

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

In the Matter of:)
)
 E X) OAH No. 13-1793-MDS
) Agency No.
)
_____)

DECISION

I. Introduction

E X was receiving 49.5 hours per week of personal care assistance (PCA) services. She requested that those services be increased. The Division of Senior and Disabilities Services (Division) denied her request.¹ Ms. X requested a hearing.

Ms. X’s hearing was held on January 21, 2014. Ms. X was represented by N X, who is her brother and court-appointed guardian. Angela Ybarra represented the Division.

The Division’s denial of Ms. X’s request for a PCA service increase is not supported by the evidence. Her newly developed conditions, liver and colon cancer, and her colostomy caused an increase in her care needs. The Division should therefore have provided her with additional services, as discussed below, with toileting, bathing, medication assistance, and medical escort.

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”² 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.”³

The Division uses the Consumer Assessment Tool or “CAT” to determine the level of physical assistance that an applicant or recipient requires in order to perform their ADLs and their

¹ The Division issued a corrective notice on December 19, 2013. All references made to Exhibit D are to this corrected notice.

² 7 AAC 125.010(a) [emphasis added].

³ 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.*

IADLs.⁴ 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.⁵

The CAT 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 assistance⁶); **3** (the person requires extensive assistance⁷); **4** (the person is totally dependent⁸). There are also codes 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 code*. These codes rate the degree of assistance that a person requires for a particular ADL. The possible codes are **0** (no setup or physical help required); **1** (only setup help required); **2** (one person physical assist required); **3** (two or more person physical assist required). Again, there are additional codes 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

The CAT also codes certain activities known as “instrumental activities of daily living” (IADLs). These are light meal preparation, main meal preparation, light housekeeping, laundry (in-home), laundry (out-of-home), and shopping.¹¹

The CAT codes IADLs slightly differently than it does ADLs. The *self-performance codes 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

⁴ See 7 AAC 125.020(a) and (b).

⁵ Ex. E, pp. 6 – 11.

⁶ 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.”

⁷ 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.”

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

¹¹ Ex. E, p. 26.

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 codes* for IADLs are also slightly different than the support codes for ADLs. The support codes 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 code that is not used to arrive at a service level: **8** (the activity did not occur).¹³

The codes assigned to a particular ADL or IADL determine how much PCA service time a person receives for each occurrence of a particular activity. For instance, if a person is coded as requiring extensive assistance (code of 3) with bathing, she would receive 22.5 minutes of PCA service time each time she was bathed.¹⁴ 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. Facts

The following facts were proven by a preponderance of the evidence.

Ms. X is 58 years old. She has cerebral palsy and is intellectually disabled. The Division assessed her need for PCA services on July 9, 2013. It authorized her to receive a total of 49.5 hours of PCA services as a result. Those services included extensive physical assistance (self-performance code 3, support code 2) with toileting 12 times per day, seven days per week; extensive physical assistance (self-performance code 3, support code 2) with dressing twice daily, seven days per week; extensive physical assistance (self-performance code 3, support code 2) with bathing once daily, seven days per week; and extensive physical assistance (self-performance code 3, support code 2) with medications once per day, seven days per week.¹⁵

Ms. X fell ill in September 2013. She was admitted to the hospital at the end of September 2013, diagnosed with colon and liver cancer, and had a cecostomy below her right breast.¹⁶ She

¹² Ex. E, p. 26.

¹³ Ex. E, p. 26.

¹⁴ 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.

¹⁵ Ex. D, p. 7; Ex. E, pp. 3, 8- 9, 11, 20, 21; Ex. F, p. 5.

¹⁶ N X testimony.

submitted a change of information form requesting additional PCA services on November 6, 2013. The request was supported by a letter from her medical care provider, D C, ANP, which stated:

E X is a patient of mine. She has recently been released from the hospital after undergoing surgery and that she has been diagnosed with liver and colon cancer. This is an end life diagnosis. Her personal care assistance needs (PCA) have increased. Her PCA has been changing her colostomy bag every 2 hours and it takes approximately 15 minutes each time an average of 12 times daily, toilet use approximately 10 times daily, dressing assistance 15 minutes daily, bathing assistance 30 minutes daily an additional help with medications every 4 hours 6 times daily 4 minutes each time. Patient required more escort to medical appointments at least once a week depending on her wound care for ostomy check.^[17]

The Division did not conduct a reassessment of Ms. X. It did not contact her medical care provider.¹⁸ It denied Ms. X's request without providing an increase for any of the tasks identified in Ms. C's letter: toileting, dressing, bathing, medication, and medical escort.¹⁹ Each of these areas is addressed below.

