

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

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|-------------------|---|---------------------|
| In the Matter of: |) | |
| |) | |
| Z K L |) | OAH No. 13-1837-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 (DSDS or Division) correctly assessed the amount of Medicaid Personal Care Assistant (PCA) services for which Ms. Z L is currently eligible. The Division decreased Ms. L's PCA services from 41.5 hours per week to 10.5 hours per week effective December 6, 2013.¹ Ms. L challenges the Division's reduction of PCA services as to five specific activities. This decision concludes that the Division's scoring as to the extent of Ms. L's need for assistance was correct with regard to dressing and personal hygiene, but that Ms. L requires a greater level of assistance with locomotion, toilet use, and laundry. In addition, Ms. L qualifies for a greater frequency of service with locomotion and toilet use. Accordingly, the Division's decision is affirmed in part and reversed in part.

II. Facts

A. Ms. L's Medical Diagnoses and Reports from Medical Providers

Ms. L is a 91-year-old Korean-speaking woman who lives alone in an apartment.² She is five feet, two inches tall and weighs about 115 pounds.³ Her primary diagnoses are occlusion and stenosis of multiple and bilateral pre-cerebral arteries with cerebral infarction, post-cerebrovascular accident (stroke), and anxiety.⁴ Her secondary diagnoses are acquired hypothyroidism, allergic rhinitis, cervical disk degeneration, cervical spondylosis without myelopathy, complete edentulism (toothlessness), constipation, depressive disorder, dizziness, essential hypertension, fatigue, gastroesophageal reflux disease (GERD), hyperlipidemia, lumbago, lumbar spinal stenosis without neurogenic claudication, malaise, osteoporosis, vascular dementia, and vertigo.⁵

¹ Ex. D1.
² Ex. E1.
³ Ex. E9.
⁴ Ex. E3.
⁵ Ex. E3.

Ms. L has a history of hospitalizations for high blood pressure and for a cholecystectomy (surgical removal of the gallbladder).⁶ Ms. L had no emergency room visits or hospitalizations in the 12 months preceding her July 2013 assessment, but her PCA has reported that Ms. L had multiple falls in her home, due to poor balance, during that period.⁷

Ms. L is a patient of N W. X, M.D.⁸ In a letter dated January 14, 2014 Dr. X stated in relevant part as follows:⁹

[Ms. L] is a patient with multiple chronic medical conditions, most notably osteoarthritis of both knees which greatly limits her ability to transfer or complete her activities of daily living. Recently she was seen in the emergency room following a fall and was noted to have almost daily falls, especially when transferring from her bed to her wheelchair, and also while trying to get around her kitchen to prepare meals. She has been wheelchair-bound for some time [due] to chronic knee pain, weakness of both lower extremities, and generalized frailty . . . I would request that [Ms. L's PCA hours] be increased so that someone may assist with transfers and . . . preparing meals.

K S, LCSW is a medical social worker with Providence Family Medicine Center.¹⁰ In a letter dated January 26, 2014 Ms. S stated in relevant part as follows:¹¹

Ms. L is a 90 year old frail elder with multiple medical needs who has been falling almost daily and has begun crawling in her home for fear of additional falls. She was seen in the Providence Hospital emergency room most recently on January 6, 2014 for a significant fall with bruising. She requires stand-by and/or assistance with all her ADLs and would benefit from complete chore services. She has no family in Alaska. She does not want to leave her home and is hesitant to be completely honest about her needs for fear that she will have to move into an assisted living home or nursing home. There have been a number of [Adult Protective Services] reports from Providence Hospital in the past year expressing concern for her and it is difficult to believe that her PCA hours were cut

B. Ms. L's Functional Abilities and Impairments According to her Witnesses

Ms. L's PCA, A B, testified at the hearing in relevant part as follows:¹²

1. He was Ms. L's PCA at the time of the July 1, 2013 assessment and he is also currently her PCA.
2. He believes Ms. L requires physical assistance from one person with all her activities of daily living, and that she also requires assistance with transportation.

⁶ Ex. E3.

⁷ Ex. E3.

⁸ Ex. 2.

