

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

In the Matter of:)	
)	
N J)	OAH No. 14-0963-MDS
)	HCS Case No.
_____)	Medicaid ID No.

DECISION

I. Introduction

The issue in this case is whether N J remains eligible for Medicaid Personal Care Assistant (PCA) services. The Division of Senior and Disabilities Services (DSDS or Division) terminated Ms. J's PCA services on the grounds that her functional abilities have materially improved since the last PCA assessment that found her eligible for PCA services.¹ The Division conducted a functional assessment and concluded that Ms. J no longer requires limited or extensive assistance, and is not fully dependent on a caregiver, as to at least one activity of daily living (ADL), and is not independent with difficulty, does not need assistance, and is not fully dependent, as to at least one Instrumental Activity of Daily Living (IADL). Based on these findings, the Division terminated Ms. J's PCA services.

Ms. J' testimony at hearing conflicted with the findings from the Division's assessment in several areas, and it created close factual isTs as to Ms. J's ability to perform certain ADLs and IADLs. However, the preponderance of the evidence indicates that Ms. J still requires limited assistance with the ADLs of locomotion and dressing, and extensive assistance with transfers. The preponderance of the evidence further indicates that Ms. J requires assistance with the IADLs of light meals, main meals, light housework, routine housework, grocery shopping, and laundry. Accordingly, Ms. J remains eligible for PCA services. The Division's determination that Ms. J is no longer eligible for PCA services is therefore reversed.

II. Facts

A. Ms. J' Diagnoses and Medical Problems

Ms. J is 61 years old.² She is widowed and lives alone in a second-floor efficiency apartment.³ Her primary language is Spanish, but she also speaks some broken English.⁴

¹ Ms. J's 2013 assessment found that she was no longer eligible for PCA services, but that determination was reversed by the Office of Administrative Hearings in *In re J*, OAH No. 13-1052-MDS (September 19, 2013).

² Ex. E1; N J's hearing testimony.

³ Ex. 1 p. 1; Ex. E1; N J's hearing testimony.

Ms. J was diagnosed as having renal dysfunction as an adult.⁵ She received a kidney transplant about five years ago, but the transplanted kidney has now failed. Ms. J undergoes dialysis three days per week on Mondays, Wednesdays, and Fridays.⁶ Ms. J must continue these dialysis treatments until she either receives a successful kidney transplant, or dies. The dialysis usually takes about four hours. After dialysis Ms. J usually feels weak, nauseated, dizzy, and confused. She is so tired when she gets home after dialysis that she must take a nap.

Ms. J has current diagnoses of anemia, congestive heart failure, depression, end-stage renal disease, essential hypertension, hyperlipidemia, renal-related hyperparathyroidism, scoliosis, and seizure disorder.⁷ She also has a gait imbalance.⁸

Ms. J believes that her physical condition has steadily worsened over the past year.⁹ Ms. J's nephrologist, T F, M.D. has written that Ms. J requires assistance with activities such as driving, "difficult" meal preparation, and heavy cleaning.¹⁰ Dr. F has recommended that Ms. J receive at least 12 hours per week of PCA services.

B. Ms. J's Functional Abilities as Determined by the Division

On January 2, 2014 Ms. J was assessed for continuing PCA eligibility by Denise Kichura, R.N. of DSDS.¹¹ The assessment fell on a Thursday, which is a day on which Ms. J does not undergo dialysis.¹² Other persons present at the assessment were Sam Cornell, R.N. of DSDS, and Ms. J's PCA agency representatives T X and L C.¹³ No interpreter was present, although Ms. J's primary language is Spanish.¹⁴ Ms. Kichura's assessment was recorded and scored on the Division's Consumer Assessment Tool or "CAT." Ms. Kichura found that Ms. J has the following abilities with regard to her Activities of Daily Living (ADLs):¹⁵

⁴ Ex. 1 p. 1; Ex. E1.

⁵ All factual findings in this paragraph are based on Ex. 1, Ex. 3, and N J's hearing testimony.

⁶ Dialysis, or the cleaning of the blood using a machine in place of the kidneys, has a number of adverse side effects. See the Mayo Clinic's website at <http://www.mayoclinic.org/tests-procedures/hemodialysis/basics/risks/prc-20015015> (date accessed August 14, 2014). These include shortness of breath, nausea, abdominal cramps, muscle cramps, anemia (which causes fatigue), sleep problems, and depression. *Id.*

⁷ Ex. 2 p. 1, Ex. E3.

⁸ Ex. 2.

⁹ All factual findings in this paragraph are based on Ex. 1 p. 1 and N J's hearing testimony.

¹⁰ Ex. 2 p. 1, Ex. E3.

¹¹ Ex. 3.

¹² Ex. E.

¹³ Ex. 1 p. 1.

¹⁴ Ex. E2.

¹⁵ Exs. E1, E2.

¹⁵ Exs. E6 - E12.

