

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

In the Matter of)	
)	Consolidated Cases
M H)	OAH No. 13-1683-MDS and
_____)	OAH No. 14-0212-MDS

DECISION

I. Introduction

The Division of Senior and Disabilities Services (the division) terminated M H’s participation in the Medicaid Home and Community-Based Waiver program (“Waiver”) and greatly reduced the amount of Personal Care Assistance (PCA) services she received. Ms. H challenges the division’s actions.¹ Based on the evidence presented, the division is correct that Ms. H has materially improved and is no longer eligible for Waiver services. This, in turn, means that the division must restore Instrumental Activities of Daily Living to Ms. H’s PCA services. The evidence presented establishes that a reduction of PCA services is partially affirmed and partially reversed.

II. Facts

Ms. H is a well-educated, 61-year-old, single woman who lives independently with a roommate and the help of a service dog. Ms. H believes that without the Waiver and PCA programs she will not be able to safely maintain her independence.²

Sam Cornell, a registered nurse employed by the division, conducted the hour-and-a-half assessment visit on June 21, 2013. He recorded his observations of Ms. H using the Consumer Assessment Tool (CAT).³ The CAT is a tool used by the division to assess an individual’s needs for physical assistance and nursing facility level of care. The assessor’s observations score the recipient’s needs. The scores are used to determine the level of care. Using the CAT scores, the division concluded that:

¹ The waiver termination and the PCA reduction were referred as separate adverse actions but consolidated for hearing. Where an exhibit is specific to one action, such as the denial letters, a citation will contain the OAH case number. All other exhibits are common to both cases.

² H Testimony; R T Testimony.

³ Cornell Testimony; Ex. E.

- Ms. H did not require physical assistance with transfers or locomotion to medical appointments.⁴ She required extensive physical assistance with bathing and limited physical assistance with dressing, toilet use, and personal hygiene.⁵ She required physical assistance (score of 2) with the Instrumental Activities of Daily Living (IADLs) of meal preparation (light and main meal) and shopping.⁶ She was dependent (score of 3) as to the IADLs of light house work and laundry.⁷ Under other covered activities, Ms. H was independent as to documentation, oxygen maintenance, and escort.⁸
- Ms. H no longer required the level of care necessary to receive Waiver services.

The division's decision to terminate Waiver services was dated October 17, 2013.⁹ On November 15, 2013, the division reduced Ms. H's authorized PCA time from 37.5 hours per week to 7 hours per week.¹⁰ The reduction was due in part to the division's conclusion that, because Ms. H received chore Waiver services, she could not receive IADL services under PCA time.¹¹ The division acknowledges the tension between its decisions to terminate Waiver participation, then, at a later date, reduce PCA services because Ms. H received chore services under the Waiver program. As a remedy, the division agrees that if the Waiver termination is upheld, the PCA IADL services denied because they were provided in the Waiver program will be restored.

The hearing process permitted for the development of a more complete record than was available at the assessment visit. Ms. H directed the tribunal's attention to several medical records that are relevant to Ms. H's condition at the time of determination.

On May 21, 2013, Ms. H's primary care doctor wrote a letter asking that her service level remain unchanged and that she receive daily bathing assistance and wound treatment, daily leg wrapping assistance due to edema, and water physical therapy at a private club without the aid of a physical therapist.¹²

⁴ Ex. E, pp. 5 – 11.

⁵ Ex. E, pp. 5 – 11.

⁶ Ex. E, p. 26.

⁷ Ex. E, p. 26.

⁸ Ex. D, p. 9.

⁹ Ex. D (OAH No. 13-1683-MDS).

¹⁰ Ex. D (OAH No. 14-0212-MDS).

¹¹ *Id.* p. 3.

