

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

In the Matter of:)
)
 J X) OAH No. 14-0354-MDS
) Agency No.
_____)

DECISION

I. Introduction

J X 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. X's functional abilities and determined that she was eligible for 11.5 hours of PCA services weekly rather than the 20.5 hours she had previously received. Ms. X filed an appeal.

The assigned administrative law judge conducted a telephonic hearing on March 26, 2014. Ms. X testified and represented herself. Angela Ybarra represented the Division. Angela Hanley, R.N., who conducted the assessment, and Olga Ipatova, who reviewed it, testified on behalf of the Division.

The preponderance of the evidence is that Ms. X requires extensive assistance for transfers and bathing, and limited assistance for locomotion and personal hygiene. However, the preponderance of the evidence supports the remainder of the Division's assessment.

II. Facts

A. Background Information

J X is 45 years old.² She is 5' 8" and weighs 280 pounds.³ Since 2011 she has lived by herself in a ramp-accessible single level manufactured home in No Name.⁴ The home is connected to her parents' home through the garage. It includes an elevated toilet, a walk-in shower with a bench, wider doorways, and lever handles, and has a wheelchair lift in the garage with which Ms. X can independently transfer into her motor vehicle.⁵

Ms. X was diagnosed with rheumatoid arthritis when she was 15.⁶ Rheumatoid arthritis is a progressive disease, characterized by fluctuations in levels of pain and debility and

¹ See AS 47.07.045.
² Ex. E, p. 1.
³ Ex. G.
⁴ Ex. H.
⁵ Ex. 2, p. 1; Ex. E, p. 27.
⁶ Ex. I, p. 7; March 25 letter, p. 1.

exacerbated by damp and cold conditions.⁷ Ms. X also has recent diagnoses of obesity, esophageal reflux, and ankylospndylitis.⁸

Prior to 2009, Ms. X received about 13 hours per week of PCA services.⁹ In 2009 she was reassessed by Jamie Panzero, R.N.¹⁰ At that time, Ms. X was living by herself in an apartment in No Name that was not modified to accommodate a wheelchair.¹¹ R.N. Panzero assessed Ms. X as needing extensive assistance with transfers, dressing, personal hygiene and bathing, limited assistance with locomotion, and as dependent for shopping, housework, main meal preparation and laundry.¹² Following R.N. Panzero's reassessment, Ms. X was authorized 20.5 hours per week of PCA services.¹³

Ms. X was reassessed by Susan Findley, R.N. in 2010,¹⁴ by Marianne Sullivan in 2011 (after Ms. X had moved into her current residence, which has been modified to accommodate a wheelchair),¹⁵ and again by R.N. Findley in 2012.¹⁶ In 2010, R.N. Findley assessed Ms. X as needing only limited assistance with all the activities of daily living (ADL) that R.N. Panzero had assessed as requiring extensive assistance except for personal hygiene, which R.N. Findley assessed as independent.¹⁷ R.N. Findley also assessed Ms. X as not dependent for any instrumental activities of daily living (IADL).¹⁸ The 2011 and 2012 assessments were the same as the 2010 assessment, except for bathing (extensive assistance) in 2011, and dressing and locomotion (independent) in 2012.¹⁹ However, due to pending litigation and the proposed revision of the applicable regulations governing the program, the Division suspended any reductions in the number of authorized hours of PCA services from 2010-2012.²⁰ Therefore, Ms.

⁷ J. X Testimony. See Ex. G, p. 6 ("remissions and exacerbations characterize inflammatory nature of both dx [rheumatoid arthritis and ankylospndylitis.]; Ex. 2, pp. 1-2 ("Her condition is greatly affected by barometric changes; the frequent changes in weather; and also time of day, i.e., morning stiffness and increased afternoon pain, following range of motion (ROM) exercises.").

⁸ Ex. 3, pp. 3, 4; Ex. E, p. 3 (obesity, esophageal reflux); Ex. I, p. 3 ("ankylosing spondylitis dx 2001"); Ex. G, p. 3 (ankylospndylitis, 4/22/2008).

