

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

In the Matter of)	
)	
C N)	OAH No. 14-0400-MDS
_____)	Agency No.

DECISION

I. Introduction

C N receives Personal Care Assistance (“PCA”) services that are paid for by Medicaid. The Division of Senior and Disabilities Services (“Division”) reassessed her condition and reduced her PCA services. Ms. N contested that decision and requested a hearing.

A hearing was held on May 29, 2014. Ms. N was present and was assisted with the hearing by her PCA, E L. Testifying for the Division was health program manager David Chadwick. The Division was represented at the hearing by fair hearing representative Angela Ybarra.

II. Facts

Ms. N is 35 years old and suffers from severe multiple sclerosis.¹ Prior to her reassessment Ms. N received 31.5 hours of PCA services per week.² On September 25, 2013 Registered Nurse Peter Ndenderoh evaluated Ms. N using the Division’s Consumer Assessment Tool (CAT).³ Mr. L was present with Ms. N for the reassessment.⁴ After the reassessment the Division stated that Ms. N’s PCA services would be reduced to 21.5 hours per week.⁵ It is this decision that is the subject of Ms. N’s request for a hearing.

III. Discussion

A. The PCA Program

The purpose of the PCA program

¹ Testimony of Ms. Ybarra and Mr. L.

² Exhibit D1.

³ Exhibit E1.

⁴ Testimony of Mr. L.

⁵ Exhibit D1. Ms. Ybarra explained that the Division’s exhibits contained a typographical error indicating in some instances that services would be reduced only to 27.5 hours (*see, e.g.*, Exhibit D1, indicating service level of 21.5 hours near the top of the page but stating a reduction to 27.5 hours in the first paragraph). She confirmed that the Division’s position is that 21.5 hours is the correct figure; this is the figure that can be extrapolated from the CAT “service level authorization chart” worksheet at Exhibit D10.

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[.⁶]

The Division uses the CAT to help it assess the level of assistance needed.⁷ The amount of time allotted for needed assistance is determined by the Personal Care Assistance Service Level Computation chart.⁸ 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.⁹ “Supervision” is defined as oversight, encouragement, or cueing three or more times a week, with physical assistance no more than two times a week.¹⁰ “Limited assistance” is defined as requiring 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.¹¹ “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.¹² “Full assistance” means the recipient has to rely entirely on the caretaker to perform the activity.¹³

The Division may change the number of hours of allotted PCA services if there has been a *material change* in the recipient’s condition.¹⁴ A *material change* means that the recipient’s medical condition has changed, or his living conditions have changed.¹⁵ 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 by a preponderance of the evidence.¹⁶ 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.¹⁷ All of the service categories at issue in this

⁶ 7 AAC 125.010(a).

⁷ 7 AAC 125.020(b).

⁸ 7 AAC 125.024(1).

⁹ The July 29, 2009 version of the CAT has been adopted by reference, 7 AAC 160.900(d)(6), and therefore the definitions in the CAT have the same effect as a regulation.

¹⁰ Exhibit E6.

¹¹ 7 AAC 125.020(a)(1); Exhibit E6.

¹² 7 AAC 125.020(a)(2); Exhibit E6.

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

¹⁴ 7 AAC 125.026(a).

¹⁵ 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).

¹⁶ 7 AAC 49.135.

¹⁷ *Id.*

case involve reductions by the Division – thus the burden was on the Division to justify those changes. However, although Ms. N’s arguments in this matter primarily were directed against the Division’s service reductions, in instances where it appears that an increase might be warranted, this decision looks at whether such an increase is supported by a preponderance of the evidence.

Because the Division notified Ms. N of its decision on March 6, 2014, her condition on that date is used when determining the amount of services she is eligible to receive.¹⁸ Ms. N only contested the service levels for certain ADLs: transfers, locomotion, and toileting. Other ADLs and IADLs addressed in the reassessment were not contested and thus were not at issue in the hearing.

