

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

In the Matter of:)
)
 Y U) OAH No. 13-1499-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 (Division) correctly assessed the amount of Medicaid Personal Care Assistant (PCA) services for which Ms. Y U is eligible. The Division decreased Ms. U's PCA services from 20.5 hours per week to 1.5 hours per week effective October 7, 2013.¹ This decision concludes, based on the evidence in the record, that the Division's scoring of Ms. U's need for assistance with her activities of daily living (ALs) was correct in the areas of transfers and locomotion, but that Ms. U is eligible for additional PCA services in the areas of toileting and bathing. This decision further concludes that the Division correctly determined that Ms. U is not currently eligible for assistance with her instrumental activities of daily living (IADLs), or assistance with certain walking and range of motion exercises which were only recently prescribed. Accordingly, the Division's decision is affirmed in part and reversed in part.

II. Facts

A. Ms. U's Medical Condition

Ms. U is 66 years old² and weighs 150 pounds.³ She is widowed and lives with a roommate (who also received PCA services) in a second floor apartment.⁴ Her primary language is Hmong.⁵ Her primary diagnoses are diabetes mellitus (type 2), hypertension, abnormality of gait, thyroid disorder / neoplasm, and depression.⁶ Her secondary diagnoses are generalized osteoarthritis, generalized muscle weakness, unspecified visual loss, and insomnia.⁷ She was hospitalized for one

¹ Ex. D1.
² Ex. E1.
³ Ex. E23.
⁴ Exs. E1, E21.
⁵ Ex. E1.
⁶ Ex. E3.
⁷ Ex. E3.

week in February 2013 due to gallbladder stones.⁸ She takes a few medications including aspirin, Glipizide, and vitamin D.⁹

A letter from Ms. U's physician Claire M. T, dated December 18, 2013, states in relevant part as follows:¹⁰

I last evaluated Ms. U on 9/20/13. At that time she arrived accompanied by a family member. She ambulated with a cane and was able to navigate the exam room. She was able to transfer from sitting to standing with stand-by assist. She does not have a history of tremors. She does have mild weakness of bilateral shoulders however the exam was limited by pain, and carries a diagnosis of acromioclavicular joint^[11] osteoarthritis. She does not have any known cognitive impairment . . .

B. The Division's Findings From the 2012 and 2013 Assessments¹²

Ms. U was previously assessed as to eligibility for PCA services on May 6, 2012.¹³ Based on her 2012 assessment, Ms. U was found to require the following levels of assistance with her ADLs:¹⁴ body mobility - independent (CAT score 0/0); transfers - required limited one-person physical assistance (CAT score 2/2, frequency 2/7); locomotion - required limited one-person physical assistance (CAT score 2/2, frequency 2/7 when inside apartment; CAT score 2/2, frequency 2/1 when going outside to medical appointments); dressing - required supervision and set-up help only (CAT score 1/1); eating - independent, requiring set-up help only (CAT score 0/1); toilet use - required limited one-person physical assistance (CAT score 2/2; frequency 4/7); personal hygiene - required supervision and setup help only (CAT score 1/1; frequency 1/7); and bathing - required limited one-person physical assistance (CAT score 2/2; frequency 1/7).

At the same 2012 assessment, Ms. U was found to require the following levels of assistance with her IADLs:¹⁵ independent as to telephone use (CAT score 0/0); independent, requiring setup help only and to financial management (CAT score 1/2); independent with difficulty, requiring physical assistance as to light meal preparation, light housework, grocery shopping, and laundry (CAT score 1/3); required physical assistance as to main meal preparation (CAT score 2/3); and dependent as to routine housework (CAT score 3/3).

⁸ Ex. E21.

⁹ Ex. E20.

¹⁰ Ex. G.

¹¹ The acromioclavicular joint, also called the AC joint, is where the collarbone (clavicle) meets the highest point of the shoulder blade (acromion).

¹² To avoid repetition, the testimony of Ms. U's witnesses regarding her functional abilities and limitations is discussed in Section III, below.

¹³ Exs. F1 - F31.

¹⁴ Exs. F6 - F12.

¹⁵ Ex. F26.