Body Mobility:¹⁶ Ms. Kichura reported Ms. J told her that (1) she is able to reach her phone located on her bedside table while she is in bed; (2) that she avoids laying on her right side because of her fistula; (3) she uses no assistive devices for bed mobility; (4) she has no decubitus ulcers; and (5) she does not require assistance with body mobility even on dialysis days. Ms. Kichura reported that she observed Ms. J (1) turn from her back to her left side to reach her night stand while in bed; (2) demonstrate turning in her bed to her right side; (3) sit up in bed; and (4) stand up from her bed independently (scored 0/0).

Transfers:¹⁷ Ms. Kichura reported Ms. J told her that she does not require assistance with transfers even on dialysis days. Ms. Kichura reported that she observed Ms. J transfer eight times during her assessment (scored 0/0).

Locomotion (walking):¹⁸ Ms. Kichura reported that Ms. J told her that she used to have a cane, but that she does not currently use it because she is "too embarrassed." Ms. Kichura reported that she observed Ms. J (1) walk from her bed to the kitchen independently; and (2) walk from her bed to her shower, stepping over the nine inch high side of the shower surround in doing so (scored 0/0).

Dressing:¹⁹ Ms. Kichura reported that Ms. J told her that she was able to dress herself to go to dialysis three days per week, and that she is able to undress herself for showers. Ms. Kichura reported that she observed Ms. J (1) demonstrate fastening her bra; and (2) put on a hooded sweatshirt, zip it, unzip it, and take it back off (scored 0/0).

Eating:²⁰ Ms. Kichura reported that Ms. J told her that she is able to eat and to swallow her medications with water. Ms. Kichura reported that she observed Ms. J (1) bring her hands up to her mouth; (2) grip a water faucet; and (3) grip a drinking cup with her left hand (scored 0/0).

Toileting:²¹ Ms. Kichura reported that Ms. J told her that (1) her body does not produce urine due to her dialysis; (2) she can walk to the bathroom and sit down on the toilet by herself; and (3) she can clean herself after toileting. Ms. Kichura reported she observed Ms. J (1) walk to the bathroom by herself; (2) transfer to / from a bed or chair eight times; (3) bend to pick up items from a low shelf under her sink; and (5) touch her scapula and her hips with each hand (scored 0/0).

¹⁶ Ex. E6.

¹⁷ Ex. E6.

¹⁸ Ex. E7.

¹⁹ Ex. E8.

²⁰ Ex. E9.

²¹ Ex. E9.

Personal Hygiene:²² Ms. Kichura reported that Ms. J told her that (1) she manages her own personal hygiene every day without difficulty; and (2) she cares for her own nails, washes her own hair, and performs her own intimate care. Ms. Kichura reported that she observed that Ms. J (1) demonstrate combing her hair with a brush; (2) pick-up tubes of various creams and apply them herself; (3) turn on a faucet by herself; and (4) take a medicine bottle from a high shelf and open the bottle without difficulty (scored 0/0).

Bathing:²³ Ms. Kichura reported that Ms. J told her that (1) she sometimes showers at 5:00 a.m. before going to dialysis, sometimes showers at 10:00 a.m. after dialysis, and sometimes showers in the evening; and (2) can remove her clothes, step into the shower, and wash herself without difficulty. Ms. Kichura reported that she observed Ms. J (1) walk to the bathroom without support or assistive devices; (2) step over the nine inch high shower surround; (3) turn on a light mounted on the ceiling of the shower using her right hand; and (4) use both arms to support herself when coming back out of the shower surround (scored 1/0).

The assessment of January 2, 2014 also scored Ms. J as completely independent with regard to all Instrumental Activities of Daily Living (IADLs) (i.e. light meal preparation, main meal preparation, telephone use, finance management, light housework, routine housework, grocery shopping, and laundry).²⁴

C. Relevant Procedural History

Ms. J has received PCA services since 2009 or before.²⁵ The earliest assessment of record in this case was conducted on April 7, 2010 by a different nurse than the nurse who performed Ms. J' two most recent assessments.²⁶ Notably, *the April 7, 2010 assessment fell on a Wednesday, which is one of the days on which Ms. J undergoes dialysis.*²⁷ The 2010 assessment found that Ms. J required limited assistance with locomotion, dressing, and personal hygiene, and extensive assistance with body mobility, transfers, toileting, and bathing.²⁸ The 2010 assessment also found that Ms. J was dependent on others for light meal and main meal preparation, light housework, routine housework, grocery shopping, and laundry.²⁹

²² Ex. E10.

²³ Ex. E11.

²⁴ Ex. E26.

²⁵ Ex. F.

²⁶ Ex. F.

²⁷ See 2010 U.S. Calendar, accessed online at <http://www.timeanddate.com/calendar/?country=1&year=2010>.

²⁸ Ex. F12.

²⁹ Ex. F26.