¹² May 21, 2013 Letter

On September 6, 2013, and again on January 23, 2014, her primary care doctor wrote letters characterizing Ms. H as wheelchair-bound due to her obesity; suffering from osteoarthritis of the neck, back, and knees; as well as degenerative disk disease; chronic lower extremity edema; pressure sores; and recurrent MRSA skin infections.¹³

On November 18, 2013, the same doctor wrote a letter “in support of her appeal for Waiver Services.”¹⁴ At that time Ms. H was suffering from Stage 1 pressure sores and recurrent boils that require skin care. He noted that she needs “assistance with toileting and transfers due to pain and limited mobility from severe knee and shoulder arthritis.”¹⁵ The doctor was concerned that if Ms. H did not have assistance with toileting and transfers, she would not take her diuretic medication, resulting in a worsening of her chronic edema.¹⁶ Finally, he wrote that while in his office, Ms. H is “barely able to stand, much less walk.”¹⁷

On January 3, 2014, Ms. H’s primary care doctor completed a division form asking if Ms. H had intermediate nursing needs or if the doctor would admit her to a skilled nursing facility.¹⁸ He responded “no” to each question but provided no explanation. That same day he wrote a letter noting that Ms. H required assistance in the form of a service dog because of her multiple chronic medical issues and mentioned, also without explanation or diagnosis, “problems with her short term memory.”¹⁹

The hearing process also provided Ms. H with the opportunity to present several witnesses, all of whom were credible. One, R T, was particularly helpful painting a picture of Ms. H’s needs. She has known Ms. H for over ten years. Several years ago she filled in as Ms. H’s PCA. They have remained close and Ms. T tries to visit twice a week. The other witnesses had contact with Ms. H, but their contact was not as pervasive or recent as Ms. T’s.

III. Discussion

The division has the burden of proving by a preponderance of the evidence that is that Ms. H is no longer eligible for Waiver service benefits and her authorized PCA time should be

¹³ September 6, 2013 Letter; January 23, 2014 Letter.

¹⁴ November 18, 2013 Letter.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Ex. H, p. 2.

¹⁹ January 3, 2014 Letter.

reduced to 7 hours per week.²⁰ It does not challenge Ms. H's physical ailments. Rather, it believes that the adaptive changes to Ms. H's home, including a bath bench, commode, grab bars, a bidet, and an electric scooter, replace the need for physical assistance with certain tasks.

Conversely, Ms. H believes she requires the same level of service as provided in the past. As to any new service requests from Ms. H, such as assistance at the pool, she has the burden of proof.²¹

This decision will address the issues raised by Ms. H and then address whether the division's assessment of Ms. H's needs and program eligibility are supported by a preponderance of the evidence.

A. Ms. H's Issues

Ms. H asked for PCA time for assistance for exercising at her private club's pool. She is asking for transfers in and out of the swimming pool, showering, and dressing/undressing while at the pool. Ms. H explained that she needs the assistance at the pool so she can do the range of motion exercises that were given to her by a physical therapist. In support of her request, Ms. H provided a letter from her doctor asking that the division approve water physical therapy at a private club without the aid of a physical therapist.²² Ms. H has the burden of proving that she requires assistance for this service and that it is covered. She has presented her own testimony and the letter.

Even if the letter were accepted as a prescription, it is too vague to be accepted for purposes of the PCA program. The regulations do not prohibit assistance with dressing or transfers outside of the residence. PCA recipients are encouraged to maintain physical activity and involvement. As discussed below under Dressing, Ms. H's compliance with range of motion exercises has reduced her need for PCA services. She should be encouraged to continue on her path to independence. However, that does not mean that PCA services will be provided for every activity outside of the home. Rather, it means for a person to receive PCA assistance of this sort, the activity must be prescribed as an exercise or physical therapy with the usual and customary instructions and information that would allow the division to make an informed decision regarding frequency and duration. The letter may be a prescription, but the PCA program is limited in the scope of services it may cover, prescribed or not. Ms. H may submit a

²⁰ 7 AAC 49.135.

²¹ 7 AAC 49.135.

²² May 21, 2013 Letter

change of information once she obtains a prescription with the information required to allow the division to make an informed decision. However, on the record as it stands, Ms. H has failed to establish by a preponderance of the evidence that she should receive authorized PCA services for activities at the pool.

