

**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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 D I )  
\_\_\_\_\_ )

OAH No. 14-0894-MDS  
Agency No.

**DECISION**

**I. Introduction**

D I challenges the Division of Senior and Disabilities Services’ (division’s) denial of her application for Medicaid Personal Care Assistance services (PCA services). Because this is a denial of an initial application for services, Ms. I has the burden of proving by a preponderance of the evidence that she is eligible for the services sought. The evidence presented by Ms. I failed to establish her eligibility. The division’s decision is affirmed.

**II. Overview of 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[. <sup>1</sup>]

The Division uses a document titled Consumer Assessment Tool (CAT) when assessing whether an applicant is eligible for PCA services.<sup>2</sup> The CAT presents a snapshot of the level of physical assistance that an applicant required to complete their activities of daily living (ADLs) and instrumental activities of daily living (IADLs) in the seven days leading up to the date of the assessment interview<sup>3</sup> The specific measured ADLs are transfers, locomotion, eating, toilet use, dressing, and bathing.<sup>4</sup> IADLs are meal preparation (either light or main meals), housework (either light or routine housework), grocery shopping, and laundry.<sup>5</sup>

Measuring an applicant’s performance on the CAT provides two text boxes for each ADL. One is a text box to record what the applicant reports that is of relevance to a particular

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<sup>1</sup> 7 AAC 125.010(a).  
<sup>2</sup> 7 AAC 130.215(2) (incorporating the CAT adopted by reference at 7 AAC 160.900(d)(6)).  
<sup>3</sup> 7 AAC 125.010(a).  
<sup>4</sup> Exhibit E at 18.  
<sup>5</sup> 7 AAC 125.020(b).

ADL, and one is a text box to record the assessor's observation. Each ADL provides instructions on what is relevant for assessing the applicant's ability to complete the ADL. For example, for the ADL of locomotion, the assessor is advised to "describe type of assistance, assistive devices used, gait and falls, if applicable."<sup>6</sup>

The assessor considers her observations, the consumer's reports, and medical information and other information contained in the division's files to score the ADL, using a numerical coding system with two components: a self-performance code<sup>7</sup> and a support code.<sup>8</sup> The "self-performance" codes rate how capable a person is with regard to performing a particular ADL or IADL.<sup>9</sup> The "support" codes rate the degree of assistance that a person requires for a particular ADL or IADL.<sup>10</sup>

With regard to ADLs, the possible self-performance codes are: **0** (person is independent and requires no help or oversight); **1** (person requires supervision); **2** (person requires limited assistance); **3** (person requires extensive assistance); **4** (person is totally dependent); **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).<sup>11</sup>

For IADLs the self-performance codes are slightly different from the ADL self-performance codes. For IADLs the self-performance codes are: **0** (independent either with or without assistive devices – no help provided); **1** (independent with difficulty - the person performed the tasks, but did so with difficulty or took a great amount of time to do the task); **2** (assistance/done with help – the person was somewhat involved in the activity, but help in the form of supervision, reminders, physical assistance was provided); **3** (dependent/done by others – the person is not involved at all with the activity and the activity is fully performed by another person); and **8** (activity did not occur within the past seven days).<sup>12</sup>

If the person requires some degree of hands-on physical assistance more than twice a week with any *one* of the specified ADLs<sup>13</sup> or any *one* of the specific IADLs,<sup>14</sup> then the person is

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<sup>6</sup> Exhibit E at 7.

<sup>7</sup> Exhibit D at 1-2.

<sup>8</sup> *Id.* 1-2.

<sup>9</sup> Exhibit D at 2; Exhibit E at 26.

<sup>10</sup> Exhibit E at 6, 26.

<sup>11</sup> Exhibit D at 2; Exhibit E at 6-11.

<sup>12</sup> Exhibit D at 2; Exhibit E at 26.

