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

In the Matter of:	)	
	)	
X T	)	OAH No. 14-0496-MDS
	)	Agency No.

DECISION

I. Introduction

X T was authorized to receive 63.75 hours per week of personal care assistant (PCA) services through the Division of Senior and Disability Services under 7 AAC 125.010-199.[1] The Division reassessed Mr. T's functional abilities and determined that he was eligible for 13.25 hours of PCA services weekly. Mr. T filed an appeal.

The assigned administrative law judge conducted a telephonic hearing on May 22, 2014. Mr. T participated and was represented by his mother and power of attorney, R T. Angela Ybarra represented the Division. Sam Cornell, R.N., who conducted the reassessment, testified, as did Vondra Rohrk-Martinez, who reviewed the reassessment for the Division.

Based on the evidence presented, Mr. T is entitled to approximately 26.75 hours of PCA services weekly. In addition, he is entitled to chore services (including meal preparation) and respite care services under the Medicaid Choice Waiver program, and he may be entitled to additional assistance under the PCA program for prescribed exercises. This matter is remanded to the Division to revise the service level authorization for personal care assistance, consistent with this decision.

II. Facts

A. Background Information

Mr. X T is 30 years old. A former firefighter, he had a spinal injury in a 2006 car accident and as a result is paraplegic.[2] Mr. T is obese and he suffers from with chronic decubitis ulcers in multiple locations[3] (including most recently a non-healing sacral ulcer), a neurogenic bladder,[4] and chronic urinary tract infections.[5] In 2009 Mr. T was assessed as needing extensive

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1 *See* AS 47.07.045.

2 *See* Supp. Ex., pp. 6, 10, 12.

3 *See* Ex. F, p. 21 ("hx decubitus ulcer inpatient treatments…, last decub on Ankle healed 1 month ago, multiple ongoing skin integrity issues") (2009); Ex. E, p. 21 ("1 visit to wound care in Alaska…possible travel to Seattle Hosp. r/t spine treatment").

4 "[A]ny condition of dysfunction of the urinary bladder caused by a lesion of the central or peripheral nervous system." Dorland's Illustrated Medical Dictionary at 212 (27th ed. 1988); "Any dysfunction of the urinary bladder from lesions of central nervous system or nerves supplying the bladder." Taber's Cyclopedic Medical Dictionary at 232 (17th ed. 1993).

assistance with body mobility, mechanical transfers, dressing, toilet use, and bathing, limited assistance with locomotion to access medical appointments and for personal hygiene, and as dependent for instrumental activities of daily living except shopping.[6] Based on that assessment, he was authorized to receive 63.5 hours per week of PCA services.[7]

Mr. T was reassessed by Sam Cornell, R.N., on October 3, 2013.[8] On March 21, 2014, the Division issued a determination based on the new assessment, reducing his service level authorization by 50.5 hours per week, from 63.75 hours to 13.25 hours of PCA services per week.[9] The reduction was due not to any change in Mr. T's medical condition or to reductions in the assessed level of Mr. T's functional abilities (other than for personal hygiene), but rather to reductions in the assessed frequency of Mr. T's need for assistance with body mobility (from 126 to 35 times per week), mechanical transfers (from 42 to 6 times per week), and toileting (from 63 to 28 times per week),[10] the elimination of assistance for prescribed range of motion and simple exercises (due to the lapse of Mr. T's prescription for those activities),[11] and the elimination of assistance under the PCA program for light meal preparation (now provided under the Medicaid Choice Waiver program).[12] Mr. T primarily objects to the change in his level assistance for personal hygiene and to the reduction in frequency for body mobility, mechanical transfers, and toileting.[13]

B. Daily Routine

Mr. T lives with his mother in her home in Alaska. The house is a single story residence that is wheelchair-accessible by a ramp.[14] Mr. T sleeps in a Hil-Rom bed with an overhead trapeze.[15] While in the bed, he has limited reach towards his lower body.[16] With assistance, he transfers from his bed into his wheelchair, and back again, with a Hoyer lift (a hoist). Once in his electric wheelchair/scooter, Mr. T is mobile without assistance within the residence.

