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

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| In the Matter of | ) | |
| | ) | |
| E N | ) | OAH No. 14-0763-MDS |
| | ) | Agency No. |

## DECISION

### I. Introduction

E N suffers from a debilitating illness. She applied for personal care assistance benefits. The Division of Senior and Disabilities Services determined she was eligible for 5.5 hours of PCA services. The Division's determination should be adjusted to provide for supervised eating, and additional assistance for dressing, main meal preparation, and housework. In all other respects, the Division's decision is affirmed.

### II. Facts

E N is a 44-year-old woman who lives in No Name. She has a primary diagnosis of myasthenia gravis, an autoimmune disease that can cause considerable muscle weakness and fatigue. To treat the disease, Ms. N receives monthly intravenous treatments of immunoglobulin. She also suffers from rheumatoid arthritis, asthma, and depression.[1]

On March 10, 2014 Ms. N was hospitalized after having been found unresponsive in her home. While hospitalized, Ms. N had to be intubated in order to be fed. After release from the hospital, Ms. N was well enough to go back home without having to be admitted to a nursing home for convalescent care. The crisis that led to the hospitalization, and the insertion and extraction of the tube, left Ms. N weaker than usual and exacerbated her swallowing problems.

The parties dispute why she had to be hospitalized. According to Geetha Samuel, the nurse who assessed Ms. N for eligibility for PCA, Ms. N overdosed on drugs, including her narcotic prescription pain medicine, and benzodiazepine.[2] Ms. N agreed that she had taken too much medication that morning, but asserted that the primary reason for her hospitalization was pneumonia caused by her aspiration of food particles. A note from Dr. C M, a physician at No Name Hospital, written on March 13, 2014, to request expedited assessment for waiver and PCA services explained the hospitalization as follows:

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1 Division Exhibit K.

2 Samuel testimony; Division Exhibit E at 3, 21. Although Exhibit E and Exhibit G at 1 list marijuana as having been identified in the toxicology screen performed upon admission on March 10, the doctor's notes from March 11 indicate that may not have been the case. Division Exhibit G at 17.

> Ms. N suffers from myasthenia gravis and rheumatoid arthritis chronically and is currently hospitalized at No Name Hospital for altered mental status, respiratory failure, aspiration pneumonia, and malnutrition related to her chronic diseases and management of these diseases. Ms. N is unable to care for herself at home and needs assistance with her ADL's, including cooking, cleaning, and medication management.[3]

After leaving the hospital, Ms. N applied for personal care assistance benefits. Whether Ms. N can receive any benefits, and, if eligible, the number of hours of PCA time that Ms. N will receive, depend on how well Ms. N can care for herself. The division assesses how much assistance an applicant needs to care for herself using a standardized assessment format, called the Consumer Assessment Tool (CAT). Under the CAT, the assessor will assign a numerical score for each of several activities of daily living (ADLs)—tasks like walking, eating, and so on—and for several "instrumental activities of daily living" (IADLs)—tasks like cooking, housework, and so on. Scores are divided into two categories, a "self-performance" score, and a "support" score. As a general matter, personal care assistance minutes are assigned for scores that show that the recipient needs actual hands-on assistance to accomplish the ADL or IADL. Scores that show independence or need for only supervision, set-up help, or cueing will not qualify for assistance.[4]

Registered Nurse Geetha Samuel assessed Ms. N on March 28, 2014. Ms. Samuel determined that Ms. N was able to perform all ADLs independently, except for accessing medical appointments.[5] She found that Ms. N was independent with difficulty ("1/3") on all

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[3] Division Exhibit C at 2. The Hospital discharge summary notes the diagnosis of "altered mental status, likely due to unintentional polypharmacy overdose." Division Exhibit G at 1.

[4] The CAT numerical coding system has two components for scoring a person's need for assistance with ADLs. The first component is the self-performance code. These codes rate how capable a person is of performing a particular activity of daily living. The relevant possible codes for ADLs are:

**0** the person is independent and requires no help or oversight;
**1** the person requires supervision;
**2** the person requires limited assistance;
**3** the person requires extensive assistance;
**4** the person is totally dependent.

The second component of the CAT scoring system is the support code. These codes rate the degree of assistance that a person requires for a particular ADL. The possible codes are:

**0** no setup or physical help required;
**1** only setup help required;
**2** one person physical assist required;
**3** two or more person physical assist required.

