

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

In the Matter of)
)
 T E)
_____)

OAH No. 14-0045-MDS
Agency No.

DECISION

I. Introduction

T E receives Personal Care Assistance (PCA) services that are paid for by Medicaid. The Division of Senior and Disabilities Services (division) reassessed his condition and terminated his services. Mr. E contested that decision, and requested a hearing.

A hearing was held on April 25, 2014. Mr. E was present, and was assisted with the hearing by his mother, S B-S; his sister, T B-M; and Consumer Direct’s Program Coordinator, Ryan Evans. While some changes in Mr. E’s PCA service time are appropriate, he should not have been terminated from the program.

II. Facts

Mr. E is 42 years old.¹ He has been diagnosed with autism, intellectual disabilities, diabetes, and high blood pressure.² Although not shown in the division’s records, Mr. E has also suffered from gout for three or four years.³ His gout is intermittent, but it reoccurs about twice each month, and can last from four to ten days. At its worst, it can leave Mr. E totally debilitated.⁴

Mr. E’s mother has started the process of having a legal guardian appointed for him, but that process is not yet complete.⁵ Although the division’s records indicate that Mr. E has granted power of attorney⁶ to another sibling, A B-M,⁷ Mr. Evans indicated on the record that the POA form used only authorized Mr. E’s agent to direct PCA services. In addition, given Mr. E’s cognitive impairments, he may not have the ability to create a valid

¹ Exhibit E1.
² Exhibit E3.
³ Testimony of Ms. B-S.
⁴ *Id.*
⁵ *Id.*
⁶ A power of attorney is a legal document granting someone authority to act as an agent for the grantor. Black’s Law Dictionary (9th ed. 2009). Some power of attorney documents grant broad powers over indefinite periods of time, while others are restricted in scope to specific dates or specific authorizations.
⁷ Exhibit E2.

power of attorney. Mr. E is probably not competent to protect his own interests during legal proceedings, such as the hearing in this case. However, his mother and his sister were both present to protect his rights and advocate for him. Mr. Evans also sought to protect Mr. E's rights. No one requested a continuance to allow for the appointment of a legal guardian. While the situation was not ideal, Mr. E received adequate assistance to protect his rights during the hearing.⁸

Mr. E has been receiving PCA services for many years.⁹ On July 9, 2013, Registered Nurse Peter Ndenderoh evaluated Mr. E using the division's Consumer Assessment Tool (CAT). This evaluation lasted approximately 30 minutes.¹⁰ Based on his findings, the division terminated Mr. E's PCA services.¹¹

III. Discussion

A. *The PCA Program*

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[.¹²]

The division uses the CAT to help it assess the level of assistance needed.¹³ The amount of time allotted for needed assistance is determined by the Personal Care Assistance Service Level Computation chart.¹⁴ 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 different levels of assistance with ADLs are defined by regulation and in the CAT.¹⁵ Supervision is defined as oversight, encouragement, or cueing three or more times a week, with physical assistance no more than two times a week.¹⁶ Limited Assistance is defined as requiring

⁸ The division may wish to seek advice from the Department of Law as to what it should do when a recipient has only granted a limited power of attorney or has not granted any power of attorney, but is also not capable of representing himself or herself at a hearing.

⁹ Testimony of Ms. B-S.

¹⁰ Exhibit 7, page 1; testimony of Ms. B-M

¹¹ Exhibit G. This corrected notice was mailed on December 30, 2013. The notice states that the start date for this change would be January 4, 2013. It would actually be January 9, 2014, which is ten days after the notice was mailed.

¹² 7 AAC 125.010(a).

¹³ 7 AAC 125.020(b).

¹⁴ 7 AAC 125.024(1).

¹⁵ The July 29, 2009 version of the CAT has been adopted by reference, 7 AAC160.900(d)(6), and therefore the definitions in the CAT have the same effect as a regulation.

¹⁶ Exhibit E6.

direct physical help or guidance from another individual three or more times a week, with weight-bearing support no more than two times a week.¹⁷ Extensive Assistance is defined as requiring direct physical help with weight-bearing support at least three times a week, or full assistance without any involvement from the recipient at least three times a week, but not all of the time.¹⁸ Full assistance means the recipient has to rely entirely on the caretaker to perform the activity.¹⁹

The division may change the number of hours of allotted PCA services if there has been a *material change* in the recipient's condition.²⁰ A *material change* means that the recipient's medical condition has changed, or his living conditions have changed.²¹ When the division wishes to reduce the amount of allotted time, the division has the burden of proving a change of condition justifying that reduction.²² When the recipient is seeking additional time for specific services, the recipient has the burden of showing the material change that would justify the need for the increase.²³ Because the division notified Mr. E of its decision on December 30, 2013, his condition on that date is used when determining the amount of services he is eligible to receive.²⁴

B. Transfers

Mr. E had previously been allowed limited assistance for transfers.²⁵ Transferring is the act of moving between surfaces, such as getting out of or into a bed, or getting up from a chair to a standing position.²⁶ The division removed all of this time because Mr. E is "ambulatory, able to move & reposition self while in bed."²⁷ Being able to walk and able to turn in bed does not necessarily mean that Mr. E does not need assistance to stand up from a chair or get out of bed. In addition, Mr. Ndenderoh was told during the assessment that Mr.

