

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

In the Matter of)
)
 J T)
_____)

OAH No. 13-1482-MDS
Agency No.

DECISION

I. Introduction

J T is receiving Medicaid Personal Care Assistance (PCA) services. The Division of Senior and Disabilities Services gave her notice that her PCA services were going to be terminated. Prior to notice of termination, the division sent an assessor, Sharon Schober, R.N., to interview Ms. T and observe her ability to perform certain activities. The assessor scored Ms. T using the division’s Consumer Assessment Tool (CAT). The division, using the information available to it at the time of the interview, correctly scored the CAT.

However, this decision is based on the evidence taken at the hearing, which presented a slightly different and fuller picture of the circumstances relevant to the assessment than had previously been available to the division. This decision concludes that the division did not meet its burden of proof as to bathing and toileting. The division has, however, met its burden of proof on all other issues.

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”¹ 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.”²

¹ 7 AAC 125.010(a).

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.”

The division uses the Consumer Assessment Tool or “CAT” to determine the level of physical assistance that an applicant or recipient requires to complete ADLs and IADLs.³ 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 scoring system has two components. The first component is the *self-performance score*. This category is intended to capture how capable a person is of performing a particular activity of daily living (ADL). The possible scores 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). There are also scores 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 score*. These scores rate the assistance that a person requires for a particular ADL. The possible scores 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 scores 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

³ See 7 AAC 125.020(a) and (b).

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.”

⁸ According to 7 AAC 125.020(a)(3), dependent as to an ADL, or dependent as to an 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.

The CAT also scores certain activities known as “instrumental activities of daily living” (IADLs). These are light meal preparation, main meal preparation, housework, grocery shopping, and laundry.¹¹

The CAT scores IADLs slightly differently than it does ADLs. The *self-performance scores for IADLs* are **0** (independent either with or without assistive devices - no help provided); **1** (independent with difficulty; the person performed the task, but did so with difficulty or took a great amount of time to do it); **2** (assistance / done with help - the person was somewhat involved in the activity, but help in the form of supervision, reminders, or physical assistance was provided); and **3** (dependent / done by others - the person is not involved at all with the activity and the activity is fully performed by another person). There is also a code that is not used to arrive at a service level: **8** (the activity did not occur).¹²

The *support scores* for IADLs are also slightly different than the support scores for ADLs. The support scores for IADLs are **0** (no support provided); **1** (supervision / cueing provided); **2** (set-up help); **3** (physical assistance provided); and **4** (total dependence - the person was not involved at all when the activity was performed). Again, there is an additional score that is not used to arrive at a service level: **8** (the activity did not occur).¹³

There is a third component to the PCA formula, frequency. Frequency is the number of occurrences per week that a person requires the scored assistance. The amount of time for each occurrence is determined by the score for each ADL or IADL as shown on the service level computation chart. That amount of time is then multiplied by the frequency to determine how much PCA time is allowed each week. 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.

III. Background Facts

J T is a 46-year-old woman who has been treated for bladder and cervical cancers as well as obstructive chronic bronchitis without exertion.¹⁴ She has other difficulties as well, including

¹¹ Ex. E p. 26.

¹² Ex. E p. 26.

¹³ Ex. E p. 26.

¹⁴ Ex. E p. 3.

limited range of motion as a result of significant arthritis and spinal fusion.¹⁵ In 2010, Ms. T was authorized for 20 hours per week of PCA time.¹⁶

She testified that her conditions cause her pain and that the pain interferes with her ability to function. As an example, she noted that she could not put her hands behind her back when asked to by Ms. Schober. Ms. T receives injections to help with her pain. The division believed Ms. T's pain was not limiting her ability to function.¹⁷

Ms. T lives with her two small grandchildren, now ages 3 and 4. They were 2 and 3 at the time of the interview. One child is autistic. Both children receive their own Medicaid services. At the time of the CAT interview, Ms. T was also caring for her three-month-old grandchild. At the time of the assessment, the three-month-old was in a car seat, moved by Ms. T from room to room throughout the interview. Ms. T does not drive, but depends upon her PCA, friends, or public transportation to go shopping, attend doctor appointments, and run other errands. Ms. T takes her grandchildren with her.

When asked how she could take public transportation with three young children, she explained that the bus stop is a less than a block away. Ms. T is able to use her walker to go from her residence to the bus stop. The walker has a seat. When she had her infant grandchild she would put the carrier on the seat of her walker and go to the bus stop. Ms. T does not claim to use public transportation without assistance. She relies upon the assistance of other passengers or the driver to help her up the steps to the bus. Ms. T is able to do her own grocery shopping with the assistance of store personnel to help her reach the items on the upper shelves.

Ms. T was questioned regarding her ability to care for her grandchildren. She explained that her grandchildren are independent and know how to do a lot for themselves. For example, if Ms. T cannot get out of bed, the children will get themselves up and ready. They follow directions well and Ms. T will explain how to put on clothing. One child has leg braces, but because they are fastened by Velcro straps the child can put them on and take them off unassisted.