<sup>13</sup> 7 AAC 125.020(a). "Limited Assistance" – the minimum hands-on physical assistance standard applicable to ADLs – is a situation in which the recipient, although "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." 7AAC 125.020(a)(1).

eligible for PCA services. However, if a person is independent or only requires non-hands-on assistance (oversight, supervision, cueing, and setup) with all of these specific ADLs and IADLs, then the person is not eligible for PCA services.<sup>15</sup>

### III. Facts

D I is a woman in her early 70s.<sup>16</sup> She speaks Hmong and participated in the hearing with the assistance of an interpreter. She recently moved to Alaska from California. Ms. I lives with her five children in a four bedroom mobile home.<sup>17</sup> She has verified diagnosis of muscle weakness, pain, and depression.<sup>18</sup> Ms. I believes she suffered a stroke while in California, but cannot recall when the stroke occurred. Both the division and her primary physician, Q T, D.O., have been unable to confirm whether Ms. I had a stroke.<sup>19</sup>

Registered Nurse Denise Kichura evaluated Ms. I's need for PCA services on January 22, 2014, using the Consumer Assessment Tool (CAT).<sup>20</sup> Present at the assessment interview were Ms. I's son, daughter, agency representative, and nephew.<sup>21</sup> The division provided an interpreter.<sup>22</sup>

During the interview Ms. I was asked to perform a variety of tasks intended to assess her physical limitations.<sup>23</sup> Ms. Kichura recorded her observations in the CAT and assigned a score of 0/0 for bed mobility, 0/1 for eating, and 1/1 for all of the remaining ADLs.<sup>24</sup> Ms. I was scored 0/0 for all instrumental activities of daily living (IADLs).<sup>25</sup>

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<sup>14</sup> 7 AAC 125.020(a). "Independent with Difficulty" – the minimum hands-on physical assistance standard applicable to IADLs -- is defined in AAC 125.020(a)(4) as a situation in which the "the recipient can perform the activity without the help of another individual, but does so with difficulty or takes a great amount of time to perform it." If a potential recipient's IADL self-performance score is a "1" – *i.e.*, independent with difficulty – then the support code must be a "3" or a "4" in order for the person to receive PCA services.

<sup>15</sup> Exhibit E at 31 (part of the CAT, adopted by reference in 7 AAC 125.02(a)(1) and 7 AAC 160.900).

<sup>16</sup> Testimony of Ms. I.

<sup>17</sup> *Id.*

<sup>18</sup> Exhibit E at 3.

<sup>19</sup> Testimony of Denise Kichura.

<sup>20</sup> Exhibit D, at 1; 7 AAC 125.020 (b).

<sup>21</sup> Exhibit E at 2.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 4-11.

<sup>24</sup> Exhibit D at 1-2.

<sup>25</sup> *Id.* at 1-2.

Based on the results of this assessment, the Division concluded that Ms. I was not eligible for PCA services. The denial determination letter was issued on May 19, 2014 informing Ms. I of the division's decision.<sup>26</sup>

Ms. I requested a hearing to challenge the denial.<sup>27</sup> A few days prior to hearing she submitted a nine page facsimile. The first page is the fax cover sheet.<sup>28</sup> The next two pages followed by two pages contain Ms. I's argument along with the services sought with the corresponding support levels and frequency.<sup>29</sup>

Activity	Score	Frequency Per Day
Transfer	4/2	7
Locomotion	3/2	9
Dressing	3/2	2
Eating	3/2	3
Toileting	3/2	7
Bathing	3/2	1
Meal Preparation	3/4	25
Shopping	3/4	60 Minutes Per Week
Light Housework	3/4	90 Minutes Per Week
Laundry	3/4	60 Minutes Per Week

Ms. I argues that

I strongly believe I qualify for the PCA program because of my health conditions and according to all the statements issued by my physicians and the people who examined my health. My physicians told me that I should receive maximum care for my [ADLs] . . . provide me with the service I deserve to have as an Alaskan resident. . . .<sup>30</sup>

The next document provided is a one page "To Whom it May Concern" letter dated March 13, 2014 from Ms. I's social worker, K S, MAT, LCSW. Ms. S wrote that she supports Ms. I's application because Ms. I has

become totally dependent on others for all of her care. She cannot perform ANY of her ADLs or IADLs independently. She cannot feed herself. She cannot go to