¹⁷ 7 AAC 125.020(a)(1); Exhibit E6.

¹⁸ 7 AAC 125.020(a)(2); Exhibit E6.

¹⁹ 7 AAC 125.020(a)(3); Exhibit E6. Bathing and the IADLs have their own assistance level definitions.

²⁰ 7 AAC 125.026(a).

²¹ 7 AAC 125.026(d). A material change also exists if the services were based on a prescription that has since expired, there was a time-limited amendment to the plan of care, or the services are no longer authorized by regulation. 7 AAC 125.026(d)(3).

²² 7 AAC 49.135.

²³ *Id.*

²⁴ See *In re T C*, OAH Case No. 13-0204-MDS (Commissioner of Health and Social Services 2013), page 7 (notice sent to recipient is the decision under review). OAH cases are available online at <http://aws.state.ak.us/officeofadminhearings/categoryList.aspx>.

²⁵ The amount of time previously allowed for each activity is not disclosed in the record.

²⁶ See Exhibit E6.

²⁷ Exhibit G2.

E had a severe gout attack the week before.²⁸ The CAT is based on the recipient's condition over a seven-day period, so the division's assessment should have included Mr. E's needs on days when his gout caused greater functional limitations.

It was the division's burden to prove a material change in Mr. E's condition before reducing his PCA services for transfers. The reason given for this reduction is not directly related to the ADL of transferring, and is inconsistent with the testimony at the hearing that he needed assistance standing up when his gout limited him. The division did not meet its burden of proof, and time previously allowed for transfers should be restored.

C. Locomotion

The ADL of locomotion refers to the manner in which a person moves within his or her own room or other areas on the same floor.²⁹ Mr. E was observed walking at the hearing and by Mr. Ndenderoh at the assessment.³⁰ Ms. B-S submitted selected PCA time sheets for days when Mr. E had gout. These time sheets do not reflect any assistance given for locomotion. In addition, the reduction in time for locomotion was not disputed in the letter outlining the areas of disagreement submitted prior to the hearing.³¹ The division has met its burden of proof for reducing PCA services for locomotion.

D. Locomotion to Medical Appointments

Time for assisting with locomoting to medical appointments was also reduced.³² In her letter, Ms. B-M writes

T requires directional assistance, sometimes guidance, when taking him to his medical appointments. Due to his diagnosis, he requires conferring with medical staff, as he is unable to retain any information or directions from his doctors.^[33]

This description is consistent with Mr. Ndenderoh's notes in the CAT. Mr. E only needs supervision to access medical appointments, and thus is not entitled to PCA time for this activity.

²⁸ Exhibit 1, page 2; testimony of Ms. B-M. There are many discrepancies between what the notes in the CAT indicate was said during the evaluation and what others present during that evaluation testified was communicated to the evaluator. Mr. Ndenderoh was not available to testify at the hearing, and the evaluation was not recorded. The only evidence of what was actually said during the evaluation comes from Mr. Ndenderoh's notes and the sworn testimony of the witnesses for Mr. E. The witnesses were credible, and because the evaluation was conducted very quickly, the witness testimony is generally accepted as more accurate.

²⁹ See Exhibit E7.

³⁰ Exhibit E7.

³¹ Exhibit 1.

³² Exhibit G2.

³³ Exhibit 1, page 2.

E. Dressing

Mr. E was previously provided with limited assistance with dressing. During the evaluation, Mr. E's family reported a greater need for assistance with this task.³⁴ Instead, time was reduced based on a finding that he only needed supervision. Mr. E needs help every day with dressing and undressing. He is unable to put on his underwear, tie his shoes, button clothing, or otherwise complete the task of dressing without assistance.³⁵ To meet the definition for extensive assistance, Mr. E would have to require weight-bearing support at least three times each week. Mr. E did not meet his burden of proving a material change for an *increase* from limited assistance to extensive assistance. At the same time, however, the division did not meet its burden of proving less need in this area. No change should have been made in the PCA time allotted for dressing.

F. Eating

The division removed time for assistance with eating because it concluded that Mr. E no longer needed supervision while eating. This finding was not disputed.³⁶ Accordingly, the decision to remove PCA time for eating is upheld.

