

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

In the Matter of)
)
)
 U U) OAH No. 14-1049-MDS
) Agency No.
_____)

DECISION

I. Introduction

U U applied to the Division of Senior & Disabilities Services (“Division”) for personal care assistant (“PCA”) services. When the Division denied his application, he requested a hearing. The hearing was first convened on July 31, 2014, but the parties agreed to continue the hearing to allow the Division additional time to review medical records recently provided by Mr. U. The continued hearing was then held on August 22, 2014. Mr. U represented himself, with the assistance of a professional interpreter fluent in the No Name language (Mr. U does not speak English), and Victoria Cobo represented the Division. Mr. U testified, but he presented no other witnesses on his own behalf. Nurse assessor Gheeta Samuel testified on behalf of the Division.

Subsequently, it was determined that the record during the hearing had not been sufficiently developed regarding two activities of daily living (ADLs) for which Mr. U seeks PCA services – transfers and bathing. Therefore, a supplemental hearing was held on January 16, 2015 for the limited purpose of addressing the follow question: assuming Mr. U qualifies for PCA help with transfers and bathing, what are the appropriate frequencies for those two ADLs?¹ At the supplemental hearing, Mr. U testified on his own behalf,² and health program manager Katie Heaslet testified on behalf of the Division.

Because Mr. U is appealing the denial of an initial application, he has the burden of proof to establish, by a preponderance of the evidence, that the Division’s denial was erroneous.³ Based on a careful review of the testimony and evidence presented at both the hearing and the

¹ See Order Setting Supplemental Hearing, 11/21/14.

² It was suggested to Mr. U that the August 2014 hearing could be continued in order to allow him the opportunity to call other witnesses, such as his wife or his son. He declined. In addition Mr. U did not offer other witnesses at the supplemental hearing in January 2015.

³ 7 AAC 49.135. “Preponderance of the evidence” means that a fact “more likely than not is true.” 2 AAC 64.290(e).

supplemental hearing, the Division’s denial of Mr. U’s application is reversed in part and affirmed in part.

II. Facts

Mr. U suffers from end-stage renal disease, hypertension and unspecified heart disease.⁴ He undergoes kidney dialysis three times per week, in the late afternoon on Mondays, Wednesdays and Fridays.⁵ The Division’s nurse assessor Ms. Samuel conducted her assessment of Mr. U on April 23, 2014, which was a Wednesday; she met with him at mid-day, before he went for his dialysis treatment later in the afternoon.⁶ Mr. U feels very weak after he receives dialysis.⁷

The Division notified Mr. U that it had determined he was not eligible for PCA services by letter dated May 19, 2014.⁸ In that letter the Division set forth the scores Mr. U had received regarding the activities of daily living (“ADLs”) that are in dispute in this matter.⁹ In addition, the letter set forth scores for Mr. U’s Instrumental Activities of Daily Living (“IADLs”), but it also stated that “IADLs are excluded where a spouse or other person is legally responsible for the provision of IADLs.”¹⁰

Mr. U appealed the Division’s denial of PCA services and requested this hearing on June 17, 2014. He later submitted a letter, dated July 31, 2014, specifying his areas of disagreement with the scores for both the ADLs and IADLs.¹¹ Each of these topics is discussed below.

III. Discussion

A. *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[.¹²]

The Division uses the Consumer Assessment Tool, or “CAT,” to help it assess the level of assistance needed.¹³ The amount of time allotted for needed assistance is determined by the

⁴ Exhibit E3.

⁵ *Id.*

⁶ Testimony of Ms. Samuel; exhibit E3.

⁷ Testimony of Mr. U.

⁸ Exhibit D1-3.

⁹ Exhibit D1-2.

¹⁰ Exhibit D1.

¹¹ Mr. U’s letter to OAH, dated 7/31/14.

¹² 7 AAC 125.010(a).

Personal Care Assistance Service Level Computation chart.¹⁴ The Service Level Computation chart shows the amount of time allotted for each ADL or IADL, depending on the level of assistance needed for each task.