IADLs have a different scoring scheme. For a full explanation of how the CAT is scored, and what the numerical scores mean for ADLs and IADLs, see, for example, *In re LB*, OAH No. 12-406-MDS at 7-8 (Comm'r Health and Soc. Serv. 2012) available at http://aws.state.ak.us/officeofadminhearings/Documents/MDS/PCA/MDS120406.pdf.

[5] Division Exhibit D at 6. Ms. Samuel found that Ms. N needed supervisory assistance with bathing, but that level of assistance does not result in PCA benefits.

IADLs except shopping and laundry, on which she was scored as needing assistance ("2/3").[6] Based on these scores, on April 9, 2014, the Division notified Ms. N that she was eligible for 5.5 hours of PCA benefits.[7] Believing that she was eligible for additional benefits, Ms. N appealed. A telephonic hearing was held on June 6, 2014. Ms. N represented herself, with assistant from J S and O F, with the No Name Agency.[8] Angela Ybarra represented the Division.

During the hearing, Ms. N presented as a person in difficulty. Her speech was slow and slurred, which is a symptom of her autoimmune disease. She indicated that she was in pain, and she wept frequently. She became angry with the Division, and would interrupt the Division's witness.

The record indicates some mental health problems, including depression and a hospitalization in 2013 for a suicide attempt.[9] An April 1, 2014, note from her treating neurologist states the following:

> Ms. N is a 44 year old woman with a history of myasthenia gravis. This [] disease [] causes severe disability and can be life threatening. Currently the patient has difficulty managing her activities of daily living due to weakness and fatigue that is a consequence of her condition. She would greatly benefit from services of a personal care attendant.[10]

Ms. F indicated that Ms. N's condition would decline during each month following her immunoglobulin treatments.[11] She was under the impression that Ms. N missed her last treatment.[12] In a post-hearing letter, however, Ms. F corrected that testimony, and stated that she had been informed by Ms. N that she did "go to infusion in the month of May."[13] Ms. Samuel testified that if Ms. N received her regular treatments on schedule each month, she would build strength and be better able to care for herself.

Ms. Samuel assessed Ms. N's ability to perform ADLs and IADLs on March 28, 2014. At that time, Ms. N was able to do her ADLs independently. She could walk in the home without assistive devices. She would not walk out doors, however, unless her son was next to

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6 Division Exhibit E at 26.

7 Division Exhibit D at 1.

8 Both Ms. F and Ms. S testified at the hearing. They were not, however, direct care providers for Ms. N, and based their testimony in part on Ms. N's former care provider who was no longer with the agency.

9 Division Exhibit E at 3.

10 N Exhibit (statement of G E. H MD).

11 F testimony.

12 The hearing revealed that Ms. N may have missed treatments in the past because she had no transportation. Transportation is not provided by the PCA program, but is available through Medicaid. ***It is vital for Ms. N's well-being that she receives her regular monthly treatments.***

13 N Exhibit.

her.[14] She could bathe independently (she needed to sit in the shower because of her pain and weakness), although she would not shower unless her son was in the home because she was at risk of falling. In general, Ms. N was able to do all ADLs, although her pain and somewhat limited range of motion meant that she did tasks very slowly and took frequent rests.

Ms. N argued that this assessment visit occurred not long after her release from the hospital, at a time when she was stronger than normal because of the treatments she had received, including a larger than normal immunoglobulin infusion and steroids. Ms. S and Ms. F confirmed that Ms. N was not doing well now. Both Ms. N and Ms. F agreed, however, that Ms. N still did most tasks independently. Even though hampered by her pain, the record shows that Ms. N is a very independent person. For example, Ms. F described Ms. N's ability to walk around the house as being hampered by pain and fear of falling—Ms. N always had a hand on a wall or a piece of furniture. Although Ms. N said she could dress herself, she admitted she could not do buttons or tie shoes.

One of the disputed issues was how well Ms. N could swallow. Ms. Samuel observed Ms. N drink coffee and eat yoghurt, and recorded that Ms. N had mentioned recently eating potato salad.[15] Ms. Samuel testified that before discharge from the hospital Ms. N had passed a swallow test. No copy of the successful swallow test was placed in the record, however.

