

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

In the Matter of)
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 O N)
_____)

OAH No. 14-0769-MDS
Agency No.

DECISION

I. Introduction

O N was receiving 41.5 hours per week of personal care assistance (PCA) services when she was reassessed in 2013. Based primarily on a reassessment visit on October 22 of that year, the Division of Senior and Disabilities Services (Division) decided on April 24 of this year that her PCA services would be reduced to 33.75 hours per week. Some of the reduction resulted from regulatory changes since her prior assessment, while others were related to what the Division perceived as improvements in Ms. N’s condition. Ms. N requested a hearing.

Ms. N’s hearing took place on June 13, 2014. Ms. N did not attend, but she was represented by her nephew, B P, who holds her power of attorney and testified on her behalf. His wife, W P, also participated, as did Q C, the representative of Ms. N’s PCA agency. Victoria Cobo represented the Division. Vonda Roark-Martinez, who wrote the reduction decision for the Division, testified for the Division.

The parties partially resolved the case at the beginning of the hearing, which left three items in dispute: the weekly frequency provided for locomotion in room, weekly frequency for locomotion multi-level, and amount of time allowed for medical escort. This decision finds the Division’s assessment of Ms. N’s PCA service needs to be correct in part. However, the Division did not show that Ms. N’s weekly frequency provided for locomotion in room should be decreased. Moreover, while it demonstrated there should be a slight decrease in the number of times that locomotion multi-level should be provided, that amount should be set at 42 times per week, rather than the 14 times weekly argued at hearing. The Division demonstrated that medical escort should be 13 minutes weekly, as it argued at the hearing.

II. The PCA Service Determination Process

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”¹ Accordingly, “[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.”²

The Division uses the Consumer Assessment Tool, or “CAT”, as a methodology to score eligibility for the PCA program, and the amount of assistance, if any, that an eligible person needs to perform ADLs, IADLs, and the other covered services.³ In general, if certain levels of assistance are required, the regulations prescribe a fixed number of PCA minutes to be assigned per instance of that activity.

The ADLs measured by the CAT are bed mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room), locomotion (between levels), locomotion (to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, personal hygiene-shampooing, and bathing.⁴ The CAT numerical coding system for ADLs has two components. The first component is the *self-performance code*. These codes rate how capable a person is of performing a particular ADL. The possible codes are **0** (the person is independent⁵ and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance⁶); **3** (the person requires extensive assistance⁷); and **4** (the person is totally dependent⁸). There are also codes which are not used in calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).⁹

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

¹ 7 AAC 125.010(a).

² 7 AAC 125.020(e). This regulation defines “cueing” as “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;” “setup” as “arranging items for use or getting items ready for use so that the recipient can independently perform an ADL or IADL;” and “supervision” as “observing and giving direction, as needed, so that the recipient can independently perform an ADL or IADL.” *Id.*

³ See 7 AAC 125.024(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900.

⁴ Ex. E, pp. 6 – 11.

⁵ A self-performance code of 0 is classified as “[I]ndependent – No help or oversight – or – Help/oversight provided only 1 or 2 times during the last 7 days.” See Ex. E, p. 6.

⁶ According to 7 AAC 125.020(a)(1), limited assistance with an ADL “means a recipient, who is highly involved in the activity, receives direct physical help from another individual in the form of guided maneuvering of limbs, including help with weight-bearing when needed.”

⁷ According to 7 AAC 125.020(a)(2), extensive assistance with an ADL “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.”

⁸ According to 7 AAC 125.020(a)(3), dependent as to an ADL, or dependent as to an IADL, “means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity.”

⁹ Ex. E, p. 18.

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). Again, there are additional codes which are not used to arrive at a service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).¹⁰

The codes assigned to a particular ADL determine how much PCA service time a person receives for each occurrence of a particular activity. For instance, if a person was coded as requiring extensive assistance (code of 3) with bathing, she would receive 22.5 minutes of PCA service time each time she was bathed.¹¹ Even if the Division agrees that the amount of time provided by the formula is insufficient for a particular PCA recipient's needs, the regulations do not provide the Division with the discretion to change the amounts specified by the formula.