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<sup>26</sup> *Id.*  
<sup>27</sup> Exhibit C at 2.  
<sup>28</sup> I Submission at 1.  
<sup>29</sup> *Id.* at 2-3.  
<sup>30</sup> *Id.* at 2-3.

the bathroom by herself. She cannot bathe, dress or transfer by herself. She cannot cook, clean, shop or do laundry.<sup>31</sup>

Ms. I also submitted four prescriptions from two providers, Dr. T and B D, M.D. On September 27, 2013 Dr. T prescribed Range of Motion and walking exercises for Ms. I.<sup>32</sup> On January 27, 2014, Dr. T's wrote on his prescription pad that Ms. I:

is unable to move her left side. She has limited range of motion and strength on both sides. Pain on the left and right. Pt. is unable to perform ADLs without help. She requires a PCA to cook, bathe and shower, feeding, moving around using the toilet, laundry and change her clothes. She requires a great deal of PCA assistance.<sup>33</sup>

Dr. D wrote two prescriptions, both dated February 2, 2010. One provides that Ms. I needs PCA services and the other a shower chair. Both prescriptions state she needs the assistance because of her stroke.<sup>34</sup>

At the hearing, Ms. I testified. Her testimony was in sharp contrast with the assessment and Ms. Kichura's testimony.

Ms. Kichura agreed that Ms. I said she needed extensive assistance with ADLs and IADLs, but that she observed Ms. I climb over clutter in the home onto her wheel chair, rub her face with her hands, pull the bed covers up to her face, move from one side of the bed to another, use the armrests of a chair to stand up, pick up and grip a pen, grip and raise a cup.<sup>35</sup> She described the home as cluttered with little room for the wheel chair. When it came to eating, Ms. Kichura recalled that Ms. I stated she could not feed herself. However, when Ms. Kichura asked Ms. I's son, he contradicted Ms. I by stating that she feeds herself.<sup>36</sup> Ms. I was upset with her son for contradicting her.<sup>37</sup> Ms. Kichura found Ms. I not credible because of how Ms. I responded throughout the assessment interview. Additionally, a conversation Ms. Kichura had with an employee at Dr. T's office contradicted Ms. I's assessment of her physical abilities.<sup>38</sup> This credibility determination influenced Ms. Kichura's assessment.<sup>39</sup>

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<sup>31</sup> I submission at 4.

<sup>32</sup> *Id.* at 8-9.

<sup>33</sup> *Id.* at 5.

<sup>34</sup> *Id.* at 6-7.

<sup>35</sup> Exhibit E at 4-11.

<sup>36</sup> Testimony of Kichura.

<sup>37</sup> *Id.*

<sup>38</sup> Testimony of Kichura.

<sup>39</sup> *Id.*

Ms. Kichura testified that she and another division employee, David Chadwick, jointly called Dr. T's office to speak with Dr. T. Before talking to Dr. T, she spoke with a certified medical assistant (CMA) employed with Dr. T, who told Ms. Kichura that the CMA observed Ms. I transfer out of her wheelchair and walk to the weight scale, get on the weight scale, and return to the wheel chair with only contact assistance.<sup>40</sup> Mr. Chadwick, who participated in the phone call with Ms. Kichura, agreed that was what they were told.<sup>41</sup> Ms. Kichura placed a summary of what she was told throughout the CAT as an assessor's observation, and in one instance in the "consumer report" box.<sup>42</sup> This information was received a week after the assessment interview.

Ms. I believes the results in the CAT are false and that Ms. Kichura cannot be trusted. Ms. I spoke of being old and suffering from many medical problems.<sup>43</sup> She attempted to discredit the CAT and Ms. Kichura by pointing out that Ms. Kichura wrote that Ms. I was attended to by a PCA but this was an initial application and PCA services had not yet been authorized.<sup>44</sup> Ms. Kichura explained that she was referring to the nephew.<sup>45</sup>

Ms. I was steadfast that she could not perform any of the ADLs or IADLs without extensive assistance. She described how she is totally dependent upon her children and relatives to transfer, how she could not feed herself, move her upper extremities or use the phone. She could not clean her house, shop, cook or do laundry. Ms. I relies upon relatives to complete her ADLs and IADLs. Ms. I described the house as clean and tidy at the time of the assessment interview, but later changed her testimony and explained why the house was cluttered at the time of the interview.