⁹ Ex. 2.

¹⁰ Ex. 3.

¹¹ Ex. 3 (paragraph breaks in original omitted for brevity).

¹² All factual finding in this paragraph are based on Mr. B's hearing testimony unless otherwise stated.

3. He has seen Ms. L's cognitive abilities decrease recently.

C D. N, M.D. credibly testified at the hearing in relevant part as follows:¹³

1. He is a neurologist. He has been Ms. L's physician since 2002 or before and has witnessed her physical and cognitive decline over the years.

2. During 2013 he saw Ms. L at least once per month.

3. Ms. L has fallen about once per month over the past year, and each of these falls has resulted in multiple bruises.

4. In the past Ms. L would arrive at his office for appointments using a walker, but lately she arrives in a wheel chair.

5. Ms. L cannot transfer by herself and needs "one or two people" to assist her.

6. Ms. L has arthritis and muscle weakness in her arms, and she cannot raise her arms above ninety degrees. She can eat and perform her own personal hygiene, but she cannot cook or prepare her own meals.

7. Ms. L has no skilled nursing needs. However, he believes she requires 24 hour-a-day supervision for her safety.

8. He believes that it would be best for Ms. L to be placed in an assisted living facility. However, Ms. L wishes to continue living at home.

C. Ms. L's Functional Abilities According to the CAT

Ms. L has received PCA services since May 2011 or before.¹⁴ She currently receives Medicaid Home and Community-Based Waiver services in addition to her PCA services, but her waiver services do not include chore services.¹⁵ The Division found Ms. L eligible for 41.5 hours of PCA services per week based on her 2011 assessment, and she continued receiving that level of PCA services through December 5, 2013.¹⁶

The assessment which resulted in the filing of this case was performed on July 1, 2013 by nurse-assessor Moli Atanoa, R.N. of DSDS.¹⁷ Ms. Atanoa used the Consumer Assessment Tool or "CAT," a system for scoring the need for nursing assistance and physical assistance that is described

¹³ All factual finding in this paragraph are based on Dr. N's hearing testimony unless otherwise stated.

¹⁴ Ex. F.

¹⁵ A B's hearing testimony.

¹⁶ Ex. D1.

¹⁷ Ex. E.

in detail in Part III, to record the results of the assessment.¹⁸ In completing the CAT, Ms. Atanoa reported that Ms. L has the following care needs and the following abilities and limitations:¹⁹

Functional Assessment:²⁰ Ms. Atanoa reported that Ms. L is able to touch her hands over her head and behind her back, and has a strong grip in both hands, but cannot touch her feet while sitting, and cannot place her hands across her chest and stand up. Ms. Atanoa wrote that Ms. L reported shoulder pain as a result of demonstrating her abilities, and that she saw Ms. L remove and reapply a right thumb and wrist support, a back brace, and knee braces by herself.

Physical Therapy:²¹ Ms. Atanoa reported that Ms. L is not currently receiving speech / language therapy, respiratory therapy, physical therapy, or occupational therapy, and that she does not currently have any prescriptions for walking, range of motion, foot care, or other care requiring hands-on assistance from a PCA.

Bed / Body Mobility:²² Ms. Atanoa reported that Ms. L told her (1) that she sleeps in a regular bed in her living room; (2) that she performs exercises using bands and a balance / posture ball on a mat on the floor; (3) that she can lay down, turn side-to-side, sit up, and get in and out of bed by herself; and (4) that she has no skin breakdown or decubitus ulcers. Ms. Atanoa reported that she observed Ms. L (1) lay down, turn side-to-side, "scoot about," sit up, and otherwise position herself in her bed and on a floor mat; and (2) demonstrate her floor exercises using her bands and a balance / posture ball (scored 0/0; frequency 0/0).

Transfers:²³ Ms. Atanoa reported she was told by Ms. L that she can get on and off the floor by herself, leaning on furniture or walls for support, but that she needs help most of the time because her balance is poor and she often feels dizzy. Ms. Atanoa reported that she observed Ms. L (1) crawl across the floor, start to stand up by leaning on a wall, but lose balance, which required her PCA to provide support for her to keep her from falling; and (2) almost fall while standing up by leaning on a coffee table (scored 2/2, frequency 5/7).