For covered services beyond assistance with ADLs and IADLs, specific rules apply that will be discussed below.

III. Background Facts

Ms. N is 87 years old. She lives with family in a two-story home in No Name City. Her diagnoses include chronic kidney disease, schizophrenia, and high blood pressure. She is extremely cognitively impaired.¹² She is unable to understand questions or answer them coherently, has a severely diminished range of motion, and has weak grips in both hands.¹³ She requires extensive assistance (self-performance code of 3) with all of her measured activities of daily living.¹⁴

Ms. N was receiving 41.5 hours of PCA services in 2013 based on an assessment conducted in 2012 and regulations that had been in effect prior to 2013. Michelle Russell-Brown, a Division nurse, made a visit to reassess Ms. N's PCA service needs on October 22, 2013. She recorded the assessment visit in the CAT. Her findings, coupled with the recent regulatory changes, resulted in a reduction of Ms. N's PCA services to 33.75 hours per week.¹⁵ In general, Ms. Russell-Brown did not find that Ms. N's level of assistance for a particular activity had improved; instead, she found that Ms. N did not require assistance as many times per

¹⁰ Ex. E, p. 18.

¹¹ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart contained at Ex. B, pp. 34 - 36.

¹² Ex. E, pp. 1 - 3, 17; Ex. F, p. 3.

¹³ Ex. E, p. 4.

¹⁴ Ex. D, p. 11; Ex. E, pp. 6 - 12.

¹⁵ The Division initially reduced Ms. N's PCA hours to 24.50 hours weekly. It revisited the issue and revised the reduction upward to 33.75 hours weekly. Ex. D, pp. 1- 3, 11.

week as previously, *e.g.*, instead of requiring extensive assistance with transfers 42 times per week, she found that Ms. N required extensive assistance with transfers 28 times weekly.

Ms. N has not broadly attacked Ms. Russell-Brown's reassessment, but has disagreed with the results of the reassessment in three very specific respects. The portions of the assessment and the associated PCA time awards that are not in dispute will not be discussed.

IV. Discussion

In this case, in which the Division is seeking to reduce a benefit a citizen is already receiving, the Division has the overall burden to prove, by a preponderance of the evidence,¹⁶ facts that show the citizen's level of eligibility has changed.¹⁷ In the context of PCA services, the showing required of the Division is that the recipient has had a "material change of condition."¹⁸ The Division can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs,¹⁹ including such sources as written reports of firsthand evaluations of the patient. The relevant date for purposes of assessing the state of the facts is, in general, the date of the agency's decision under review.²⁰

In particular areas where Ms. N seeks to add services that were not previously provided, Ms. N has the burden of proof.²¹

A. Locomotion In Room

The 2013 assessment reduced the frequency of assistance for this activity from 42 times per week to 28 times per week, but provides no explanation at all for the reduced frequency,²² and no further light was shed on this area by the Division's presentation at the hearing. In disputing the reduction, Mr. P offered his own testimony which, on this point, was rather vague. He discussed assisting Ms. N with locomotion around the downstairs portion of the house to enable her to receive some exercise and to go out on the deck on nice days.²³ In addition, she would undoubtedly require other assistance to move from room to room downstairs, and possibly upstairs. However, given that the Division did not present any evidence explaining the reduction

¹⁶ Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

¹⁷ 7 AAC 49.135.

¹⁸ 7 AAC 125.026(a). This is a term of art that encompasses not only changes in the patient's situation, but also changes in regulations affecting the authorized level of services. *See* 7 AAC 125.026(d).

¹⁹ 2 AAC 64.290(a)(1).

²⁰ *See* 7 AAC 49.170; *In re T.C.*, OAH No. 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013) (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf>).

²¹ 7 AAC 49.135.

²² Ex. D, p. 11; Ex. E, p. 7.

²³ Mr. P's testimony.

in the number of times locomotion assistance was provided, it did not meet its burden of proof, and the frequency that was previously in place cannot be disturbed.