Ms. J was reassessed for PCA services on April 2, 2013.³⁰ Denise Kichura, R.N. conducted the assessment. Ms. Kichura was originally scheduled to assess Ms. J on a day on which Ms. J was to undergo dialysis. However, Ms. Kichura is a certified dialysis nurse, and she knew that it is very common for dialysis patients to feel poorly on days they receive dialysis. Accordingly, Ms. Kichura rescheduled Ms. J's assessment for a day on which Ms. J was not undergoing dialysis. Ms. Kichura found that Ms. J was independent with regard to body mobility, transfers, toilet use, locomotion, and dressing, and required only supervision for bathing, and that she was independent with regard to light and main meal preparation, light and routine housework, shopping, and laundry. Based on these findings, the Division found that Ms. J no longer qualified for PCA services. Ms. J requested a hearing.

A hearing was subsequently held before administrative law judge (ALJ) Lawrence A. Pederson.³¹ Following the hearing, ALJ Pederson issued a decision reversing the Division's termination of Ms. J' PCA services. First, ALJ Pederson found that Ms. J is a poor historian and that she exaggerated her functional capabilities when answering the nurse-assessor's questions. Second, ALJ Pederson found that Ms. J's dialysis sessions significantly impair her functioning on the three days per week that she undergoes dialysis. He concluded that Ms. J's functional capability on her dialysis days is critical for determining what degree of assistance she requires. Based on this, ALJ Pederson found that assessing Ms. J on a non-dialysis day skewed the results of the assessment, and that the assessment on which the Division's proposed termination was based was therefore flawed. Accordingly, ALJ concluded that the Division had failed to meet its burden of proof, and he reversed the termination of Ms. J's PCA services.

Ms. J was assessed again by the Division on January 2, 2014, only three months after ALJ Pederson's decision was issued.³² This was a Thursday, and, as with the prior assessment, was a day on which Ms. J did not undergo dialysis. Based on this assessment, the Division again found that Ms. J was no longer eligible for PCA services, and a notice to that effect was issued by the Division on May 28, 2014.³³

Ms. J requested a hearing on June 4, 2014.³⁴ Ms. J's hearing was held on July 24, 2014 using a Spanish-speaking interpreter. Ms. J participated by phone, represented herself, and testified

³⁰ All factual findings in this paragraph are based on *In re N.J.*, OAH No. 13-1052-MDS (October 3, 2013).

³¹ All factual findings in this paragraph are based on *In re N.J.*, OAH No. 13-1052-MDS (October 3, 2013).

³² All factual findings in this paragraph are based on Ex. E unless otherwise stated.

³³ Ex. D.

³⁴ Ex. C.

on her own behalf. T X, Ms. J's PCA agency representative, also participated by phone and testified briefly on Ms. J's behalf.

The Division was represented by Victoria Cobo, who attended the hearing in person. Nurse-assessor Sam Cornell, R.N. attended the hearing and testified for the Division; Ken Gillum also attended but did not testify. Denise Kichura, R.N. testified by phone on behalf of the Division. The record closed at the end of the hearing.

III. Discussion

A. The PCA Program - Overview

The Medicaid program provides personal care services (PCA) to eligible persons; "[t]he purpose of personal care services is to provide to 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" ³⁵ [Emphasis added]. 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." ³⁶

B. Alaska's PCA Program - Use of the Consumer Assessment Tool (CAT)

The Department conducts an assessment for PCA services using the Consumer Assessment Tool or "CAT." ³⁷ The goal of the assessment process is to determine the level of physical assistance that an applicant or recipient requires in order to perform their activities of daily living (ADLs) and instrumental activities of daily living (IADLs). ³⁸ The CAT seeks to make the assessment process more objective by standardizing the evaluation of the applicant's or recipient's functional impairments. ³⁹

The ADLs coded or scored by the CAT are body 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-

³⁵ 7 AAC 125.010(a).

³⁶ 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.*

³⁷ 7 AAC 125.020(b). The CAT has been adopted into DHSS regulations by reference. *See* 7 AAC 160.900(d)(6).

³⁸ *See* 7 AAC 125.010(a).

³⁹ Ex. E.

shampooing, and bathing.⁴⁰ In addition, the CAT codes or scores five other ADL-like activities which are not technically ADLs. These are medication, vital signs/glucose levels, dressings/bandages/oxygen, sterile wound care, and documentation.

The CAT numerical scoring system for ADLs has two components. The first is the *self-performance score*. These scores rate how capable a person is of performing a particular ADL. The self-performance codes related to scoring are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance⁴¹); **3** (the person requires extensive assistance⁴²); and **4** (the person is totally dependent⁴³).

The second component of the CAT scoring system for ADLs is the *support score*. These scores rate the degree of assistance that a person requires for an ADL. The support codes related to scoring are **0** (no setup or physical help required); **1** (only setup help required); **2** (physical assistance from one person required); and **3** (physical assistance from two or more persons needed).