A. *Toileting*

Toileting includes both regular toileting and colostomy care.²⁰ Ms. X had previously been provided extensive assistance with toileting (self-performance code 3, support code 2) 12 times per day, seven days per week.²¹ This was before she had her colostomy. The Division declined to provide her with additional time to care for her colostomy, reasoning that the 12 times previously provided was sufficient. The evidence presented at hearing was that Ms. X's condition results in a need to frequently have her colostomy bag emptied, and that she is not capable of assisting in that process. However, emptying the colostomy bag does not relieve Ms. X of the need to urinate. Ms. X wears Depends, and her brother, who has been assisting with Ms. X's care, stated that they try to combine the colostomy care with urinary care. He further stated that between the combined colostomy care and urination, Ms. X requires toileting assistance between eight to twelve times per day. He also stated that the time required for each act of toileting assistance was sometimes 15 minutes and other times as long as 25 minutes.²²

¹⁷ Ex. F, p. 6.
¹⁸ Teresa Burnett testimony.
¹⁹ Ex. D.
²⁰ 7 AAC 125.030(b)(6).
²¹ Ex. D, p. 7; Ex. E, p. 9.
²² N X testimony.

Because the toileting function encompasses both the colostomy care and the urinary care, and because Ms. X is completely unable to assist with the colostomy care, Ms. X has demonstrated that it is more likely true than not true that she is completely dependent for assistance (self-performance code 4, support code 2) with toileting. However, based upon Mr. X's testimony, as her caregiver, Ms. X has not shown that she requires more frequent toileting assistance than the 12 times per day previously provided.

B. Dressing

Ms. X was previously provided with extensive physical assistance (self-performance code 3, support code 2) with dressing twice per day, seven days per week, for a total of 22.5 minutes per day.²³ The evidence at hearing demonstrated that Ms. X required a great deal of assistance with dressing. She, however, was capable of minimally participating in the process. She could not put socks on, but could take them off. She could put her arms through sleeves if the shirt was held up and arranged for her. Her pants needed to be arranged very carefully by a caregiver due to her Depends and her colostomy bag.²⁴ However, there was no evidence provided that she was wholly incapable of participating with dressing in any amount, *i.e.*, that she was totally dependent upon assistance for dressing. It is therefore more likely true than not true that Ms. X continues to require extensive assistance with dressing and is not totally dependent with regard to that task. It should also be noted that Ms. X's medical provider's letter requested 15 minutes per day in assistance. Ms. X was already provided with 22.5 minutes per day, an amount that exceeded the 15 minute request.

C. Bathing

Ms. X was previously provided with extensive physical assistance (self-performance code 3, support code 2) with bathing once per day, seven days per week, for a total of 22.5 minutes per day.²⁵ She requested a total of 30 minutes per day for bathing, which is equivalent to being totally dependent (self-performance code 4, support code 2) in this task.²⁶ The evidence at hearing demonstrated that she has either a "spit bath" or that she is bathed in the tub. She has to be physically lifted in and out of the tub, wherein she sits on a bath chair, and is bathed by her caregiver.²⁷ There was no evidence showing that Ms. X was capable of assisting with her own

²³ Ex. D, p. 7.

²⁴ N X testimony.

²⁵ Ex. D, p. 7.

²⁶ See Ex. B, p. 34.

²⁷ N X testimony.

bathing. It is therefore more likely true than not true that Ms. X is completely dependent (self-performance code 4, support code 2) upon others for assistance with bathing.