Finally, Ms. T does not believe the CAT score is correct; because not only was the day of the CAT interview a "good day," but Ms. T and her PCA, S X, testified that shortly after the CAT interview Ms. T developed bowel incontinence. Ms. T cannot adequately clean herself due

¹⁵ Ex. E; Ex. F; Testimony of T.

¹⁶ Ex. D.

¹⁷ Testimony of Cobo.

to her limited range of motion, and if not cleaned properly, she develops bed sores. Ms. T disagrees with the division's decision to terminate her PCA services. Ms. T noted that in many respects the CAT was scored correctly for that particular day because it was a good day. However, there are many days which interfere with her physical ability to perform certain tasks. She has difficulty getting out of bed in the morning and must wait for her PCA to arrive or she will call a friend to come help her. She has difficulty bending over and requires assistance with meal preparation because standing can cause pain. She also has difficulty using kitchen utensils. The numbness in her hands makes it difficult to button shirts, so assistance with dressing is requested.

IV. Discussion

The division is seeking to terminate Ms. T's PCA services. The division has the burden of showing by a preponderance of the evidence¹⁸ that Ms. T has had a material change in condition¹⁹ which results in her no longer qualifying for the PCA program. The division can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs.²⁰

Ms. Schober testified that she observed Ms. T carry her three-month-old grandchild in a car seat from room to room during the hour long interview. The division relied heavily on the inference that if Ms. T can care for her grandchildren she does not require PCA services. This is too broad a generalization. At hearing, Ms. T provided credible explanations of how she could care for her grandchildren and still require physical assistance to perform some ADLs. The division did not have the benefit of these explanations at the time it scored the CAT because it did not inquire beyond surface observations.

The division was reasonable to question how Ms. T could care for three grandchildren all under three years old, including one child who is autistic and requires leg braces, but be unable to care for herself.

¹⁸ 7 AAC 49.135; Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

¹⁹ 7 AAC 125.028(a).

²⁰ 2 AAC 64.290(a)(1).

The underlying question is whether the division, based on information known at the time of the assessment and up until the decision date,²¹ had evidence sufficient to support its decision to terminate Ms. T from the PCA program. It did not.

A. Transfer

The ADL of transfer considers the physical assistance required by Ms. T when moving between surfaces such as “to/from bed, chair, wheelchair, standing position (excluding to/from bath and toilet).”²²

Ms. T testified that at times she requires physical assistance to transfer out of bed in the morning. She explained that on an average day she can get up out of bed without assistance. Ms. T found it “hard to describe when [the need for physical help] is going to hit, can be weather,” or recent activities.²³ When she does need assistance, if her PCA is not available, Ms. T will remain in bed until the PCA arrives or a friend can come and help.

The prior CAT noted Ms. T has spinal fusions and osteoarthritis. Based on Ms. T’s need for pain injections, it is reasonable to conclude she still suffers from these conditions. The division failed to establish that it is more likely than not that Ms. T never requires a one person physical assist to transfer out of bed. However, when the evidence is weighed, it is more probable than not that Ms. T does not meet the minimum frequency requirements to receive PCA services for the ADL of transfer.

B. Dressing

The ADL of dressing looks at Ms. T’s ability to put on, fasten, and take off all items of street clothing. Throughout the hearing, the topic of dressing was discussed in two different contexts: dressing in the normal course of the day and dressing as the result of incontinence. Dressing associated with incontinence is discussed under the ADL of toileting.

Ms. Schober testified that her scoring of Ms. T was based on what she observed during the interview. Specifically, she observed that Ms. T was able to reach her hands above her head

²¹ 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>).

²² Exhibit E at 6.

²³ Ms. T and Ms. X testified convincingly that there are times when she needs physical assistance with transfers due to pain.

during the functional testing as well as when demonstrating getting in the tub.²⁴ The assessor's testimony is that Ms. Schober observed Ms. T put one hand up on the curtain rod. Ms. Schober also found compelling Ms. T's ability to touch her feet during the functional test and how Ms. T could place her foot up on the opposite knee. The CAT recorded balanced bilateral hand strength and a demonstration of fine motor skills by drawing a clock.²⁵

Ms. T and Ms. X described limited assistance on a daily basis. Ms. T contends that pain and numbness in her upper extremities interfere with her ability to dress herself. She has particular trouble with her right side and requires help daily. Ms. T testified that she did not raise her hands above her head.

There is no doubt that Ms. T experiences pain and has difficulty dressing. She testified that she cannot touch her hands behind her back. However, the ability to touch one's hands behind one's back is not a prerequisite to self-dressing. Undergarments can be hooked in front and moved to the back and shirts may be put on over the head or buttoned in the front. The division, through Ms. Schober, observed Ms. T maneuver a child in a car seat, lift one arm above her head, and place a foot atop her knee. When viewed as a whole, the evidence supports a 0/0 dressing score.