The CAT also scores certain activities known as "instrumental activities of daily living" (IADLs).⁴⁴ These are light meal preparation, main meal preparation, light housekeeping, routine housekeeping, laundry, and grocery shopping. Finally, the CAT scores one other IADL-like activity which is not technically an IADL (oxygen maintenance).

The CAT scores IADLs slightly differently than ADLs.⁴⁵ The *self-performance codes for IADLs* are **0** (independent either with or without assistive devices - no help provided); **1** (independent with difficulty; the person performed the task, but did so with difficulty or took a great amount of time to do it); **2** (assistance / done with help - the person was somewhat involved in the activity, but help in the form of supervision, reminders, or physical assistance was provided); and **3** (dependent / done by others - the person is not involved at all with the activity and the activity is fully performed by another person).

⁴⁰ See Division of Senior and Disabilities Services' *Personal Care Assistance Service Level Computation* (accessed online at <http://www.hss.state.ak.us/dsds/pca/documents/PCA%20Service%20Computation.pdf>) (accessed August 14, 2014); see also Exs. E6 - E11.

⁴¹ Pursuant 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."

⁴² Pursuant 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."

⁴³ Pursuant 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."

⁴⁴ Ex. E26.

⁴⁵ *Id.*

The *support scores* for IADLs are also slightly different than the support scores for ADLs.⁴⁶ The support scores for IADLs are **0** (no support provided); **1** (supervision / cueing provided); **2** (set-up help); **3** (physical assistance provided); and **4** (total dependence - the person was not involved at all when the activity was performed).

If a person requires limited assistance or extensive assistance, or is fully dependent as to at least one ADL (receives a self-performance scores of 2, 3, or 4 as to any one ADL), then the person is eligible to receive PCA services.⁴⁷ Alternatively, if a person is independent with difficulty, requires assistance, or is dependent as to at least one IADL (i.e. receives self-performance scores of 1, 2, or 3 as to any one IADL), then the person is eligible to receive PCA services.⁴⁸

C. *Applicable Burden of Proof*

In this case, the Division is seeking to terminate existing PCA services (services which Ms. J is now receiving). Accordingly, the Division has the burden of proving, by a preponderance of the evidence, that Ms. J's need for PCA services has decreased to the extent asserted.⁴⁹

D. *Does Ms. J Require Limited Assistance With an Activity of Daily Living?*

As stated above, in order to qualify (or remain qualified) for PCA services based on ADL scores, an applicant or recipient must receive a CAT score of 2/2 or better as to at least one ADL.⁵⁰ Ms. J's CAT scores for each ADL are discussed below.

1. *Body Mobility*

For the ADL of body mobility, PCA time is allowed when a non-ambulatory person requires physical assistance to reposition in a bed or chair.⁵¹ Ms. Kichura reported that Ms. J is independent with regard to body mobility, and Ms. J did not contest this finding.⁵² Accordingly, the Division's finding that Ms. J is independent as to body mobility (CAT score 0/0) is affirmed.

2. *Transfers*

PCA time is allowed for transfers when a person requires physical assistance to move between one surface and another (including to or from a bed, chair, or wheelchair), and/or when a

⁴⁶ *Id.*

⁴⁷ 7 AAC 125.020(a).

⁴⁸ *Id.*

⁴⁹ See 42 CFR 435.930, 2 AAC 64.290(e), 7 AAC 49.135, and *Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

⁵⁰ 7 AAC 125.020(a). The minimum standard applicable to ADLs, "limited assistance," is defined by 7 AAC 125.020(a)(1) as 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."

⁵¹ 7 AAC 125.030(b)(1).

⁵² Ex. 1 p. 2.

person requires physical assistance to move from a lying or sitting position to a standing position.⁵³ The Division found Ms. J is independent with transfers (CAT score 0/0). Ms. J asserts her CAT scores for transfers should remain at their 2010 levels (3/2, frequency 42 per week).⁵⁴ Ms. J asserts that she requires assistance with transfers because, on dialysis days, she experiences weakness, nausea, vomiting, confusion, and dizziness, which puts her at a high risk for falls.⁵⁵

The testimony on this issue by Ms. Kichura and Mr. Cornell (on one hand), and Ms. J (on the other), is diametrically opposed. Yet, each witness appeared to be sincere and, in general, equally credible.⁵⁶ Because of this, it is reasonable to conclude that *each* of these witnesses is correct, *but as to different days*. As discussed in Sections I(A) and I(C), above, Ms. J's functional abilities can vary significantly between those days on which she undergoes dialysis, and those days on which she does not. Ms. Kichura observed Ms. J on a "non-dialysis day," and it is plausible that Ms. J may not need any assistance on her "non-dialysis days." On the other hand, it is undisputed that Ms. J has end-stage renal failure and undergoes dialysis, and that dialysis can cause nausea, abdominal cramps, muscle cramps, and fatigue. Accordingly, it is not unlikely that Ms. J requires extensive assistance with transfers on her dialysis days.

