

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

In the Matter of)
)
 D C)
_____)

OAH No. 14-0857-MDS
Agency No.

DECISION

I. Introduction

D C was receiving 34.75 hours per week of personal care assistance (PCA) services when she was reassessed in 2013. Based primarily on a reassessment visit on November 4, 2013, the Division of Senior and Disabilities Services (Division) decided on April 23, 2014 that her PCA services would be reduced to 11 hours per week. Some of the reductions resulted from regulatory changes since her prior assessment, or were related to what the Division perceived as improvements in Ms. C’s condition. Ms. C requested a hearing.

Ms. C’s hearing was held on August 11, 2014. Ms. C did not participate. She was represented by her daughter A T; she holds Ms. C’s power of attorney and testified on her behalf. L A, from Consumer Direct, provided assistance to Ms. T. T E-N, Ms. C’s PCA, also testified. Victoria Cobo represented the Division. Marianne Sullivan, RN, the assessor, and Suzanne Mittlestadt, who wrote the reduction decision for the Division, testified for the Division.

There were seven items in dispute: the amount of PCA time provided for transfers, locomotion, dressing, eating, toileting, personal hygiene, and medication assistance. The Division’s assessment of and provision for Ms. C’s PCA service needs, with the modifications made by agreement during the hearing, was correct in part and incorrect in part. The Division’s allocation of PCA service time is therefore affirmed in part and reversed in part as discussed below.

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

¹ 7 AAC 125.010(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.

As a gateway to eligibility for PCA services, the CAT evaluates a subset of the ADLs and IADLs. If a person requires some degree of hands-on physical assistance with any one of these ADLs or IADLs, then the person is eligible for PCA services. Once eligibility is established, time for additional ADLs and IADLs, as well as certain other covered services, can be added to the PCA authorization. In Ms. C’s case, there is no dispute that she needs hands-on help with some of the gateway ADLs and IADLs.

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); **4** (the person is totally dependent⁸).

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.”

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.”

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 setup or physical help required); **1** (only setup help required); **2** (one-person physical assist required); **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 were 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. C is 83 years old. She lives with her daughter, A T, and Ms. T's husband. She has a number of medical conditions that impact her functionality, including osteoarthritis and cerebrovascular disease. She had a brain tumor removed in 1998 and a stroke in 2009. She is extremely cognitively impaired. She is frequently incontinent, of both bowel and bladder.¹² She receives adult day care services 2 days per week, for 6 hours each day.¹³

Ms. C was receiving 34.75 hours of PCA services in 2013 based on an assessment from 2006 and a 2009 amendment. Marianne Sullivan, a Division nurse, made a visit to reassess Ms. C's PCA service needs on October 4, 2013. She recorded the assessment visit in the CAT. Her findings, coupled with recent regulatory changes, resulted in a reduction of Ms. C's PCA services to 11 hours per week.¹⁴ In general, Ms. Sullivan found that Ms. C's physical

⁹ Ex. E, p. 18.

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, 9, 17; Ex. F (2006 Assessment), p. 1; Ex. 2; Ex. 3, p. 1; Ex. 8; Ms. T's testimony.

¹³ Ex. E, p. 2; Ms. Mittelstadt's testimony.

¹⁴ Ex. D, p. 10.

functionality had increased, which resulted in a decrease in both the degree of assistance required and the number of times weekly that assistance was required.

Ms. C did not dispute all of the reductions proposed by the Division, but has disagreed with the results of the reassessment in seven categories. 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,¹⁵ facts that show the citizen's level of eligibility has changed.¹⁶ In the context of PCA services, the showing required of the Division is that the recipient has had a "material change of condition."¹⁷ The Division can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs,¹⁸ 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.¹⁹

In particular areas where Ms. C seeks to increase services or add services that were not previously provided, Ms. C has the burden of proof.²⁰

A. Transfers

The 2013 assessment reduced the type of transfer assistance from extensive (self-performance code of 3) to limited assistance (self-performance code of 2) and reduced the frequency from 42 times weekly to 28 times weekly.²¹ Ms. C did not disagree with the reduction in frequency, but disagreed on the reduction in the type of assistance from extensive to limited.²²

The assessor could not recall how Ms. C got in and out of a chair.²³ The only references note, under the category of bed mobility, that the assessor observed Ms. C transferring onto a chair in the living room, and then states, under the category of transfers, that the assessor was

¹⁵ Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

¹⁶ 7 AAC 49.135.

¹⁷ 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).

¹⁸ 2 AAC 64.290(a)(1).