Ms. N did not deny that she passed a swallow test at the hospital, but testified that at the time of the swallow test, she had just been given a much larger treatment of immunoglobulin than normal, as well as pain medication and steroids. Her performance was not indicative of her actual swallowing ability. She described how her disease affected her facial and esophageal muscles, such that she had to eat soft foods and even then was in danger of aspirating. Further, she remained at risk of food coming up for up to twenty minutes after eating, which increased the risk of aspirating food.[16] Ms. F described how Ms. N was unable to drink a cup of coffee because her lack of control of her facial muscles caused the coffee to spill.[17]

Another issue that arose at hearing was how much assistance Ms. N needed on certain IADLs. The parties agree that Ms. N needed help on IADLs. The issue here was a question of degree. If Ms. N was able to perform a task with difficulty, she would receive a self-performance score of "1," and she would receive some PCA benefit. If she was involved in the

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14 Division Exhibit E at 7. .
15 Samuel testimony; Division Exhibit .E at 9.
16 N testimony.
17 F testimony.

task, but required assistance, she would receive a self-performance score of "2," which would give her additional PCA time for help with that task. (If she was completely independent, she would receive a "0," and if completely dependent, a "3." Neither of those extremes were at issue here, however.)

Ms. N testified that many household tasks like laundry, vacuuming, preparing the main meal, and scrubbing floors were simply beyond her capability. Ms. Samuel agreed. Ms. N agreed, however, that she was capable of being *involved in* these activities—she just couldn't do them, or at least not effectively, if she was completely on her own.

## III. Discussion

The Medicaid program authorizes PCA services for the purpose of providing "physical assistance with activities of daily living (ADLs), physical assistance with instrumental activities of daily living (IADLs), and other services based on the physical condition of the recipient."[18] Under the regulations governing the Medicaid program, "[t]he department will not authorize personal care services for a recipient if the assessment shows that the recipient only needs assistance with supervision, cueing, and setup in order to independently perform an ADL or IADL."[19]

Ms. N suffers from a debilitating disease. She has significant medical needs. How much personal care assistance she is eligible for, however, will depend on her scores on the CAT. Here, this hearing identified the scores on four ADLs that were in dispute: locomotion, dressing, toileting, and eating.[20] It also identified three IADLs in dispute: main meal preparation, housework, and laundry. The issues will be discussed below.

### A. Do the CAT scores for locomotion, dressing, toileting, and eating need to be adjusted?

*Locomotion.* Ms. N's walking in the house is clearly burdened by her disease. Yet, at this time, she is able to walk without assistance and without assistive devices. The evidence does not establish that she is a fall risk. From comparing Ms. Samuel's report of her locomotion in March to that of Ms. F's at the hearing in June, it appears that when she receives her treatments, her walking is stronger and more confident. Given the expectation that her walking will

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[18] 7 AAC 125.010(a).

[19] 7 AAC 125.020(e). "Cueing" means "daily verbal or physical guidance provided to a recipient that serves as a signal to the recipient that the recipient needs to perform an activity." *Id.* "Setup" means "arranging items for use or getting items ready for use so that the recipient can independently perform an ADL or IADL." *Id.* "Supervision" means "observing and giving direction, as needed, so that the recipient can independently perform an ADL or IADL." *Id.*

[20] Although Ms. N stated she was contesting all issues in the CAT, she did not put on any evidence

improve, at most her CAT score should be a "1"—needs supervisory assistance, but not hands-on assistance. If her walking does not improve, however, and she is a fall risk for walking without assistance (but with a cane or walker), she can file a Change of Information and request additional assistance.

*Dressing.* Ms. N is not able to snap or button clothing. Therefore, she needs assistance to get dressed. Nothing, however, indicated that she would need assistance to get undressed. Her score for dressing should be a 2/2, one time per day.