The PCA regulations do not address situations where (as here) a person's functional abilities differ significantly within the same week. However, this exact situation was addressed recently in *In re E.W.*, OAH No. 14-0601-MDS (Commissioner of Health and Social Services, August 4, 2014). In that case, the Commissioner's delegee ruled that, in these situations, the individual should be given the *highest self-performance score* for the type of help he or she requires within a week, but that, if he or she is sometimes able to perform the activity without physical assistance, then the *frequency level should be limited* to the number of times that he or she requires physical help.

Applying this rule here, the undersigned finds that Ms. J is independent with transfers on her "good" (non-dialysis) days (CAT score 0/0), but requires weight bearing assistance with transfers on her "bad" (dialysis) days (CAT score 3/2). Accordingly, Ms. J should be assigned a self-

⁵³ 7 AAC 125.030(b)(2).

⁵⁴ Ex. 1 p. 2.

⁵⁵ Ex. 1 p. 2.

⁵⁶ Admittedly, Ms. J's testimony, viewed in isolation, is probably entitled to less weight because of her cognitive / memory difficulties. However, Ms. J's position is supported by the letter from her nephrologist, T F, M.D., and the opinions of treating physicians are entitled to significant weight in Medicaid matters. See *Rush v. Parham*, 625 F.2d 1150, 1156 (5th Cir. 1980); *Pinneke v. Preisser*, 623 F.2d 546, 550 (8th Cir.1980); *Weaver v. Reagan*, 886 F.2d 194, 200 (8th Cir. 1989); *A.M.L. v. Department of Health, Div. of Health Care Financing*, 863 P.2d 44 (Utah App. 1993), *Snyder v. Florida Department of Children & Family et. al.*, 705 So.2d 1067, 1068 (Fla. 1st DCA 1998); *Holman v. Ohio Dept. of Human Services*, 757 N.E.2d 382 (Ohio App. 7th Dist. 2001); *Smith v. Rasmussen*, 249 F.3d 755, 759 (8th Cir. 2001); *Hummel v. Ohio Department of Job & Family Services*, 844 N.E.2d 360 (Ohio App. 6th Dist. 2005); *Urban v. Meconi*, 930 A.2d 860 (Del. Supr. 2007).

performance score of three for transfers (score 3/2), but the frequency of transfers should be limited to the number of times that Ms. J requires assistance with transfers on her bad days.

Given Ms. J's self-performance score on her 2014 assessment, the Division did not assign a frequency for transfers. However, Ms. J's 2010 assessment assigned a frequency of 42 transfers per week.⁵⁷ A preponderance of the evidence indicates that Ms. J still requires the same transfer frequency, but only on her bad days (only three days per week). Accordingly, Ms. J's transfer frequency should be 3/7 of 42, or 18 transfers per week.

3(a). Locomotion - Single Level

For the ADL of locomotion, PCA time is allowed when a person requires assistance with walking (whether with the support of a walker, cane, gait belt, braces, crutches, or manual wheelchair), either between different locations in the recipient's home, or outside the home to keep a medical or dental appointment; PCA time is also allowed when walking and simple exercises have been prescribed by a physician.⁵⁸

Ms. Kichura found that Ms. J is independent as to single-level locomotion. Ms. J asserts that she requires limited assistance.⁵⁹ For the reasons discussed in the section on transfers, above, the undersigned finds that Ms. J is independent with single-level locomotion on her good days, but requires limited assistance with locomotion on her bad days. Accordingly, Ms. J should be assigned a self-performance score of two for single-level locomotion (CAT score 2/2), but frequency should be limited to the number of times that Ms. J requires assistance with single-level locomotion on her bad days.

Given Ms. J's self-performance score on her 2014 assessment, the Division did not assign a frequency for locomotion. However, Ms. J's 2010 assessment assigned a single-level locomotion frequency of 42 per week. A preponderance of the evidence indicates that Ms. J still requires the same frequency, but only on her bad days (three days per week). Accordingly, Ms. J's frequency for assistance with single-level locomotion should be 3/7 of 42, or 18 per week.

3(b). Locomotion to Access Medical Appointments

With regard to locomotion to medical appointments, Ms. Kichura found that Ms. J requires only supervision. Because 7 AAC 125.020(e) precludes authorization of personal care services for a recipient if the assessment shows that the recipient only needs assistance with supervision, cueing,

⁵⁷ Ex. F6.

⁵⁸ 7 AAC 125.030(b)(3).

⁵⁹ Ex. 1 p. 2.

and setup in order to independently perform an ADL, the Division axed Ms. J no PCA time for locomotion to access medical appointments.

Ms. J testified, however, that when going outside to doctor appointments, the taxi driver comes to the door and usually holds onto her as they walk to the cab, especially in the winter. Ms. J stated at hearing that, "when I get up from dialysis, I walk like drunk person," and that, after dialysis, her PCA or the taxi cab driver must help her too and from the cab. Based on this, Ms. J asserts that she requires limited assistance with locomotion to access medical appointments.