Ms. H also raised several issues for resolution that are beyond the scope of this proceeding or are conclusively determined by regulation. For example, she wanted additional PCA time to care for her service dog. By regulation, caring for a service animal is provided under light housekeeping.²³ She wanted the ability to choose her friends and associates to provide program services, regardless of their criminal background or qualifications. She also asked the division to allow riders of Anchor Rides or Quick Rides to be taken directly from home to destination A and then destination B rather than home between destinations A and B. These are beyond the scope of this hearing, which is limited to the issues of Waiver eligibility and PCA service time.

B. PCA Services and Waiver Eligibility

The Division uses the CAT to determine Waiver eligibility and the amount of PCA services a person receives. The scores assigned to a particular Activity of Daily Living (ADL) or IADL²⁴ determine how much PCA service time a person receives for each occurrence or frequency of a particular activity. For instance, if a person is scored as requiring extensive assistance (score of 3) with bathing, he or she would receive 22.5 minutes of PCA service time each time he or she is bathed.²⁵ 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 this tribunal or the division with the discretion to change the amounts specified by the formula.

1. The Consumer Assessment Tool's Role in Assessing Service Needs

a. PCA Program – Its Purpose and Scoring

The purpose of the PCA program

is to provide 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[.²⁶]

²³ 7 AAC 125.030(c)(3)(F).

²⁴ Instrumental Activities of Daily Living include light and main meal preparation, housekeeping, shopping, and laundry. They are scored slightly differently than the ADLs. Ex. D, pp. 6 – 8 (OAH Case No. 13-1683-MDS).

²⁵ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart contained at Ex. B, pp. 34 - 36.

²⁶ 7 AAC 125.010(a).

The division uses the CAT to help it assess the level of assistance needed.²⁷ The amount of time allotted for needed assistance is determined by the Personal Care Assistance Service Level Computation.²⁸ The Service Level Computation chart shows the amount of time allotted for each ADL or IADL depending on the level of assistance needed for each task. The amount and type of physical assistance for each ADL or IADL is captured by a scoring system.

The ADLs measured by the CAT are body 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.²⁹ In addition, the CAT measures five other ADL-like activities. These are medication, vital signs/glucose levels, dressings/bandages/oxygen, sterile wound care, and documentation.

The CAT numerical scoring system has two components. The first is the *self-performance score*. These scores rate how capable a person is of performing a particular activity of daily living (ADL). The possible scores are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance³⁰); **3** (the person requires extensive assistance³¹); **4** (the person is totally dependent³²). 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).

The second component of the CAT scoring system is the *support score*. These scores rate the degree of assistance that a person requires for a particular activity of daily living (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

²⁷ 7 AAC 125.020(b).

²⁸ 7 AAC 125.024(1).

²⁹ See Division of Senior and Disability Services' *Personal Care Assistance Service Level Computation* (Exhibits B29 - B30).

³⁰ Pursuant 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."

³¹ Pursuant 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."

³² Pursuant 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."

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).

The CAT also scores certain activities known as “instrumental activities of daily living” (IADLs).³³ These are light meal preparation, main meal preparation, light housekeeping, laundry (in-home), laundry (out-of-home), and shopping. Finally, the CAT scores one other activity under IADL, oxygen maintenance.

The CAT scores IADLs slightly differently than ADLs.³⁴ 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); **3** (dependent / done by others - the person is not involved at all with the activity and the activity is fully performed by another person); and **8** (the activity did not occur).

The *support scores* for IADLs are also slightly different than the support scores for ADLs.³⁵ The support scores for IADLs are **0** (no support provided); **1** (supervision / cueing provided); **2** (set-up help only); **3** (physical assistance provided); and **4** (total dependence - the person was not involved at all when the activity was performed); and **8** (the activity did not occur).

b. Waiver Eligibility – Its Purpose and Scoring³⁶

The Alaska Medicaid program provides Waiver services to adults with physical disabilities who require “a level of care provided in a nursing facility.”³⁷ The purpose of Waiver services is “to offer a choice between home and community-based waiver services and institutional care.”³⁸

The nursing facility level of care³⁹ requirement is determined in part by the CAT.⁴⁰ The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,⁴¹ and whether an applicant has impaired cognition or displays problem behaviors.⁴²

³³ Exhibit E26.