⁹ Ex. F, p. 1.

¹⁰ Ex. F.

¹¹ See Ex. F, p. 1; Ex. G, p. 1.

¹² See Ex. D, p. 9.

¹³ Ex. D, p. 1. The record does not include any documentation showing how this total was calculated.

¹⁴ Ex. G.

¹⁵ Ex. H.

¹⁶ Ex. I.

¹⁷ Ex. G, p. 12.

¹⁸ Ex. G, p. 26.

¹⁹ Ex. H, pp. 11, 12. In addition, Ms. Sullivan assessed Ms. X as requiring limited assistance with toileting, to conform with her assessed need for assistance with transfers and dressing. See Ex. H, pp. 9, 12.

²⁰ O. Ipatova Testimony. See In Re E.C., OAH No. 13-0438-MDS, at 2 (Commissioner of Health and Social Services 2013). See generally Baker v. State, Department of Health and Social Services, 191 P.3d 1005 (Alaska

X's service plan was not amended following the 2010-2012 reassessments. New regulations went into effect on January 26, 2012.²¹

Ms. X was reassessed by Angela Hanley, R.N., on September 11, 2013.²² R.N. Hanley used the Consumer Assessment Tool (CAT) to record the results of her assessment. Her assessment was the same as the 2012 assessment, except for dressing, which R.N. Hanley assessed as requiring limited assistance (independent in 2012). Using the Personal Care Assistance Service Level Computation chart (service level chart) in conjunction with the CAT, the Division calculated Ms. X's need for PCA services as 11.50 hours weekly.²³

B. Daily Routine

Ms. X is not ambulatory. She moves about in a manual wheelchair, and she spends much of the day in her lift recliner chair.²⁴ She cannot maintain her balance in a standing position unless she has a hand hold.²⁵ Her knees are fused in extension²⁶ and the range of motion in her ankles is limited by at least 80%.²⁷

Ms. X has multi-joint deformities that significantly impair her mobility.²⁸ She has a limited range of motion in her left shoulder.²⁹ She is unable to touch her hands over her head or behind her back and she cannot place her hands across her chest and stand up.³⁰ Her left elbow joint is contracted, with flexion limited from 5 to 30 degrees; her right elbow is within functional limits.³¹ Her left wrist range of motion is limited by 50%, and her right by 80%.³² Ms. X can make a fist, but her hand strength is weak.³³ Her fingers are deformed, with an extension contracture of her left second digit.³⁴

2008). The Baker litigation was concluded by a settlement agreement on February 27, 2012. Baker v. State, Department of Health and Social Services, Superior Court No. 3AN-06-10871CI (copy on file with the Office of Administrative Hearings).

²¹ See 7 AAC 125.010-.199.

²² Ex. E.

²³ Ex. D, pp. 1, 6, 9. See 7 AAC 125.024(a)(1); 7 AAC 160.900(d)(29).

²⁴ Ex. 2, p. 2.

²⁵ See Ex. 3, p. 33. ("The patient is unable to maintain her standing balance independently and requires surrounding furniture or her w/c [wheelchair] to stay upright.").

²⁶ Ex. 3, p. 34.

²⁷ Ex. 3, p. 33.

²⁸ Ex. 3, p. 34.

²⁹ See Ex. E, p. 4 ("Limited UE ROM due to RA"); Ex. 3, p. 34 ("30 degrees of left shoulder active elevation and 60 degrees passively...Right should AROM [active range of motion] is WFL [within functional limits] with normal strength.").

³⁰ Ex. E, p. 4.

³¹ Ex. 3, p. 33.

³² Ex. 3, p. 34.

³³ Ex. 3, p. 34.

³⁴ Ex. 3, p. 34.

C. Activities of Daily Living

1. *Transfers*

Ms. X is able to independently pivot transfer between her bed and her wheelchair and between her wheelchair and her lift recliner chair, except when limited by pain.³⁵ When limited by pain, she requires a one arm assist.³⁶ Because her pain is acute in the morning and in damp and cold conditions, her pain threshold results in a need for this assistance at least three days per week. Ms. X transfers, outside of the bathroom and apart from dressing and meals, at least four times daily (in the morning from her bed to wheelchair; during the day on and off her recliner; at night from her wheelchair into bed).