Ms. U was most recently assessed for PCA eligibility on June 6, 2013 by Elena Mitchell, R.N. of DSDS.¹⁶ Present at the assessment, in addition to Ms. U and Ms. Mitchell, were Ms. U's PCA and relative W W, her son O Z, and her then-PCA agency representative.¹⁷ Ms. Mitchell found Ms. U to be cooperative and a good historian at the time of the assessment.¹⁸ She also found Ms. U to be oriented as to person, place, time, and situation,¹⁹ and that she "usually" understood what others were saying, but might miss something.²⁰ Ms. Mitchell found that Ms. U had good strength in both hands.²¹ Ms. U was able to touch her arms over her head, and touch her feet, but could not touch her arms behind her back due to pain in her shoulders.²²

Ms. Mitchell's assessment is recorded and coded on the Consumer Assessment Tool or "CAT." The codes or scores referenced below are those assigned by Ms. Mitchell based on the assessment. Ms. Mitchell found that Ms. U has the following abilities and limitations with regard to her Activities of Daily Living (ADLs):²³

Body Mobility / Bed Mobility:²⁴ Ms. Mitchell reported that she was told that Ms. U sleeps in a regular bed, has no bed sores, and is not bed or wheelchair bound. Ms. Mitchell reported that she observed Ms. U reposition herself several times without assistance while seated (scored 0/0 - independent).

Transfers:²⁵ Ms. Mitchell reported that she was told by Ms. U that she can transfer independently. Ms. Mitchell reported that she observed Ms. U "standing up / sitting down on a little short stool unassisted," that Ms. U "pushed herself up off of the stool to stand and grabbed onto her walker" (scored 0/1 - independent with setup help).

Locomotion (walking):²⁶ Ms. Mitchell reported that she was told that Ms. U walks independently within her apartment using a walker. Ms. Mitchell reported that she observed Ms. U walking in her living room using her walker, with her PCA walking nearby to guide and spot her (scored 0/0).

¹⁶ Ex. E.

¹⁷ Ex. E2.

¹⁸ Ex. E4.

¹⁹ Ex. E4.

²⁰ Ex. E22.

²¹ Ex. E4.

²² Ex. E4.

²³ Exs. E6 - E12.

²⁴ All references in this paragraph are based on Ex. E6 unless otherwise stated.

²⁵ All references in this paragraph are based on Ex. E6 unless otherwise stated.

²⁶ All references in this paragraph are based on Ex. E7 unless otherwise stated.

Dressing:²⁷ Ms. Mitchell reported that she was told by Ms. U that she dressed herself on the day of the assessment, but that she sometimes needs assistance due to shoulder pain. Ms. Mitchell reported that she observed that Ms. U has good fine motor control, was able to move her arms and hands up and down, and was appropriately dressed for the assessment (scored 2/2; frequency 1/4).

Eating:²⁸ Ms. Mitchell reported that she was told that Ms. U can feed herself, has no chewing or swallowing problems, and can make simple meals for herself (scored 0/1).

Toileting:²⁹ Ms. Mitchell reported that she was told that Ms. U is continent of bowel, has urinary incontinence about once every two weeks, does not wear adult diapers, and can use the toilet independently (scored 0/0).

Personal Hygiene:³⁰ Ms. Mitchell reported that she was told by Ms. U that she can perform her own personal hygiene as long as she does it slowly (scored 0/0).

Bathing:³¹ Ms. Mitchell reported that she was told that Ms. U showers every other day, and requires physical assistance to get in and out of the bath tub, but that once she gets in, she can wash herself while sitting on a small step stool during the assessment. Ms. Mitchell reported that she observed there were no grab bars, shower chair, or hand-held shower in Ms. U's bathroom (scored 2/2, frequency 1/4).

The assessment of June 6, 2013 also scored Ms. U as follows with regard to her Instrumental Activities of Daily Living (IADLs):³² independent as to telephone use (scored 0/0); independent with difficulty, requiring set-up help as to finance management and light meal preparation (scored 1/2); independent with difficulty, requiring physical assistance as to light housework (scored 1/3); requires physical assistance with setup as to main meal preparation, grocery shopping, and laundry (scored 2/3); and dependent as to routine housework (scored 3/3).

C. Relevant Procedural History

The Division performed the assessment at issue on June 6, 2013.³³ On September 27, 2013 the Division notified Ms. U that her PCA service level was being reduced from 20.5 hours per week to 1.5 hours per week effective October 7, 2013.³⁴ Ms. U requested a hearing to contest the

²⁷ All references in this paragraph are based on Ex. E8 unless otherwise stated.

²⁸ All references in this paragraph are based on Ex. E9 unless otherwise stated.

²⁹ All references in this paragraph are based on Ex. E9 unless otherwise stated.

³⁰ All references in this paragraph are based on Ex. E10 unless otherwise stated.

³¹ All references in this paragraph are based on Ex. E11 unless otherwise stated.

³² Ex. E26.

³³ Ex. E.

³⁴ Ex. D1.