The different levels of assistance with ADLs are defined by regulation and in the CAT.¹⁵ The CAT uses a coding system with two components: the first component is the self-performance code, which rates how capable a person is of performing a particular activity. “Supervision,” denoted by a “self-performance” code of **1**, is defined as oversight, encouragement, or cueing three or more times a week, with physical assistance no more than two times a week.¹⁶ “Limited assistance,” denoted by a self-performance code of **2**, is defined as requiring direct physical help or guidance from another individual three or more times a week, with weight-bearing support no more than two times a week.¹⁷ “Extensive assistance,” shown as a self-performance code of **3**, is defined as requiring direct physical help with weight-bearing support at least three times a week, or full assistance without any involvement from the recipient at least three times a week, but not all of the time.¹⁸ “Total dependence,” denoted as a self-performance code of **4**, means the recipient has to rely entirely on the caretaker to perform the activity.¹⁹

The second component of the CAT's coding system is the support code. These codes rate the degree of assistance that a person requires for a particular activity. The support codes for ADLs are **0** (no setup or physical help required); **1** (only setup help required); **2** (one person physical assist required); and **3** (two or more person physical assist required).

The "instrumental activities of daily living" or IADLs are scored somewhat differently. 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

¹³ 7 AAC 125.020(b).

¹⁴ 7 AAC 125.024(a)(1). The March 20, 2012 version of this chart has been adopted by reference, 7 AAC 160.900(d)(29), and therefore its requirements have the same effect as a regulation.

¹⁵ The January 29, 2009 version of the CAT has been adopted by reference, 7 AAC 160.900(d)(6), and therefore the definitions in the CAT have the same effect as a regulation.

¹⁶ Exhibit E6.

¹⁷ 7 AAC 125.020(a)(1); Exhibit E6.

¹⁸ 7 AAC 125.020(a)(2); Exhibit E6.

¹⁹ 7 AAC 125.020(a)(3); Exhibit E6.

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). The support codes for IADLs also differ from the support codes for ADLs.²⁰ The support codes 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).²¹

B. Transfers

Transfers are defined as “how [a] person moves between surfaces – to/from bed, chair, ... [and] standing position.”²² The Division’s assessor gave Mr. U a score of 1/1 for transfers, which does not qualify him for services. Mr. U’s July 31 letter indicated that he believed he should have received a score of 2/3,²³ which according to the CAT would mean “limited assistance” under self-performance, i.e., he requires “direct physical help or guidance from another individual three or more times a week, with weight-bearing support no more than two times a week;” and “two or more person physical assist required” under the support category. However, when he was questioned during the hearing regarding why he believed his score for transfers should be 2/3, Mr. U testified only generally that “he cannot move around” without physical assistance from others. He could not articulate the basis for his proposed score of 2/3 for transfers. Mr. U apparently did not understand the distinction between transfers and, for example, locomotion (walking), nor did he articulate why he should receive the particular score of 2/3 for transfers (in particular why he should have a support score of 3, which would mean he requires physical assistance from two or more persons). Mr. U stated that his brother-in-law helped him write the July 31 letter setting forth his proposed scores.²⁴

Nurse Samuel’s narrative regarding transfers on the CAT states as follows:

[Mr. U] said he can get out of bed & up from chairs w/o help & asks son or wife to help him [as needed] for set-up help/contact guard assist on nights after dialysis, uses cane w/transfers always/use furniture help. Dialysis RN’s [*sic*] said no cane/help used w/transfers.

Observed [Mr. U] sitting in chair independently at the start of assessment & when asked for DEMO he preferred his son to help w/minimal contact guard assist as he

²⁰ Exhibit E26.

²¹ *Id.*

²² Exhibit E6.

²³ Mr. U’s letter to OAH, dated 7/31/14, at p. 1. In this letter Mr. U asserts he should have been given a score of 2/3 for each ADL in dispute in this matter: transfers, locomotion, dressing, toileting, and bathing.