Locomotion:²⁴ Ms. Atanoa reported she was told by Ms. L that she (1) sometimes is light-headed and/or has weak legs when standing up; (2) sometimes walks by leaning onto the walls or furniture, but sometimes crawls instead when she feels dizzy; and (3) uses a walker when leaving her apartment for shopping or appointments. Ms. Atanoa reported that she observed Ms. L crawl

¹⁸ Ex. E.

¹⁹ Ex. E1 - E31. Ms. Atanoa utilized a Korean-speaking interpreter in conducting Ms. L's assessment.

²⁰ Ex. E4.

²¹ Ex. E5.

²² Ex. E6.

²³ Ex. E6.

²⁴ Ex. E7.

across the living room floor to the hallway, stand up, and nearly fall, at which time Ms. L's PCA kept her from falling and helped her back down to her floor mat (scored 2/2, frequency 4/7 inside the house, and 2/2, frequency 2/1 when going to medical appointments).

Dressing:²⁵ Ms. Atanoa reported she was told by Ms. L that she dresses and undresses herself because she has a male PCA. Ms. Atanoa reported that she observed Ms. L tear duck tape off a tin can by herself (scored 1/1, frequency 0/0).

Eating:²⁶ Ms. Atanoa reported she was told by Ms. L that her PCA cooks for her, but that she can eat and drink on her own, that she has no dietary restrictions, and that she can swallow oral medications and liquids without any problems. Ms. Atanoa did not observe Ms. L eat or drink, but noted that Ms. L can raise her hands up to her face and has a strong grip with each hand (scored 0/1; frequency 0/0).

Toileting:²⁷ Ms. Atanoa reported she was told by Ms. L that (1) she sometimes has urinary incontinence, wears adult diapers, and can change those by herself; and (2) she can get on and off the toilet by herself by holding onto a nearby sink for support, and that she could clean herself after toileting (scored 1/1; frequency 0/0).

Personal Hygiene:²⁸ Ms. Atanoa reported she was told by Ms. L that (1) she wears glasses and dentures, but no hearing aids; (2) she can perform her personal hygiene tasks independently; and (3) she uses wet wipes frequently to wipe her face and hands (scored 0/1).

Bathing:²⁹ Ms. Atanoa reported she was told by Ms. L that she showers every day, and that she washes herself because she has a male PCA and does not want him to do it, but that she needs help from her PCA to get in and out of the bath tub (scored 2/2, frequency 1/7).

Senses:³⁰ Ms. Atanoa found that Ms. L is moderately impaired as to her vision, and that she has mild difficulty in verbal communication with others.

The assessment of July 1, 2013 also scored Ms. L as follows with regard to her Instrumental Activities of Daily Living (IADLs):³¹ independent as to telephone use and financial management (score 0/0); but requiring physical assistance with light meal preparation, main meal preparation, light housework, routine housework, grocery shopping, and laundry (score 2/3).

²⁵ Ex. E8.

²⁶ Ex. E9.

²⁷ Ex. E9.

²⁸ Ex. E10.

²⁹ Ex. E11.

³⁰ Ex. E22.

³¹ Ex. E26.

D. Relevant Case Procedural History

Based on the July 1, 2013 assessment, the Division found Ms. L eligible for 10.5 hours per week of PCA services, a reduction of 31 hours per week compared to Ms. L's May 2011 assessment.³² On November 26, 2013 the Division notified Ms. L that her PCA service level was being reduced from 41.5 hours per week to 10.5 hours per week effective December 6, 2013.³³

Ms. L requested a hearing to contest the Division's reduction of her PCA services on December 18, 2013.³⁴ The hearing was held on January 30 and February 14, 2014. Ms. L participated in the hearing by phone and testified on her own behalf. Ms. L's Care Coordinator, E F, participated in the hearing by phone and represented Ms. L. Ms. L's PCA, A B, K S, LCSW, and C D. N, M.D. testified by phone on Ms. L's behalf. Daniel Hong, a representative of Ms. L's PCA agency, acted as interpreter.

