

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

In the Matter of)
)
B N) OAH No. 14-1168-MDS
) Agency No.
_____)

DECISION

I. Introduction

B N receives Personal Care Assistance (“PCA”) services that are paid for by Medicaid. The Division of Senior and Disabilities Services (“Division”) reassessed his condition and reduced his PCA services. Mr. N, through his parents, contested that decision and requested a hearing.

A hearing was held on August 18, 2014. Mr. N was present and was represented by his mother O N. The Division was represented at the hearing by fair hearing representative Victoria Cobo; health program manager Sharon Girouard and nurse assessor Sam Cornell testified for the Division.

Prior to the start of the hearing the parties requested and were given an opportunity to confer off the record about their areas of disagreement. After off-the-record discussions, the parties indicated that they had reached a settlement of most of the issues raised by Mr. N, with just one issue remaining in dispute: the activity of daily living, or ADL, of “bed mobility” (also referred to as body mobility).

Based upon the evidence in the record, and as further discussed below, the Division’s decision is reversed as to PCA services for bed mobility.

II. Facts

Mr. N suffered a traumatic brain injury at age 00, in 2002. His physician characterizes his condition as an “acquired anoxic brain injury following severe trauma.”¹ The physician has also stated that “his condition and diagnosis are perhaps most closely related to spastic quadriplegic cerebral palsy.”² He is immobile and non-verbal, he suffers from spasticity and severe pain episodes from kidney stones, and he is susceptible to aspiration and skin

¹ N exh. 2, p. 1.

² *Id.*

breakdown.³ He cannot walk or stand or move his extremities, nor can he operate a wheelchair on his own.⁴

Prior to his reassessment, Mr. N received 700 minutes per week of bed mobility services.⁵ On January 17, 2014 registered nurse Cornell evaluated Mr. N using the Division’s Consumer Assessment Tool (“CAT”).⁶ After the reassessment, the Division stated in a letter dated July 1, 2014 that Mr. N’s bed mobility services would be reduced to zero minutes per week.⁷

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...⁸

The Division uses the Consumer Assessment Tool, or “CAT,” to help it assess the level of assistance needed.⁹ The amount of time allotted for needed assistance is determined by the Personal Care Assistance Service Level Computation chart.¹⁰ 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.¹¹ 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.¹² “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,

³ *Id.*

⁴ *Id.*

⁵ Exhibit D1.

⁶ Exhibit E1.

⁷ Exhibit D3.

⁸ 7 AAC 125.010(a).

⁹ 7 AAC 125.020(b).

¹⁰ 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.

¹¹ 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.

¹² Exhibit E6.

with weight-bearing support no more than two times a week.¹³ “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.¹⁴ “Total dependence,” denoted as a self-performance code of **4**, means the recipient has to rely entirely on the caretaker to perform the activity.¹⁵

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).

Under the PCA regulations in effect prior to January 26, 2012, the Division would provide a recipient with time for a particular ADL based on the assessor’s perception of how much time would reasonably be required (up to a maximum level specified by regulation) to perform the activity at issue.¹⁶ However, in January 2012 the PCA regulations were amended to implement a new system in which the self-performance code and support code for the specific activity automatically dictate the amount of PCA time that is awarded per unit of frequency.¹⁷

The Division may change the number of hours of allotted PCA services if there has been a material change in the recipient’s condition.¹⁸ A material change means that the recipient’s medical condition has changed, or his living conditions have changed.¹⁹ When the Division wishes to reduce the amount of allotted time, the Division has the burden of proving a change of condition justifying that reduction by a preponderance of the evidence.²⁰ When the recipient is seeking additional time for specific services, the recipient has the burden of showing the material

¹³ 7 AAC 125.020(a)(1); Exhibit E6.

¹⁴ 7 AAC 125.020(a)(2); Exhibit E6.

¹⁵ 7 AAC 125.020(a)(3); Exhibit E6.

¹⁶ See former regulations 7 AAC 43.750, 7 AAC 43.751, 7 AAC 43.752, and 7 AAC 43.755.

¹⁷ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart (exh. B34).

¹⁸ 7 AAC 125.026(a).

¹⁹ 7 AAC 125.026(d). A material change also exists if the services were based on a prescription that has since expired, there was a time-limited amendment to the plan of care, or the services are no longer authorized by regulation. 7 AAC 125.026(d)(3).

²⁰ 7 AAC 49.135.

change that would justify the need for the increase.²¹ The service category at issue in this case involves a reduction by the Division – thus the burden was on the Division to justify that change.