²⁴ Testimony of Mr. U.

stood up to use his cane; good upper extremity [range of motion] w/strong grips to use cane & [lower extremity] strength.²⁵

In her testimony, Nurse Samuel explained the reference in her narrative to “dialysis RNs,” stating that after she met with Mr. U and conducted her assessment, she contacted the nurses where he receives his dialysis treatments and spoke with them about his ability to transfer and locomote. She stated that they informed her that Mr. U is able to transfer and walk without assistance both before and after his dialysis treatments.²⁶ Ms. Samuel also testified that she observed Mr. U transfer without assistance from his bed and a chair, and that generally her observation was that he did not need any help with transfers.

Mr. U’s response to the assertion regarding the dialysis nurses was that because he does not speak English, he is unable to communicate his needs to the nurses, so he just does the best he can without their help. He said that on one occasion he needed help sitting down after dialysis, but he was unable to explain that to the nurses; as a result he became very fatigued and experienced a fall when he got back to his home.²⁷ Mr. U’s response to Ms. Samuel’s general comments was to emphasize his weakness after dialysis. His response to her specific observations regarding transfers was to accuse her of testifying falsely, and to state that there was always someone holding onto him during the assessment when, for example, he got up from a chair. Nurse Samuel acknowledged that there was someone holding him, not bearing any of his weight but providing a “contact guard” to ensure that he wouldn’t fall, but she stated that, in her opinion, the contact guard assistance was not necessary.

Although Nurse Samuel acknowledged the fact that she conducted her assessment on a date and time just before Mr. U’s dialysis treatment, she did not acknowledge the possibility that his needs might be greater after dialysis. It is reasonable to infer that Mr. U’s needs are significantly greater after his dialysis treatments than they are before, especially given his testimony that he feels very weak after dialysis.

Mr. U has met his burden of proof of establishing, by a preponderance of the evidence, that the Division’s score for transfers is incorrect. Nurse Samuel’s own narrative acknowledged

²⁵ *Id.*

²⁶ Testimony of Ms. Samuel. Ms. Samuel’s testimony concerning the nurses’ comments is hearsay, which is admissible in Medicaid proceedings before the Office of Administrative Hearings. 2 AAC 64.290(b). Because it is hearsay and the nurses did not themselves testify at the hearing and allow Mr. U to question them, however, this testimony is given far less weight than Mr. U’s direct testimony or Ms. Samuel’s testimony as to her observations regarding Mr. U’s abilities and needs.

²⁷ Testimony of Mr. U.

that on nights after dialysis Mr. U indicated to her that he needs “contact guard assist,” and her own observation was that he received such assistance from his son in her presence.²⁸ This qualifies him for a self-performance score of 2, “limited assistance,” because contact guard assistance is “direct physical help or guidance from another individual,” and he requires such assistance at minimum three or more times a week, given that he receives dialysis three days per week. Mr. U, however, did not establish that he needs help from “two or more persons,” so his support score should be 2, rather than 3.

Accordingly, Mr. U’s score for transfers should be a 2/2. The appropriate frequency of his need for assistance with transfers was one of the topics addressed at the January 16, 2015 supplemental hearing. The evidence presented on this question was mixed. Mr. U testified that he needs assistance with transfers at least 13 or 14 times per day. In his July 31, 2014 letter, however, he requested only nine daily transfer assists. In addition, Mr. U insisted that he needs physical assistance with transfers every day, even though the evidence only supported a finding that he requires such assistance after his dialysis treatments.

The Division, on the other hand, did not offer additional testimony from Nurse Samuel regarding the frequency of Mr. U’s need for transfer assists. Instead, Ms. Heaslet testified for the Division. Ms. Heaslet never observed Mr. U in person and based her testimony on her review of the CAT, the medical documents in the record, and the other witnesses’ testimony. She testified that she found it reasonable that Mr. U would need assistance with transfers on his dialysis days. She also testified that she saw no reason to believe that he needs help with every transfer on those days. Ms. Heaslet concluded that, based on her review of the documents and testimony in this case, Mr. U needs approximately six transfer assists per day after dialysis.