2. *Dressing*

Ms. X generally wears dresses to maximize her independence in donning and removing her street clothing.³⁷ However, she requires assistance to don and remove pants, which she sometimes wears,³⁸ and she is unable to fasten buttons or zippers, or take her shoes and socks on or off.³⁹

3. *Bathing*

Ms. X needs weight bearing assistance with transfers in the shower, for safety reasons.⁴⁰ She is able to cleanse her body,⁴¹ but she is unable to shampoo independently, and her personal care assistant shampoos her hair when she showers.⁴²

4. *Personal Hygiene*

Ms. X is able to independently brush her teeth and brush her hair, without assistance.⁴³ She cannot trim her toenails independently, and her personal care assistant trims her toenails for her.⁴⁴

³⁵ See, e.g., Ex. E, p. 6 (“Transfer assistance needed at times due to severe pain related to RA. Pivot transfer not observed today during assessment due to client’s pain in knees.”) (2013).

³⁶ See Ex. I, p. 6 (“Occ one arm assist if having back pain...few times/W.”) (2012).

³⁷ Ex. I, p. 8 (“wears easy to don/doff clothing...does not get any assistance to dress”) (2012); Ex. G, p. 8 (2010).

³⁸ Ex. H, p. 8 (2011).

³⁹ J. X Testimony; Ex. E, p. 8 (2013). See also March 25 letter, p. 1.

⁴⁰ See Ex. E, p. 11 (“gets help getting in and out of the shower”) (2013); Ex. 2, p. 2 (“I...assist...for the duration of her daily shower, due to her stiffness, as well as, dizziness and balance issues from the arthritis in her neck.. I also perform a transfer both in and out of the shower.”); March 25 letter, p. 2 (“dependent on someone being involved daily, due to her dizziness, balance issues, and physical limitations.”). See also Ex. I, p. 11 (“only needs assistance in/out of shower”) (2012); (Ex. H, p. 11 (“assistance in/out of shower”) (2011).

⁴¹ Ex. E, p. 11 (“States she is able to clean herself.”) (2013); Ex. I, p. 11 (“Ct and her mother report J can wash herself.”) (2012). But see Ex. H, p. 11 (“assistance to reach areas she cannot reach, shampooing hair.”) (2011). In 2009, when she did not have an accessible shower, Ms. X relied on her personal care assistant to wash her back, legs and feet. See Ex. F, p. 5.

⁴² J. X Testimony. See also, e.g., March 19 letter, p. 2.

5. *Locomotion*

Ms. X operates her manual wheelchair backwards by pushing with her feet, although she can manually turn one wheel with her right hand.⁴⁵ Her residence is designed to accommodate the wheelchair, but due to her limited ability to control it she frequently bumps into furniture, walls or doorways. On occasion, she requires pushing assistance to maneuver in a confined area or across flooring with variations in height.⁴⁶ On some days, she is unable to self-propel the wheelchair due to pain.⁴⁷

D. Instrumental Activities of Daily Living

1. *Meal Preparation*

Ms. X is able to provide physical assistance in meal preparation, but she cannot perform that activity independently: she is able to lift plates, glasses and utensils, but she cannot lift heavy cookware; she cannot access her upper cabinets; she can independently use her stove top but not her wall oven.⁴⁸

2. *Laundry*

Ms. X can gather and sort her laundry. She can fold small items, but not a blanket; due to space limitations in the laundry room, she cannot independently access her washing machine and drier, and she cannot independently operate the control knobs.⁴⁹ She is unable to change her bed linens without physical assistance to lift the mattress. With the mattress lifted by another person, Ms. X can provide physical assistance with the removal and replacement of bed linens.

3. *Shopping*

Ms. X must be accompanied by a personal care assistant to engage in shopping. She cannot independently access a store, and she cannot independently reach shelving to obtain all of the items she needs. She requires physical assistance to perform this activity.