¹⁹ 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>).

²⁰ 7 AAC 49.135.

²¹ Ex. D, p. 10; Ex. E, p. 6.

²² Ex. 1, p. 2.

²³ Ms. Sullivan's testimony.

told during the assessment that Ms. C required assistance to transfer.²⁴ Ms. C also has a history of falls.²⁵ While Ms. C has a lift recliner, it is located in her bedroom.²⁶ Ms. T's testimony was consistent with the information told to the assessor, being that Ms. C required assistance with transfers for regular chairs. Ms. T further testified that Ms. C required assistance even when transferring out of her lift recliner, although using the lift recliner made the process easier. Ms. C's PCA also testified that Ms. C requires weight-bearing assistance when transferring. Given the evidence on this point, the Division has not met its burden of proof to demonstrate that Ms. C should no longer receive extensive assistances with transfers. However, as agreed by Ms. C, the number of times should be reduced to 28 times per week.

B. Locomotion In Room

The 2013 assessment reduced the degree of assistance from limited (self-performance code of 2) to supervision (self-performance code of 1), which eliminated assistance for this activity altogether. Ms. C had previously been receiving limited assistance with locomotion 49 times per week.²⁷ Ms. C disagreed with the reduction.

At hearing, the parties agreed that Ms. C should receive limited assistance (self-performance code 2) with locomotion. This only left the question of how many times per week she should receive assistance. Ms. C had, prior to hearing, agreed to a reduction in the frequency to 42 times per week.²⁸ Ms. T testified that Ms. C required help with moving a minimum of 6 to 7 times daily, sometimes up to 10 times daily. Ms. C's need for daily assistance is reduced slightly because she is scheduled to be out of the home 12 hours per week for day care. However, given that her need for assistance varies, and is a minimum of 6 times daily, and because Ms. C may not always go to day care as scheduled, the Division has not met its burden of proof to demonstrate that she should receive locomotion assistance less than the 42 times per week agreed to by Ms. C.

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²⁴ Ex. E, p. 6.

²⁵ Ms. T's testimony. *Also see* Incident Report for October 3, 2013 – fall when transferring; Incident Report for October 9, 2013 – fall when walking. (Ex. 6, pp. 1 – 4).

²⁶ Ms. T's testimony.

²⁷ Ex. D, p. 10; Ex. E, p. 7.

²⁸ Ex. 1, p. 3.

C. Dressing

The 2013 assessment reduced the type of assistance from extensive (self-performance code of 3) to limited (self-performance code of 2). The frequency was unchanged.²⁹ Ms. C disagreed with the reduction.

The Division's determination that only limited assistance was required was based upon the assessor's functional assessment, which showed that Ms. C was able to touch her feet, had a good upper extremity range of motion, and good physical strength in both hands.³⁰ In July 2013, approximately 4 months before the Division's assessment visit, a doctor's examination showed that Ms. C had good muscle strength in both upper extremities and both lower extremities, but that her reflexes were lacking, and that she was unable to stand without support.³¹ On June 14, 2014, a date not much past the Division's reduction determination date of April 23, 2014, Ms. C's doctor wrote that she had "limited mobility and requires assistance with all of her activities of daily living such as personal hygiene and dressing."³² Ms. T's and the PCA's testimony regarding dressing showed a great deal of hands on weight-bearing assistance, including having to physically lift Ms. C's body parts to dress her. As a result, the weight of the evidence demonstrates a continued need for weight-bearing assistance, *i.e.*, extensive assistance with dressing. The Division has therefore not met its burden of proof to justify a reduction with this activity.

D. Eating

The 2013 assessment reduced the degree of assistance from limited (self-performance code of 2) to independent (self-performance code of 0), which eliminated assistance for this activity altogether. Ms. C had previously been receiving limited assistance with eating 21 times per week.³³ At hearing, the Division agreed that Ms. C should receive supervised eating due to swallowing issues. Supervised eating is provided at a flat rate of 45 minutes per day. It is provided concurrent with any time allowed for eating.³⁴ If a person has a need for the maximum level of assistance with eating, the most PCA assistance he or she can receive is 15 minutes per meal.³⁵ Assuming three meals per day, this would be 45 minutes per day. This is the same

²⁹ Ex. D, p. 10; Ex. E, p. 8.

³⁰ Ms. Sullivan's testimony; Ex. E, p. 4.

³¹ Ex. 3, pp. 3 - 4.

³² Ex. 2.

