

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

In the Matter of)	
)	
K H)	OAH No. 14-0630-MDS
_____)	Agency No.

DECISION AFTER REMAND

I. Introduction

K H 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. H contested that decision and requested a hearing.

A hearing was held on June 30, 2014. Ms. H was present and was assisted with the hearing by No Name Agency’s regional coordinator, K W. Also attending the hearing and testifying on Ms. H’s behalf were her PCAs D D and B N, her care coordinator L A, and her son U H. The Division was represented at the hearing by fair hearing representative Victoria Cobo. Testifying for the Division was health program manager Angie Fey-Merritt and Marianne Sullivan, the registered nurse who performed the reassessment of Ms. H.

Prior to the start of the hearing Ms. Cobo requested that the parties be given an opportunity to confer off the record about their areas of disagreement, and Ms. H agreed to this request. After approximately an hour of off-the-record discussion, the parties indicated that they had reached a settlement of several of the issues raised by Ms. H, but two issues remained in dispute: the activity of daily living, or ADL, of “bed mobility” (also referred to as body mobility), and the instrumental activity of daily living, or IADL, of “shopping.” The parties then presented testimony pertinent to these two issues.

The record was left open after hearing for Ms. H to supplement the record, which she did. The Division was provided an opportunity to respond to her supplemental filing by July 10, 2014. Two weeks after that deadline the Division provided a response, the substance of which is discussed in this decision.¹

¹ It is noted for the record that the Division did not seek leave to submit its responsive filing two weeks late, did not provide any explanation of the circumstances that caused the filing to be submitted late, nor did it even acknowledge the lateness of the filing. In the future if the Division, or any other party appearing before the Office

A proposed decision was then issued. After reviewing the Division's proposal for action responding to the proposed decision, the Commissioner of Health and Social Services remanded the case to the administrative law judge "for issuance of a revised decision, after providing the parties with the opportunity to brief the specific issue of whether a person is allowed body mobility assists at night even if they may have utilized 12 assists during the day." The parties each submitted their briefs, and the matter is now ripe for decision.

Based upon the evidence in the record, and the parties' briefs submitted after remand, the Division's decision is reversed as to PCA services for body mobility and affirmed as to PCA services for shopping.

II. Facts

Ms. H suffers from a variety of physical ailments, including coronary arteriosclerosis, congestive heart disease,² and spinal "stenosis with neurogenic claudication" (i.e. severe spinal degeneration) which causes severe, chronic pain and weakness in her back and legs.³ Prior to her reassessment, Ms. H received 54.25 hours of PCA services per week.⁴ On October 24, 2013 registered nurse Sullivan evaluated Ms. H using the Division's Consumer Assessment Tool.⁵ U H was present with Ms. H for the reassessment.⁶ After the reassessment the Division stated that Ms. H's PCA services would be reduced to 16.25 hours per week.⁷

The Division's Adverse Action Letter, dated April 15, 2014,⁸ informed Ms. H of the Division's decision to reduce her PCA hours. Regarding "body mobility," the letter stated as follows:

On your 2009 assessment you were assessed as needing extensive assistance with Body mobility, 84 times per week for a time allowed of 336 min/week. However, current regulations state Body mobility-positioning is reduced due to position changes provided as a part of other activities like transfers, toileting, locomotion, bathing, etc. as referenced in the PCA Service Level Computation. (7 AAC 125.024(a)(1)). Time for this activity has been removed.⁹

of Administrative Hearings, seeks to submit a filing after an established deadline, it shall request that the proposed filing be accepted late and explain the reasons that the filing could not be submitted in a timely manner. Absent such a request and explanation the party risks the late filing not being accepted into the record.

² Exhibit E3.

³ Exhibit E3; testimony of Ms. H and of U H.

⁴ Exhibit D1.

⁵ Exhibit E1.

⁶ Testimony of U H.

⁷ Exhibit D1.

⁸ Exhibit D.

⁹ Exhibit D2.

The Adverse Action Letter provided no other justification for the reduction in body mobility service time.

Regarding the IADL of “shopping,” the Adverse Action letter stated as follows:

On your 2009 assessment, you were assessed as being dependent on others for this activity with a time allowed of 60 min/week. On your 2013 assessment, you reported needing assistance- done with help for a time now allowed of 45 min/week. Because you reported a need for less assistance, time for this has been reduced.¹⁰

III. Discussion

A. *The PCA Program*

The purpose of the PCA program

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[. ¹¹]

The Division uses the Consumer Assessment Tool, or “CAT,” to help it assess the level of assistance needed.¹² The amount of time allotted for needed assistance is determined by the Personal Care Assistance Service Level Computation chart.¹³ 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.¹⁴ The CAT uses a coding system with two components: the first component is the self-performance code, which rates how capable a person is of performing a particular activity. “Supervision,” denoted by a “self-performance” code of **1**, is defined as oversight, encouragement, or cueing three or more times a week, with physical assistance no more than two times a week.¹⁵ “Limited assistance,” denoted by a self-performance code of **2**, 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.¹⁶ “Extensive assistance,” shown as

¹⁰ Exhibit D4.