⁴³ See Ex. E, p. 10 (2013); Ex. I, p. 10 (2012); Ex. G, p. 10 (2010). *Contra*, Ex. H, p. 10 (“mother combs her hair daily, and mother provides setup help”).

⁴⁴ See Ex. 2, p. 3 (log of provider duties, “Trim Toenails”).

⁴⁵ Ex. E, p. 7 (by report, “able to self propel her w/c with right hand and will use her feet to get herself around her home”); March 25 letter, p. 1.

⁴⁶ March 25 letter, p. 1.

⁴⁷ Ex. E, p. 7 (“Client in pain today and unable to demonstrate mobility in w/c.”) (2013).

⁴⁸ Ex. E, p. 9 (“Her mom does most of cooking but she is able to get things out of fridge. Cabinets were made lower so she would be able to reach things. She does have weak grips and hard to held on to heavy objects like pans.). See March 25 letter, p. 2; Ex. 2, p. 2 (“In the kitchen, she has burned herself multiple times...and caught her sleeve on fire.”); March 26 letter.

⁴⁹ J. X Testimony; March 26 letter; March 25 letter, p. 2.

III. Discussion

The Department of Health and Social Services is authorized to provide eligible persons with personal care services.⁵⁰ 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),⁵¹ instrumental activities of daily living (IADL),⁵² and certain other functions.⁵³ The assessment is conducted using the Consumer Assessment Tool (CAT),⁵⁴ a form created by the Department of Health and Social Services to evaluate an individual's ability to care for herself.⁵⁵

One section of the CAT covers the individual's physical abilities with respect to the eight ADL's: body mobility, transfers, locomotion, dressing, eating and drinking, toileting, personal hygiene, and bathing.⁵⁶ Individuals are given two scores reflecting their ability to perform 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 individual performs the activity independently (self-performance) with no setup or physical help (support). Increasing inability to perform and need for assistance result in progressively higher scores, including scores of two for limited assistance, three for extensive assistance, and four for dependence.⁵⁷

The Division provides a specified amount of time for PCA assistance with each ADL, depending on the scores provided and the frequency with which the activity occurs, in accordance with the Personal Care Assistance Service Level Computation form (service level chart) devised for that purpose.⁵⁸ For IADLs, the Division provides a specified amount of time

⁵⁰ AS 40.07.030(b).

⁵¹ 7 AAC 125.030(b)(1)-(8).

⁵² 7 AAC 125.030(c)(1)-(5).

⁵³ 7 AAC 125.030(d)(1)-(9), (e).

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

⁵⁵ See generally, <http://dhss.alaska.gov/dsds/Documents/docs/cat-pcatOnlineFlyer.pdf> (accessed June 19, 2013).

⁵⁶ Ex. E, pp. 6-11. The CAT terminology does not precisely track the regulatory language for each ADL. For one example, the ADL of "body mobility" is described in the regulation as positioning or turning in a bed or a chair, while the CAT uses the term "bed mobility" and omits any reference to a chair. Compare, 7 AAC 125.030(b)(1), with Ex. E, p. 6. For another, for the ADL of "toileting", the CAT expressly includes how the recipient "adjusts clothes", and the regulation does not mention that action. See *In Re V.W.* at *2, OAH No. 12-0957-MDS (Commissioner of Health and Social Services 2013); compare, 7 AAC 125.030(b)(6) with Ex. E, p. 9.

⁵⁷ Ex. E, pp. 6-11. 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.

⁵⁸ 7 AAC 125.024(a)(1); 7 AAC 160.900(d)(29). See Ex. B, pp. 34-36.

for PCA assistance each week, depending on the scores provided and, for light meal preparation only, depending on the number of such meals (one or two per day).⁵⁹

The Division bears the burden of proof with respect to reductions in the level of assistance or frequency.