³³ Ex. D, p. 10; Ex. E, p. 7.

³⁴ *Personal Care Assistance Service Level Computation*, p. 1. (Ex. B, p. 34).

³⁵ *Id.*

amount provided for supervised eating, which must be concurrent. In other words, if a person receives supervised eating, they are not eligible to receive additional eating time. Because of the Division's agreement that Ms. C should receive supervised eating, she is not eligible for additional time for other eating-related PCA services. Accordingly, it is not necessary to address the reduction by the Division because Ms. C's needs are already provided at the maximum time allowable through supervised eating.

E. Toileting

The 2013 assessment reduced the type of assistance from extensive (self-performance code of 3) to limited (self-performance code of 2) and reduced the frequency from 42 times weekly to 35 times weekly.³⁶ The reduction in the type of assistance was due to the fact that there were modifications to the bathroom to aid in transfers (raised toilet seat, safety rails). There was no explanation for the decrease in frequency on the assessment.³⁷

As found above, Ms. C continues to require extensive assistance with transfers. Although there are safety modifications in the bathroom, which undoubtedly aid in transfers on and off the toilet, this would not entirely obviate the need for weight-bearing assistance. In addition, Ms. T's testimony established that Ms. C needs a great deal of assistance with dressing (removing and replacing clothing and incontinence garments), which again was found to be at the extensive level above. She is frequently incontinent and requires a great deal of assistance with cleansing herself, both due to incontinence and when using the toilet. Her incontinence products need to be changed at least 6 times per day. The Division did not meet its burden of proof on the reduction of the type of assistance from extensive to limited. Similarly, it did not meet its burden on the reduction in the frequency from 42 to 35; there was a dearth of evidence showing a decrease in toileting frequency, even taking into account the argument that Ms. C's toileting needs were slightly decreased by the 12 hours per week that she is scheduled to attend adult day care.

F. Personal Hygiene

The 2013 assessment kept Ms. C's type of assistance at limited (self-performance code of 2) but reduced the frequency to 7 times per week, for 70 total minutes per week.³⁸ The reduction in frequency is due to a regulatory change that limits personal hygiene assistance to a total of 10

³⁶ Ex. D, p. 10; Ex. E, p. 9.

³⁷ Ms. Sullivan's testimony; Ex. E, p. 9.

³⁸ Ex. D, p. 10; Ex. E, p. 10.

minutes per day for a person who requires limited assistance.³⁹ Ms. C is requesting an increase in the type of assistance to extensive assistance (self-performance code of 3), so she has the burden of proof on this point.

Ms. T's and the PCA's testimony showed that Ms. C requires a great deal of hands-on assistance with her personal hygiene. However, she did not establish that weight-bearing assistance was required. Ms. C therefore did not meet her burden of proof to increase the type of assistance from limited to extensive.

G. Medication Assistance

The Division provided Ms. C with 21 minutes per week (3 minutes daily) of medication assistance based upon Ms. C requiring limited assistance (self-performance code of 2) with personal hygiene.⁴⁰ Ms. C disagreed, maintaining that she should receive medication assistance at the extensive assistance level. By regulation, however, medication assistance is provided for based upon the personal hygiene score.⁴¹ As discussed above, Ms. C's personal hygiene score was correctly assessed as requiring limited assistance, and not extensive assistance. Accordingly, she has not shown a basis for increasing her medication assistance.

V. Conclusion

The Division's assessment of Ms. C's needs for PCA assistance was, with the changes agreed to at hearing (eating supervision and limited assistance with locomotion), partially correct. Extensive assistance with transfers should be provided 28 times per week. Limited assistance with locomotion within the room should be provided 42 times weekly. Extensive assistance with dressing should be provided. Because supervised eating is provided, no additional time for eating is allowed. Extensive assistance with toileting should be provided 42 times per week. The amount of time provided for personal hygiene and medication assistance shall remain unchanged. The Division is to recalculate Ms. C's PCA service time consistent with the limited agreement at hearing and this decision.

DATED this 9th day of October, 2014.

Signed

Rebecca Pauli
Administrative Law Judge

³⁹ *Personal Care Assistance Service Level Computation*, p. 1. (Ex. B, p. 34).

⁴⁰ Ex. D, p. 10.

⁴¹ Ex. D, p. 10; *Personal Care Assistance Service Level Computation*, pp. 1 - 2. (Ex. B, pp. 34 - 35).

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 23rd day of October, 2014.

By: *Signed* _____
Name: Andrew M. Lebo
Title: Administrative Law Judge

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