Mr. U’s emphatic testimony regarding his own needs and abilities on the days he receives dialysis carries more weight than Ms. Heaslet’s conclusions based on her review of documents and testimony of other witnesses. Based on all of the evidence presented, Mr. U has established, by a preponderance of the evidence, that he requires assistance with transfers nine times per day when he receives dialysis, or 27 transfer assists per week.

C. Locomotion

Nurse Samuel’s narrative regarding locomotion on the CAT states as follows:

²⁸ Ms. Samuel’s observation that the contact guard did not appear to be necessary was likely due to the fact that the assessment occurred before Mr. U’s dialysis treatment, and for this reason it is given less weight than Mr. U’s testimony on this issue.

[Mr. U] walks in the home without anyone's assistance & has a cane which he uses independently inside/outside the home. He said he has no balance problems & reported steady gait. No hands on help needed. Dialysis RN's *[sic]* said [he] walks independently w/o help.

Observed [Mr. U] walking independently from bedroom to the Living room at the start of the assessment w/his cane. No hands-on help needed; gait steady & had good balance while ambulating from room to room. Son stayed as standby all the time.

Mr. U denied telling Ms. Samuel that "he has no balance problems." When questioned about this, Ms. Samuel acknowledged erroneously stating her own observations in the narrative as a "report" from Mr. U. Mr. U insisted that he needs physical help with walking; when he was asked if that need is documented anywhere, he referred to a letter submitted by his physician for this hearing. The letter, however, only states that Mr. U "would benefit from ... PCA services" and that he should "be evaluated by physical therapy" regarding "range of motion and exercise ability."²⁹ The physician's letter does not support Mr. U's assertions regarding locomotion.

Ms. Samuel's testimony was credible regarding her observations of Mr. U walking without physical assistance during the assessment. In the absence of testimony from any other witness, or documentary evidence of any sort, Mr. U has not established by a preponderance of the evidence that the Division's scoring for locomotion was incorrect.³⁰

D. Dressing

Nurse Samuel's narrative regarding dressing on the CAT states as follows:

[Mr. U] said he has numbness in L arm, but he can don/doff shirts independently with set-up help. His wife or his son always does the set up help. He does not have any special equipment or devices with which he needs help; hasn't reported numbness to Dr/RN.

Observed he was able to thread his sleeves on both arms & needed set-up help when he wore his large heavy winter jacket. Obs that he has good upper extremity ROM w/ good hand/pincer grips. No diagnosis supporting his reported numbness. He reached his feet.

Mr. U's testimony regarding his ability to dress himself was general and vague. When directly asked whether he is incapable of doing so when alone, he testified that he "cannot stand for long because his arms and legs are weak." In response to Ms. Samuel's observations, Mr. U again

²⁹ See Dr. V letter dated July 31, 2014.

³⁰ In his July 31 letter, Mr. U asserts that he should have been given a score of 2/3 for "locomotion-access medical." However he presented no evidence in support of this assertion, beyond his general statements relating to the ADL of locomotion. Accordingly he has not shown by a preponderance of the evidence that the Division was incorrect in concluding he does not need physical assistance in locomotion for medical appointments.

accused Ms. Samuel of testifying falsely regarding his ability to dress himself without physical assistance. Ms. Samuel's written observations and testimony, however, were credible. In the absence of testimony from any other witness, or documentary evidence of any sort, Mr. U has not established by a preponderance of the evidence that the Division's scoring for dressing was incorrect.

E. Toileting

Nurse Samuel's narrative regarding toileting on the CAT states as follows:

[Mr. U] said he can walk to toilet room independently, transfer on/off toilet using counter help, cleanse & can adjust the clothes independently w/o difficulty. He said he voids maybe 3 times a day. He said he has leaking of urine 1-2 times/week. No diapers.