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5 Ex. F, p. 3; Ex. E, p. 3; Supp. Ex., p. 7.
6 *See* Ex. D, p. 10.
7 Ex. A, p. 2; Ex. D. p. 1.
8 Ex. E.
9 Ex. D.
10 *See* Ex. D, pp. 2-3, 10.
11 *See* Ex. D, pp. 4, 10.
12 *See* Ex. D, pp. 3, 10.
13 *See* Supp. Ex., p. 2.
14 Ex. E, p. 1.
15 Ex. E, p. 6.
16 See Ex. E, p. 8.

Depending on his wound status, at times Mr. T reduces his use of the Hoyer lift and wheelchair in order to avoid dislodging his dressing or aggravating his wound.[17]

Mr. T is unable to use a toilet. He urinates through a Foley catheter into a drainage bag and defecates into a colostomy bag. Both receptacles occasionally separate from his body, and must be reattached. Both must be emptied and cleaned several times daily.[18]

Mr. T requires assistance for non-sterile dressing changes and wound care for his recurring decubitus ulcers. Typically, his personal care assistant positions his body while his mother changes the dressing. In addition, Mr. T regularly visits a physician for wound care, and he also regularly visits a nurse for a catheter change and wound care.[19] In May, 2014 Mr. T renewed his prescription for passive range of motion exercises, to be performed three times daily, seven days a week, for 20 minutes (one hour per day).[20] He was also referred to a physical therapist for evaluation and treatment.[21] For all medical visits, Mr. T brings his Hoyer lift for transfers, with the assistance of his personal care assistant, between his wheelchair and the examination table.

III. Discussion

The Department of Health and Social Services is authorized to provide eligible persons with personal care services in the recipient's home.[22] 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), instrumental activities of daily living (IADL), and certain other specific activities.[23] The assessment is conducted using the Consumer Assessment Tool (CAT),[24] a form created by the Department of Health and Social Services to evaluate an individual's ability to care for himself or herself.[25] 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). The Division issues a determination providing a specified amount of time for PCA assistance with each activity, depending on the scores provided and the frequency with which the activity occurs,

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17 *See* Ex. E, p. 7.
18 *See* Ex. E, p. 9.
19 R. T Testimony.
20 Supp. Ex. 2, p. 2.
21 *See* Supp. Ex. 2, pp. 3-5.
22 AS 40.07.030(b).
23 *See* 7 AAC 125.010, -.020, .030.
24 7 AAC 125.020(b); 7 AAC 160.900(d)(6).
25 *See generally*, http://dhss.alaska.gov/dsds/Documents/docs/cat-pcatOnlineFlyer.pdf (accessed June 19, 2013).

in accordance with the Personal Care Assistance Service Level Computation form devised for that purpose.[26] On appeal, the Division's determination is reviewed in light of all the evidence in the record, based on the individual's condition on the date of the determination.[27]

A. Activities of Daily Living

1. Transfers

The ADL of transfer includes "moving between one surface and another, including to and from a bed, chair, or wheelchair" as well as "moving from a lying or sitting position to a standing position." It is undisputed that Mr. T needs extensive assistance for this activity.[28] Mr. T disputes the reduction in frequency from six times daily (42 times per week) in 2009, to less than once daily (six times per week) in 2013.[29]

Mr. Cornell based the frequency on Mr. T's report at the assessment in October, 2013 that he was able to get out of bed two or three times a week.[30] At the hearing, Ms. T testified that since January, 2014 her son had become more active, and that in accordance with his doctor's directive she and his personal care assistant were trying to get him up at least three or four times a day, which is equivalent to six to eight transfers daily.