A. Activities of Daily Living

1. *Transfers*

7 AAC 125.030(b)(2) states that personal care services for transferring include physical assistance for “moving between one surface and another, including to and from a bed, chair, or wheelchair” and for “moving from a lying or sitting position to a standing position.”⁶⁰

In 2009, Ms. X was assessed as requiring extensive assistance with this activity.⁶¹ In 2010-2013, she was assessed as requiring limited assistance.⁶² As described above, and as the prior assessments indicate, Ms. X requires assistance for this activity at least three days per week, because, due to pain, on at least three days per week she cannot perform the activity independently.⁶³

The level of assistance is defined by regulation and is also addressed in the CAT, for scoring purposes. As defined by regulation, a person who needs weight bearing assistance may be considered to require limited assistance or extensive assistance.⁶⁴ For scoring purposes, the two levels are distinguished depending on the frequency of the need for weight-bearing assistance: if weight bearing assistance is needed three or more times a week, the assistance is scored as extensive assistance.⁶⁵ In Ms. X’s case, R.N. Hanley reported that the assistance required, on days when she needs assistance, is a “one arm assist.”⁶⁶ A one arm assist could consist of guided assistance, which is not weight bearing assistance,⁶⁷ or it could be a pulling

⁵⁹ Ex. B, p. 34.

⁶⁰ 7 AAC 125.030(b)(2)(A), (B).

⁶¹ Ex. F, p. 3.

⁶² Ex. G, p. 6 (2010); Ex. H, p. 6 (2011); Ex. I, p. 6 (2012); Ex. E, p. 6 (2013).

⁶³ See Ex. G, p. 6 (assistance four days per week) (2010); Ex. I, p. 6 (assistance three days per week) (2012); Ex. E, p. 6 (assistance three days per week) (2013).

⁶⁴ See 7 AAC 125.020(a)(1) (“help with weight-bearing when needed”); 7 AAC 125.020(a)(2) (“periodically requires direct physical help from another individual for weight-bearing support”). The difference is a matter of degree. See In Re E.C., OAH No. 13-0438-MDS, at 13-14 (Commissioner of Health and Social Services 2014); In Re V.H., OAH No. 12-0559-MDS, 9 (Commissioner of Health and Social Services 2012).

⁶⁵ Ex. E, p. 6. See, e.g., In Re F.V., OAH No. 13-1306/0781-MDS, at 10 (Commissioner of Health and Social Services 2013).

⁶⁶ Ex. E, p. 6.

⁶⁷ See, e.g., In Re F.M., OAH No. 13-1051-MDS, at 5 (Commissioner of Health and Social Services 2014) (“[O]ne arm guided assist constitutes limited assistance.”).

assist, which is weight bearing assistance.⁶⁸ In this case, given the nature of Ms. X's condition, the preponderance of the evidence in the record is that on those occasions when Ms. X needs assistance, the assistance provided is a one arm pulling assist. Because this occurs at least three days a week, under the CAT Ms. X is scored as requiring extensive assistance with this activity.

The Division assessed a need for transfer assistance 42 times per week in 2009.⁶⁹ Thereafter it assessed a need for transfer assistance twice each day she needed assistance, for a weekly total of eight in 2010,⁷⁰ 14 in 2011,⁷¹ and six in 2012 and 2013.⁷² Ms. X contends that she requires assistance for transfers at least twice daily (14 times per week).⁷³ As discussed above, it appears that Ms. X transfers at least four times daily, one of which is out of the lift recliner and would not require assistance even on a bad day. Given that she requires weight bearing assistance at least three days per week, for at least three transfers on each of those days, the preponderance of the evidence is that Ms. X requires assistance for transfers at least nine times a week.

2. *Dressing*

7 AAC 125.030(b)(4) states that the activity of dressing includes “donning, fastening, unfastening, and removal of the recipient’s street clothing, support hose, or prosthesis.” Ms. X was assessed as needing extensive assistance with dressing in 2009,⁷⁴ limited assistance in 2010, 2011 and 2013,⁷⁵ and independent in 2012.⁷⁶

Ms. X asserts that she requires extensive assistance with dressing.⁷⁷ However, the type of assistance that is provided to her is not weight bearing assistance, but rather assistance with fastening and pulling on socks and shoes. This is limited assistance.