¹¹ 7 AAC 125.010(a).

¹² 7 AAC 125.020(b).

¹³ 7 AAC 125.024(a)(1). The March 20, 2012 version of this chart has been adopted by reference, 7 AAC 160.900(d)(29), and therefore its requirements have the same effect as a regulation.

¹⁴ The January 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.

¹⁵ Exhibit E6.

¹⁶ 7 AAC 125.020(a)(1); Exhibit E6.

a self-performance code of **3**, 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.¹⁷ “Total dependence,” denoted as a self-performance code of **4**, means the recipient has to rely entirely on the caretaker to perform the activity.¹⁸

The second component of the CAT's coding system is the support code. These codes rate the degree of assistance that a person requires for a particular activity. The support codes for ADLs are **0** (no setup or physical help required); **1** (only setup help required); **2** (one person physical assist required); and **3** (two or more person physical assist required).

The "instrumental activities of daily living" or IADLs are scored somewhat differently. The self-performance codes for IADLs are **0** (independent either with or without assistive devices - no help provided); **1** (independent with difficulty; the person performed the task, but did so with difficulty or took a great amount of time to do it); **2** (assistance / done with help - the person was somewhat involved in the activity, but help in the form of supervision, reminders, or physical assistance was provided); and **3** (dependent / done by others - the person is not involved at all with the activity and the activity is fully performed by another person). The support codes for IADLs also differ from the support codes for ADLs.¹⁹ The support codes for IADLs are **0** (no support provided); **1** (supervision / cueing provided); **2** (set-up help); **3** (physical assistance provided); and **4** (total dependence - the person was not involved at all when the activity was performed).

Under the PCA regulations in effect prior to January 26, 2012, the Division would provide a recipient with time for a particular ADL based on the assessor's perception of how much time would reasonably be required (up to a maximum level specified by regulation) to perform the activity at issue.²⁰ However, in January 2012 the PCA regulations were amended to implement a new system in which the self-performance code and support code for the specific activity automatically dictate the amount of PCA time that is awarded per unit of frequency.²¹

¹⁷ 7 AAC 125.020(a)(2); Exhibit E6.

¹⁸ 7 AAC 125.020(a)(3); Exhibit E6.

¹⁹ *Id.*

²⁰ See former regulations 7 AAC 43.750, 7 AAC 43.751, 7 AAC 43.752, and 7 AAC 43.755.

²¹ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart.

The Division may change the number of hours of allotted PCA services if there has been a material change in the recipient's condition.²² A material change means that the recipient's medical condition has changed, or his living conditions have changed.²³ 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.²⁴ 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.²⁵ All of the service categories at issue in this case involve reductions by the Division – thus the burden was on the Division to justify those changes.

Because the Division notified Ms. H of its decision on April 15, 2014, her condition on that date is used when determining the amount of services she is eligible to receive.²⁶ The parties reached a resolution of some of the areas in dispute, and that resolution was stated on the record during the hearing by Ms. Cobo. Only the service levels for the ADL of body mobility and the IADL of shopping were at issue in the hearing.

B. Body Mobility

During the hearing the Division put on evidence relating to whether Ms. H is properly classified as “ambulatory,” and both parties spent a great deal of time discussing this issue. The Division considered the question relevant because its regulations dictate that body mobility PCA services can only be awarded to a recipient who is “nonambulatory.”²⁷ Because the Division determined through its reassessment that Ms. H is ambulatory, it gave her a 0/0 score for body mobility.

However, the hearing regulations of the Division's parent agency, the Department of Health and Social Services, require that the Division provide a written notice of an action to deny or reduce assistance, and it must “state in the written notice the reasons for the proposed action,

²² 7 AAC 125.026(a).

²³ 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).

²⁴ 7 AAC 49.135.

²⁵ *Id.*

²⁶ *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>.