³⁴ *Id.*

³⁵ *Id.*

³⁶ This decision relies upon the regulations in effect at the time of the assessment visit.

³⁷ 7 AAC 130.205(d)(1)(B) and (d)(2).

³⁸ 7 AAC 130.200.

³⁹ See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

⁴⁰ 7 AAC 130.230(b)(2)(B).

⁴¹ Ex. E, pp. 13 – 15.

⁴² Ex. E, pp. 16 – 17.

Each of the assessed items is scored and contributes to a final numerical score. For instance, if an individual required 5 days or more of therapies (physical, speech/language, occupation, or respiratory therapy) per week, he or she would receive a score of 3.⁴³

The CAT also records the degree of assistance an applicant requires to complete the activities of daily living (ADL), which include five specific categories: bed mobility (moving within a bed), transfers (i.e., moving from the bed to a chair or a couch, etc.), locomotion (walking or movement when using a device such as a cane, walker, or wheelchair) within the home, eating, and toilet use, which includes transferring on and off the toilet and personal hygiene care.⁴⁴

If a person has a self-performance score of 2 (limited assistance, which consists of non-weight-bearing physical assistance three or more times during the last seven days, or limited assistance plus weight-bearing assistance one or two times during the last seven days) or 3 (extensive assistance, which consists of weight-bearing support three or more times during the past seven days, or the caregiver provides complete performance of the activity during a portion of the past seven days), plus a support score of 2 (physical assistance from one person) or 3 (physical assistance from two or more persons), that person receives points toward his or her total eligibility score on the CAT. A person can also receive points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive behaviors, etc.), and required assistance with the five specified activities of daily living.⁴⁵

In order for a person who only has physical assistance needs to score as eligible for Waiver services on the CAT, he or she would need a self-performance score of 3 (extensive assistance) or 4 (total dependence) and a support score of 2 or 3 for three or more of the five specified activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting).⁴⁶

The results of the assessment portion of the CAT are then scored. If an applicant's score is 3 or higher, the applicant is medically eligible for Waiver services.⁴⁷

⁴³ Ex. E, p. 31.

⁴⁴ Ex. E, p. 18.

⁴⁵ Ex. E, p. 31.

⁴⁶ Ex. E, p. 31.

⁴⁷ Ex. E, p. 31.

C. PCA Services – ADLs and IADLs

1. Transfers

The ADL of transfers captures how a person moves between surfaces, to/from a bed, chair, wheelchair, etc. It excludes toilet transfers.⁴⁸

Ms. H agrees that she is independent in her transfers except for when she takes her diuretic. The unchallenged testimony establishes that when Ms. H takes her diuretic she urinates frequently. The frequent urination results in frequent transfers out of her chair, which leave her weak and in need of assistance. When this occurs, she requires physical assistance to transfer, because if not, she either skips her diuretic, which leads to other problems, or sits on the toilet for hours at a time. These options are at odds with the purpose and goal of the PCA program – physical assistance based on the physical condition of a recipient within the regulatory parameters. Transfers associated with the toilet are scored under the ADL of toileting.

Previously, Ms. H was scored 3/2 with a weekly frequency of 112 times per week. This means she required extensive assistance from one person with transfers 16 times per day. The 3/2 score was based on an observation that Ms. H had poor balance and had to be lifted to a standing position.⁴⁹ She no longer needs this type of assistance to complete a transfer except for when she takes her diuretics.

Ms. H should take her diuretic daily. The testimony of Ms. H and her witnesses establish that when she takes her medication, with each transfer she requires more assistance to transfer. It is reasonable to conclude that by the end of the “diuretic induced transfers,” she requires both limited assistance and weight-bearing support more than three times a week.

It should be noted that, were it not for the diuretic induced transfers, the division has correctly scored this ADL. With the evidence developed through the hearing process, the physical assistance required by Ms. H to complete the ADL of transfers after she has taken her diuretic is a score of 3/2.