Evidence in the record indicates that at the time of the assessment Mr. T was less active and was spending more time in bed, due to a change for the worse in his recurrent decubitus ulcer, in order to avoid dislodging his bandage.[31] Other evidence in the record indicates that Mr. T's worsened condition was associated with the lack of adequate care from a prior personal care assistant, and that with improved care his ulcer is less problematic.[32] His physician supports his request to maintain his prior frequency, which indicates that it is medically appropriate.[33] Six transfers per day is equivalent to getting up in the morning, resting in bed after bathing and eating breakfast, getting up for lunch, returning to bed for an afternoon rest, and getting up one last time for dinner and the evening. It is neither an excessive nor unusual amount, but rather is reasonable for a person in Mr. T's condition. Based on the record as a whole, the preponderance of the evidence is that by the time the Division issued its determination in late March, 2014 Mr.

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[26] 7 AAC 125.024(a)(1); 7 AAC 160.900(d)(29). *See* Ex. D, p. 7.

[27] *See* In Re F.M., at 3, OAH No. 13-1051-MDS (Commissioner of Health and Social Services 2014).

[28] Ex. D, p. 10; Ex. E, pp. 6, 18; Ex. F, pp. 6, 18.

[29] Ex. D, p. 10; Ex. E, p. 6; Ex. F, p. 6.

[30] *See* Ex. E, p. 6.

[31] Testimony of R. T. *See* Ex. E, p. 7 ("operation of chair is deferred, recent application of coccyx dressing, his concerns regard dislodging dressing.").

[32] *See* Supp. Ex, p. 3 ("wound slowly closing, looking healthier. Linear excoriations are from lack of repositioning and 'pincing' tissues in his sitting position."); p. 5, p. 11.

[33] Supp. Ex., p. 2.

T was again as active as he was when assessed in 2009. The Division did not prove, by a preponderance of the evidence, that the frequency of transfers should be reduced.

2. Body Mobility

7 AAC 125.030(b)(1) states that personal care services for the activity of body mobility include "positioning or turning in a bed or chair, if the recipient is nonambulatory." 7 AAC 125.030(h)(1)(A)-(B) state that "body mobility" means moving a recipient to and from a lying position, turning a recipient from side to side, and positioning a recipient in a bed or chair.

Mr. T does not dispute the Division's determination that he requires extensive assistance with this activity. He disputes the frequency provided, which was 35 times per week (five times daily), as compared with 126 times per week (eighteen times daily) in 2009.[34]

The service level chart provides that the personal care assistant's "task level" for body mobility is based on a frequency of "less than or equal to every two hours as a standard (12 x daily) reduced by any frequencies for other ADL tasks (transfer, toileting, bathing, locomotion, etc.) where body mobility is a functional part of the overall task."[35]

The service level chart provides for a maximum of twelve per day "as a standard." Mr. T's need for body mobility is not standard: he is paraplegic and he has chronic and recurrent decubitus ulcers, and the primary reason for providing assistance with body mobility is to avoid that condition. The Division provided for assistance seven times daily, which is substantially more than would be justified by the standard frequency of twelve (reduced by ADLs), in recognition of the fact that Mr. T's susceptibility to ulcers warrants more assistance for this activity than the "standard" amount.

Mr. T lies on his back in bed through the night as he sleeps. Unlike most persons, who shift their body weight while continuing to sleep, Mr. T cannot move himself from side to side while sleeping. During the daytime, whether in bed or seated in his wheelchair, without assistance he cannot adequately reposition his body weight to avoid dislodging dressings or otherwise aggravating body sores. Mr. T, at his prior level of assistance (18 times daily) continued to suffer from chronic recurring ulcers. His physician has recommended a frequency of at least eight times daily.[36] The Division did not prove, by a preponderance of the evidence, that Mr. T's need is less than the eight times daily recommended by his physician.

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[34] Supp. Ex., p. 2. *See* Ex. D, p. 10.
[35] Ex. B, p. 34.
[36] Supp. Ex., p. 2.

3. Toileting

Mr. T needs extensive assistance with toileting. However, the frequency of this activity was reduced from nine times daily (63 per week) in 2009, to four times daily (28 per week) in 2013.