²⁷ 7 AAC 125.030(b)(1).

including the statute, regulation, or policy upon which that action is based.”²⁸ Therefore, the bases for the Division’s reduction in services must be limited to those expressed in the Adverse Action letter of April 15, 2014; stated differently, the Division cannot assert at a hearing a new basis for a reduction in services.²⁹ A fair reading of the letter reveals that the only rationale presented by the Division for reducing Ms. H’s body mobility PCA services was that it was due to her reaching the maximum number of “position changes provided as a part of other activities like transfers, toileting, locomotion, bathing, etc.” allowed by the PCA Service Level Computation chart. Accordingly, the Division is foreclosed from asserting its assessment that Ms. H is “ambulatory” in connection with its assessment of her need for body mobility services. Under these circumstances, the Division must restore its prior assessment of Ms. H regarding body mobility: a score of 3/2.

As to frequency of body mobility services, the Division’s position is that the PCA Service Level Computation chart allows a **maximum** of 12 body position changes per day. The actual relevant language of the chart, however, is as follows: “Task levels are determined based on: ... (b) Body mobility is 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.”³⁰ Contrary to the Adverse Action Letter, however, the Division’s CAT for Ms. H shows that she will be receiving at most six other body position changes per day: two movements for transfers; two for dressing; one for personal hygiene; and one for bathing.³¹ In addition, Ms. H argues that the chart’s language regarding the allowable number of body position changes per day is a “soft cap,” rather than a hard cap that the agency can never exceed.³² She has supported this argument with a post-hearing supplemental filing which argues that the regulatory language refers to a “standard rather than an absolute limit.”³³ Included with the supplemental filing are two documents (service level authorization

²⁸ 7 AAC 49.070.

²⁹ See *Allen v. State, Dept. of Health and Social Services, Division of Public Assistance*, 203 P.3d 1155, 1167-1168 (Alaska 2009); *Baker v. State, Dept. of Health and Social Services*, 191 P.3d 1005, 1009 (Alaska 2008); see also OAH Case No. 13-1517-MDS, p. 10 (Commissioner of Health & Social Services 2014); *In re U.W.*, OAH Case No. 13-0796-MDS (Commissioner of Health and Social Services 2013), page 6.

³⁰ March 20, 2012 Personal Care Assistance Service Level Computation chart, page 1 of 3 (emphasis added). As noted in footnote 13 above, the PCA Service Level Computation chart has been adopted by reference in the Division’s regulations. 7 AAC 125.024(a)(1), 7 AAC 160.900(d)(29).

³¹ Exhibits E6, E8, E10, E11.

³² Statement of Mr. W; Exhibit 15 (supplemental filing of Mr. W, July 2, 2014).

³³ See Exhibit 15, page 1.

charts for two unnamed persons who have received PCA benefits from the Division) which appear to show that the Division has, on at least two occasions, allowed recipients to receive services for more than 12 body position changes per day.³⁴

As noted above, the Division submitted a late response to Ms. H's supplemental filing without acknowledging the untimeliness of the response. The Division's response will nonetheless be given due consideration here, because of the importance of this issue. The Division responded to Ms. H's argument regarding the allowable frequency of body mobility assists as follows:

[T]he allowed frequency is 12/day reduced by any frequencies for other ADL tasks (transfer, toileting, bathing, locomotion, etc.) where body mobility is a functional part of the overall task. ... This is **NOT** a "soft cap" as stated by [Ms. H]; this is regulation. While [the Division] may have had instances in the past of incorrectly applying this regulation, we ... have trained assessors/ reviewers to ALWAYS abide by this regulation.³⁵

In support of this argument the Division refers to an attached training memo "developed to better insure that we ... consistently apply the regulation." The Division also argues that the two service level authorization charts attached to Ms. H's supplemental filing "cannot be verified as authentic" and, "even if they are authentic, should be considered 'error'."³⁶

The Division's argument, however, misses the point. There is no dispute that the PCA Service Level Computation chart has the legal effect of a regulation. The question posed by Ms. H is whether the chart imposes a maximum number of daily body movement assists that can never be exceeded, or does it set a "standard" that can be exceeded if warranted by the circumstances?³⁷ The Division's response thus begs the question. We can find guidance on this question, however, from other sources. First, the pertinent language of the chart itself states the allowable number of movements as a "standard" rather than an absolute cap. The term "standard" is commonly defined as something akin to a guideline or point of reference. For example, Black's Law Dictionary defines "standard" as "[a] model accepted as correct by custom, consent, or authority," or "a criterion for measuring acceptability, quality, or accuracy."³⁸ West Legal

³⁴ See Exhibit 15, page 3 (23 bodily movements per day); exhibit 15, page 4 (16 bodily movements per day).

³⁵ Memorandum from Rodney George, July 24, 2014, at 1 (emphasis in original).

