

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

In the Matter of:)
)
 E W) OAH No. 14-0601-MDS
) Agency No.

COMMISSIONER'S ORDER REMANDING CASE

After due deliberation, for the reasons specified below, and in accordance with AS 44.64.060(e)(3) and AS 44.64.060(e)(5), by delegation from the Commissioner of the State of Alaska Department of Health and Social Services, I decline to adopt the proposed decision of the Administrative Law Judge (ALJ) as issued, and instead modify and revise the disposition of the case as set forth below.

I. Introduction

The issue in this case is the amount of Medicaid Personal Care Assistant (PCA) services to which E W is entitled. Ms. W has received PCA services since 2009 or before.¹ The Division of Senior and Disabilities Services (Division) performed an assessment on September 26, 2013.² On March 26, 2014 the Division notified Ms. W that her PCA service level was being reduced from 39.93 hours per week to 2.0 hours per week effective April 5, 2014.³ On April 9, 2014 Ms. W requested a hearing to contest the Division's reduction of her PCA services.⁴

Ms. W's hearing was held on May 12, 2014. On June 27, 2014 the administrative law judge (ALJ) issued his proposed decision. In his decision, the ALJ concluded that:

1. The Division's scoring of Ms. W's need for assistance with her activities of daily living (ADLs) was correct in the areas of body mobility, dressing, eating, and toileting.
2. Ms. W requires a greater level of PCA assistance with regard to transfers, locomotion, personal hygiene, and bathing than was found by the Division.
3. Ms. W is entitled to a greater frequency of assistance with the ADLs of transfers, dressing, toileting, personal hygiene, and bathing than was found by the Division.
4. Ms. W is entitled to assistance with her instrumental activities of daily living (IADLs).

¹ Ex. 1 p. 1.
² Ex. E.
³ Ex. D1.
⁴ Ex. C.

5. The Division was correct to deny Ms. W PCA time for assistance checking vital signs and glucose levels, and for assistance with documentation.

6. Ms. W is entitled to PCA escort services.

Accordingly, the ALJ affirmed the Division's decision in part and reversed it in part.

On July 7, 2014 the Division filed a proposal for action (PFA) challenging two aspects of the ALJ's proposed decision. First, the Division asserts that the ALJ erred when he concluded that, when a PCA applicant or recipient has regularly recurring good days and bad days, the person's self-performance scores for his or her activities of daily living (ADLs) should be averaged. Second, the Division asserts that the ALJ erred when he concluded that, because the Division did not present any evidence showing that Ms. W's husband actually assists Ms. W with her IADLs, the Division should have awarded Ms. W PCA time for assistance with her IADLs. These two issues are addressed below.

II. Revised Legal Analysis

The undersigned, in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation / application of a statute or regulation in the decision as follows and for these reasons:

A. The "Good Day / Bad Day" Scenario Should be Addressed in PCA Cases Using a Frequency Adjustment Instead of a Self-Performance Score Adjustment

The ALJ made the following factual findings in this case:

1. Ms. W has end-stage renal failure and requires dialysis three days per week.
2. Dialysis generally causes muscle cramps and anemia (which causes fatigue), and Ms. W is usually so fatigued after her dialysis sessions that she sleeps for 12 hours immediately thereafter.
3. This makes it more likely than not that Ms. W requires weight bearing assistance when at her worst following dialysis.
4. At the same time, Ms. W may not need any assistance on her "good days" between dialysis sessions.

The ALJ noted that the PCA regulations do not provide for situations in which a person's functional abilities differ significantly within the same week. Because of this, the ALJ found that it would be appropriate to average Ms. W's "good day" scores with her "bad day" scores. The ALJ applied this averaging approach in determining the amount of PCA services to which Ms. W is entitled for the ADLs of transfers, locomotion, dressing, toilet use, and bathing.

The Division does not dispute that PCA recipients may have "good days" and "bad days." The Division asserts, however, that in these situations, the individual should be given the *highest self-performance score* for the type of assistance they require within a week, but that, if the

individual is sometimes able to perform the activity without physical assistance, the individual's *frequency level should be limited* to the number of times that he or she requires *physical help*.⁵

The undersigned finds that the method proposed by the Division for calculating PCA time in "good day / bad day" cases is more workable than the method proposed by the ALJ. Accordingly, the rule proposed by the Division, as stated in the preceding paragraph, is adopted.