There has been no change in Mr. T's medical condition with respect to toileting since his 2009 assessment. Now, as then, he has a colostomy and urine catheter. In 2009 he was assessed as requiring assistance with emptying the colostomy bag about three times daily, and with the urine catheter and bag every one to three hours, for a total frequency of nine times daily.[37] R.N. Cornell assessed a need of four times daily, based on his own estimate of the likely need in light of the size of the urine container.[38]

Ms. T testified at the hearing that the colostomy bag needs changing two to three times daily, and the urine drainage bag four to six times, for a total of from six to nine times daily (combined). She added that her son is a large person who drinks a large quantity of fluids. Mr. T's physician supported a frequency of six times daily (combined).[39] There is no evidence that Mr. T's medical condition has changed, such as that he was previously taking diuretics and is no longer. The Division previously assessed a need of nine times daily, based on Mr. T's report and the assessor's observation.[40] In light of the prior assessment notes, Ms. T's testimony, and the absence of any improvement in Mr. T's medical condition, the Division did not prove that Mr. T's frequency of need is less than six times daily.

4. Personal Hygiene

For the 2009 assessment, the activity of personal hygiene and grooming was defined to include bathing and dressing, which are separate activities under the current regulations.[41] For the 2013 assessment, 7 AAC 125.030(b)(7)(A)-(G) provide 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).[42]

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[37] Ex. F, p. 9.
[38] Cornell Testimony.
[39] Supp. Ex., p. 2.
[40] *See* Ex. F, p. 9.
[41] *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.
[42] 7 AAC 125.030, *am*. 1/26/2012, Register 201.

In 2009 Mr. T was assessed as needing limited assistance with this activity.[43] In 2013, he was assessed as needing set up assistance only.[44] Mr. T contends that he continues to need physical assistance with this activity.[45]

Limited assistance means that "a recipient, who is highly involved in the activity, receives direct physical help…in the form of guided maneuvering of limbs, including help with weight-bearing when needed."[46] Extensive assistance 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."[47]

Mr. T is able to perform many of the tasks composing the activity of personal hygiene, once provided set up assistance, such as brushing his teeth, washing his hands and face, shaving, and hair care. He is able to perform some parts of other tasks in this category, such as skin care in some locations, and finger nail care. However, Mr. T is unable, even with assistance, to perform the entirety of his skin care and nail care, because of his paraplegia and limited range of motion.

Mr. T is highly involved in the activity of personal hygiene, but he requires direct physical assistance to complete some of the tasks involved. There has been no relevant change in his medical condition since 2009, and the Division has not proved that his need for assistance with this task is any less than it was in 2009 (limited assistance). The time allowed for this activity is a fixed amount per day, rather than varying with frequency.[48] However, additional time is allowed for shampooing when that activity is performed separately from bathing.[49] Mr. T receives full body sponge baths and does not shampoo in a shower or tub; his hair is not shampooed as part of his sponge baths.[50] He is entitled to additional time for shampooing.

C. Instrumental Activities of Daily Living

Mr. T is eligible to receive up to ten hours per week of chore assistance under the Medicaid Choice Waiver program.[51] Chore services under the Medicaid Choice Waiver

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43 Ex. F, p. 10.
44 Ex. E, p. 10.
45 Supp. Ex., p. 2.
46 7 AAC 125.020(a)(1).
47 7 AAC 125.020(a)(2). *See* In Re V.H., at *9, OAH No. 12-0559-MDS (Commissioner of Health and Social Services 2012).
48 *See* Ex. D, p. 7.
49 *Id.*
50 *See* In Re W.X., at 12, OAH No. 13-1094-MDS (Commissioner of Health and Social Services 2014).
51 Ex. E, p. 2.

program include cleaning and household chores, as well as shopping and food preparation.[52] Some chore services provided under the Medicaid Choice Waiver program are also covered under the PCA program as IADLs, specifically, light housekeeping, shopping and meal preparation,[53] although other services provided under the Medicaid Choice Waiver program are not covered by the PCA program.[54]