The undersigned finds that, on her way to dialysis, *before undergoing the procedure*, Ms. J likely requires only supervision. However, on her way back home, after undergoing dialysis, Ms. J probably requires limited assistance. Accordingly, Ms. J should be assigned a self-performance score of two for locomotion to access medical appointments, (CAT score 2/2), but frequency should be limited to the number of times that Ms. J requires assistance on dialysis days (once per day, after dialysis, three days per week).

4. Dressing and Undressing

For the ADL of dressing, PCA time is allowed for the donning, fastening, unfastening, and removal of the recipient's street clothing, support hose, or prosthesis.⁶⁰ Ms. Kichura found that Ms. J is independent with dressing (CAT score 0/0). Ms. J asserts that she requires limited assistance (CAT score 2/2).⁶¹ For the reasons discussed in the section on transfers, above, the undersigned finds that Ms. J is independent with dressing on her good days, but requires limited assistance with dressing on her bad days. Accordingly, Ms. J should be assigned a self-performance score of two for dressing (CAT score 2/2), but frequency should be limited to the number of times that Ms. J requires assistance with dressing on her bad days.

Given Ms. J's self-performance score on her 2014 assessment, the Division did not assign a frequency for dressing. However, Ms. J's 2010 assessment assigned a dressing frequency of 14 per week. A preponderance of the evidence indicates that Ms. J still requires the same frequency, but only on her bad days (only three days per week). Accordingly, Ms. J's frequency for assistance with dressing should be 3/7 of 14, or 6 per week.

5. Eating and Drinking

For the ADL of eating and drinking, PCA time is allowed for feeding through a feeding tube, enteral feeding, and supervising the eating and drinking of a recipient who has swallowing,

⁶⁰ 7 AAC 125.030(b)(4).

⁶¹ Ex. 1 p. 2.

chewing, or aspiration difficulties.⁶² Ms. Kichura found that Ms. J is independent with eating and drinking, and Ms. J did not contest that finding.⁶³ Accordingly, a CAT score of 0/0 is appropriate for the ADL of eating in this case.

6. Toilet Use

For the ADL of toilet use, PCA time is, by regulation, allowed only to assist with moving to and from the toilet or urinal and transfers on and off the toilet.⁶⁴ The CAT's definition of "toilet use" is somewhat broader, encompassing post-toileting hygiene and clothing adjustments.⁶⁵ Ms. Kichura found that Ms. J is independent with toileting, and Ms. J did not contest that finding.⁶⁶ Accordingly, a CAT score of 0/0 is appropriate for the ADL of toileting in this case.

7. Personal Hygiene

For the ADL of personal hygiene, PCA time is allowed for washing and drying the face, hands, and perineum; nail care, skin care, mouth and teeth care; brushing and combing the hair; shaving when done separately from bathing; and shampooing the hair when done separately from bathing.⁶⁷ Ms. Kichura found that Ms. J is independent with personal hygiene, and Ms. J did not contest that finding.⁶⁸ Accordingly, a CAT score of 0/0 is appropriate for the ADL of personal hygiene in this case.

8. Bathing

For the ADL of bathing, PCA time is allowed for "the taking of a full-body bath, shower, or sponge bath and the required transfers in and out of the bathtub or shower."⁶⁹ Ms. Kichura found that Ms. J requires only supervision with bathing, and Ms. J did not contest that finding. Accordingly, a CAT score of 1/0 is appropriate for the ADL of bathing in this case.

E. Does Ms. J Require Assistance With Instrumental Activities of Daily Living?

An applicant or recipient can also qualify for PCA services by being independent with difficulty as to at least one Instrumental Activity of Daily Living (IADL), by needing assistance with at least one IADL, or by being dependent as to at least one IADL (*i.e.* by having self-

⁶² 7 AAC 125.030(b)(5).

⁶³ Ex. 1.

⁶⁴ 7 AAC 125.030(b)(6). For reasons that do not appear in the record, the regulation does not cover assisting the recipient with necessary personal hygiene after using the toilet. The PCA regulation for personal hygiene, 7 AAC 125.030(b)(7), likewise fails to cover such necessary activities.

⁶⁵ The CAT form defines toilet use as "[h]ow person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, *cleanses* . . . manages ostomy or catheter, *adjusts clothes*" (Ex. E9, emphasis added).

⁶⁶ Ex. 1.

⁶⁷ 7 AAC 125.030(b)(7).

⁶⁸ Ex. 1.

⁶⁹ 7 AAC 125.030(b)(8). The definition of bathing contained in the CAT is essentially identical (*see* Ex. E11).

performance scores of 2, 3, or 4), *and* by requiring physical assistance for support or being totally dependent for support (*i.e.* by having support scores of 3 or 4).⁷⁰ Ms. J is entitled to receive PCA assistance with IADLs if she can demonstrate a need for assistance through her CAT scores.