Angela Ybarra participated by phone as the Division's hearing representative. Moli Atanoa, R.N. (the nurse who conducted the 2013 assessment), Darlene Day (who prepared the service reduction notice), and Theresa Burnette participated in the hearing by phone and testified on behalf of the Division. Following the hearing the record was left open through March 15, 2014, at the parties' request, to provide an opportunity for them to negotiate a post-hearing settlement. The parties were unable to reach a settlement, and the record closed on March 15, 2014.

III. Discussion

A. The PCA Program - Overview

The purpose of the Medicaid personal care services program is to provide assistance to the elderly, people with disabilities, and individuals with chronic or temporary conditions so that they can remain in their homes and communities.³⁵ Alaska's PCA program authorizes 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 . . .".³⁶ The ADLs for which PCA services are provided are body mobility, transfers, locomotion, dressing, eating, toilet use, personal hygiene, and bathing.³⁷ The IADLs for which PCA services are provided are telephone use, and financial management, light meal preparation, main meal preparation, light housework, routine housework, grocery shopping,

³² Ex. D1.

³³ Ex. D1.

³⁴ Ex. C1.

³⁵ See Social Security Act § 1905(a)(24), codified at 42 USC 1396d(a)(24); see also 42 CFR 440.167 (defining personal care services).

³⁶ 7 AAC 125.010(a) [emphasis added].

³⁷ 7 AAC 125.030(b).

and laundry.³⁸ PCA services are provided when the recipient requires limited or extensive assistance to perform an ADL or IADL, or when the recipient is fully dependent on the PCA to perform an ADL or IADL.³⁹ However, "[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."⁴⁰ Further, pursuant to 7 AAC 125.040(a)(11), PCA services are not available in cases where they would duplicate Home and Community-Based Waiver services provided under 7 AAC 130.

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."⁴¹ 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).⁴² The CAT seeks to make the assessment process more objective by attempting to standardize the assessment of an applicant or recipient's functional impairment.⁴³

The ADLs scored by the CAT are body mobility, transfers (both non-mechanical and mechanical), locomotion (both in-room, between levels of a home, and as needed to access the apartment or living quarters), dressing, eating, toilet use, personal hygiene, personal hygiene-shampooing, and bathing.⁴⁴ The IADLs scored by the CAT are telephone use, financial management, light and main meal preparation, light housework, routine housework, grocery shopping, and laundry.⁴⁵

The CAT's numerical scoring 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

³⁸ Ex. E26.

³⁹ 7 AAC 125.020(a); Exs. E6 - E12, Ex. E26.

⁴⁰ 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.*

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

⁴² See 7 AAC 125.010(a).

⁴³ Ex. E.

⁴⁴ See Division of Senior and Disabilities Services' *Personal Care Assistance Service Level Computation* (accessed online at <http://www.hss.state.ak.us/dsds/pca/documents/PCA%20Service%20Computation.pdf>) (accessed April 16, 2014); see also Exs. B34 - B36.

⁴⁵ Ex. E26.

oversight); **1** (the person requires supervision); **2** (the person requires limited assistance⁴⁶); **3** (the person requires extensive assistance⁴⁷); and **4** (the person is totally dependent⁴⁸). There are also codes that are not treated as numerical scores for purposes of 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's scoring 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 scores are **0** (no setup or physical help required); **1** (only setup help required); **2** (one person physical assist required); and **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*.⁴⁹ 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.⁵⁰

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. L was already receiving), the Division has the burden of proving, by a preponderance of the evidence, that Ms. L no longer requires her prior level of PCA services.⁵¹

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

Initially, it is important to remember that the PCA regulations underwent significant revisions in 2012, and these amendments are partly responsible for the decrease in the current level of Ms. L's PCA services. Under the *old* PCA regulations and the *old* PCA assessment tool, the assessor was allowed to award as much time as the assessor thought the applicant/recipient

⁴⁶ 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).

⁴⁷ 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).

⁴⁸ 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).