Division's reduction of her PCA services on October 14, 2013.³⁵ The hearing was held on January 27, 2014. The following persons attended the hearing: Ms. U, who was represented by her daughter-in-law, T W; Ms. W, who testified using an interpreter; Ms. U's son, O Z; her PCA agency representative, Q A; Shelly Boyer-Wood, who represented the Division; and Olga Ipatova, who testified on behalf of 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"³⁶ [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."³⁷

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."³⁸ 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).³⁹ The CAT seeks to make the assessment process more objective by attempting to standardize the assessment of an applicant or recipient's functional impairment.⁴⁰

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

³⁵ Ex. C.

³⁶ 7 AAC 125.010(a).

³⁷ 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.*

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

³⁹ *See* 7 AAC 125.010(a).

⁴⁰ Ex. E.

apartment or living quarters), dressing, eating, toilet use, personal hygiene, personal hygiene-shampooing, and bathing.⁴¹

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 assistance⁴²); **3** (the person requires extensive assistance⁴³); **4** (the person is totally dependent⁴⁴).

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*.⁴⁵ 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.⁴⁶

C. Applicable Burden of Proof and Standard of Proof

In this case, because the Division is seeking to reduce existing PCA services (services which Ms. U is now receiving), the Division has the burden of proving, by a preponderance of the evidence, that Ms. U's need for PCA services has decreased to the extent asserted.⁴⁷

⁴¹ 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 February 13, 2014); see also Exs. B34 - B36.

⁴² 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).

⁴³ 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).

⁴⁴ 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).

⁴⁵ See former regulations 7 AAC 43.750, 7 AAC 43.751, 7 AAC 43.752, and 7 AAC 43.755.

⁴⁶ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart.

⁴⁷ 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).

D. How Much PCA Time is Ms. U Eligible to Receive in This Case?

At the hearing Ms. U provided a letter setting forth those areas of the Division's assessment that she disputes.⁴⁸ Those areas are transfers, in-home locomotion, locomotion to medical appointments, toilet use, bathing, light meal preparation, main meal preparation, light housework, shopping, and laundry. In addition, Ms. U seeks PCA assistance with prescribed range of motion and walking exercises based on a prescription dated January 24, 2014.⁴⁹ These items will each be addressed separately below.

1. Transfers

For the ADL of transfers, 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 position to a standing position.⁵⁰ The Division found that Ms. U is independent with transfers, requiring setup help only (CAT score 0/1).

The general quality of both parties' evidence regarding Ms. U's ability to transfer was poor. The written assessment prepared by Ms. Mitchell does not have much detail. In addition, Ms. Mitchell did not testify at hearing. Ms. W's hearing testimony was more detailed, but her family relationship with Ms. U creates a potential for bias. The undersigned finds that the evidence most likely to be accurate and unbiased is the letter from Ms. U's physician.⁵¹ That letter states in relevant part that Ms. U is able to transfer independently with only standby assistance. This is what the Division's assessment found. Accordingly, the preponderance of the evidence indicates that the Division's assessment of Ms. U's need for assistance with transfers is correct.

2. Locomotion

For the ADL of locomotion, PCA time is allowed when a person requires assistance with walking (whether with the support of a walker, cane, gait belt, braces, crutches, or manual wheelchair), either between different locations in the recipient's home, outside the home to keep a medical or dental appointment, and/or when walking and simple exercises have been prescribed by a physician.⁵² The Division found Ms. U to be independent as to both in-home/single level locomotion, and locomotion to medical appointments (CAT score 0/0).

⁴⁸ This letter, dated January 20, 2014, has been marked as Ex. 1.

⁴⁹ Ex. 2 p. 3.

⁵⁰ 7 AAC 125.030(b)(2).

⁵¹ Ex. G.

⁵² 7 AAC 125.030(b)(3).

As was the case with transfers (above), the general quality of both parties' evidence regarding Ms. U's ability to ambulate was poor. The written assessment prepared by Ms. Mitchell does not have much detail, and Ms. Mitchell did not testify at hearing. Although Ms. W's hearing testimony was more detailed, her family relationship with Ms. U creates a potential for bias. The undersigned again finds that the evidence most likely to be accurate and unbiased is the letter from Ms. U's physician.⁵³ That letter states in relevant part that Ms. U arrived at her appointment ambulating "with a cane and was able to navigate the exam room." This indicates that Ms. U can walk independently, as the Division's assessment found. Accordingly, the preponderance of the evidence indicates that the Division's assessment of Ms. U's need for assistance with locomotion (both in-home and to access medical appointments) is correct.

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.⁵⁴ The CAT's definition of "toilet use" is somewhat broader, encompassing post-toileting hygiene and clothing adjustments.⁵⁵

The Division found that Ms. U is now independent as to toilet use (CAT score 0/0). Ms. U asserts that she requires limited one-person physical assistance with toilet use, and that she needs that assistance five times per day.⁵⁶ This is basically what the Division found in its prior (2012) assessment (CAT score 2/2; frequency 4/7).