Turning to frequency, Ms. H testified that when she takes her diuretic, the number of transfers dramatically increases to “at least 12” times. This testimony is corroborated by Ms. T. However, the record does not support 12 transfers. Ms. H said she only requires physical assistance after she has independently transferred several times on her own. Therefore, it is

⁴⁸ Ex. E, p. 6.

⁴⁹ Ex. F p. 6.

reasonable to conclude that Ms. H requires limited assistance after 2 – 4 transfers associated with her diuretic, so it is more likely than not that Ms. H requires extensive assistance by one person (score 3/2) eight times a day (56 per week).

2. Locomotion to Access Medical Appointments

Ms. H was previously provided extensive assistance (score of 3/2) four days per week for locomotion-access medical appointments. The assessor found that Ms. H was independent with her scooter and wheelchair. The assessor's conclusion is bolstered by Ms. H's ability to independently travel to the division to conduct research associated with this proceeding.⁵⁰ Additionally, Ms. H locomoted independently to the hearing.⁵¹ It is more likely than not true that once she is transported to her destination, she is able to locomote independently. The division correctly scored this ADL at 1.

3. Dressing

Ms. H was previously scored as requiring extensive assistance from one person to dress twice a day, seven days a week (score of 3/2). The assessor found that Ms. H required limited assistance for dressing.⁵² The difference between limited and extensive assistance is the frequency of the need for weight-bearing support. The assessor observed Ms. H reach to rub her feet and reach up and behind her head to straighten her pillow while seated. Both of these are physical maneuverings similar to the physical ability required to dress oneself.

Ms. H disagreed and claimed that she requires extensive assistance to dress and undress because of her limited shoulder range of motion and hand tremors. Ms. H's witnesses testified that they noticed tremors when Ms. H was stressed, but all agreed her tremors were not present on a regular basis. Moreover, no tremors were observed when Ms. H testified in person. Nor was Ms. H observed to suffer from restricted range of motion. The tribunal observed that when Ms. H appeared in person, she would raise her hands up to the top of her head, and could lean over the side of her wheelchair to grab items on the floor.

Ms. H also argues that her primary medical conditions are degenerative and therefore cannot improve – only worsen. This is an attractive argument. However, the explanation is provided by Ms. H. She has been compliant with her home physical therapy, including range of

⁵⁰ Ms. H confirmed the division's assertion on this point.

⁵¹ Ex. E, p. 7 (OAH Case No. 14-0212-MDS). Ms. H did testify regarding her dissatisfaction with the way transportation was provided and the rules governing the provision of transportation. However, her complaint is beyond the limited scope of this proceeding.

⁵² Ex. D, p. 9 (OAH Case No. 14-0212-MDS).

motion exercises. Her compliance with her physical therapist's instructions, and the resulting need for less physical assistance, is commendable. The symptoms of a degenerative condition may improve, and often do improve, with appropriate treatment while there is no corresponding improvement in the underlying condition.

The observations of the tribunal are consistent with the observations of the assessor. It is therefore more likely true than not true that Ms. H requires limited physical assistance from one person dressing twice daily, seven days per week (score of 2/2).

4. Toileting

Ms. H previously received a score of extensive assistance (score of 3/2) and a frequency of 84 times per week. Her bathroom has been modified to allow Ms. H more independence. The modifications include a raised toilet seat and grab bars. For the ADL of toileting, the division scored Ms. H as requiring limited assistance from one person two times a day. As explained by the division, the need for physical assistance had to do with the emptying and cleaning of Ms. H's commode.

As discussed above when addressing transfers, when Ms. H takes her diuretic she remains highly involved in the activity, but it is more likely true than not true that Ms. H continues to require limited assistance to transfer on and off of the toilet after several independent assists. A better representation of the physical assistance required by Ms. H to complete the ADL of transfer after she has taken her diuretic is a score of 3/2 ten times a day (70 times a week). The frequency score addresses the likely frequency with which Ms. H requires a one-person physical assist with toileting transfers (eight) and her commode (two).

As with transfers, if it were not for the effect of Ms. H's diuretic, the division's scoring would be correct.