1. Light Meals

The PCA regulations define the IADL of light meal preparation as the preparation, serving, and cleanup in the recipient's home of any meal that is essential to meet the health needs of the recipient, and that is not the main meal of the day.⁷¹ The Division found Ms. J to be independent as to light meals (CAT score 0/0). Ms. J asserts that she is dependent on others for light meals (CAT score 3/4).⁷² The Division's findings as to a recipient's ability to perform IADLs are essentially based on extrapolations from the Division's findings regarding range of motion and ability to perform ADLs. On the other hand, Ms. J testified at hearing that she can make tea when her PCA is not there, can pour cereal into a bowl, can get slices of bread out of a bag, and can spread butter on the bread, but cannot make a complete sandwich. She testified that she can wash vegetables like lettuce and tomatoes, but is afraid to slice things with a knife because she thinks she would cut her hand. She said she is uncertain as to whether she could stir the contents of a pot on the stove, and that her PCA must prepare all her main meals.

The undersigned finds that Ms. J is not independent with light meals, but that she is not completely dependent either. Accordingly, the preponderance of the evidence indicates that Ms. J requires some physical assistance with light meals (CAT score 2/3).

2. Main Meals

The PCA regulations define the IADL of main meal preparation as the preparation, serving, and cleanup in the recipient's home of one main meal per day that is essential to meet the health needs of the recipient.⁷³ The Division found Ms. J to be independent as to main meals (CAT score 0/0). Ms. J asserts that she is dependent on others for light meals (CAT score 3/4).⁷⁴ For the reasons discussed above in the context of light meals, the preponderance of the evidence indicates that Ms. J requires physical assistance with main meals (CAT score 2/3).

⁷⁰ See Ex. E-31 and 7 AAC 125.020(a). The minimum standard applicable to IADLs, "independent with difficulty," is defined by 7 AAC 125.020(a)(4) as a situation in which "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."

⁷¹ 7 AAC 125.030(c)(1).

⁷² Ex. 1 p. 3.

⁷³ 7 AAC 125.030(c)(2).

⁷⁴ Ex. 1 p. 3.

3. Light Housework

The PCA regulations define the IADL of "light housekeeping" as (1) picking up, dusting, vacuuming, and floor-cleaning of the living spaces used by the recipient; (2) the cleaning of the kitchen and dishes used for preparation of the recipient's meals; (3) the cleaning of any bathroom used by recipient; (4) making the recipient's bed; (5) removing the recipient's trash; and (6) caring for the recipient's service animal.⁷⁵ The Division found Ms. J to be independent with light housework (CAT score 0/0). Ms. J asserts that she is dependent on others for light housework (CAT score 3/4).⁷⁶ Ms. J testified that she is physically able to wipe a countertop, but believes it would be very painful to do so since she had back surgery. She testified that she cannot vacuum due to back pain and balance issues. Her testimony is consistent with her diagnoses and with her doctor's letter. However, Dr. F did not find Ms. J to be completely dependent as to housework, but rather that she requires PCA assistance with it. The preponderance of the evidence thus indicates that Ms. J requires physical assistance with light housework (CAT score 2/3).

4. Routine Housework

Although *the CAT* differentiates between "light housework" and "routine housework," *the PCA regulation* includes all the constituent activities of these two "CAT categories" within a single definition of "light housekeeping."⁷⁷ Since Ms. J was scored 2/3 for the IADL of "light housekeeping" (above), her score for routine housework should be the same.

5. Grocery Shopping

The PCA regulations define the IADL of grocery shopping as shopping in the vicinity of a recipient's residence for groceries and other household items required for the health and maintenance of the recipient, and prescribed drugs and medical supplies required by the recipient.⁷⁸ The Division found Ms. J to be independent with grocery shopping (CAT score 0/0). Ms. J asserts that she is dependent on others for grocery shopping (CAT score 3/4).⁷⁹

Ms. J testified that she can sometimes go shopping herself, but that her PCA normally goes shopping with her because she cannot reach up for those items located on the higher store shelves because she gets dizzy. This testimony was credible and consistent with Ms. J's diagnoses, but does

⁷⁵ 7 AAC 125.030(c)(3).

⁷⁶ Ex. 1 p. 3.

⁷⁷ 7 AAC 125.030(c)(3).

⁷⁸ 7 AAC 125.030(c)(5).

⁷⁹ Ex. 1 p. 3.

not prove she is totally dependent. Rather, the preponderance of the evidence indicates that Ms. J requires physical assistance with grocery shopping (CAT score 2/3).

