determination are affirmed. Based on the evidence that Mr. D’s tremor and physical limitations inhibit his ability to perform fine motor functions, and the testimony that he needs frequent toileting assistance, however, the following determinations made by the Division are reversed: (1) the frequency of need for assistance in toileting, and (2) the level of assistance needed for eating and personal hygiene.

II. Facts

E D is a 71-year-old man who needs significant care and attention. Mr. D suffers from mental impairments, including schizoaffective disorder with mild mental retardation.¹ His primary medical diagnosis is diabetes. He also suffers from tremors, acute pain, and asthma.

Q X is Mr. D’s benefactor. She took Mr. D into her home and cared for him. In July 2009, on a petition from the Department of Law, the court appointed Ms. X as Mr. D’s guardian.² The court authorized Ms. X to receive compensation as Mr. D’s personal care assistant, and waived any conflict of interest.³

Ms. X described the task of caring for Mr. D as a twenty-four job. Because of his mental disabilities, he is often non-responsive. For example, when she bathes or showers him, he often does not respond to her requests that he move to facilitate cleansing. Although at times he is

¹ Inouye testimony; Division Exhibit E at 3.

² Division Exhibit C at 9.

³ *Id.*

capable of getting out of a chair, and capable of walking, he often requires assistance, and sometimes extensive assistance on these and other tasks.⁴

Mr. D is not capable of using the toilet and is not aware of his toileting needs. He suffers from both bowel and urinary incontinence. He wears incontinence products and wets and soils himself frequently. Because Mr. D does not tolerate having his incontinence products changed in the usual way, Ms. X has devised a scheme that involves having him wear two diapers at once, and using scissors to cut the inside one off when he needs to be changed.⁵ Mr. D's medications cause diarrhea, and his bowel incontinence can be particularly demanding. Ms. X described instances of explosive diarrhea that escaped the incontinence products and resulted in her having to throw away the clothes that Mr. D had been wearing. She testified that because of his incontinence, she has to bathe him twice a day.

With regard to eating, Mr. D is able to feed himself snacks using his fingers. Because of his tremors, however, he is not able to pour himself a glass of liquid (such as milk), or drink liquids, without spilling. He cannot use utensils, and Ms. X must feed him his meals. He has problems chewing and with choking.⁶

Mr. D clearly needs assistance. The Department of Health and Social Services, Division of Senior and Disability Services, will provide personal care assistance (PCA) benefits to help eligible recipients with activities of daily living.⁷ Mr. D is eligible for PCA benefits, but the question in this appeal is how many hours of PCA benefits he will receive. To determine the level of assistance a recipient needs, the Division assesses the recipient using a standardized assessment format, called the Consumer Assessment Tool (CAT). Under the CAT, the assessor will assign a numerical score for each of several activities of daily living (ADLs)—tasks like walking, eating, and so on—and for several instrumental activities of daily living (IADLs)—tasks like cooking, housework, and so on. Scores are divided into two categories, a “self-performance” score, and a “support” score. As a general matter, personal care assistance minutes are assigned for scores that show that the recipient needs actual hands-on assistance to

⁴ Division Exhibit E at 6-7; Cornell testimony; X testimony.

⁵ X testimony.

⁶ *Id.*

⁷ 7 AAC 125.010.

accomplish the ADL or IADL. Scores that show independence or need for only supervision, set-up help, or cueing will not qualify for assistance.⁸

On June 11, 2013, Sam Cornell, RN, visited Ms. X's home and evaluated Mr. D using the CAT. Mr. Cornell observed that Mr. D could move around independently and could get up from the recliner where he was sitting.⁹ He noted that Mr. D had good strength and balance.¹⁰ He also noted, however, Ms. X's explanation that she had to assist Mr. D in the performance of ADLs. For bed mobility, Mr. Cornell scored Mr. D as independent or "0/0." Mr. Cornell scored Mr. D as needing limited (one person) assistance, or "2/2," in transfers, locomotion, personal hygiene, and dressing.¹¹ In toileting and bathing, Mr. Cornell recognized that Mr. D needed additional assistance, and scored his need as "extensive (one person) assistance," or "3/2." In eating, Mr. Cornell scored Mr. D as needing only supervisory assistance or "1/2."¹² Before computing Mr. D's final benefit level, however, the Division changed the self-performance score for eating to "limited (one person) assistance," or "2/2."¹³

Based on the Division's final scoring, the Division determined that Mr. D qualified for 16.75 hours of PCA care per week. It sent an adverse action letter to Ms. X on October 2, 2013, reducing Mr. D's benefit level from 44.75 hours to 16.75 hours. Ms. X appealed this decision, and requested a fair hearing. A telephonic hearing was held on January 23, 2014. Angela Ybarra presented the case for the Division. Mr. Cornell, Health Program Manager David

⁸ The CAT numerical coding system has two components for scoring a person's need for assistance with ADLs. 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 relevant possible codes for ADLs are:

- 0 the person is independent and requires no help or oversight;
- 1 the person requires supervision;
- 2 the person requires limited assistance;
- 3 the person requires extensive assistance;
- 4 the person is totally dependent.