B. Locomotion Multi-level

Ms. N lives in a two-story house. Her bedroom is upstairs. The kitchen, dining room, and family room are located downstairs.²⁴ The 2013 assessment reduced the frequency of assistance for this activity from 56 times per week to 7 times per week. The assessment does not explain the reason for the reduction in multi-level locomotion.²⁵ Ms. Roark-Martinez, who authored the Division's reduction letter, related that the nurse-assessor explained the basis for the reduction as her determination that moving Ms. N from the upstairs to the downstairs frequently was not good for her, given her health condition. Ms. Roark-Martinez did concede that the frequency should be twice daily, once downstairs and once upstairs.²⁶ This would result in multi-level locomotion 14 times per week, rather than the 7 times previously posited by the Division.

Mr. P explained that Ms. N normally takes her meals downstairs, three times per day, and after spending time downstairs returns to her bedroom after each meal to rest. This would be 6 locomotions daily (three times each way). He did not testify as to any other times that locomotion would be required between the different levels in the home.²⁷

The Division's explanation for reducing the frequency to twice daily, once downstairs and once upstairs, is not persuasive. Ms. N eats three meals per day and needs to be able to get from the upstairs for the meal and back to her room to rest. The Division's position that it is not beneficial for Ms. N to move between floors is conjecture, without any medical justification in the record. If the Division's reduction is allowed, it would either lessen Ms. N's opportunity to get out of her bedroom several times per day, making her more bedbound than she already is, or it would leave her downstairs during the entirety of the day and limit her ability to rest after meals. The Division has not met its burden of proof to limit locomotion between levels in the home to twice per day. In light of Mr. P's testimony, the appropriate number of locomotions would be six times daily, for a total of 42 weekly. While this is a reduction from the 56 previously allotted, it is higher than the 14 times weekly sought by the Division in its revised position at the hearing.

²⁴ Mr. P's testimony.

²⁵ Ex. D, p. 11; Ex. E, p. 7.

²⁶ Ms. Roark-Martinez's testimony.

²⁷ Mr. P's testimony.

C. Medical Escort

Escort time in the PCA program is generally provided for a narrow purpose relating to cognition; in order to qualify for Medical Escort, a person must require, not merely transport, but someone to confer with the medical or dental staff on her behalf.²⁸ Ms. N previously received 8.07 minutes per week (just under 7 hours per year) of escort time. Upon reassessment, Ms. N was provided 9.23 minutes per week (8 hours per year) of escort time. At hearing, the Division agreed to increase the amount to 13 minutes per week. This was based on allowing 120 minutes for each of Ms. N’s three yearly medical appointments in Anchorage, and allowing 60 minutes for each of Ms. N’s five yearly medical appointments in the No Name Area.

Ms. N did not dispute the time allotted for her medical appointments in the No Name Area. However, Mr. P argued that Ms. N’s Anchorage appointments required 120 minutes apiece just for travel, and that the actual medical appointment time required an additional hour or two per appointment.

Traveling to and from Anchorage from Ms. N’s No Name City home, depending upon traffic and weather conditions, could take up to two hours per visit. However, it could also take less time in normal traffic and weather conditions. In addition, time spent in doctor’s office waiting rooms is not compensated: the regulation only allows medical escort time for time spent traveling and conferring with medical personnel, and it does not allow time spent waiting to confer.

The Division’s reasoning for an increase to 13 minutes weekly is supported by a preponderance of the evidence. Ms. N bears the burden to support any increase above that amount, and her representatives have not met that burden.

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²⁸ 7 AAC 125.030(d)(9); *see also In re E.K.*, OAH No. 13-1750-MDS (Comm’r of Health & Soc. Serv. 2014), at 5 & n.17.

V. Conclusion

The Division’s assessment of Ms. N’s needs for PCA assistance was, with the partial resolution at hearing, partially correct. However, locomotion within the room should continue at 42 times weekly. Locomotion multi-level should be reduced to 42 times weekly from the 56 times previously provided, rather than the 14 times weekly requested by the Division. Further, medical escort time should be allowed at 13 minutes weekly, consistent with the Division’s position taken at hearing. The Division is to recalculate Ms. N’s PCA service time consistent with the partial resolution at hearing and this decision.

DATED this 2nd day of October, 2014.

Signed

Christopher Kennedy
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 16th day of October, 2014.

By: *Signed*

Name: Christopher M. Kennedy
Title: Administrative Law Judge

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