

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

In the Matter of	)	
	)	
E T	)	OAH No. 13-1615-MDS
_____	)	Agency No.

**DECISION**

**I. Introduction**

E T began receiving personal care assistant (PCA) services in early 2013, based on an assessment conducted in February of that year. In July of 2013 she was reassessed because she was being considered for eligibility for the Choice Waiver program. Based primarily on new findings in the July assessment visit, the Division of Senior and Disabilities Services (Division) notified her on October 28, 2013 that her PCA services would end. Ms. T requested a hearing.

After a series of delays occasioned by procedural issues on Ms. T’s side, a hearing on the merits took place on February 18, 2014. E T and her former PCA, C N, participated by telephone. Ms. T was assisted by D Q of Access Alaska. Shelly Boyer-Wood, agency advocate, presented the agency’s case through two Division nurses, Denise Kichura and Olga Ipatova.

After weighing the evidence, the administrative law judge finds it more probable than not 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 October 28, 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 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

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

<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.*

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**

E T is an educated, articulate 58-year-old lady residing in her own home in No Name.<sup>6</sup> She suffers from morbid obesity and related breathing difficulties, including sleep apnea, as well as hypertension, high cholesterol/triglycerides, and obstructive chronic bronchitis.<sup>7</sup> She uses a “CPAP” machine and supplemental oxygen at night. There is a history of chronic pain, but it does not seem to be a major issue anymore.<sup>8</sup>

When assessed in February of 2013, Ms. T was found to need significant physical assistance with transfers, dressing, toilet use, personal hygiene, and bathing, as well as with most IADLs.<sup>9</sup> She received about 17 hours per week of PCA services on the basis of those needs.<sup>10</sup>

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<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> See Ex. E, p. 1.

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

<sup>8</sup> Ex. H; inference from testimony of Denise Kichura. Ms. T testified at the hearing that her pain is undiminished, but her testimony on this point is less credible than the observations of her former physician and Ms. Kichura, and their reports of what she told them.

<sup>9</sup> Ex. D, p. 6.

<sup>10</sup> Ex. D, pp. 2-4.

Ms. T was reassessed on July 2, 2013 by Denise Kichura, R.N. Although assessments typically occur at approximately one-year intervals, Ms. T was being considered for the Choice Waiver program and hence needed a fresh assessment for that program.<sup>11</sup> In July, the assessor was greatly impressed by Ms. T's physical independence, and found her to need no physical help at all. About a month after the assessment, Ms. Kichura received a call from D U, M.D., who had been Ms. T's primary care physician in 2012 and early 2013. Dr. U was concerned that Ms. T might be misrepresenting her need for PCA assistance.<sup>12</sup> He subsequently confirmed the essential physical capabilities that Ms. Kichura had observed in the July assessment.<sup>13</sup>

On October 28, 2014, the Division notified Ms. T that it would be terminating her PCA services.<sup>14</sup> This appeal followed.

#### **IV. Discussion**

In this case, in which the Division is seeking to reduce or end a benefit a citizen is already receiving, the Division has the burden to prove, by a preponderance of the evidence,<sup>15</sup> facts that show the citizen's level of eligibility has changed.<sup>16</sup> The Division can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs,<sup>17</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>18</sup>

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

When she visited Ms. T's home in July, Ms. Kichura was struck by Ms. T's range of physical capabilities. She observed her rise and sit down in multiple contexts (including bathroom contexts) without assistance, or even with any assistive device. She saw her sit cross-legged in bed, and watched while she put on a sweatshirt without difficulty, touched her feet, put her hands over her head, and brushed her own hair.<sup>19</sup> Ms. T disputed some of these observations, but they were essentially credible, both because Ms. Kichura had recorded them in

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<sup>11</sup> Direct testimony of Denise Kichura.

<sup>12</sup> *Id.*

<sup>13</sup> Ex. H.

<sup>14</sup> Ex. D.

<sup>15</sup> Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

<sup>16</sup> 7 AAC 49.135.

<sup>17</sup> 2 AAC 64.290(a)(1).

<sup>18</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>19</sup> Kichura testimony; Ex. E.

detail at the time she observed them and because Ms. T's former physician reported similar observations. Indeed, the physician reported:

She had good muscle strength, and was able to perform squat exercises, was able to reach over her head without difficulty, had good shoulder range of motion and arm range of motion. She also had good flexibility and range of motion at the hips, knees, and other joints. She did profess some low back discomfort, but was able to flex and extend well at the waist. She had normal gait and balance. I found her to have a high functional level with good physical strength . . . . Her functional level appeared as better than many others who care completely for themselves.<sup>20</sup>

This level of functioning does not support a finding that Ms. T needs hands-on physical assistance with any one of the gateway ADLs of transfers, locomotion, eating, toilet use, dressing, or bathing.

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

As noted previously, the gateway IADLs for PCA eligibility are meal preparation, housework, grocery shopping, and laundry. Again, Ms. T's range of physical abilities, attested to by a firsthand observer and by her physician, make it likely she can perform these activities without physical help. Ms. T reported that she walks 100 feet to her mailbox and that she is able to go shopping unassisted with her girlfriends. She walks around the grocery store using the cart for support.<sup>21</sup> Laundry, which she does outside the home, presents the closest question, and both sides presented relatively little information on this activity, but it seems slightly more probable than not, given her overall independence, that Ms. T can accomplish this task without hands-on physical assistance.

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

On the basis of her February assessment, Ms. T had received some PCA time for escorts to medical appointments, but this service was terminated by the October 28 decision. Some of Ms. T's testimony at the hearing was aimed at showing a continued need for this assistance, and at showing that Ms. Kichura's belief that Ms. T was driving herself around regularly was based on a misunderstanding regarding whose car was being used and who was driving it. The dispute over the need for escort services could have no effect on the outcome of this case, however. 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

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<sup>20</sup> Ex. H, pp. 3-4.

<sup>21</sup> Ex. E, pp. 7-9.

any other activity.<sup>22</sup> The scoring process for awarding PCA time terminates if the assessment methodology yields no time for the gateway ADLs or IADLs.

**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 25<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 8<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.]

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<sup>22</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).