1. Transfers

The ALJ found that Ms. W requires only supervision with transfers on her good days (CAT score 1/1), but requires weight bearing assistance with transfers on her bad days (CAT score 3/2). Accordingly, Ms. W should be assigned a self-performance score of three for transfers, but the frequency of transfers should be limited to the number of times that Ms. W requires assistance with transfers on her bad days.

2. Locomotion

The ALJ found that Ms. W is independent with locomotion on her good days (CAT score 0/0), but requires weight-bearing assistance from one person, for both in-home and outside locomotion, on her bad days (CAT score 3/2). Accordingly, Ms. W should be assigned a self-performance score of three for locomotion, but the frequency of assistance with locomotion should be limited to the number of times that Ms. W requires assistance with locomotion on her bad days.

3. Dressing and Undressing

The ALJ found that Ms. W is independent with dressing on her good days (CAT score 0/0), but requires limited assistance from one person on her bad days (CAT score 2/2). Accordingly, Ms. W should be assigned a self-performance score of two for dressing, but the frequency of assistance with dressing should be limited to the number of times that Ms. W requires assistance with dressing on her bad days.

4. Toilet Use

The ALJ found that Ms. W is independent with toileting on her good days (CAT score 0/0), but requires extensive assistance from one person on her bad days (CAT score 3/2). Accordingly, Ms. W should be assigned a self-performance score of three for toileting, but the frequency of assistance with toileting should be limited to the number of times that Ms. W requires assistance with toileting on her bad days.

⁵ See the Division's Proposal for Action at page 4.

5. Bathing

The ALJ found that Ms. W requires only supervision with bathing on her good days (CAT score 1/1), but requires extensive assistance from one person on her bad days (CAT score 3/2). Accordingly, Ms. W should be assigned a self-performance score of three for bathing, but the frequency of assistance with bathing should be limited to the number of times that Ms. W requires assistance with bathing on her bad days.

B. Eligibility for PCA Assistance with IADLs When the Recipient's Spouse Lives with the Recipient

The Division's assessment of September 26, 2013 found that Ms. W requires physical assistance with the instrumental activities of daily living (IADLs) of finance management, main meal preparation, light housework, routine housework, grocery shopping, and laundry (CAT score 2/3). Nevertheless, the Division did not award Ms. W with any PCA time for IADLs, finding that "[y]ou are not eligible to receive PCA for an IADL because you have a parent, legal guardian, or spouse who is legally obligated to provide IADL," citing 7 AAC 125.040(a)(13).

The ALJ concluded that 7 AAC 125.040(a)(13) does not actually *require* the spouse of a PCA recipient to provide assistance with IADLs, but rather makes the recipient ineligible for PCA assistance with IADLs only when the spouse of the recipient is actually *providing* assistance with IADLs. While the ALJ's interpretation of 7 AAC 125.040(a)(13) is plausible based on the language of the regulation, the Division's interpretation is just as reasonable, and is preferable on policy grounds because it promotes family self-sufficiency. Accordingly, under 7 AAC 125.040(a)(13), a recipient is not entitled to Medicaid-funded PCA assistance with IADLs unless the recipient proves, by a preponderance of the evidence, that the recipient's spouse is unable to provide that assistance.

III. Proposed Decision Adopted as Modified Above.

Except to the extent modified above, all factual findings contained in the ALJ's proposed decision, and all legal conclusions not inconsistent with the above, are hereby adopted.

IV. Case Disposition.

The undersigned, in accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows:

1. The case is remanded directly to the Division of Senior and Disabilities Services with instructions to recalculate Ms. W's PCA time according to the principles set forth above.

2. The Division of Senior and Disabilities Services shall issue a new written PCA eligibility and service plan determination, and serve that determination on Ms. W's legal representative, within 10 days of the date of this order.

3. Should Ms. W disagree with the Division's recalculation of PCA time as described above, she may request a new hearing on that issue.

DATED this 4th day of August, 2014.

By: Signed _____
Jared C. Kosin
Executive Director, Office of Rate Review
Department of Health and Social Services

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