#### **IV. Discussion**

##### *A. Burden of Proof*

As the person applying for PCA benefits, Ms. I has the burden of proving eligibility by a preponderance of the evidence.<sup>46</sup> This means she must either point to evidence already in the record or add evidence that will support her eligibility for the requested services.

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<sup>40</sup> *Id.*  
<sup>41</sup> Testimony of Chadwick.  
<sup>42</sup> Exhibit D at 6, 7, 9, 11.  
<sup>43</sup> Testimony of I.  
<sup>44</sup> *Id.*  
<sup>45</sup> Testimony of Kichura.  
<sup>46</sup> 7 AAC 49.135.

B. *Evidence to be Considered*

In this type of administrative proceeding the formal rules of evidence do not apply.<sup>47</sup> Evidence will be admitted if it is relevant and is “evidence of the type on which a reasonable person might rely in the conduct of serious affairs. . . .”<sup>48</sup>

Evidence considered includes Exhibits C – E,<sup>49</sup> the providers’ four prescriptions,<sup>50</sup> and the testimonies of Ms. I, Ms. Kichura, and Mr. Chadwick. This evidence will be weighed and where appropriate credibility will be assessed to determine the weight given to the evidence presented.

1. The record does not support a finding that Ms. I suffered a stroke.

Dr. T worded his prescription for PCA services very carefully and did not use the word “stroke.” Dr. D’s prescription uses the word stroke but lacks any medical record in corroboration. Dr. T is represented as Ms. I’s provider for at least six months. It is unknown how long Dr. D has known Ms. I. Dr. T’s lack of a stroke diagnosis is given more weight than Dr. D’s prescription.

Regardless, whether Ms. I suffered a stroke is not determinative of her eligibility for PCA services. PCA services are authorized for individuals who require physical assistance to complete ADLs and IADLs. The determinative issue is whether Ms. I established that it is more likely than not that she requires hands on physical assistance or weight bearing assistance to complete ADLs and requires assistance to complete her IADLs.

2. The CAT

The CAT works neither for nor against Ms. I. It is of neutral persuasive value because it does not contain evidence that allows a trier of fact to have a clear picture of what was observed or not observed throughout the assessment interview.

When Ms. Kichura has the ability to record her first hand observations she does not capture the information requested by the instructions in the CAT. For example, Ms. Kichura observed Ms. I receive assistance from her PCA (later determined to be Ms. I’s

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<sup>47</sup> 2 AAC 64.290(b). Formal Rules may apply if the parties stipulate to their use. Here there was no stipulation.

<sup>48</sup> 2 AAC 64.290(a).

<sup>49</sup> Exhibit C is Ms. I’s request for hearing; Exhibit D is the division’s May 19, 2014 determination letter; and Exhibit E is the CAT.

<sup>50</sup> Ms. S’s “To Whom It May Concern” letter of support, Dr. T’s March 27, 2013 and January 27, 2014 prescriptions; and Dr. D’s February 10, 2014 prescriptions. I Submission at 4-9.

nephew) but did not explain the type of assistance provided or received. If the division had the burden of proof in this instance, the lack of information would make it difficult to determine whether the division had correctly scored the CAT.

Also, scattered throughout the CAT in the text box reserved for assessor observations, Ms. Kichura inexplicitly recorded as her observation what she was told by an employee at No Name Medical Center eight days after the assessment interview. Ms. Kichura wrote as her observation that the “CMA stated [Ms. I] took a few steps to step onto the scale to get weighed w/ contact support;” “CMA reported [Ms. I] stood from w/c and stepped onto the scale w/contact assistance.”<sup>51</sup> These are not Ms. Kichura’s observations. These represent Ms. Kichura’s written recollection of what she was told over the telephone on January 30, 2014 by a certified medical assistant, who told Ms. Kichura that she observed Ms. I transfer and locomote without physical or hands on assistance.