B. Bed Mobility

Bed mobility, also referred to as body mobility, is defined as “how a person moves to and from lying position, turns side to side and positions body while in bed.”²² Nurse assessor Cornell gave Mr. N a score on the CAT of 4/2, or “total dependence,” for bed mobility.²³ The Division’s July 1, 2014 adverse action letter,²⁴ however, informed Mr. N of the decision to reduce his PCA hours. Regarding “bed mobility,” the letter stated as follows:

No time given due to excessive movement and per regulations; as a standard 12 x daily reduced by any frequencies for other ADL task [*sic*] where body mobility is a functional part of the overall task. As a result, your service level authorization has been decreased from 700.00 to zero weekly minutes.²⁵

The adverse action letter provided no other justification for the reduction in bed mobility service time. At the hearing, no evidence was presented to contradict Mr. N’s 4/2 score for bed mobility; on the contrary, nurse Cornell confirmed Mr. N’s need for assistance in moving and changing positions both when he is in bed or while on any other surface.²⁶ Along with the 4/2 score, nurse Cornell recorded in the CAT that Mr. N required six bed mobility assists per day, or 42 per week.²⁷ Prior to the reassessment, Mr. N was authorized for 35 bed mobility assists per week.²⁸

During the hearing the Division’s evidence focused on the rationale stated in the adverse action letter regarding the denial of bed mobility services. Ms. Girouard testified, consistent with the adverse action letter, that no time was authorized for bed mobility because Mr. N already was authorized to receive more than 12 body movement assists per day in other activities such as transfers, toileting, dressing and bathing.²⁹ This reflects the Division’s position that the PCA Service Level Computation chart allows a **maximum** of 12 body position changes

²¹ *Id.*
²² Exhibit E7.
²³ *Id.*
²⁴ Exhibit D.
²⁵ Exhibit D3.
²⁶ Cornell testimony.
²⁷ Exh. E7.
²⁸ Exhibit D10.
²⁹ Girouard testimony.

per day.³⁰ The actual relevant language of the chart, however, is as follows: “Task levels are determined based on: ... (b) Body mobility is less than or equal to every two hours **as a standard** (12 x daily) reduced by any frequencies for other ADL tasks (transfer, toileting, bathing, locomotion, etc.) where body mobility is a functional part of the overall task.”³¹

The chart’s language regarding the allowable number of body position changes per day, however, is properly interpreted as setting forth a standard, rather than a hard cap that the agency can never exceed. This issue was recently decided by the Commissioner of Health and Social Services in a similar PCA service reduction appeal, *In re KH*, OAH Case No. 14-0630-MDS (Commissioner of Health and Social Services (11/3/14). In that case the Commissioner adopted the administrative law judge’s recommended decision, finding the Division’s interpretation of the language of the PCA Service Level Computation chart to be erroneous, essentially because a “standard” is not the same thing as an absolute cap. The result of the Division’s erroneous interpretation of the body movement “standard” as an absolute cap has been that a PCA service recipient who is authorized to receive at least 12 body movement assists under other ADL categories will not receive any body mobility assists while in bed at night, or even at other times during the day when the assistance is truly needed to shift position in order to be able to prevent bed sores or skin breakdown, achieve comfortable sleep, etc. The Commissioner’s rationale in adopting the decision in 14-0630-MDS is hereby incorporated in this Decision by reference.³² The PCA Service Level Computation chart is properly interpreted as setting a guideline or point of reference for the allowable frequency of body mobility assists, rather than an absolute cap that can never be exceeded.

As noted above, the Division’s CAT gave Mr. N a score of 4/2, with a frequency of 42 times per week, regarding bed mobility. Because the Division’s decision to award zero bed mobility service needs is incorrect,³³ and the Division offered no other evidence of the appropriate frequency, it is reasonable and appropriate to rely upon the estimate arrived at by

³⁰ As noted in footnote 10 above, the PCA Service Level Computation chart has been adopted by reference in the Division’s regulations. 7 AAC 125.024(a)(1), 7 AAC 160.900(d)(29).

³¹ March 20, 2012 Personal Care Assistance Service Level Computation chart, page 1 of 3 (emphasis added).

³² The decision in 14-0630 examined definitions of the term “standard,” as well as language used by the Division in other areas of the PCA Service Level Computation chart, and concluded that the intent of the agency in adopting the chart was to set a guideline for allowable body movement assists, rather than an absolute cap. *See In re KH*, case no. OAH 14-0630-MDS, at pp. 6-9.

³³ The Division did not argue that Mr. N actually needs less frequent bed mobility services.

nurse Cornell. The Division, therefore, should authorize body mobility services for Mr. N based on his score of 4/2 and a frequency of six per day, or 42 per week.³⁴

IV. Conclusion

The Division erred by reducing Mr. N’s PCA service level for the ADL of bed mobility. Accordingly, his PCA service levels should be recomputed in accordance with the discussion above and with the parties’ settlement agreement. The Division’s reassessment decision on the issue of bed mobility services is reversed.

Dated this 20th day of April, 2015.

Signed _____
Andrew M. Lebo
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 7th day of May, 2015.

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

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

³⁴ In doing so, the Division should not reduce any other PCA services for Mr. N where body mobility may be a functional part of the task.