3. *Bathing*

7 AAC 125.030(b)(8) provides that bathing includes a shower and the required transfers in and out of the shower. Ms. X was assessed as requiring extensive assistance in 2009 and

⁶⁸ See, e.g., *In Re M.C.*, OAH No. 13-1191-MDS, at 3 (Commissioner of Health and Social Services 2014) (“Pulling a client to a standing position is weight bearing assistance.”).

⁶⁹ Ex. F, p. 4.

⁷⁰ Ex. G, p. 6.

⁷¹ Ex. H, p. 6.

⁷² Ex. I, p. 6 (2012); Ex. E, p. 6 (2013).

⁷³ March 25 letter, p. 1.

⁷⁴ Ex. F, p. 4.

⁷⁵ Ex. G, p. 8 (2010); Ex. H, p/ 8 (2011); Ex. E, p. 8 (2013).

⁷⁶ Ex. I, p. 8.

⁷⁷ March 25 letter, p. 1. Contestant’s Statement, p. 2.

2011,⁷⁸ and limited assistance in 2010, 2012, and 2013.⁷⁹ Ms. X asserts that she requires extensive assistance with this activity.⁸⁰

For bathing, the CAT does not use the terms “limited assistance” and “extensive assistance,” which are used for the other ADLs and which are further defined by regulation.⁸¹ Rather, the CAT describes two levels of physical assistance: a score of two is provided for physical assistance limited to transfers only, and a score of three is provided for physical assistance in part of the (non-transfer) bathing activity.⁸² In effect, these descriptions provide a more specific definition of limited assistance (score of two) and extensive assistance (score of three) than is provided by regulation, limited to this particular activity.

In Ms. X’s case, the preponderance of the evidence is that in addition to providing assistance with transfers, Ms. X’s personal care assistant shampoos her hair while showering.⁸³ This is physical assistance with part of the bathing activity. Accordingly, under the scoring matrix set forth in the CAT, Ms. X is entitled to a score of three (equivalent to extensive assistance) for the activity of bathing.

4. *Personal Hygiene*

For the 2009-2011 assessments, the activity of personal hygiene and grooming was defined to include bathing and dressing, which are separate activities under the current regulations.⁸⁴ For the 2012 and 2013 assessments, 7 AAC 125.030(b)(7)(A)-(G) provided that the activity of personal hygiene includes washing and drying face and hands, nail care (if not diabetic), skin care, mouth and teeth care, brushing and combing hair, shaving (if separate from bathing), and shampooing (if separate from bathing).⁸⁵

Ms. X was assessed as needing extensive assistance with this activity in 2009⁸⁶ and as independent in 2010-2013.⁸⁷ A person is independent, according to the CAT, if the person receives no help or oversight,⁸⁸ and by regulation personal care assistance is not provided if the

⁷⁸ Ex. F, p. 5 (2009); Ex. H, p. 11 (2011).

⁷⁹ Ex. G, p. 11 (2010); Ex. I, p. 11 (2012); Ex. E, p. 11 (2013).

⁸⁰ March 25 letter, p. 2.

⁸¹ See 7 AAC 125.020(a)(1), (2).

⁸² See, e.g., Ex. E, p. 11.

⁸³ J. X Testimony. See also Ex. H, p. 11 (2011) (“assistance to reach areas she can not reach, shampooing hair”); March 25 letter, p. 1; Ex. 2, p. 2 (“I also shampoo J’s hair daily, due to her limited hand and arm use”).

⁸⁴ See former 7 AAC 43.752(a)(1)(A)(i), (ii), *eff.* 4/1/2006, Register 177; *am.* 12/14/2007, Register 184; 7 AAC 125.030(a)(1)(a)(i), (ii), Register 193, *eff.* 2/1/2010.

⁸⁵ 7 AAC 125.030, *am.* 1/26/2012, Register 201.

⁸⁶ Ex. F, pp. 4-5.

⁸⁷ Ex. G, p. 10 (2010); Ex. H, p. 10 (2011); Ex. I, p. 10 (2012); Ex. E, p. 10 (2013).