The division was correct to consider evidence gathered between the assessment interview (January 22, 2014) and the determination letter (May 19, 2014). However, the statement attributable to the CMA will not be considered for the truth of the matter asserted because it is not the type of evidence on which a reasonable person might rely on in the conduct of serious affairs. If the statement is offered for the truth of the matter asserted thereby intending to impeach Ms. I, it is up to the division to establish the statement attributable meets the test for reliability. The division has not done so.

However, the statements attributable to the CMA are admissible if offered to show the depth and breadth of information gathered and considered by the division before determining whether to approve or deny Ms. I’s application.

### 3. Provider’s Statements

Treating physician’s opinions are normally given a great deal of weight. Ms. S, Dr. T, and Dr. D all write in support of Ms. I’s application for PCA services that “she requires a great deal of PCA assistance,” “she has become totally dependent on others, . . . “she cannot feed herself” and “she has had a stroke leaving her unable to take care of herself.”<sup>52</sup> In this instance the prescribed requests for PCA services are opinions, not prescriptions for care. They do not contain sufficient detail from which it is possible to infer the amount of

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<sup>51</sup> Exhibit E at 6, 9.

<sup>52</sup> I submission at 4-6.



physical assistance required to complete an ADL or IADL. Regarding Dr. T's prescription for range of motion and walking exercises, these activities are not used to determine eligibility.<sup>53</sup> For these reasons, the provider's statements are, at best, neutral for Ms. I.

#### 4. Testimony

The division's testimony, like its CAT, is of neutral value because Ms. Kichura's and Mr. Chadwick's conclusions were heavily influenced by their reliance on a statement that is not accepted for the truth of the matter asserted.<sup>54</sup>

The conflicting statements peppered throughout Ms. I's testimony detract from its credibility. For example, Ms. I testified that at the time of the assessment interview the home was not cluttered. In later testimony she changed her testimony and began explaining why her home was cluttered.

Ms. I testified she could not use the phone. Later, upon cross examination, Ms. I testified that when she is alone, which is often, she will use the phone to call her cousin or nephew<sup>55</sup> to come help her. Ms. I did not know how far away her cousin or nephew lived, and that if she called it would "take him a little while to get there."<sup>56</sup> If Ms. I is completely dependent on others for transfers as she contends, then how does she get to the bathroom? She is not diagnosed as incontinent and there is no mention of incontinence products in the CAT; there is no commode listed under assistive devices. This begs the question as to how Ms. I toilets when she is alone.

Finally, it is Ms. I's burden of proof and she did not seek to challenge or rebut Ms. Kichura's testimony regarding statements attributable to her family, including that her son testified that Ms. I could and does feed herself or that Ms. I was upset when he said she could feed herself. Ms. Kichura's testimony that Ms. I could grasp and raise fine items, such as a pen or larger items such as a cup and raise them to her mouth, remained undisturbed.

#### C. *Ms. I has not Established by a Preponderance of the Evidence that she is Eligible for PCA Services*

The majority of the evidence presented neither helps nor hinders Ms. I. While there is some evidence in the record that supports Ms. I's application for benefits, to prevail the record

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<sup>53</sup> 7 AAC 125.030(e).

<sup>54</sup> Testimony of Kichura and Chadwick.

<sup>55</sup> At times the relative was identified as her cousin and at times her nephew.

<sup>56</sup> Testimony of I.

must contain a preponderance of the evidence in support of her application. Ms. I's testimony lacks sufficient credibility or corroboration to satisfy her burden of proof with regard to any one of the scored ADLS or IADLS.

**V. Conclusion**

While there is evidence in the record that supports Ms. I's application, the evidence does not establish that it is more likely than not that Ms. I has established by a preponderance of the evidence that she is eligible for PCA services for scored ADLS or IADLS. The division's denial of her application is affirmed.

DATED this 20<sup>th</sup> day of August, 2014.

By: Signed  
Rebecca L. Pauli  
Administrative Law Judge

**Adoption**

The undersigned, by delegation from 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 29<sup>th</sup> day of August, 2014.

By: Signed  
Name: Rebecca L. Pauli  
Title: Administrative Law Judge

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