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.

IADLs have a different scoring scheme. Mr. D's IADL scores are not relevant to this appeal, however. For a full explanation of how the CAT is scored, and what the numerical scores mean for ADLs and IADLs, see, for example, *In re LB*, OAH No. 12-406-MDS at 7-8 (Comm'r Health and Soc. Serv. 2012) available at <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/PCA/MDS120406.pdf>.

⁹ Cornell testimony; Division Exhibit E at 6.

¹⁰ Cornell testimony; Division Exhibit E at 6.

¹¹ Cornell testimony.

¹² Cornell testimony; Division Exhibit E at 9.

¹³ Chadwick testimony; Division Exhibit D at 7.

Chadwick, and Dr. Inouye testified for the Division. Ms. X presented the case for Mr. D. She and H T, a representative of No Name, Inc., testified for Mr. D.

III. Discussion

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.”¹⁴ Under the regulations governing the Medicaid program, “[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.”¹⁵

Here, Mr. D is not eligible for assistance with IADLs because he receives services under the Medicaid Home and Community-based Waiver program.¹⁶ Therefore, the only question is whether the Division has correctly determined the level and frequency of assistance that Mr. D needs for ADLs.

Ms. X argues that the Division has erred on all aspects of assistance. She presented her case both in writing and orally. Her testimony and her written material describe how she is exerting herself many times per day to move him in and out of his bed or chair, to dress him, to bathe him, to change his incontinence products, and to do his personal hygiene tasks. To her, Mr. D is totally dependent on her assistance. Without her, he would not accomplish his activities of daily living. She believes his scores on the CAT should reflect that reality.

The problem for Ms. X, however, is that PCA benefits are available only for actual physical need for assistance. If Mr. D is able to physically perform the activity, but needs cueing in order to initiate the activity, no PCA benefits are available. “Cueing” includes “physical guidance.”¹⁷

Here, many sources, including Ms. X, Dr. Inouye, and Mr. Cornell, confirm that Mr. D is capable of independent gross physical activity. For example, at times he is able to get out of his

¹⁴ 7 AAC 125.010(a).

¹⁵ 7 AAC 125.020(e). “Cueing” means “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.” *Id.* “Setup” means “arranging items for use or getting items ready for use so that the recipient can independently perform an ADL or IADL.” *Id.* “Supervision” means “observing and giving direction, as needed, so that the recipient can independently perform an ADL or IADL.” *Id.*

¹⁶ 7 AAC 125.040(d).

¹⁷ 7 AAC 125.020(e).

chair, walk to the refrigerator on his own, open it, and eat snacks with his fingers. Yet, Ms. X testified to times when Mr. D needed significant physical assistance to move or function. She also testified to a tremor that interferes with his fine motor function. The tremor is reflected in his medical diagnosis.¹⁸ All parties, including Dr. Inouye and Mr. Cornell, recognized that Mr. D has significant limitations on his physical functions. With this in mind, the scores that Mr. D received on the CAT are reviewed as follows:

Bed mobility. Bed mobility refers only to ability to move or sit up in bed. In 2009, Mr. D was scored as needing limited one person assistance in bed mobility (“2/2”).¹⁹ In 2013, he was scored as independent, or “0/0.” Under current regulations, assistance on bed mobility is awarded only if the patient is nonambulatory.²⁰ Mr. D is ambulatory and he is able to adjust his body position in bed without assistance. Therefore, the Division has met its burden of proof that Mr. D is not eligible for assistance on this ADL.

Transfers and Locomotion. On the gross motor activities of locomotion and transfers, Mr. Cornell exercised his judgment to determine that Mr. D qualified for limited assistance twice per day, and an additional twice per day for locomotion/multi-level. For these activities, the need for and frequency of assistance is a judgment call because, based on Ms. X’s own testimony, at times Mr. D is independent and at times he needs assistance. Nothing in this record demonstrates that Mr. Cornell’s judgment that Mr. D needed limited assistance for transferring and locomotion twice per day was in error. Therefore, the Division has met its burden of proof that Mr. D needs limited assistance twice per day on the ADLs of transfer and locomotion.