⁸⁸ See, e.g., Ex. E, p. 10.

person can be independent when provided assistance in the form of cueing, setup or supervision.⁸⁹ Ms. X is plainly not independent with personal hygiene, because she requires physical assistance to trim her toenails. Because this is not a daily activity, however, her level of assistance is best characterized as limited, rather than extensive, as those terms are described in the CAT, which reserves extensive assistance to physical assistance provided three or more times a week.

5. *Locomotion*

Ms. X was assessed as requiring limited assistance in 2009 (28 times weekly), 2010 (eight times weekly), and 2011 (14 times weekly), and as independent in 2012 and 2013.⁹⁰

A person who is wheelchair-bound is assessed for self-sufficiency in the chair.⁹¹ On the date of her 2013 assessment, Ms. X was unable to demonstrate use of the wheelchair due to pain.⁹² Her inability to use the chair due to pain on the day she was assessed established a need on that day for someone to push her wheelchair, that is, a need for limited physical assistance. While the frequency with which Ms. X requires assistance to move about in her wheelchair was not specifically addressed at the hearing, the record includes evidence from which the frequency may reasonably be inferred. For example, Ms. X's pain level limits her ability to transfer at least three times a week, and it is likely that pain also restricts her wheelchair mobility on at least some of those occasions. Moreover, even though her residence is in general wheelchair accessible, it does have constricted areas in which physical assistance to maneuver it is required. In addition, the manner in which Ms. X operates her wheelchair (backwards, scooting with her feet) indicates that she could occasionally find herself unable to position it where she needs to be. On balance, the preponderance of the evidence is that Ms. X requires limited assistance with this activity, in the form of pushing assistance at least once each day.

B. Instrumental Activities of Daily Living

1. *Meal Preparation*

Meal preparation consists of two separate IADLs, one for light meal preparation and the other for main meal preparation.⁹³ For IADLs, there is no distinction between the levels of assistance, as there is for ADLs. A person is assessed as independent,⁹⁴ independent with

⁸⁹ 7 AAC 125.020(e)(1)-(3).

⁹⁰ Ex. F, p. 4 (2009); Ex. G, p. 7 (2010); Ex. H, p. 7 (2011); Ex. I, 7 (2012); Ex. E, p. 7 (2013).

⁹¹ See, e.g., Ex. E, p. 7 ("If in wheelchair, self-sufficiency once in chair.").

⁹² Ex. E, p. 7.

⁹³ 7 AAC 125.030(c)(1), (2).

⁹⁴ See, e.g., Ex. E, p. 26 (score of 0).

difficulty,⁹⁵ needing assistance,⁹⁶ or dependent.⁹⁷ Ms. X has been assessed as requiring assistance with meal preparation every year, except for 2009.⁹⁸

In 2009, the assessor noted that Ms. X was “unable to chop, cut or lift anything,” and assessed her as dependent for main meal preparation only.⁹⁹ However, at present Ms. X does not claim to be unable to lift anything; rather, she reports she is unable to lift pans of food.¹⁰⁰ Her report is consistent with the medical evidence, which indicates that her grip is weak, but does not suggest that she is unable to lift light items.¹⁰¹ The preponderance of the evidence in the record is that even though she may be unable to cut up or chop food items, Ms. X is able to provide substantial physical assistance in meal preparation, such as by transporting empty dishware and utensils, by lifting small containers in and out of those areas of the refrigerator and shelving that are accessible to her from her wheelchair, or by placing items in a dishwasher or herself washing them. Because the preponderance of the evidence is that Ms. X is capable of providing physical assistance with meal preparation activities, she was correctly assessed as requiring assistance rather than as dependent.