6. Laundry

The PCA regulations define the IADL of laundry as the changing of a recipient's bed linens and the in-home or out-of-home laundering of a recipient's bed linens and clothing.⁸⁰ The Division found Ms. J to be independent with laundry (CAT score 0/0). Ms. J asserts that she is dependent on others for her laundry (CAT score 3/4).⁸¹

Ms. J testified that there is a laundry room in her apartment complex, but that she does not use it, because it is necessary to go outside to access it. She explained that, two years ago, she went outside to take out the trash, fell, and broke her wrist, and so she is fearful of going outside by herself to go to the laundry room lest she fall again. Ms. J testified that her PCA picks up Ms. J's laundry, washes it at the PCA's house, and then brings it back. Ms. J thinks she could fold her laundry once it has been washed and dried, but her PCA folds it for her. This testimony was credible and consistent with Ms. J's diagnoses, but does not prove she is totally dependent. Rather, the preponderance of the evidence indicates that Ms. J requires physical assistance with laundry (CAT score 2/3).

7. Other Covered Activities - PCA Escort to Medical Appointments

Pursuant to 7 AAC 125.030(d)(9), PCA time is available for "traveling with the recipient to and from a routine medical or dental appointment outside the recipient's home and conferring with medical or dental staff during that appointment." Ms. Kichura found that Ms. J is a good historian and has no cognitive problems.⁸² On the other hand, the nurse who performed Ms. J's 2010 assessment found that Ms. J has short-term and long-term memory problems and needs reminders.⁸³ ALJ Peterson likewise found, in his decision reviewing the Division's 2013 assessment, that Ms. J is a poor historian.

It is undisputed that Ms. J goes to dialysis and back three days per week. Ms. J testified that she undergoes dialysis in the morning on Mondays, Wednesdays, and Fridays. She stated that sometimes her PCA goes with her to dialysis (at which times the PCA drives the car⁸⁴), but that, at

⁸⁰ 7 AAC 125.030(c)(4).

⁸¹ Ex. 1 p. 3.

⁸² Exs. E4, E16.

⁸³ Exs. F4, F16.

⁸⁴ Ms. J formerly received waiver services and went to her doctor appointments via waiver-funded Anchor Rides (N J's hearing testimony). However, she lost her waiver services at some time prior to her 2013 assessment, so now, when her PCA cannot drive her, she takes a taxi to her appointments using a Medicaid voucher. *Id.*

other times, when Ms. J is feeling well, she does not have her PCA come at all. Ms. J testified that when her PCA is at the dialysis session, the PCA helps weigh Ms. J and sometimes talks to the doctor for Ms. J because Ms. J forgets things. Ms. J stated that she had brain surgery in 2001 and again in 2009, and that, since those surgeries, she often cannot remember things very well.

Viewing the evidence as a whole, and having personally heard the way Ms. J testified and responded to questions at hearing, the undersigned finds that Ms. J has cognitive / memory problems. This means that Ms. J needs someone to confer with her medical providers during her appointments. Accordingly, Ms. J is entitled to receive escort services.

PCA time for escort to medical appointments is based on the number of the recipient's medical appointments per year, multiplied by the duration of the appointment; the resulting number is then divided by 52 to obtain a weekly average.⁸⁵ Ms. J attends dialysis three days per week, 52 weeks per year, for a total of 156 visits per year. While the record does not disclose the average duration of Ms. J's dialysis sessions, there has been no change in the frequency or duration of the dialysis sessions since 2010 or before. Ms. J previously received 79 minutes of PCA time per week for escort services.⁸⁶ There has been no material change on this point, so Ms. J should continue to receive 79 minutes of PCA time per week for escort services.

F. Has the Division Proven a Material Change in Ms. J' Condition?

Where (as here) the Division seeks to terminate a recipient's PCA services, the Division must demonstrate that there has been a material change in the recipient's condition since the recipient's last assessment.⁸⁷ This "change in condition" requirement is satisfied as to those activities as to which this decision has approved reduction or termination, but is not satisfied as to those activities as to which this decision has found reduction or termination to be inappropriate.

IV. Conclusion

Ms. J has scored a 2/2 with regard to the ADLs of locomotion and dressing, and a 3/2 with regard to the ADL of transfers. A score of 2/2 with regard to any one of these ADLs qualifies her to receive PCA services. In addition, Ms. J has scored a 2/3 with regard to the IADLs of light meals, main meals, light housework, routine housework, grocery shopping, and laundry. A score of 2/3 on any one of these IADLs qualifies her to receive PCA services. Accordingly, Ms. J remains eligible

⁸⁵ Ex. D11.

⁸⁶ Ex. D9.

⁸⁷ 7 AAC 125.026(a), (d).

for PCA services. The Division's determination that Ms. J is no longer eligible for PCA services is therefore reversed.⁸⁸

DATED this 20th day of August, 2014.

Signed _____
Jay Durych
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 29th day of August, 2014.

By: *Signed* _____
Name: Jay D. Durych
Title: Administrative Law Judge, DOA/OAH

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

⁸⁸ This decision does not calculate the hours per week of PCA services which Ms. J is eligible to receive. If Ms. J disagrees with the Division's calculation of the specific number of hours of PCA services for which she is eligible, she may request a new hearing on that issue.