*Toileting.* The evidence established that Ms. N had some difficulty with urine dribbling. She was able to manage this difficulty by using panty liners. She is independent in her management of this ADL. Her score for toilet use, "0/0," properly recognized her independence.[21]

*Eating.* Ms. N has met her burden of proof that she is at-risk for aspirating her food. She described, and Ms. F and Ms. S agreed, that she has difficulty swallowing. Difficulty swallowing could lead to aspirating and choking. The medical evidence in the record confirms this testimony. Although Ms. Samuel testified that Ms. N had passed a swallowing test just before being released from the hospital, that test result was not among the Exhibits at the hearing, and her passing the test may have been due to the medications Ms. N had recently taken. The exhibits describe an earlier swallow test done on March 13, 2014, at No Name Hospital before she had received her treatments for Myasthenia Gravis. This test noted significant issues with swallowing, drinking, and choking, and recommended "NPO"—nothing by mouth.[22] Additional evidence that Ms. N has difficulties with eating and is at risk for aspirating includes:

- Her testimony that she suffers from reflux, which can occur many minutes after eating and drinking, and which she feels makes her particularly prone to aspirating;

[21] Ms. F and Ms. S appeared surprised that Ms. N did not admit to urinary and bowel incontinence. This may have been based on reports they have from their former employee. Those reports were not made part of the record. The evidence does not support a finding of incontinence. If Ms. N is incontinent, however, she may submit a COI. She may be eligible for additional time for laundry, and if she needs assistance in using the toilet (which she may if she is incontinent), she may be eligible for additional PCA time for the ADL of toilet use.

[22] Division Exhibit H at 7. The doctor who was called in to consult as a result of this test stated "she failed a swallowing study, and therefore I was consulted." Division Exhibit G at 15. This swallow test was administered shortly after the tube was removed, however, and is not necessarily indicative of her swallowing ability at discharge. Nevertheless, the documentation clearly confirms chronic swallowing issues and indicates that these issues are worsening. *E.g*, Division Exhibit G at 14.

- The notes from her treating physician during 2013 indicate "difficulty swallowing"; "significant reflux"; and "[s]he chokes about one time per week";[23]
- At the time of her hospitalization she was suffering from malnutrition, which could be related to problems with eating and swallowing;[24]
- She was hospitalized with aspirational pneumonia, showing that aspiration has occurred.[25]

In sum, Ms. N is eligible for PCA assistance for the ADL of "supervising the eating and drinking of a recipient who has swallowing, chewing, or aspiration difficulties" as provided under 7 AAC 125.030(5)(C).[26]

**B. Do the CAT scores for main meal preparation, housework, and laundry need to be adjusted?**

At the hearing, Ms. Samuel agreed that Ms. N's scores for main meal preparation and housework should be adjusted up from a "1/3" to a "2/3." The evidence showed that Ms. N could be involved in main meal preparation and some housework, but she was not independent or independent with difficulty. She could however, prepare light meals.[27]

Also at the hearing, Ms. N agreed that she could be involved in some laundry tasks, such as folding, as long as it was understood that the main tasks of carrying laundry baskets and loading the washer/dryer were done by others. This means that she agrees with Ms. Samuel's CAT score for laundry of "2/3," and no adjustment is necessary.

## IV. Conclusion

Ms. N's CAT scores and PCA benefits should be adjusted as follows:

- Her score for the ADL of dressing should be 2/2, one time per day.
- She is eligible for PCA benefits for supervised eating under 7 AAC 125.030(5)(C).
- Her score for the IADL of main meal preparation should be 2/3.

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[23] N Exhibit (chart notes of Dr. H from 10/13 and 4/13).

[24] Division Exhibit E.

[25] Her incident of aspirating may be related in part to her drug use and altered mental status, but no evidence in this hearing established whether drug use or her physical condition caused by her illness caused her to aspirate. The incident does demonstrate, however, that the risk is real.

[26] Although there is considerable evidence of the risk of aspiration, the finding that Ms. N met her burden on this question is a close call. Ms. Samuel gave credible testimony that if Ms. N takes regular treatments, and implements her physical and speech therapies, she will not have swallowing or aspiration issues in the future. For now, however, the limited evidence in the record makes it more likely than not that Ms. N has swallowing problems, especially later in the 30 day period following her last treatment, and is at risk for aspirating. A swallow test or other medical evidence should be considered at the time of her next assessment.

[27] At the time of the assessment visit, Ms. N's son was living with her. He is no longer allowed in the home.

- Her score for the IADL of housework should be 2/3.

In all other respects, the Division's determination is affirmed.

DATED: June 16, 2014.

By: *Signed*
Stephen C. Slotnick
Administrative Law Judge

# Adoption

Under a delegation from the Commissioner of Health and Social Services, I adopt this Decision as the final administrative determination in this matter, 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 Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 2nd day of July, 2014.

By: *Signed*
Name: Stephen C. Slotnick
Title: Administrative Law Judge/DOA

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