Walking for exercise/ foot care. Ms. X presented an exhibit that appeared to be prescriptions for Mr. D to walk for exercise and for foot care.²¹ The prescriptions were not written on a prescription form, however, and the date of the prescriptions was December 12, 2013. Because the prescriptions were not in the correct form and were issued after the date of the adverse action letter, October 2, 2013, these prescriptions will not be considered here. Ms. X will need to file a Change of Information (COI) with the Division to have these matters considered.

¹⁸ Division Exhibit E at 3.

¹⁹ Division Exhibit D at 7.

²⁰ 7 AAC 125.030(b)(1).

²¹ D Exhibit at 7. Mr. Chadwick explained that this exhibit was in the wrong form because the doctor had signed a sheet from the CAT rather than a prescription form. Mr. Chadwick said this was easily remedied. Mr. Chadwick also stated that a PCA could not provide foot care for a diabetic.

Dressing. Mr. D needs assistance in dressing. In both 2009 and 2013 he was assessed as needing limited one person assistance (“2/2”). Mr. D has the ability to do gross motor functions, which are a large component of dressing. His fine motor function is affected by his tremor, and dressing includes some fine motor functions, but no evidence indicates that he needs extensive assistance to get dressed. Therefore, the Division has met its burden of proof, and Mr. Cornell’s assessment of limited assistance is affirmed. Although Ms. X requested time for dressing more than twice per day, time allotted for dressing is capped regulation.²²

Eating. In 2009, Mr. D was assessed as being totally dependent on one person for assistance in eating (“4/2”).²³ Eating is fine motor skill that is affected by Mr. D’s tremor. Mr. Cornell explained that he rated Mr. D as needing only supervision in eating (“1/2”) because Mr. D was able to eat finger food and would go to the refrigerator and help himself to food. The Division changed that to a rating of limited one person assistance (“2/2”). Although Mr. D is able to eat finger food or snacks, Mr. Cornell also explained that the ADL of eating did not relate to snacks—it only related to meals. For Mr. D to eat a meal, he has to be fed by Ms. X.²⁴ The evidence that Mr. D can do some eating suffices to prove that he is not totally dependent on others for this task, and should no longer be scored a “4.” Given the evidence that he needs extensive assistance to eat a meal, however, the Division has not met its burden of proof that Mr. D can eat with only limited assistance. Eating assistance should be scored with a self-performance score of “3”—extensive assistance.²⁵

Toilet use. Mr. Cornell scored Mr. D as needing extensive assistance in toilet use. This score is consistent with Ms. X’s testimony, and is affirmed. Mr. Cornell scored the frequency of toileting assistance as four times per day. He testified that he based this score not on evidence of Mr. D’s actual toileting frequency, but on general knowledge that most people will use the toilet between 4-6 times per day. Ms. X testified that she had to assist Mr. D in toileting activities at

²² Division Exhibit D at 9 (adopted into regulation at 7 AAC 7 AAC 160.900)).

²³ Division Exhibit D at 7.

²⁴ Ms. X described Mr. D as having choking and chewing issues. This evidence supports the finding that he needs extensive assistance in eating. No additional PCA time is awarded under the category of “swallowing, chewing, or aspirating issues,” however. Award of time under this category would require medical verification of the issue and a Change of Information.

²⁵ Under the regulations, “‘limited assistance’ 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). “[E]xtensive assistance’ 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). The CAT explains that extensive assistance can be found where the assistant performs the entire task during part, but not all of the last seven days.

least 15 times per day, which included having to get up at night to clean him when he has diarrhea. Mr. T affirmed that when he visited Ms. X's home, he observed that Ms. X changed Mr. D 3-4 times during his 1½ hour visit. This visit occurred during the relevant time period before October 2, 2013. 15 times per day is an unusually high frequency for toileting, but given Mr. D's unawareness of his bodily functions, plus his diarrhea, this frequency is plausible. In an attempt to show that 15 times per day was unreasonable, the Division closely questioned Ms. X regarding the number of incontinence products that she purchased each month. The testimony on this issue was very confusing, although it seemed to indicate that actual incontinence product use was slightly less than 15 times per day.²⁶ The Division, however, did not provide alternative evidence showing the number of incontinence products actually used. Nor did the Division establish that use of incontinence products was the only method by which Mr. D completed the ADL of toilet use. Further, the Division did not offer any estimate of toileting frequency other than four times per day. The previously allotted toileting frequency was 61 times per week, which is just over eight times per day.²⁷ On this record, the Division did not meet its burden of proof on the issue of toileting frequency.²⁸ Ms. X's sworn testimony that she assisted Mr. D in toileting 15 times per day is consistent with her written submission. That Mr. D needs frequent toileting assistance is corroborated by Mr. T's first-hand evidence. Nothing in this record provides a reasonable ground for estimating a different frequency. Accordingly, the frequency of toileting is established at 15 times per day.