G. Toilet Use

Toilet use includes transfers on and off the toilet, cleaning oneself, and adjusting clothing. Mr. E had previously been allowed extensive assistance for this activity. The division concluded that Mr. E only needed supervision.³⁷ That finding is incorrect. First, on days when his gout is bad, Mr. E needs help with transfers, and this would include transferring on and off the toilet. In addition, he needs assistance with his clothing and cleaning himself after using the toilet.³⁸ Mr. E needed extensive assistance with this ADL in 2011,³⁹ and the division has not met its burden of proving a material change in condition. Therefore, time for this ADL should not have been reduced.

³⁴ Exhibit 1, page 3.

³⁵ Testimony of Ms. B-M; Exhibit 1, page 3.

³⁶ See Exhibit 1.

³⁷ Exhibit G3.

³⁸ Exhibit 1, page 3; testimony of Ms. B-S.

³⁹ Exhibit H9.

H. Personal Hygiene

The division concluded that Mr. E no longer needed limited assistance with personal hygiene tasks such as combing hair, brushing teeth, or shaving.⁴⁰ Ms. B-S testified that she trims his beard and brushes his teeth. Mr. E also needs help combing his hair.⁴¹ While he may be physically able to perform some of these tasks, he is not cognitively able to do these independently, and does not respond well to cueing for these tasks. The division has not met its burden of proving a material change of medical condition to support a reduction of PCA services for personal hygiene.

I. Bathing

The division concluded that Mr. E no longer needed extensive assistance with bathing. Based on the testimony at the hearing, he needs assistance into and out of the bathtub, and needs help washing his body.⁴² The primary restriction on Mr. E's ability to wash himself is based on his cognitive impairments. The division has not met its burden of proving that this medical condition has materially changed. In addition, Mr. E's gout further restricts his ability with this ADL. The division has not met its burden of proving that his ability to bathe himself has materially changed. PCA time for the ADL of bathing should not have been reduced.

J. IADLs of Light Meal Preparation, Main Meal Preparation, Shopping, Light Housework, and Laundry

In 2011, Mr. E was assessed as being fully dependent on others for each of these tasks.⁴³ In 2013, he was assessed as independent with difficulty in each of these with supervision.⁴⁴ Neither the termination notice nor the CAT contains an explanation for this change, and there was no evidence that Mr. E's cognitive or physical condition materially improved between these years.

On the other hand, there was evidence of Mr. E's employment at the airport. When he is not suffering from gout or other illness, Mr. E works one day each week at the airport in a supported employment position. He empties trash and sweeps with supervision. A self-performance score of 2 is appropriate when the recipient can perform an IADL with help.

⁴⁰ Exhibit E10; Exhibit G3.

⁴¹ Exhibit 1, page 4.

⁴² Exhibit 1, page 3; testimony of Ms. B-S.

⁴³ Exhibit H26.

⁴⁴ Exhibit E26.

Help is defined as including “supervision, reminders, and/or physical ‘hands on’ help.”⁴⁵ Mr. E should have received a score of 2/2 for the IADL of routine housework, rather than a score of 1/2.

Based on the testimony at the hearing, Mr. E remains dependent on others for the remaining IADLs. The division has not met its burden of proving a material change in condition to reduce time for these tasks.

K. Medication⁴⁶

Two reasons were stated for reducing his time for this PCA service. First, time was reduced because the personal hygiene score is used in computing time for medication, and Mr. E’s personal hygiene score had changed.⁴⁷ As discussed above, that score should not have been changed, so this reason is no longer applicable. Second, the division stated that Mr. E reported a less frequent need for assistance.⁴⁸ His prior CAT showed that he received medication twice a day, seven days a week.⁴⁹ His most recent CAT shows the same frequency.⁵⁰ The division has not met its burden of proof for reducing time for this task.

L. Vital Signs, Glucose Levels

The only reason stated for reducing this time was the change in Mr. E’s personal hygiene score, which is used to determine whether to allow PCA services for this task.⁵¹ As stated above, the personal hygiene score should not have been changed. Accordingly, the division has not met its burden of proof to reduce PCA services for this task.

M. Documentation

The only reason stated for reducing this task was the change in Mr. E’s personal hygiene score, which is used to determine whether to allow PCA services for this task.⁵² As stated above, the personal hygiene score should not have been changed. Accordingly, the division has not met its burden of proof to reduce PCA services for this task.

⁴⁵ *Id.*

⁴⁶ Mr. E’s PCA services were completely terminated. Yet, under medication, the division informed him that he remained eligible for the PCA service of medication reminders. Exhibit G4.

⁴⁷ Exhibit G4.

⁴⁸ Exhibit G4.

⁴⁹ Exhibit H12; Exhibit H20.

⁵⁰ Exhibit E20.

⁵¹ Exhibit G4.

⁵² Exhibit G4.

