

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

In the Matter of:)
)
 N H) OAH No. 14-0053-MDS
) Agency No.

DECISION

I. Introduction

N H receives personal care assistant (PCA) services through the Division of Senior and Disability Services under 7 AAC 125.010-199.¹ The Division reassessed Ms. H’s functional abilities and determined that she was no longer eligible for PCA services. Ms. H filed an appeal.

The assigned administrative law judge conducted a telephonic hearing on March 13, 2014. Ms. H participated. Anita Halterman represented the Division. The Division conceded that Ms. H’s physical condition has not improved, but asserts that she is ineligible for PCA assistance.

The preponderance of the evidence supports the Division’s determination that Ms. H does not require physical assistance to perform the instrumental activities of daily living (IADL). Accordingly, the Division’s decision to terminate Ms. H’s services is sustained.

II. Facts

N H is 48 years old.² She lives by herself in an apartment in Alaska.³ Ms. H’s primary diagnosis is bipolar disorder (depressed type), with secondary diagnoses including kidney disease, hypertension, and thyrotoxicosis.⁴

Ms. H was first diagnosed with bipolar disorder in 1990, and she has been hospitalized several times for that condition.⁵ She moved to Alaska in 2005. Ms. H receives Social Security disability benefits,⁶ but with proper medication, she does not exhibit symptoms of her bipolar condition.⁷

¹ See AS 47.07.045.

² Ex. E, p. 1.

³ Ex. E, p. 1.

⁴ Ex. E, p.3. Thyrotoxicosis is “the condition resulting from...excessive quantities of the thyroid hormones...” Dorland’s Illustrated Medical Dictionary, p. 1721 (27th ed. 1988). See Psychiatric Progress Report, 9/20/2013 (“Bipolar 1 disorder, depressed type”)

⁵ Psychiatric Evaluation 1/5/2012; Behavioral Health Assessment 12/16/2011, pp. 2-3.

⁶ Behavioral Health Evaluation, pp. 4, 8.

⁷ See, e.g., Psychiatric Progress Report, 2/3/2014, pp. 1-2; Psychiatric Progress Report 9/10/2013

Ms. H first began receiving PCA services in 2011,⁸ when after an assessment by Peter Ndenderoh she was authorized to receive a total of about seven hours per week of PCA services for assistance with five IADLs: light and main meal preparation, shopping, light housework, and laundry.⁹ Mr. Ndenderoh had assessed Ms. H as requiring set up assistance for light meal preparation, and as requiring physical assistance for the other IADLs.¹⁰

Ms. H was reassessed by Mr. Ndenderoh in 2013.¹¹ Ms. H's physical condition in 2013 was substantially the same as it was in 2011.¹² However, Mr. Ndenderoh assessed her as requiring setup help only for her IADLs.¹³

III. Discussion

The Department of Health and Social Services is authorized to provide eligible persons with personal care services in the recipient's home.¹⁴ The Division provides compensation for personal care services in the form of physical assistance, based on an assessment of the recipient's ability to perform specified activities of daily living (ADL),¹⁵ instrumental activities of daily living (IADL),¹⁶ and certain other functions.¹⁷ The assessment is conducted using the Consumer Assessment Tool (CAT),¹⁸ a form created by the Department of Health and Social Services to evaluate an individual's ability to care for herself.¹⁹

One section of the CAT covers a person's involvement in the performance of five IADLs specified by regulation (light meal preparation,²⁰ main meal preparation,²¹ light housekeeping,²²

⁸ See 1/31/2011 Medical Record, p. 1 ("She has never had a PCA before but feels like she needs help around the house.").

⁹ Ex. D, pp. 2, 4; Ex. F. According to Ex. D, the time allowed for those activities totaled 381 minutes per week, and she was authorized for an additional two minutes per week for escort services. The total number of minutes per week, 383, is equal to 6.383 hours per week. At the hearing, Ms. Halterman stated that Ms. H had been receiving seven hours per week of PCA services.

¹⁰ Ex. F, p. 26.

¹¹ Ex. E.

¹² The division conceded that Ms. H's physical condition had not changed. The record supports that concession.

¹³ Ex. E, p. 26.

¹⁴ AS 47.07.030(b).

¹⁵ 7 AAC 125.030(b)(1)-(8).

¹⁶ 7 AAC 125.030(c)(1)-(5).

¹⁷ 7 AAC 125.030(d)(1)-(9), (e).