³⁶ *Id.*

³⁷ See *Norcon, Inc. v. Kotowski*, 971 P.2d 158, 175 fn. 21 (Alaska 1999) (supreme court distinguishes "standards" from "maxima" in discussion of legislative amendments to punitive damages statute).

³⁸ Black's Law Dictionary, Ninth Edition (2009), at 1535.

Publishing defines the term as “[a] yardstick or point of reference (well-known standard).”³⁹ Pertinent definitions found in lay dictionaries define “standard” as “something considered by an authority ... as a basis of comparison, an approved model,” or “an average or normal requirement, quality, quantity, level, grade, etc.”⁴⁰ All of these definitions support the view that the term “standard” should be interpreted as a guideline that can permissibly be increased or decreased as circumstances dictate.⁴¹

Furthermore, in promulgating its regulations the Division could have chosen to use absolute terms such as “maximum” or “cap” when describing the allowable number of daily body movement assists, but it chose not to do so. In fact the Division does use such terminology at other points in the PCA Service Level Computation chart, setting forth the “max allowable time” for certain IADLs,⁴² or listing the allowable frequency of certain ADLs and IADLs as a specific number of the given activity “per day.”⁴³ The fact that the Division uses such terminology for other activities in the chart while using the term “standard” for body movements is a clear indication that the intent of the agency in adopting the PCA Service Level Computation chart was to set a guideline or point of reference for allowable body movement assists, rather than an absolute cap. To conclude otherwise would be to ignore the plain meaning of the language used by the agency.

Given the above discussion, Ms. H’s argument makes sense, especially in light of the evidence submitted with her supplemental filing. The two service level authorization charts submitted show that the Division has, on occasion, deviated from the standard of 12 body movement assists per day. Whether or not these represent errors by Division staff, as argued by the Division, they buttress the view that the operative language of the PCA Service Level Computation chart sets a guideline or point of reference, rather than an absolute cap that can never be exceeded.

³⁹ West’s Legal Thesaurus/Dictionary (1982), at 713.

⁴⁰ See <http://dictionary.reference.com/browse/standard>.

⁴¹ See AS 01.10.040(a) (words and phrases shall be construed according to the rules of grammar and according to their common and approved usage); *Tesoro Petroleum Corporation v. State*, 42 P.3d 531, 537 (Alaska 2002) (internal citations omitted) (“The purpose of statutory construction is to give effect to the intent of the legislature, with due regard for the meaning that the statutory language conveys to others. Statutory construction begins with the language of the statute construed in light of the purpose of its enactment.”).

⁴² See, e.g., Exhibit B34-36.

⁴³ See Exhibit B34.

As explained above, the Division must restore its prior assessment of Ms. H regarding body mobility at a score of 3/2. Additional discussion follows regarding the Division's determination of the frequency of her body mobility services, taking into consideration the parties' arguments presented after the Commissioner's remand.

B. The Parties' Briefs After Remand Regarding Body Mobility

After issuance of the proposed decision, the Commissioner remanded this matter to the administrative law judge for further proceedings on the question of the Division's interpretation of the PCA Service Level Computation chart language regarding body mobility.⁴⁴ Specifically, the Commissioner directed that the parties "brief the specific issue of whether a person is allowed body mobility assists at night even if they may have utilized 12 assists during the day." Both parties submitted briefs addressing that issue.

The Division's brief argues that its interpretation of the body mobility standard in the PCA Service Level Computation chart is reasonable, because the overall structure of the PCA program is flexible and allows recipients to use their PCA hours as they see fit. Regarding the specific question posed by the Commissioner's remand, the Division stated:

[I]f someone receives body mobility, [the Division] does not specify whether the frequencies allotted are for day or night. If frequencies are reduced for other tasks that involve body movement, the same rule applies. It would be difficult to determine how or why an individual would use all 12 body mobilities or other movements during the day and have none leftover [*sic*] for the evening. This is why [the Division] does not have a policy of doing so, and an additional reason why its interpretation of the 12 per day standard makes sense.⁴⁵

The Division concludes its argument with the following comments:

There should not be a situation where an individual does not receive time for body mobility at night who needs and uses those movements. The PCA program should be flexible enough that this does not happen.⁴⁶

Ms. H's brief, on the other hand, first acknowledges that the flexibility of the PCA program can be useful to recipients. But Ms. H points out that there are limitations to that flexibility that bear directly on the question posed by the Commissioner's remand. As discussed above, a recipient's body mobility time will be reduced to "zero" if their other body movement

⁴⁴ Note that although recipients, Division representatives, care providers and ALJs all commonly refer to this service as "body mobility," the CAT labels the service as "bed mobility," i.e., movement or repositioning in bed.