⁴⁹ See former regulations 7 AAC 43.750, 7 AAC 43.751, 7 AAC 43.752, and 7 AAC 43.755.

⁵⁰ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart.

⁵¹ 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).

reasonably needed to perform an ADL, up to certain specified limits, *regardless of the person's self-performance code*.⁵² Now, however, the amount of PCA time awarded is set automatically, based on the applicant / recipient's self-performance code.⁵³ For example, a CAT code of three as to non-mechanical transfers (a transfer that uses hands-on assistance but does not use an assistive device such as a lift) gives a recipient 3.75 minutes of PCA time *regardless of the actual amount of time it takes to perform the transfer*; a CAT code of four as to non-mechanical transfers gives a recipient 5 minutes of PCA time *regardless of the actual amount of time it takes to perform the transfer*.⁵⁴

Ms. L does not contest all of her 2013 PCA assessment scores. Rather, she contests the Division's findings as to her required degree of assistance and required frequency that she requires in five specific areas.⁵⁵ These are locomotion, dressing, toilet use, personal hygiene, and laundry.⁵⁶ Ms. L's eligibility for these PCA services will be addressed separately, as to each of the five services at issue, in the order stated.

1. Locomotion / Walking

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.⁵⁷ Ms. Atanoa reported she was told by Ms. L that she (1) sometimes is light-headed and/or has weak legs when standing up; (2) sometimes walks by leaning onto the walls or furniture, but sometimes crawls instead when she feels dizzy; and (3) uses a walker when leaving her apartment for shopping or appointments. Ms. Atanoa reported that she observed Ms. L crawl across the living room floor to the hallway, stand up, and nearly fall, at which time Ms. L's PCA kept her from falling and helped her back down to her floor mat (scored 2/2, frequency 4/7 inside the house, and 2/2, frequency 2/1 when going to medical appointments).

⁵² See former regulations 7 AAC 43.750, 7 AAC 43.751, 7 AAC 43.752, and 7 AAC 43.755. The former "per unit" maximum time allowances for ADLs were as follows: body mobility - up to 5 minutes; transfers - up to 5 minutes; locomotion - up to 10 minutes; dressing and undressing - up to 15 minutes; bathing - 15 to 30 minutes; toilet use - 5 to 12 minutes per use; personal hygiene/grooming - up to 20 minutes per day.

⁵³ See Division of Senior and Disabilities Services' *Personal Care Assistance Service Level Computation* at Exs. B34 - B36.

⁵⁴ *Id.*

⁵⁵ Ex. 1.

⁵⁶ On her statement of disputed items (Ex. 1), Ms. L also listed "take Meals on Wheels out to get hours on PCAT." This is something that simply needs to be accomplished as a ministerial matter, rather than a disputed factual of legal issue. Ms. L's representatives should be able to accomplish this with the Division outside the hearing process. Accordingly, this matter is not addressed in this decision.

⁵⁷ 7 AAC 125.030(b)(3).

Ms. L does not dispute the degree of assistance score (two - limited assistance) assigned by the Division. Rather, she disputes the frequency score for inside-the-home transfers. The Division allowed her four assists per day, seven days per week; she asserts that she needs eight assists per day, seven days per week.⁵⁸

While the quality of both parties' evidence regarding Ms. L's ability to ambulate was good, the testimony regarding the frequency of her need for assistance with locomotion was poor. Accordingly, Ms. L's frequency of locomotion must be approximated by examining her other ADLs. The preponderance of the evidence indicates that Ms. L requires assistance with walking at least two times per day for meals, at least six times per day for toileting,⁵⁹ at least one time per day for personal hygiene, and at least one time per day for bathing, for a total of 10 times per day, seven days per week. However, Ms. L only requested a frequency of eight times per day.⁶⁰ Accordingly, Ms. L's need for assistance with in-home locomotion should be scored as 2/2, frequency 8/7.