¹⁸ 7 AAC 125.020(b); 7 AAC 160.900(d)(6).

¹⁹ See generally, <http://dhss.alaska.gov/dsds/Documents/docs/cat-pcatOnlineFlyer.pdf> (accessed June 19, 2013).

²⁰ Ex. E, p. 26, Ex. F, p. 26; 7 AAC 125.030(c)(1).

²¹ Ex. E, p. 26, Ex. F, p. 26; 7 AAC 125.030(c)(2).

²² Ex. E, p. 26, Ex. F, p. 26; 7 AAC 125.030(c)(3). The CAT provides a separate sections for "light housework such as dishes, dusting..., making own bed" and for "routine housework such as vacuuming, cleaning floors, trash removal, [and] cleaning bathroom." All of the activities described in these two separate sections on the CAT are expressly included in the regulatory definition of light housekeeping. See 7 AAC 125.030(c)(3)(A)

laundrying,²³ and shopping²⁴) as well as with two other activities (telephone use and managing finances).²⁵ Individuals are given two scores reflecting their involvement in these activities, one for their ability to perform the activity (self-performance), and the other for the degree of assistance they require (support). A score of two zeros indicates the person performs the activity independently (self-performance) with no assistance (support). Increasing inability to perform and need for assistance result in progressively higher scores. For self-performance, a score of one indicates the person was independent with difficulty, two indicates the person was provided assistance, and three indicates the person was dependent.²⁶ For support, a score of one indicates assistance was provided in the form of supervision or cueing, two indicates set-up assistance, three indicates physical assistance, and four indicates dependence.²⁷ A person is eligible for PCA assistance if, for any one of the IADLs specified by regulation, she receives a score of one, two or three for self-performance (*i.e.*, the person does not perform the activity independently), and a score of three or four for support (*i.e.*, the person is provided some degree of physical assistance).²⁸

The Division bears the burden of proof with respect to termination of eligibility. Thus, it needed to prove, by a preponderance of the evidence, that Ms. H performs the all of the specified IADLs without any physical assistance. Neither the assessor (Mr. Ndenderoh) nor Ms. H's personal care assistant (O S) testified at the hearing, and Mr. Ndenderoh made no notes on either the 2011 or the 2013 the CAT to explain his IADL scores.

The Division argued that because Ms. H does not have a physical condition that limits her ability to perform the instrumental activities of daily living, she is ineligible for PCA services. But this argument is invalid: a mental disorder may, absent any limiting physical condition, prevent a person from performing the instrumental activities of daily living without physical assistance. An example is the recent case In Re B.A., involving a person with a mental disorder

(“vacuuming, and floor-cleaning”), (B) “cleaning...dishes”), (C) (“cleaning of any bathroom”), (D) (“making the recipient’s bed”), (E) (“trash removal”).

²³ Ex. E, p. 26, Ex. F, p. 26; 7 AAC 125.030(c)(4).

²⁴ Ex. E, p. 26, Ex. F, p. 26; 7 AAC 125.030(c)(5).

²⁵ Ex. E, p. 26; Ex. F, p. 26.

²⁶ Ex. E, p. 26; Ex. F, p. 26.

²⁷ 7 AAC 125.020(a)(1)-(3). A score of one indicates supervision, cueing or set up; five indicates verbal assistance is provided; a score of eight indicates the activity did not occur within the past seven days.

²⁸ Ex. E, p. 26, Ex. F, p. 26. The eligibility requirement stated in the CAT was the same in 2011 as in 2013. However, the applicable regulation in effect in 2011 did not expressly limit eligibility to persons requiring physical assistance to perform an IADL. See In Re C.L., at 4, notes 20, 21, OAH No. 13-1323-MDS (Commissioner of Health and Social Services 2013).

(autism) but no identified limiting physical condition.²⁹ The Division scored that individual at three for support (some physical assistance) for the IADL's of light meal preparation and laundry. By contrast, in another recent case, In Re C. L.,³⁰ also involving a person with a mental disorder (depression) but no identified limiting physical condition, the Division scored that individual at one for support (supervision and cueing) for all IADLs. As these cases demonstrate, whether a person with a mental disorder but no limiting physical condition can perform all the IADLs without any physical assistance is a factual question that must be determined on a case by case basis.