C. Bathing

The ADL of bathing considers how a person takes a full bath/shower, sponge bath, and transfers in and out of the tub or shower. The testimony established that it is more likely than not that Ms. T requires assistance cleaning after an episode of bowel incontinence. This type of "bathing" falls under the ADL of toileting and is addressed there.

The division concluded that Ms. T required supervision and oversight with bathing, but not physical assistance. Its decision is based upon Ms. T's statement that she sometimes needs help in and out of the tub due to back pain or if she feels unsteady. The division also relied upon the observation of the assessor that Ms. T could stand beside the tub and demonstrate lifting her foot over the edge. Ms. Schober did not have Ms. T demonstrate how she would lower herself into the tub or how she got out of the tub after bathing.

²⁴ Ms. T's testimony transitioned from the observations in the CAT being fairly accurate because it was a good day at the start of the hearing to a denial of the ability to place her hands over her head. No finding is made as to which version is correct. Rather, the evolving testimony goes to the weight given to Ms. T's evidence offered to counter the division's testimony.

²⁵ Ex. E p. 4. (Left Hand Physical Strength – Strong, Right Hand Physical Strength – Strong).

Ms. T testified credibly that she regularly needs physical assistance to get out the tub. Getting out of a bathtub is much different than getting in. The division established that, more likely than not, Ms. T does not require PCA services to get into a tub, but the functional test does not support the division's position that it is more likely than not that Ms. T no longer requires assistance transferring out of the tub. Therefore, Ms. T's bathing score should be returned to a score of 2/2 seven times a week.

D. Toileting

Ms. T developed bowel incontinence shortly after the interview was completed, but before the decision to terminate was finalized. Ms. T and Ms. X testified credibly and convincingly that Ms. T requires a one-person physical assist more than three times per week, at least on a daily basis. She requires physical assistance if her undergarment is wet. The division did not establish by a preponderance of the evidence that Ms. T does not require physical assistance with this activity of daily living. Ms. T previously received a score of 2/2, 42 times per week. The record does not support the need for a hands-on physical assist 42 times per week. It is reasonable, based on Ms. T and Ms. X's testimony, to score Ms. T 2/2 for the ADL of toileting 14 times per week.

E. Personal Hygiene

Personal hygiene is how a person combs their hair, brushes their teeth, washes and dries their face and hands. Ms. T did not dispute that she was able to reach her hand over her head to demonstrate how she would get into the tub. While it is likely that Ms. T may require assistance from time to time, the division has met its burden of establishing that Ms. T requires less than limited assistance with this ADL.

F. Medication

Ms. X testified that she provides assistance by assuring Ms. T that she has taken her medications. Because Ms. T has the ability to make decisions and manage her finances, as well make herself understood and understand others, assuring is not a covered PCA service under the Service Level Computation chart.²⁶

²⁶ Ex. B p. 35.

G. Documentation

The record contains no indication that Ms. T's provider has prescribed she document her temperature, pulse, blood pressure and respiration.²⁷

H. IADLs

IADLs are light meal preparation, main meal preparation, housework, grocery shopping, and laundry.²⁸ The division's conclusion that Ms. T has the functional ability to perform her own IADLs is supported by Ms. T's demonstration of fine motor skills (drawing a clock) and reasonable assumptions regarding the care of a three-month-old infant, such as changing a diaper.

In response, Ms. T and Ms. X testified that Ms. X prepares all of Ms. T's meals, does light housekeeping, grocery shopping, and laundry. Ms. T testified that she cannot prepare her own meals because she cannot stand for long periods of time, and considers herself unsafe with sharp utensils and her limited ability to use her right side.

However, the evidence at hearing described a woman who has the functional ability to complete all IADLs with difficulty. There is no requirement that a person stand for an extended period of time while cooking. Ms. T testified regarding her ability to shop independently. It is also more likely than not that Ms. T could use her walker to transport laundry, as she used it to transport her grandchild. The division established by a preponderance of the evidence that Ms. T could reasonably perform the IADLs, and therefore, they are an excluded PCA service.²⁹

I. Escort Services

Escort services include traveling with the recipient to and from routine medical or dental appointments and conferring with medical or dental providers during that appointment. The division denied escort because it assessed Ms. T as needing transportation only, not an escort. Ms. T does not have a power of attorney and makes all of her own health care decisions. She takes care of three grandchildren. Ms. T is able to travel with her grandchildren on public transportation unattended, albeit with difficulty. The division has established by a preponderance of the evidence that Ms. T no longer qualifies for escort services.

²⁷ 7 AAC 125.028(d)(3).

²⁸ Ex. E p. 26.

²⁹ 7 AAC 125.040(a)(4).

V. Conclusion

The division incorrectly scored Ms. T for the ADLs of bathing and toileting. The division correctly scored the remaining ADLs and IADLs. The division's decision is reversed in part and affirmed in part, with instructions to recalculate the number of authorized minutes of PCA services in accordance with this decision.

DATED this 19th day of March, 2014.

Signed

Rebecca L. Pauli
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 16th day of April, 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.]