B. Transfers

Ms. N had previously been allowed no assistance for transfers.¹⁹ 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.²⁰ After the September 2013 reassessment, the Division determined that Ms. N needs extensive assistance (CAT score 3/2). Ms. N, however, is completely dependent on others to transfer; she cannot assist herself with this activity in any way – this was established by a preponderance of the evidence through Mr. L’s testimony. Accordingly, Ms. N’s score for transfers should be revised to 4/2 (“full assistance”). The testimony of both Mr. L and Ms. N suggests a higher frequency of transferring is needed each day than what the division assessed. That Ms. N needs transfers for 6 times each day appears more reasonable.²¹

C. Locomotion

Ms. N had previously been allowed “limited assistance” for single-level locomotion, i.e. on one floor of her home (CAT score 2/2), but her current assessment indicated she needs no physical assistance (score 1/1).²² 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.²³ Mr.

¹⁸ See *In re T C*, OAH Case No. 13-0204-MDS (Commissioner of Health and Social Services 2013), page 7 (finding that the notice sent to recipient is the decision under review). OAH cases are available online at <http://aws.state.ak.us/officeofadminhearings/categoryList.aspx>.

¹⁹ Exhibit D10.

²⁰ See Exhibit E6.

²¹ If this proves to be insufficient, Ms. N can document her higher need and submit a change of information.

²² Exhibit D10.

²³ See Exhibit E7.

Chadwick testified that her prior assistance level had been based on the support she needed in order to walk, but she had now lost her ability to walk and had learned to locomote in a wheelchair. RN Ndenderoh commented on the CAT that she is “able to use hands to propel the wheel chair around same floor.”²⁴ Thus the Division concluded that Ms. N needs no assistance in locomotion. RN Ndenderoh did not testify at the hearing, however, and Mr. Chadwick had no personal knowledge regarding RN Ndenderoh’s observations.

Ms. N and Mr. L testified that Ms. N cannot move around in her wheelchair at all without Mr. L’s assistance. Therefore, the Division did not meet its burden of showing by a preponderance of the evidence that the reduction of Ms. N’s assistance level for locomotion was incorrect. Furthermore, the preponderance of the evidence demonstrated that her score for locomotion should be increased to 3/2, as Ms. N met her burden of showing that she needs a great deal of assistance in moving around her home. The evidence presented at hearing, however, was insufficiently clear to support a score of 4/2.

The Division had previously determined that Ms. N needed single-level locomotion five times a day or 35 times per week. Because the current assessment indicated she needs no assistance in this category, it did not determine a frequency level. The evidence presented at hearing did not directly address the frequency of single-level locomotion assistance, as it was focused more on the extent of the need for assistance rather than how often it occurs. In the absence of such evidence, a frequency level of 35 per week is a reasonable estimate.

Ms. N resides in a two-story apartment. The Division increased her score for multi-level locomotion from limited assistance to extensive assistance. The preponderance of the evidence established, however, that she is entirely dependent on the assistance of her PCA to move up or down the stairs in her home. Therefore her score should be increased to full assistance (a score of 4).

As to frequency, Mr. L testified that he carries Ms. N up and down the stairs in her apartment 40 to 50 times per week. Again, this frequency seems high, however Ms. N has shown by a preponderance of the evidence that she needs to move between levels more than twice each day. A frequency level of six per day is a reasonable estimate under these circumstances.

²⁴ Exhibit E7.

D. Toileting

Ms. N had previously been allowed “limited assistance” for toileting, with a CAT score of 2/2, and the Division gave her the same score after the reassessment.²⁵

The testimony of Ms. N and Mr. L established by a preponderance of the evidence that Ms. N is fully dependent on others in the area of toileting. She is not capable of assisting in this task at all. Therefore, the Division should have increased Ms. N’s score for toileting to 4/2.

The Division’s assessment gave Ms. N a frequency of six times each day for toileting. Ms. N and Mr. L’s testimony was convincing that she needed a higher frequency, but not as high as they asserted. A frequency of seven times a day is more reasonable.

IV. Conclusion

Ms. N suffers from advanced multiple sclerosis that severely limits her ability to transfer, move around her home, or engage in toileting. The Division erred by reducing her locomotion score, failing to increase her toileting score, and inadequately increasing her transfer score. Her PCA service levels should be recomputed in accordance with the discussion above. The Division’s reassessment decision is reversed as to the three ADLs discussed herein, and affirmed in all other respects,

Dated this 6th day of June, 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 24th day of June, 2014.

By: Signed
Name: Christopher M. Kennedy
Title: Administrative Law Judge

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

²⁵ Exhibit D10.