N. Escort

The division did not explain its reason for eliminating escort time, other than to say Mr. E did not need an escort.⁵³ PCA services are allowed when needed for “travelling with the recipient to and from a routine medical or dental appointment outside the recipient’s home and [for] conferring with medical or dental staff during the appointment.”⁵⁴ Based on the testimony at the hearing, Mr. E is not able to manage his own medical appointments. He could not travel to an appointment without someone to escort him, and he is not capable of conferring with and remembering the instructions from the medical or dental staff. The division did not meet its burden of proving that Mr. E no longer needs escort services.

At the hearing, the division also asserted that PCA time would not be allowed because Mr. E has signed a power of attorney document.⁵⁵ Nothing in the regulations suggests that giving another person authority to act on one’s behalf requires that agent to attend medical or dental appointments with the grantor. While a recipient remains capable of making his own decisions, the recipient can decide who, if anyone, he would like to accompany him to medical appointments. If the recipient later becomes incompetent, and if the power of attorney is a durable power, then the agent has the authority to make that decision for the recipient. However, the agent is not required to be the one who actually escorts the recipient.⁵⁶

In addition, as noted above, it is unlikely that any power of attorney signed by Mr. E is legally valid. He does not appear to have the cognitive ability necessary to authorize someone to act on his behalf.

O. Activities Requiring a Prescription

Mr. E’s physician has ordered range of motion exercises twice a week with a duration of 30 minutes each time, and foot care once a week, with a duration of 10

⁵³ Exhibit G4.

⁵⁴ 7 AAC 125.030(d)(9). It was noted by the ALJ during the hearing that different nurse assessors and different nurse reviewers employed by the division have provided inconsistent testimony as to what is allowed for escort services. The explanations have ranged from only authorizing assistance walking from the car to the doctor’s waiting room, to allowing the full amount of time it takes to leave the home, wait for the appointment, consult with the doctor, and return home, with other interpretations in between.

⁵⁵ In terminating or denying benefits, the division may not rely on reasons not asserted in its notice to the recipient. 42 C.F.R. 431.210; 7 AAC 49.070; *Allen v. State*, 203 P.3d 1155, 1167 – 1168 (Alaska 2009); *Baker v. State*, 191 P.3d 1005, 1009 (Alaska 2008).

⁵⁶ *In re B A*, OAH No. 13-1782-MDS (Commissioner of Health and Social Services 2014), page 5; *In re K D*, OAH No. 13-1305-MDS (Commissioner of Health and Social Services 2014), page 13.

minutes.⁵⁷ Registered Nurse Teresa Burnett denied time for these activities based on her conclusion that Mr. E was able to perform these tasks without physical assistance.⁵⁸ She testified, however, that she did not know what exercise had been prescribed.

It is difficult, if not impossible, to determine whether someone can perform a task on their own without knowing what the task is. In this case, Ms. B-S testified that she needs to hold on to her son's foot, and rotate his ankle for him, twice a day. He is not able to do this on his own. Mr. E's physician has also determined that Mr. E is unable to do this exercise without physical assistance.⁵⁹ The opinion of his treating physician, who has actually examined Mr. E, is given greater weight than a nurse who has not examined Mr. E and does not know what exercise has been prescribed.

Based on the testimony at the hearing, Mr. E is also not able to perform his own foot care. He has diabetes, and it is important that his nails be trimmed and his feet be cared for. The division argued at the hearing that a person with diabetes is not eligible for foot care. That is incorrect. Nail care for a diabetic may not be included as part of the personal hygiene task.⁶⁰ It is allowable separately under 7 AAC 125.030(d)(5) when prescribed by a medical professional. The division did not meet its burden of proving a material improvement, and time for these tasks should be allowed.

IV. Conclusion

Mr. E has severe functional and cognitive impairments that limit his ability to perform Activities of Daily Living and Instrumental Activities of Daily Living without physical assistance. The division erred when it terminated his PCA services. His PCA service level should be recomputed in accordance with the discussion above. In doing so, the division must incorporate regulatory changes that have occurred since Mr. E's 2011 assessment. Regulatory changes are considered a material change in condition allowing an increase or decrease in PCA services.⁶¹ Where the division's determination is modified, the time allowed for each activity should be the frequency previously approved multiplied by

⁵⁷ Exhibit F3; Exhibit 2, page 4.

⁵⁸ Exhibit G4 and G5.

⁵⁹ Exhibit F3.

⁶⁰ 7 AAC 125.030(b)(7)(B).

⁶¹ 7 AAC 125.026(b)(3)(C).

the number of minutes for that activity and CAT score listed in the Personal Care Assistance Service Level Computation Chart.

Dated this 1st day of May, 2014.

Signed _____
Jeffrey A. Friedman
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 9th day of June, 2014.

By: *Signed* _____
Name: Jared C. Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS

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