Observed independent transfer, locomotion, good UE ROM. [Mr. U] walked to bathroom using his cane & transferred on/off toilet w/o hands on help w/o difficulty. He reached to his back independently w/o help & good fine motor skills. Asked him to get Depends.

Ms. Samuel acknowledged during the hearing that she erroneously recorded in the narrative her own observation of Mr. U walking unassisted as a report from Mr. U. Nonetheless, Mr. U presented no evidence to counter Ms. Samuel's specific, detailed observations regarding this ADL. Consequently he has not established by a preponderance of the evidence that the Division's score for toileting was incorrect.

F. Bathing

Nurse Samuel's narrative regarding bathing on the CAT states as follows:

[Mr. U] said on dialysis days he feels weak, takes bath before he goes for dialysis. Other days he needs set-up help w/transfers as his L leg has slight numbness; wife/son would help him, give a hand w/transfers. No washing help needed & sits on low stool.

Observed that he has good upper/lower extremity strength to do task, has good hand grips to use bathroom sliding door w/transfer assist instead of helping hand. Dialysis RN's said no help used w/transfers in unit. Good ROM UE/LE. Only supervision needed.

In contrast to Ms. Samuel's observations regarding Mr. U's physical strength, Mr. U specifically testified that he has to "hold onto" whoever is helping him (his wife or his son) when he bathes, and that he is too weak to wash himself. Ms. Samuel's observations regarding Mr. U's "good upper/lower extremity strength to do task" do not take into account that they were made before dialysis rather than after. Her comment that on non-dialysis days he only needs

“set-up help,” however, contains an implicit acknowledgement that on dialysis days his weakness causes him to need more than just mere set-up help.

Having to hold onto a helper for support while being washed by the helper qualifies Mr. U for a self-performance score of 2, “limited assistance,” because this is “direct physical help or guidance from another individual,” and he requires such assistance at minimum three or more times a week, given that he receives dialysis three days per week. Mr. U, however, did not establish that he needs help with bathing from “two or more persons,” so his support score should be 2, rather than 3.

Mr. U met his burden of establishing, by a preponderance of the evidence, that the Division’s score for bathing was incorrect. His score should be a 2/2. But the appropriate frequency of bathing assists was not sufficiently developed in the record at the hearing, so testimony was taken on this issue at the supplemental hearing. Mr. U testified that he bathes once or twice per day, depending on how tired he is. He also testified that he typically bathes before going to dialysis. The Division offered no testimony on the frequency of Mr. U’s need for assistance with bathing. Given that the evidence only supported a finding that he needs assistance after he receives dialysis, it is reasonable to infer that Mr. U requires assistance with bathing three times per week.

G. IADLs

Mr. U disputed each of the Division’s scores for the IADLs of light meal preparation, main meal preparation, shopping and light housework. At the hearing, however, the Division established that IADLs are not available where a spouse is legally responsible for the provision of IADLs.³¹ Mr. U did not dispute that he lives with his wife and that she provides these types of tasks for him. Therefore, Mr. U did not establish by a preponderance of the evidence that the Division’s decision as to his IADLs was incorrect.

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³¹ See 7 AAC 125.040(a)(13).

IV. Conclusion

The Division erred in its self-performance and support scores for Mr. U regarding the ADLs of transfers and bathing. His scores for each of those ADLs should be 2/2, with a frequency of 27 assists per week for transfers and three assists per week for bathing. In all other respects, the Division's decision regarding Mr. U's application for PCA services is affirmed.

Dated this 9th day of March, 2015.

Signed _____

Andrew M. Lebo

Administrative Law Judge

Adoption

The undersigned, under the authority of AS 44.64.060(e)(1), adopts the foregoing 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 26th day of March, 2015.

By: *Signed* _____

Name: Andrew M. Lebo

Title: Administrative Law Judge

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