7 AAC 125.040(d) states that a person "who is eligible for chore services under 7 AAC 130.245 is not eligible for an IADL…if a home and community-based waiver services provider is willing to provide chore services to the recipient."[55] The preponderance of the evidence is that Mr. T is eligible for chore services under the Medicaid Choice Waiver program. Accordingly, assuming that a provider is available, he is ineligible for assistance with IADLs under the PCA program. He may receive meal preparation assistance under the Medicaid Choice Waiver program, or, if available, may be provided meals under the Meals on Wheels program. In addition, Mr. T is eligible to receive respite care services under the Medicaid Choice Waiver program, which can provide up 520 hours per year (*i.e.*, ten hours per week) of additional care services to relieve his primary care provider (his mother).[56]

D. Other Covered Activities

1. Non-Sterile Dressing Changes

Under 7 AAC 125.030(d)(4), assistance may be provided with non-sterile bandage or dressing changes. Whether assistance is provided is determined based on the individual's scores for personal hygiene.[57] Because Mr. T requires limited assistance with personal hygiene, he is entitled to assistance with this activity, with the frequency (once daily) approved by his physician.

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52 7 AAC 130.245(b)

53 *See* 7 AAC 125.030(c).

54 Specifically excluded from the PCA program are "chore services in the home." 7 AAC 125.040(a)(3). Presumably, the excluded services do not include the specific services authorized in 7 AAC 125.030(c), but do include some chore services covered by the Medicaid Choice Waiver program, such as heavy housework (*e.g.*, hauling water, chopping or collecting firewood, and show removal). *See* 7 AAC 130(b)(2).

55 7 AAC 125.030 and .040 were amended in 2012; prior to 2012, 7 AAC 125.030(i) stated "A recipient who is eligible for core services under 7 AAC 130.245 is not eligible for IADL services" and 7 AAC 125.040 did not apply. The same prohibition was in effect at the time of Mr. T's 2009 assessment. *See* former 7 AAC 43.752(i), *repealed*, 2/1/2010, Register 193. *Compare* 7 AAC 130.245(d) ("If a recipient is eligible for chore services under this section and eligible for personal care services under 7 AAC 125.01007 AAC 125.199, the recipient must choose to receive the chore services described in this section or to have similar chores performed as personal care services.").

56 *See* 7 AAC 130.280.

57 Ex. B, p. 35.

R.N. Cornell testified that Mr. T is not entitled to assistance for this activity because Mr. T's mother, rather than his PCA, generally changes his dressing (while the personal care assistant holds his body in the proper position), and as the holder of a power of attorney for Mr. T, his mother may not act as a paid PCA.[58] But the service level authorization is based on the individual's need, not on the identity of a care provider. 7 AAC 125.195(b) expressly provides for payment based on the total time spent providing covered services and tasks. Payment is not limited, as it was previously, to the time authorized for each specific service and task. Rather, the recipient may allocate the PCA's time in accordance with their own preferences, as permitted by 7 AAC 125.024(b): the Division may not reduce the time allowed for one activity when a recipient, as permitted by the regulation, chooses to forego assistance for that activity in order to have more time for assistance with another activity.[59] It would be inconsistent with these regulations to deny assistance with an activity based on the recipient's allocation of PCA time for that activity to another activity.

2. Medication

Under 7 AAC 125.030(d)(2), assistance may be provided "with the administration of medication." As with non-sterile dressing, personal hygiene scores are used to determine whether assistance is provided and the level of assistance.[60] Although Mr. T uses medication that is applied topically,[61] the Division denied assistance in 2013, based on its determination that Mr. T needed setup assistance only for personal hygiene.[62] Because Mr. T requires limited assistance for that activity, he is entitled to the same level of assistance with his medication, with a frequency of once daily.[63]

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58 Cornell Testimony.

59 7 AAC 125.040(a)(12) states that personal care services are not provide reimbursement for "tasks that supplant or duplicate assistance offered by an individual or organization without charge." What this means is that if Mr. T chose to have his personal care assistant provide sterile wound dressing, reimbursement would be denied so long as his mother is willing to provide that same service. It does not mean that Mr. T's frequency of need would be any less. At issue in this case is not reimbursement, which is addressed in 7 AAC 125.040(a)(12), but the calculation of frequency of need. In this particular case, in any event, the evidence indicates that <u>both</u> Mr. T's mother and his PCA need to provide assistance with wound care, which means that the assistance provided by the PCA neither supplants nor duplicates his mother's services. *See* Ex. E, pp. 3, 21 ("some help from pca to 'hold him over during dressing change'").