D. Medications

Ms. X was previously provided with extensive physical assistance (self-performance code 3, support code 2) with medications once per day, seven days per week, for a total of 3 minutes per day.²⁸ Her health care provider requested that the assistance be increased to every four hours, six times daily, for four minutes each time, seven days per week.²⁹

The Division did not increase her medication assistance because it did not receive a list of medications.³⁰ The Division, despite there being a health care provider's statement that Ms. X had a cecostomy and an end-stage cancer diagnosis, which were both substantial changes in her medical condition, and required medication assistance every four hours, failed to make any inquiry regarding medications. Mr. X testified that Ms. X was receiving pain medications every four hours in addition to other medications, and that if he gave her the medication, she would take it.³¹ Given Mr. X's testimony and the health care provider's statement, it is more likely true than not true that Ms. X requires medication assistance six times per day. However, given that Ms. X was capable of taking the medication if it was handed to her by Mr. X, she did not establish that she was dependent (self-performance code 4, support code 2) with regard to taking her medications.³²

E. Medical Escort

Ms. X was previously provided medical escort time of 720 minutes per year (12 visits per year at 60 minutes each visit), which came out to an average of 13.85 minutes per week based upon a 52-week year.³³ Ms. X requested that she receive escort services of at least once a week, based upon her health care provider's written statement. The Division denied her request, reasoning that the 60 minutes provided per month was adequate.³⁴ At hearing, the Division's witness expressed her opinion that Ms. X would not require weekly medical appointments for an extended time

²⁸ Ex. D, p. 7.

²⁹ A time of four minutes for each time medication assistance is supplied is equivalent to total dependence in this task. *See* Ex. B, p. 35.

³⁰ Ex. D, p. 2; Teresa Burnett testimony.

³¹ N X testimony.

³² The personal hygiene score is used for purposes of calculating medication assistance time. This was an extensive assistance score, rather than complete dependence. *See* Ex. D, p. 7. This is a "3", which is identical to the score provided for medication assistance as discussed above.

³³ Ex. D, p. 7; Ex. E, p. 5.

³⁴ Ex. D, p. 1.

period.³⁵ However, N X testified that Ms. X had medical appointments approximately once per week.³⁶ Given the combination of Mr. X's testimony and Ms. X's health care provider's statement regarding the frequency of Ms. X's medical appointments, Ms. X has shown that it is more likely true than not true that she requires medical escort for weekly appointments, *i.e.*, 52 times per year, rather than the 12 times per year previously provided.

IV. Discussion

Ms. X has challenged the denial of her request for an increase in her PCA benefits. Ms. X has the burden of proof.³⁷ As discussed above, the facts of this case show the following:

- Ms. X met her burden of proof to establish that she is completely dependent (self-performance code 4, support code 2) with toileting. She, however, did not meet her burden of proof to establish that she required an increase in toileting assistance from the 12 times per day previously provided.
- Ms. X did not meet her burden of proof with regard to an increase in dressing assistance. The previously provided time allotment for this task of 22.5 minutes per day is unchanged.
- Ms. X met her burden of proof and established that she was completely dependent (self-performance code 4, support code 2) for bathing.
- Ms. X met her burden of proof and established that she required medication assistance six times per day rather than the one time per day previously provided. She, however, did not meet her burden of proof to establish that the assessment of her need in this task as extensive assistance (self-performance code 3, support code 2) was incorrect.
- Ms. X met her burden of proof and established that she required medical escort for weekly medical appointments, *i.e.*, 52 weeks per year, rather than the 12 yearly appointments previously allowed. Because the Division had previously allowed 60 minutes per appointment, Ms. X should similarly be provided 60 minutes per weekly appointment.

As discussed above, while Ms. X did not meet her burden of proof with regard to all of changes she sought, the evidence shows that Ms. X's medically documented change in her

³⁵ Teresa Burnett testimony.

³⁶ N X testimony.

³⁷ 7 AAC 49.135.

condition results in an increase in her PCA care needs. Ms. X is advised that the specific amount of time provided for each PCA task is set by regulation, and not by the actual time incurred for each task.³⁸ The Division is to recalculate Ms. X's PCA assistance time consistent with this decision and the limits set by regulation.

V. Conclusion

The Division's denial of Ms. X's request for increased PCA assistance is reversed with regard to toileting, bathing, medication assistance, and medical escort.

DATED this 13th day of February, 2014.

Signed

Lawrence A. Pederson
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 27th day of February, 2014.

By: Signed

Signature
Lawrence A. Pederson

Name
Administrative Law Judge

Title

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

³⁸ See Ex. B, pp. 34 – 36.