5. Personal Hygiene

Ms. H was previously scored as requiring extensive assistance by one person every day (score of 3/2). For the reasons indicated under dressing, it is more likely than not that Ms. H now requires limited, versus extensive, physical assistance with her personal hygiene. The division correctly scored this ADL at 2/2.

6. Escort

Escort time is provided for recipients who have a functional deficit that interferes with the recipient's ability to confer with medical or dental staff during an appointment. Ms. H was

scored “modified independence.”⁵³ This means that she can make financial and other decisions for herself. She does have some difficulty in new situations.⁵⁴ As with all of us as we age, she has difficulty recalling where she put her keys and finding the right words or completing her thoughts.⁵⁵ The examples provided by Ms. H and her witnesses do not demonstrate an inability to confer with health care providers or carry out their instructions.⁵⁶

Ms. H’s health care provider’s letter stating that Ms. H has problems with her short-term memory was considered in this scoring. Ms. H has no diagnosis that would support the need for escort services. Should this change, a change of information should be submitted.

The weight of the evidence establishes that Ms. H requires transportation, but not escort services. The division correctly scored this ADL.

7. Main and Light Meal Preparation

These are IADLs (independent activity of daily living). IADLs are scored based on the ability of the recipient to perform or be involved in an activity. Ms. H was previously scored as dependent, needing full caregiver assistance (score of 3/4) for main⁵⁷ and light⁵⁸ meal preparation 21 times a week. In her current assessment, she was scored as requiring assistance to help her complete the task (score of 2/3). The observations of Ms. H at hearing and the results of the physical assessment demonstrate an individual who is capable of being involved in her meal preparation. The evidence shows that, more likely than not, the division accurately scored Ms. H’s need for assistance with meal preparation.

8. Shopping

Ms. H was previously scored as dependent, needing full caregiver assistance (score of 3/4). For the reasons set forth under the above ADLs and IADLs, the division has established by a preponderance of the evidence that Ms. H can be involved in shopping, but does require assistance to complete the task. The tribunal’s observations corroborate the observations of the

⁵³ Ex. E, p. 16.

⁵⁴ Ex. E, p. 16.

⁵⁵ Ex. E, p. 22.

⁵⁶ Ms. H attempted to discredit the accuracy of the memory recall test where she could only recall 2 out of 3 words. The two words she could recall, dog and horse, were items visible to her (her dog was on her lap and she had a photo of a horse) during this part of the assessment visit. Mr. Cornell testified that he does not have specific words he uses during the memory test. Therefore, it is just as likely that his choice of words was influenced by what he saw in the room. Regardless, this decision relies heavily on Ms. H’s conduct and abilities throughout the fair hearing process: her research at the division and her capable ability to represent herself at hearing.

⁵⁷ Frequency of one per day.

⁵⁸ Frequency of twice per day.

assessor. The tribunal was able to observe Ms. H's functional limitations first-hand. Ms. H could reach (albeit not far) and had motor skills that would allow her to remove grocery items on lower shelves that are not oversized or heavy. She can also transport her groceries from the aisle to the checkout stand. The division correctly scored this IADL as requiring physical assistance (score of 2/3).

9. Oxygen Maintenance

Ms. H testified that she uses her nebulizer on average less than once a week. The division argues that this is too infrequent to be provided for PCA services. However, the division's *Personal Care Assistance Service Level Computation*, which has been adopted into regulation, provides for respiratory equipment maintenance, which is based upon the light housekeeping IADL score.⁵⁹ Because Ms. H was scored as being dependent (score of 3) in light housekeeping, she should receive PCA service time consistent with her light housekeeping score.

10. Wound Care

At the time of the assessment visit in June, there were no sores or boils. Three days after the decision to reduce PCA services in November, Ms. H's doctor noted pressure sores and boils that required skin care.⁶⁰ It is likely that these developed between the assessment visit and the division's decisions to deny Waiver services and reduce PCA services relevant to the level of PCA services.⁶¹ The *Personal Care Assistance Service Level Computation* discussed above provides for nonsterile bandage and dressing changes, which is based upon the personal hygiene score.⁶² Because Ms. H was scored as requiring limited assistance in personal hygiene (score of 2/2), she should receive PCA service time consistent with her personal hygiene score.