2. Dressing

For the ADL of dressing, PCA time is allowed for the donning, fastening, unfastening, and removal of the recipient's street clothing, support hose, or prosthesis.⁶¹ Ms. Atanoa reported she was told by Ms. L that she dresses and undresses herself because she has a male PCA, and reported she observed Ms. L tear duck tape off a tin can by herself. Accordingly, Ms. Atanoa assigned Ms. L a dressing score of 1/1, frequency 0/0, which scores were the same as in Ms. L's prior (2011) assessment.⁶²

On the other hand, Ms. L's PCA testified that Ms. L requires limited assistance with all her ADLs (including dressing), and Dr. N testified that Ms. L has arthritis and muscle weakness in her arms and cannot raise her arms above ninety degrees.

The testimony of Dr. N and of Ms. L's PCA as to her need for assistance with dressing was credible. However, it is undisputed that Ms. L, out of modesty, still dresses herself, even though it is hard for her to do so. Accordingly, the Division proved by a preponderance of the evidence that Ms. L is still able to dress and undress without assistance, and that her CAT scores as to dressing should remain the same as they were at the time of Ms. L's prior assessment (CAT score 1/1; frequency 0/0).

⁵⁸ Ex. 1.

⁵⁹ The Division's prior assessment found that Ms. L requires assistance with toileting six times per day (Ex. F9), and the evidence indicates that Ms. L's condition has gotten worse since that time rather than better.

⁶⁰ Ex. 1.

⁶¹ 7 AAC 125.030(b)(4).

⁶² Ex. F8.

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.⁶³ The CAT's definition of "toilet use" is somewhat broader, encompassing post-toileting hygiene and clothing adjustments.⁶⁴

Ms. Atanoa reported she was told by Ms. L that (1) she sometimes has urinary incontinence, wears adult diapers, and can change those by herself; and (2) she can get on and off the toilet by herself by holding onto a nearby sink for support, and that she could clean herself after toileting (scored 1/1; frequency 0/0). At Ms. L's prior (2011) assessment, she received toileting scores of 2/2, frequency 6/7.⁶⁵

On the other hand, Ms. L's PCA testified that Ms. L requires limited assistance with all her ADLs (including toileting). Dr. N echoed this, and testified that Ms. L has arthritis and muscle weakness in her arms and cannot raise her arms above ninety degrees.

In resolving the factual dispute on this issue, the undersigned does not doubt that Ms. L told Ms. Atanoa that she can use the toilet by herself. However, the undersigned finds it more likely than not that Ms. L requires limited assistance with toileting, for the following reasons. First, the undersigned's experience indicates that waiver and PCA recipients often over-report their abilities with regard to toileting due to embarrassment. Second, the Division determined that Ms. L requires limited assistance with transfers,⁶⁶ and Ms. L's need for assistance with transfers would logically extend to transfers associated with getting on and off the toilet. Accordingly, the preponderance of the evidence indicates that Ms. L requires limited one-person assistance with toileting (a CAT score of 2/2).

The testimony regarding the frequency of Ms. L's need for assistance with locomotion was poor. However, at Ms. L's prior (2011) assessment, she received a toileting frequency of 6/7.⁶⁷ Ms. L's doctor testified at hearing that her condition has worsened in recent years, and there is no evidence in the record indicating that her condition has actually improved. Accordingly, the

⁶³ 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.

⁶⁴ 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).

⁶⁵ Ex. F9.

⁶⁶ Ex. E6.

⁶⁷ Ex. F9.

preponderance of the evidence indicates that Ms. L's CAT scores for toileting should remain the same as they were at the time of her prior assessment (score 2/2; frequency 6/7).

4. Personal Hygiene

For the ADL of personal hygiene, PCA time is allowed for washing and drying the face and hands, nail care, skin care, mouth and teeth care, brushing and combing the hair, shaving when done separately from bathing, and shampooing the hair when done separately from bathing.⁶⁸

Ms. Atanoa reported she was told by Ms. L that she can perform her personal hygiene tasks independently (scored 0/1). Ms. L's PCA testified that Ms. L requires limited assistance with all her ADLs, including personal hygiene. However, Dr. N testified that Ms. L can perform her own personal hygiene, even though she has arthritis and muscle weakness in her arms. The undersigned finds that Dr. N's testimony (which is based on a long-term relationship with Ms. L, and which is consistent with his patient's own statements), is more credible than the somewhat inspecific testimony of Ms. L's PCA. Accordingly, the preponderance of the evidence indicates that Ms. L is currently independent as to her personal hygiene tasks (CAT score 0/1, frequency 0/0).