In this case, in the absence of any testimony from the assessor or the personal care assistant, at the hearing the Division relied entirely on Ms. H's testimony to establish that she does not require physical assistance.³¹ Ms. H testified that she does not go shopping because there are "too many people in the store". She testified that before she began receiving PCA services in 2011, she relied on her mother to perform IADLs for her. She testified that she does not prepare her meals because she does not know how to prepare a balanced meal, and without assistance she would eat fast food. She added that she needs assistance to make sure the chores get done, and that she requires physical assistance in folding laundry and in making her bed.

Following the hearing, Ms. H submitted medical records. Those records indicate that her bipolar condition is associated with depression and anxiety.³² By definition, a bipolar condition involves mood changes, which indicates a person may have greater or lesser functional ability, depending on their status. Ms. H reported she has had about 10 manic attacks, most recently in 2010 or 2011, and about 20 "panic" attacks.³³ She has reported significant depression during the winter.³⁴

At Ms. H's most recent mental health evaluation, on March 17, 2014, she reported that on most days her poor mental health "prevented her from doing her usual activities" and that she was spending "(8) hours through the week being productive[.]" (as compared with prior reports

²⁹ In Re B.A., OAH No. 13-1782-MDS (Commissioner of Health and Social Services 2104).

³⁰ In Re C.L., OAH No. 13-1323-MDS (Commissioner of Health and Social Services 2013).

³¹ The Division speculated that the scores Mr. Ndenderoh awarded when he assessed Ms. H in 2011 were erroneous, due to his inexperience or a misunderstanding of the applicable regulations and policy. Whether the 2011 scores were correct or not, the issue in this case is Ms. H's current status and eligibility.

³² See, e.g., 3/17/2014 Treatment Plan, p. 3 (1/3/2012); Psychiatric Progress Report, 9/20/2013 ("Bipolar 1 disorder, depressed type"); Psychiatric Evaluation, 1/5/2012, p. 3 ("bipolar I disorder, most recent episode depressed, severe without psychiatric symptoms").

³³ Psychiatric Evaluation, 1/5/2012, p. 1.

³⁴ See e.g., Psychiatric Progress Report, 8/13/2013.

of 30-40 hours per week).³⁵ However, her report was unconvincing and the clinician noted she “believes client is underestimating [productive time] because the client does spend time going to the food banks, attending appts, and interacting with friends.”³⁶ The substance of the report is to the effect that with medication and outpatient care, Ms. H “can live independently.”³⁷ However, one of the services recommended for Ms. H’s outpatient treatment was “Comprehensive Community Support Services”, which was described as “self-care and life skill instruction, skill practice, and skill monitoring in order to develop or improve specific self-care skills...and independent living skills.”³⁸ This appears to be a recommendation for assistance in developing skills necessary to perform IADLs, and, consistent with Ms. H’s testimony, it appears that she has not yet developed those skills to the point that she can perform a number of IADLs independently.

But that Ms. H requires assistance does not necessarily mean that she requires physical assistance. In light of the record as a whole, Ms. H’s testimony at the hearing supports a score of one or two for her IADLs, rather than a score of three. For shopping, Ms. H testified that she does not shop because there are too many people. However, her history and medical records indicate that Ms. H is able to function in the community, and thus indicate that the assistance she requires for shopping is in the form of a companion to provide reassurance and support in the presence of strangers, rather than to fully perform the activity. Similarly, with respect to cooking, Ms. H’s testimony indicates that she needs assistance in the form of mentoring and cooking instruction, rather than requiring another person to fully perform the activity. Lastly, with respect to laundry and bed making, despite Ms. H’s testimony, her history and medical records do not support her assertion that she needs physical assistance to perform those activities, even though she may require supervision, guidance and cueing.

IV. Conclusion

The preponderance of the evidence in the record is that Ms. H does not require physical assistance in order to perform IADLs. The Division’s decision is therefore sustained.

DATED April 16, 2014.

Signed

Andrew M. Hemenway
Administrative Law Judge

³⁵ 11/5/2013 Treatment Plan, p. 2 (40 hours this report, 30 hours prior report).

³⁶ 3/17/2014 Treatment Plan, p. 2 (3/10/2014).

³⁷ 3/17/2014 Treatment Plan, p. 1 (3/10/2014).

³⁸ 3/17/2014 Treatment Plan, p. 4 (1/3/2012).

Adoption

The undersigned by delegation from the Commissioner of Health and Social Services, adopts this revised decision as final under the authority of AS 44.64.060(e)(1).

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 5th day of May, 2014.

By: Signed
Signature
Andrew M. Hemenway
Name
Administrative Law Judge
Title

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