

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

In the Matter of:)
)
 M E) OAH No. 14-0895-MDS
) Agency No.

DECISION

I. Introduction

M E receives personal care assistant (PCA) services through the Division of Senior and Disability Services under 7 AAC 125.010-199.¹ The Division assessed Ms. E's functional abilities and determined that she was eligible for 9.75 hours of PCA services weekly rather than the 19.0 hours she had previously received. Ms. E filed an appeal.

The assigned administrative law judge conducted a telephonic hearing on September 30, 2014. Ms. E participated and was assisted by her son and power of attorney, K E. Ms. E and her son testified. Victoria Cobo represented the Division. Olga Ipatova, who reviewed the assessment, testified on behalf of the Division.

The Division did not prove, by a preponderance of the evidence, that Ms. E requires less personal care assistance than previously.

II. Facts

A. Background Information

M E is 82 years old.² She is five feet tall and weighs 103 pounds.³ She was born in Alaska and raised by her grandparents in Alaska, and raised 13 children of her own. Now widowed, she lives by herself in an apartment in Alaska.⁴ Although the bathroom has grab bars, the bathroom and toilet area is hazardous rather than adequate for safe use by Ms. E.⁵ A neighbor, N B, is Ms. E's personal care assistant. Ms. E's son K, one of her two living children, is her power of attorney and visits regularly.

Ms. E previously received 19.0 hours per week of PCA services, based on a 2009 assessment.⁶ Ms. E was reassessed by Margaret Rogers, R.N., on December 6, 2013.⁷ R.N. Rogers used the Consumer Assessment Tool (CAT) to record the results of her assessment.

¹ See AS 47.07.045.
² Ex. E, p. 1.
³ Ex. E, p. 9.
⁴ Ex. E, p. 1.
⁵ See Ex. E, pp. 24, 27.
⁶ See Ex. D.
⁷ Ex. E.

Using the Personal Care Assistance Service Level Computation chart (service level chart) in conjunction with the CAT, the Division calculated Ms. E's need for PCA services as 9.75 hours weekly.⁸

B. Daily Routine

Ms. E is ambulatory. She has an unsteady gait and balance problems when standing.⁹ She moves about in her home by holding onto the walls and furniture.¹⁰ She has good days and bad days, with more bad days than good.¹¹ On bad days, because of her gait and balance issues she requires weight bearing physical assistance to locomote and to transfer on and off the toilet. Even on good days, her gait and balance issues prevent her from preparing meals unassisted. She cannot apply her lotions or brush her hair without physical assistance.¹²

III. Discussion

The Department of Health and Social Services is authorized to provide eligible persons with personal care services.¹³ The Division provides compensation for personal care services in the form of physical assistance, based on an assessment of the recipient's ability to perform specified activities of daily living (ADL),¹⁴ instrumental activities of daily living (IADL),¹⁵ and certain other functions.¹⁶ The assessment is conducted using the Consumer Assessment Tool (CAT),¹⁷ a form created by the Department of Health and Social Services to evaluate an individual's ability to care for herself.¹⁸

One section of the CAT covers the individual's physical abilities with respect to the eight ADL's: body mobility, transfers, locomotion, dressing, eating and drinking, toileting, personal hygiene, and bathing.¹⁹ Individuals are given two scores reflecting their ability to perform these

⁸ Ex. D, pp. 1, 6, 9. See 7 AAC 125.024(a)(1); 7 AAC 160.900(d)(29).

⁹ Ex. E, p. 23.

¹⁰ Ex. E, p. 27; M. E Testimony. R.N. Rogers noted the presence of a cane, but did not record its use as Ms. E's primary means of locomotion. See Ex. E, p. 26.

¹¹ K. E Testimony.

¹² M. E Testimony.

¹³ AS 40.07.030(b).

¹⁴ 7 AAC 125.030(b)(1)-(8).

¹⁵ 7 AAC 125.030(c)(1)-(5).

¹⁶ 7 AAC 125.030(d)(1)-(9), (e).

¹⁷ 7 AAC 125.020(b); 7 AAC 160.900(d)(6).

¹⁸ See generally, <http://dhss.alaska.gov/dsds/Documents/docs/cat-pcatOnlineFlyer.pdf> (accessed June 19, 2013).

¹⁹ Ex. E, pp. 6-11. The CAT terminology does not precisely track the regulatory language for each ADL. For one example, the ADL of "body mobility" is described in the regulation as positioning or turning in a bed or a chair, while the CAT uses the term "bed mobility" and omits any reference to a chair. Compare, 7 AAC 125.030(b)(1), with Ex. E, p. 6. For another, for the ADL of "toileting", the CAT expressly includes how the recipient "adjusts

activities. The Division provides a specified amount of time for PCA assistance with each ADL, depending on the scores provided and the frequency with which the activity occurs, in accordance with the Personal Care Assistance Service Level Computation form (service level chart) devised for that purpose.²⁰ For IADLs, the Division provides a specified amount of time for PCA assistance each week, depending on the scores provided.²¹

The Division bears the burden of proof with respect to a reduction in the amount of services provided.

In this particular case, after hearing Ms. E's and her son's testimony, the Division conceded that the assessment did not accurately reflect Ms. E's actual needs in several areas. In particular, the Division conceded that Ms. E requires limited assistance with toileting (on bad days), physical assistance with light meal preparation, limited assistance with personal hygiene, and escort services. Moreover, the Division conceded that Ms. E might also be provided assistance with medication.²²

Calculating Ms. E's service level based on those concessions, applying for all ADLs the frequencies previously provided, and providing the same time for medication as previously, would result in authorization of just over 19 hours per week. The Division asserts that the frequencies previously provided should be reduced for toileting, dressing, and locomotion. However, Ms. E's osteoarthritis is a progressive condition. Five years have passed since the 2009 assessment that is the basis for her current level of services. In addition, Ms. E's son testified that she has substantially more bad days (which are the occasions on which she needs assistance) than good ones. Based on the prior frequencies, Ms. E's age, the progressive nature of osteoarthritis, and Mr. E's testimony, and the absence of any specific evidence to support reducing the frequencies previously provided, the Division did not prove that Ms. E's need for assistance, in total, is any less today than previously.

IV. Conclusion

The Division had the burden of proof. It conceded that Ms. E's functional capacity is substantially the same as it was in 2009, and it did not prove that the frequency of her need for assistance is less in any of the activities of locomotion, toileting, and dressing. Accordingly, the

clothes", and the regulation does not mention that action. *See In Re V.W.*, at *2, OAH No. 12-0957-MDS (Commissioner of Health and Social Services 2013); *compare*, 7 AAC 125.030(b)(6) with Ex. E, p. 9.

²⁰ 7 AAC 125.024(a)(1); 7 AAC 160.900(d)(29). *See* Ex. B, pp. 34-36.

²¹ Ex. B, p. 34.

²² *See* Ex. E, p. 20 (Ms. E scored 1, for preparation/administration of medication); Ex. B, p. 35 (medication score of 1 may indicate need for assistance/eligibility).

Division has not proved that the total amount of time previously authorized may be reduced.
The Division shall revise the service level authorization in accordance with this decision.

DATED October 21, 2014.

Signed _____
Andrew M. Hemenway
Administrative Law Judge

NOTICE OF FINAL DECISION

The undersigned by delegation from the Commissioner of Health and Social Services, adopts the decision dated October 21, 2014 as final under the authority of AS 44.64.060(e)(1). A copy of the final decision is attached to this notice.

DATED November 6, 2014.

Signed _____
Andrew M. Hemenway
Administrative Law Judge

Appeal Rights

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date this decision is distributed to you.