D. Waiver Eligibility

Once an individual such as Ms. H has qualified to participate in the Choice Waiver program, there are additional protections before he or she can be removed from that program. Specifically, the individual must have had an annual assessment, the assessment must have been reviewed by an independent, qualified health professional, and the

⁵⁹ Ex. B, p. 35.

⁶⁰ November 18, 2013 Letter.

⁶¹ Evidence of developments in a recipient's condition or care needs that came about during the interval between the assessment visit and the decision to terminate will not be disregarded when relevant. *In re T.C.*, OAH No. 13-0204-MDS at pages 8, 9 (Comm'r of Health & Social Serv., as adopted October 2, 2013).

⁶² Ex. B, p. 35.

assessment must find that the individual has materially improved.⁶³ For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska qualified to assess adults with physical disabilities.⁶⁴ Material improvement for an adult with physical disabilities is defined as

no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for waiver services.^[65]

The same criteria used in determining whether a recipient no longer has a functional limitation or cognitive impairment are used in making the initial determination that he or she did have the limitation or impairment.⁶⁶

Based on the record presented, Ms. H does not require professional nursing services, therapy from a qualified therapist, specialized treatment, or therapies. Although she was scored as modified independence for cognition, the evidence shows that she is able to recall her location, names, faces, controls her own finances, and is aware of what is going on around her. She does not therefore qualify for a scoring point based upon impaired cognition.⁶⁷ Nor does Ms. H display socially in appropriate behavior. As a result, she would not qualify for a scoring point due to her behavior issues.

The only other way for Ms. H to retain her eligibility for Waiver services is if she is totally dependent (self-performance code of 4) or requires extensive one-person physical assistance (self-performance code of 3, support code of 2) with any three of the five specified activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting). As discussed above, Ms. H requires extensive one-person physical assistance with only two ADLs: transfers and toileting. This does not satisfy the requirement that she require a minimum of extensive assistance with three ADLs to maintain her eligibility for Waiver services.

Waiver eligibility is determined by the scoring on the CAT. The evidence at hearing, as discussed above, showed that it was more likely true than not true that the CAT was correctly scored in most areas. Even though Ms. H has substantial health issues, she does not have nursing care needs as measured by the CAT, does not receive any specialized treatments or therapies,

⁶³ AS 47.07.045(b)(1) – (3).

⁶⁴ AS 47.07.045(b)(2)(B).

⁶⁵ AS 47.07.045(b)(3)(C).

⁶⁶ 7 AAC 130.230(g).

⁶⁷ Ex. E, p. 16; Ex. E, p. 29, Scoring Question NF 3.

and her physical functioning, impaired cognition, and behavior issues do not rise to the level necessary for her to score as qualifying on the CAT.

E. Termination of Waiver Services

Before the Division may terminate Waiver services for a person who was previously approved for those services, Alaska Statute 47.07.045, enacted in 2006, requires that the Division demonstrate that the recipient's condition has materially improved to the point that the recipient "no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for waiver services."⁶⁸ As discussed above, Ms. H's 2013 assessment shows that she is no longer eligible for Waiver Services, *i.e.*, her condition has materially improved as the term is defined by statute.⁶⁹

IV. Conclusion

Ms. H's condition has materially improved to the point that she no longer qualifies for Medicaid Waiver services. The Division's decision to terminate Ms. H's Waiver services is upheld.

Ms. H's PCA service plan should be revised to be consistent with this decision, and any removed PCA services should be restored in accordance with the above scoring.

DATED this 30th day of May, 2014.

Signed _____
Rebecca Pauli
Administrative Law Judge

⁶⁸ AS 47.07.045(b)(1) and (b)(3)(C).

⁶⁹ AS 47.07.045 also requires that the Division's assessment showing material improvement be "reviewed by an independent qualified health care professional under contract with the department." This was done. *See* Ex. D, p. 2.

Adoption

The undersigned, by delegation from 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 10th day of June, 2014.

By: Signed
Name: Rebecca L. Pauli
Title: Administrative Law Judge

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