⁴⁵ Division's Response to the Commissioner's Order Remanding the Case, at 4-5.

⁴⁶ Division's Response to the Commissioner's Order Remanding the Case, at 5.

tasks reach the standard maximum of 12 per day. The Division's regulations dictate that if a recipient's time for any service category is zero, that category is not considered approved and the recipient can no longer access that particular type of care.⁴⁷ So if the Division has authorized zero time for a recipient for body mobility services, under the Division's regulations the recipient cannot receive such services. Ms. H summarizes the reality posed by the Division's interpretation of the body mobility standard in the PCA Service Level Computation chart, when viewed within the context of the entire PCA regulatory scheme, as follows: "[R]ecipients who have lost all time for body mobility due to the Division's cap (i.e. those who are authorized for 12 or more assists in other motion categories) may not utilize caregivers to assist with the task of body mobility, regardless of whether such assistance is needed at day or at night."⁴⁸

The Division's arguments are not persuasive. Its own regulations dictate that, regardless of the flexibility that the Division has attempted to build into its regulatory scheme, if a recipient is given zero time for body mobility, that recipient will not be able to access body mobility services. The result will be that the recipient will not receive any body mobility assists at night (i.e. "bed mobility"), when he or she may truly need assistance to shift position in bed in order to be able to prevent bed sores, achieve comfortable sleep, etc. Ms. H's post-remand brief correctly identifies this problem and describes the real-world impact it would impose on the care she can receive from her PCA.

Accordingly, this decision finds that the Division's determination of the frequency of her body mobility services is incorrect because it relies on an erroneous interpretation of the language of the Division's PCA Service Level Computation chart. It is reasonable and appropriate to restore Ms. H's body mobility PCA services at the frequency allowed under her previous assessment (seven times per day).⁴⁹

D. Shopping

The Division's reassessment of Ms. H reduced her PCA services for the IADL of shopping by giving her a 2/3 score and 45 minutes of services per week. At the hearing the Division argued that her prior self-performance score of 3 meant she was assessed as

⁴⁷ See 7 AAC 125.024(c) ("[t]he department will not pay a provider for a task or other service that ... is not identified in a recipient's personal care service level authorization"); 7 AAC 125.040(a)(6) ("personal care services reimbursable under Medicaid ... do not include ... a task that is not on the recipient's personal care service level authorization").

⁴⁸ Ms. H's Response to Order Upon Remand, at 2.

⁴⁹ Exhibit D2.

“dependent/done by others,” which is defined as: “Full performance of the activity was done by others. The person was not involved at all each time the activity was performed.”⁵⁰ The Division argued, and established through testimony, that Ms. H participates in shopping by writing out shopping lists, accompanying her PCA on shopping outings, and locomoting through the store with her electric wheelchair.⁵¹ It was also established that Ms. H typically does not participate in shopping to the extent of taking items off of store shelves, but she is physically capable of doing so if an item is not too heavy for her to lift.⁵²

The definitions of the IADL self-performance scores dictate the Division’s scoring for purposes of the IADL of shopping. For Ms. H to be given a score of **3**, she must be completely dependent on others to perform the task and cannot be involved in the activity in any manner. The Division established through testimony that Ms. H does participate in shopping by the fact of her physical ability to accompany her PCA through the store and to place items from store shelves in the shopping cart.⁵³ Therefore the Division met its burden of establishing, by a preponderance of the evidence, that the reduction in her PCA services for the IADL of shopping is justified.

IV. Conclusion

The Division erred by reducing Ms. H’s PCA service level for the ADL of body mobility, but it did not err in reducing her PCA service level for the IADL of shopping. Her PCA service levels should be recomputed in accordance with the discussion above and with the parties’ settlement agreement. The Division’s reassessment decision is reversed as to body mobility, and affirmed in all other respects,

Dated this 31st day of October, 2014.

Signed _____
Andrew M. Lebo
Administrative Law Judge

⁵⁰ Exhibit E26.

⁵¹ Testimony of Ms. H, C. D, T. H, and M. Sullivan.

⁵² *Id.*

⁵³ Merely creating shopping lists, in and of itself, is insufficient participation in shopping to warrant a self-performance score of 2. Otherwise a completely paralyzed quadriplegic person could be given a score of 2 merely based on their ability to inform their PCA of their grocery preferences.

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 3rd day of November, 2014.

By: Signed _____
William J. Streur, Commissioner
Department of Health and Social Services