60 Ex. B, p. 35.

61 Ex. E, p. 20.

62 Ex. D, p. 4.

63 *See* Ex. E, p. 20.

3. Escort Services

7 AAC 125.030(d)(9) states that personal care services include "travelling with the recipient to and from a routine medical or dental appointment…and conferring with medical or dental staff during that appointment." The service level chart states that escort services are provided when consistent with the assessment, as necessary to meet the identified needs of the recipient.[64]

The Division previously provided 60 minutes of escort services per week.[65] In 2013, it provided 9.23 minutes per week of escort services in 2013, based on sixteen doctor visits per year, and 30 minutes of escort time per visit.[66]

Ms. T testified that a visit to the doctor typically takes two hours, including one hour of travel time and one hour for the appointment. The Division provided no explanation for the 30 minute per visit figure. The preponderance of the evidence is that Mr. T generally requires at least 1.5 hours of escort services for each doctor visit, including one hour of travel time and two Hoyer lift transfers (on and off the examination table). During the first quarter of 2014, Mr. T visited a doctor six times, which is equivalent to 24 times per year. Accordingly, the preponderance of the evidence is that providing escort services in the amount of 40 minutes per week is consistent with his assessment and is necessary to meet his identified needs.[67]

V. Conclusion

The record does not establish the manner in which Mr. T's previous level of assistance was calculated. Under the regulations currently in effect, the assessed scores and frequencies in 2009 would result in a service level of approximately 47.45 hours of PCA services weekly, as compared with the 63.75 hours actually authorized in 2009. The 16 hour difference is likely due to changes in the applicable regulations: the regulations in effect in 2009 provided a range of permissible times for each ADL, rather than specifying a time based on the level of assistance, and also permitted the Division to exceed those limits for extraordinary circumstances,[68] whereas under the current regulations the time allowed is fixed.[69]

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64 *See* Ex. B, p. 36.

65 Ex. D, p. 10.

66 Ex. D, p. 10; Ex. E, p. 5.

67 *See generally*, In Re E.C., at 5-8, OAH No. 13-0438-MDS (Commissioner of Health and Social Services 2014) (calculating escort time as including all travel time plus transfers and locomotion).

68 *See* In Re [N.N.], at 22, OAH No. 13-1307-MDS (Commissioner of Health and Social Services 2014).

69 The regulations were also amended to provide flexibility in the allocation of time, which may alleviate the impact of any reduction in the total authorized service level. *See supra*, at 9; In Re [N.N.], at 22-23, notes 176, 179.

Apart from any reduction due to regulation changes, it appears that Mr. T lost approximately 10.5 hours per week because he did not notify the Division of the renewal of his range of motion prescription, nearly an hour per week due to the loss of escort time, and nearly 20 hours per week due to the reduction in the frequency of several tasks.

The Division did not prove, by a preponderance of the evidence, that that reduced frequencies it provided for transfers, body mobility and toileting were appropriate, and it did not prove, by a preponderance of the evidence, that Mr. T no longer needs limited assistance with personal hygiene, or that his need for escort assistance is less than 40 minutes per week.

Based on the evidence, Mr. T is entitled to approximately 26.75 hours of PCA services. In addition, the Division may provide additional time for his newly-submitted prescription. With additional time for his prescription care (seven hours per week), and assuming Mr. T receives the full amount of chore (ten hours per week) and respite care (ten hours per week) services available under the Medicaid Choice Waiver program, Mr. T will receive in-home care services for approximately 53.75 hours per week.

This matter is remanded to the Division to recalculate the PCA service level authorization in accordance with this decision.

DATED July 9, 2014.

Signed
Andrew M. Hemenway
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 25th day of July, 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.]