Bathing. Mr. Cornell scored Mr. D as needing extensive assistance in bathing. This is consistent with the testimony of Ms. X that indicated that Mr. D was not able to provide much, if any, physical assistance in bathing. Ms. X requested that bathing assistance be allowed for twice per day, but under the regulations, only 22.5 minutes are allowed for extensive assistance in

²⁶ Ms. X, who herself is in her seventies, had a very difficult time estimating the number of incontinence products used, and seemed to give inconsistent testimony on this point. That she struggled with the numbers, however, does not demonstrate that she was not a credible witness. She was trying to give accurate testimony, but the numbers were confusing her. At one point she stated that she used 4-5 boxes per month, and that a box contained four packages with 18 diapers per package. At five boxes per month, that would equal 360 diapers per month, which, in a 30-day month, would be 12 diapers per day. It may be that Mr. D does occasionally use the toilet which might account for any discrepancy—the testimony was unclear on that issue. In any event, nothing in this record provides a valid basis for estimating frequency to be anything other than 15 times per day.

²⁷ Division Exhibit D at 7.

²⁸ The Division made a good point that the record shows that Mr. D does not drink enough water, which would normally tend to lead to fewer toileting episodes. Here, however, Ms. X was very emphatic that he needs very frequent changes. On this evidence it appears that Mr. D's problem of not having control of his bodily functions leads to very frequent toileting episodes notwithstanding his need to drink more water.

bathing.²⁹ Mr. Chadwick explained that the PCA has discretion to use the time to bathe Mr. D twice, but no additional time may be allotted.

Personal hygiene. Personal hygiene includes the tasks of washing and drying face and hands, skin care, mouth and teeth care, brushing and combing hair, shaving, when done separately from bathing, and shampooing hair, when done separately from bathing.³⁰ In 2009, Mr. D was assessed as being totally dependent on one person (“4/2”) for personal hygiene. In 2013, Mr. Cornell assessed Mr. D as needing limited (one person) assistance for personal hygiene (“2/2”). When asked for an explanation of this score, Mr. Cornell explained it in terms of the assistance that Mr. D needed for medication. This explanation does not meet the Division’s burden of proof, however. First, in the area of medication, Dr. Inouye specifically testified that Mr. D could not administer his own medications. Second, although the amount of time for medication is contingent upon the personal hygiene score, the hygiene score should be determined based on Mr. D’s need for assistance in performing hygiene tasks. Here, many aspects of this record demonstrate that Mr. D would need extensive assistance in personal hygiene. His physical limitations, including his tremor, would preclude Mr. D’s being able to shave himself, brush and comb his hair, take care of his teeth, or apply skin care products without extensive assistance.³¹ Given his ability to perform gross motor functions, he would be able to participate to some extent in washing his face and hands, so the Division has met its burden of proof that he is no longer fully dependent on others for personal hygiene. Yet, even on simple tasks like washing his face and hands, Ms. X’s testimony shows that he does not have the physical skill to accomplish the task correctly. Dr. Inouye confirmed that it would be very difficult for Mr. D to clean himself adequately. Accordingly, Mr. D should be scored as a “3/2” for personal hygiene.

IV. Conclusion

1. The Division’s finding that Mr. D needs limited assistance in eating is reversed. Mr. D’s score for eating should be “3/2.”
2. The Division’s finding that Mr. D needs limited assistance in personal hygiene is reversed. Mr. D’s score for personal hygiene should be “3/2.”

²⁹ Division Exhibit D at 9 (adopted by reference by 7 AAC 160.900)).

³⁰ 7 AAC 125.030(b)(7). Because Mr. D is diabetic, personal hygiene does not include nail care. *Id.*

³¹ Mr. D wears dentures and would not be able to insert them or clean them without extensive assistance. Ms. X’s exhibits document that he needs special skin care products and he does not have the coordination or fine motor skill necessary to apply those products where they are needed.

3. The Division's finding that Mr. D needs toileting assistance four times per day is reversed. Mr. D need for toileting assistance should be scored at a frequency of 15 times per day.
4. All other findings of the Division are affirmed.

DATED this 24th of January, 2014.

By: Signed
Stephen C. Slotnick
Administrative Law Judge

Adoption

Under a delegation from the Commissioner of Health and Social Services, I adopt this Decision as the final administrative determination in this matter, under the authority of AS 44.64.060(e)(1).

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 February, 2014.

By: Signed
Name: Jared C. Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS

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