5. Laundry

The PCA regulations define the IADL of laundry as the changing of a recipient's bed linens and the in-home or out-of-home laundering of a recipient's bed linens and clothing.⁶⁹ The Division's prior (2011) assessment found that, at that time, Ms. L was fully dependent with her laundry (CAT score 3/4).⁷⁰ The Division's current (2013) assessment found that Ms. L requires physical assistance with her laundry (CAT score 2/3).⁷¹ However, the two assessments indicate that in 2011 Ms. L had to go *outside her home* to do her laundry, while Ms. L *now* has laundry facilities *in her own home*.⁷²

Based on the evidence in the record, the issue of whether Ms. L requires assistance with her laundry, or is fully dependent as to her laundry, is a close question. On one hand, it could be expected that it is easier to do one's laundry inside the home, and that a person might well require less assistance to do laundry in the home instead of outside the home. On the other hand, it is undisputed that Ms. L has had numerous falls and requires assistance with transfers. Her doctor testified that Ms. L has arthritis and muscle weakness in her arms and cannot raise her arms above ninety degrees. It is hard to believe that someone who has trouble walking and standing, and must

⁶⁸ 7 AAC 125.030(b)(7).

⁶⁹ 7 AAC 125.030(c)(4).

⁷⁰ Ex. F26.

⁷¹ Ex. E26.

⁷² Exs. E26, F26.

sometimes crawl, is able to stand in front of a washing machine for the amount of time necessary to put clothes and detergent in a washing machine and take them out when done, let alone bend over and place the wet clothes into the clothes dryer. For these reasons, the preponderance of the evidence indicates that Ms. L is fully dependent with her in-home laundry (CAT score of 3/4; 30 minutes per week).⁷³

E. Has the Division Proven a Material Change in Ms. L'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.⁷⁴ When Ms. L's 2011 PCA assessment is compared with the evidence of her current condition, it is apparent that Ms. L's functional abilities have improved with regard to personal hygiene, and stayed basically the same with regard to dressing, toileting, and laundry, but that her functional abilities have deteriorated with regard to locomotion. Accordingly, 7 AAC 125.026's "change in condition" requirement is satisfied as to personal hygiene, but is not satisfied with regard to locomotion, dressing, toilet use, and laundry.

IV. Conclusion

Based on the evidence in the record, the Division's scoring as to the extent of Ms. L's need for assistance was correct with regard to dressing and personal hygiene, but Ms. L requires a greater level of assistance with locomotion, toilet use, and laundry. In addition, Ms. L qualifies for a greater frequency of service with locomotion and toilet use. Accordingly, the Division's decision is affirmed in part and reversed in part.

DATED this 22nd day of April, 2014.

Signed

Jay Durych

Administrative Law Judge

⁷³ See Ex. B34.

⁷⁴ 7 AAC 125.026(a), (d).

Non-Adoption Options

D. The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

The administrative law judge (ALJ) concluded that Ms. L demonstrated eligibility for assistance with locomotion at a frequency of ten times per day. However, in its Proposal for Action (PFA), the Division correctly noted that this conclusion is at odds with the Commissioner of Health and Social Services' recent decision in *In re F.V.*, OAH No. 13-1306-MDS (December 10, 2013). In that case, it was held that "when a recipient locomotes between locations in his or her home, and one of those locations is the toilet, commode, bedpan, or urinal, then that locomotion is exclusively covered within the ADL of toileting." The ALJ's calculation of ten instances of locomotion per day included six instances of locomotion per day for toileting. Pursuant to the decision in *In re F.V.*, those six instances of locomotion must be deleted, leaving a balance of four instances of locomotion per day, seven days per week. The ALJ's decision is affirmed in all other respects.

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 4th day of June, 2014.

By: Signed
Jared C. Kosin
Executive Director, Office of Rate Review
Department of Health and Social Services

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