2. *Laundry*

The IADL of laundering includes changing bed linens and in- or out-of-home laundering of bed linens and clothing.¹⁰² Ms. X was assessed as dependent for laundry in 2009,¹⁰³ and as needing assistance in 2010-2013.¹⁰⁴ The 2009 assessment states that Ms. X “[d]epends on her PCA for her laundry” but does not provide any basis for that statement. To be dependent, a person must be unable to perform any part of an activity. The clear preponderance of the evidence in this case is that Ms. X can provide a substantial amount of physical assistance with the activities of changing her bed linens and laundering her clothing, such as by collecting and sorting her clothing and folding small articles, or by pulling bed linens into place after the mattress has been lifted. She was correctly assessed as requiring assistance, rather than as dependent, for this activity.

⁹⁵ 7 AAC 125.020(a)(4). *See, e.g.*, Ex. E, p. 26 (score of 1).

⁹⁶ 7 AAC 125.020(a)(5). *See, e.g.*, Ex. E, p. 26 (score of 2).

⁹⁷ 7 AAC 125.020(a)(3). *See, e.g.*, Ex. E, p. 26 (score of 3).

⁹⁸ *See* Ex. F, p. 4.

⁹⁹ Ex. F, p. 4.

¹⁰⁰ March 26 letter, p. 2.

¹⁰¹ *See* Ex. 3, p. 24 (“The patient’s grip strength is 15 lbs. bilaterally.”).

¹⁰² 7 AAC 125.030(c)(4)(A), (B).

¹⁰³ Ex. F, p. 4.

¹⁰⁴ Ex. G, p. 10 (2010); Ex. H, p. 10 (2011); Ex. I, p. 10 (2012); Ex. E, p. 10 (2013).

3. *Shopping*

The IADL of shopping includes shopping for groceries, household necessities, and prescription drugs and medication.¹⁰⁵ Ms. X was assessed as dependent with this activity in 2009,¹⁰⁶ and as needing assistance in 2010-2013.¹⁰⁷ The clear preponderance of the evidence is that Ms. X can assist in the physical activities that occur in the course of shopping. It may be that it is more expeditious for her personal care assistant to take care of this activity without any assistance from Ms. X, but that does not mean that Ms. X is incapable of performing any of the tasks required: the preponderance of the evidence is that she can locomote through a supermarket, and, to the extent the products she requires are within reach, she can collect, transport, and purchase them.¹⁰⁸ She was correctly assessed as needing assistance, rather than as dependent for this activity.

IV. **Conclusion**

As the vagaries of Ms. X's assessment over the years suggest, scoring on the CAT is subjective, and may vary significantly absent any actual change in the functional capacity of the individual being assessed. In this particular case, based on the evidence at the hearing, which includes prior assessments, testimony under cross-examination, and medical records, the preponderance of the evidence is that, contrary to the Division's determination based on the limited information obtained in the course of the assessment, Ms. X requires extensive assistance with transfers (nine times weekly) and bathing, and limited assistance with locomotion (seven times weekly) and personal hygiene. The preponderance of the evidence supports the Division's assessment of Ms. X's need for assistance with IADLs. The Division shall revise and recalculate Ms. X's service authorization plan in accordance with this decision.¹⁰⁹

DATED April 25, 2014.

Signed

Andrew M. Hemenway
Administrative Law Judge

¹⁰⁵ 7 AAC 125.030(c)(5).

¹⁰⁶ Ex. F, p. 4.

¹⁰⁷ Ex. G, p. 10 (2010); Ex. H, p. 10 (2011); Ex. I, p. 10 (2012); Ex. E, p. 10 (2013).

¹⁰⁸ Cf. In Re F.M., OAH No. 13-1051-MDS, at 6 (Commissioner of Health and Social Services 2014) ("Ms. M. testified she does not like to go to the grocery store, but that if she did, she 'could' sit in an electric grocery cart and participate in grocery shopping.").

¹⁰⁹ At the time of the assessment, Ms. X did not have a current prescription for range of motion exercise, and she was therefore not entitled to assistance for that activity. By the time of the hearing, Ms. X had obtained and submitted to the Division a current prescription for range of motion exercises. The revised service level authorization shall incorporate range of motion exercise assistance in accordance with the prescription and the CAT, as may be appropriate.

Adoption

The undersigned by delegation from the Commissioner of Health and Social Services, adopts this 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 19th 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.]