As was the case with transfers and locomotion (above), the general quality of both parties' evidence regarding Ms. U's ability to use the toilet by herself was poor. The written assessment prepared by Ms. Mitchell does not have much detail, and Ms. Mitchell did not testify at hearing. On the other hand, although Ms. W's hearing testimony was more detailed, her family relationship with Ms. U creates a potential for bias. Accordingly, the evidence most likely to be accurate and unbiased is once again the letter from Ms. U's physician. That letter states in relevant part that Ms.

⁵³ Ex. G.

⁵⁴ 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.

⁵⁵ 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).

⁵⁶ Ex. 1 p. 2.

U has acromioclavicular joint^[57] osteoarthritis (which causes shoulder pain), as well as mild weakness in both her shoulders. This supports Ms. U's assertion that she requires limited one-person assistance with post-toileting hygiene and clothing adjustment. Accordingly, the preponderance of the evidence indicates that the Division's assessment of Ms. U's need for assistance with toileting was incorrect. Ms. U's CAT scores for toileting should remain the same as they were at the time of her prior assessment (CAT score 2/2; frequency 4/7).

4. Bathing

For the ADL of bathing, PCA time is allowed for "the taking of a full-body bath, shower, or sponge bath and the required transfers in and out of the bathtub or shower."⁵⁸ The Division found that Ms. U requires limited assistance from one person for bathing (scored 2/2, frequency 1/4). Ms. U agrees that she requires limited one-person assistance with bathing, but asserts that she baths every day rather than every other day as indicated in the assessment.⁵⁹

Both parties' evidence as to frequency of bathing was equally credible. Accordingly, the burden of proof becomes determinative. The Division bears the burden of proving that Ms. U bathes less frequently now than she did at the time of her prior (2012) assessment. The Division did not carry its burden. Accordingly, Ms. U's CAT scores for bathing should remain the same as they were at the time of her prior assessment (CAT score 2/2; frequency 1/7).

5. Instrumental Activities of Daily Living (IADLs)

Pursuant to 7 AAC 125.040(a)(13)(C), PCA services are not available for assistance with IADLs when other recipients living in the same residence receive IADL services under 7 AAC 125.010 - 7 AAC 125.199 or under 7 AAC 130 (home and community-based waiver services). This is the case even when the two recipients are not related and merely share housing expenses. The Division's witness testified that Ms. U's house mate receives assistance with IADLs, and Ms. U did not dispute this. Accordingly, pursuant to applicable regulations, the Division was correct not to award Ms. U PCA time for assistance with her IADLs.

6. PCA Assistance with Prescribed Range of Motion and Walking Exercises

Finally, Ms. U seeks PCA time for range of motion and walking exercises based on her physician's prescription dated January 24, 2014. However, the evidence indicates that this prescription was not in effect at the time of Ms. U's assessment or at the time the Division issued its

⁵⁷ The acromioclavicular joint, also called the AC joint, is where the collarbone (clavicle) meets the highest point of the shoulder blade (acromion).

⁵⁸ 7 AAC 125.030(b)(8). The definition of bathing contained in the CAT is essentially identical (*see* Ex. E11).

⁵⁹ Ex. 1 p. 2.

determination letter. Accordingly, Ms. U must pursue PCA time for these exercises by submitting a PCA service plan amendment request or Change of Information (COI) pursuant to 7 AAC 125.026, and cannot be awarded PCA time for those activities based on her 2013 assessment.

E. Has the Division Proven a Material Change in Ms. U's Condition?

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.⁶⁰ When Ms. U's 2012 PCA assessment is compared with her current (2013) assessment, it is apparent that Ms. U's functional abilities have improved with regard to transfers and locomotion, but that her functional abilities with regard to toilet use and bathing remain essentially unchanged. Accordingly, 7 AAC 125.026's "change in condition" requirement is satisfied as to transfers and locomotion, but is not satisfied with regard to toilet use and bathing.

IV. Conclusion

The Division's scoring of Ms. U's need for assistance with her activities of daily living (ALs) was correct in the areas of transfers and locomotion, but Ms. U is eligible for additional PCA services in the areas of toileting and bathing. The Division correctly determined that Ms. U is not currently eligible for assistance with her instrumental activities of daily living (IADLs), or assistance with certain walking and range of motion exercises which were only recently prescribed. Accordingly, the Division's decision is affirmed in part and reversed in part.

DATED this 14th day of February, 2014.

Signed

Jay Durych

Administrative Law Judge

⁶⁰ 7 AAC 125.026(a), (d).

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 25th 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.]