

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

In the Matter of)
)
K T) OAH No. 14-1172-MDS
) Agency No.
_____)

DECISION

I. Introduction

K T 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. T, through his parents, contested that decision and requested a hearing.

A hearing was held on August 18, 2014. Mr. T was present and was represented by his parents B and D T,¹ and he was assisted with the hearing by a representative of No Name Agency, H L. The Division was represented at the hearing by fair hearing representative Tammy Smith, and nurse assessor Sam Cornell testified for the Division. The nurse who performed Mr. T’s reassessment did not testify.

Prior to the start of the hearing the parties conferred off the record about their areas of disagreement. After the off-the-record discussion, the parties indicated that they had reached a settlement of several of the issues raised by Mr. T, with only one issue remaining in dispute: the activity of daily living, or ADL, of “bathing.” The parties then presented testimony pertinent to that issue.

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

II. Facts

Mr. T suffers from cerebral palsy, congenital hemiplegia, epilepsy, a seizure disorder, developmental delay, cleft palate, and tactile deficiencies in his hands.²

Prior to his reassessment, Mr. T received 31.25 hours of PCA services per week.³ On January 22, 2014 a registered nurse evaluated Mr. T using the Division’s Consumer

¹ D T holds power of attorney for Mr. T.

² Exh. E3; testimony of D T.

³ Exhibit D1.

Assessment Tool.⁴ Mr. T's parents were present with him for the reassessment.⁵ After the reassessment, the Division stated in a letter dated June 19, 2014 that Mr. T's PCA services would be reduced to 23.7.5 hours per week.⁶

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[.]⁷

The Division uses the Consumer Assessment Tool, or "CAT," to help it assess the level of assistance needed.⁸ The amount of time allotted for needed assistance is determined by the Personal Care Assistance Service Level Computation chart.⁹ 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.¹⁰ 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.¹¹ "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.¹² "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

⁴ Exhibit E1.

⁵ Exhibit E2.

⁶ Exhibit D1.

⁷ 7 AAC 125.010(a).

⁸ 7 AAC 125.020(b).

⁹ 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.

¹⁰ 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.

¹¹ Exhibit E6.

¹² 7 AAC 125.020(a)(1); Exhibit E6.

at least three times a week, but not all of the time.¹³ “Total dependence,” denoted as a self-performance code of **4**, means the recipient has to rely entirely on the caretaker to perform the activity.¹⁴

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.¹⁵ 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.¹⁶

The Division may change the number of hours of allotted PCA services if there has been a material change in the recipient's condition.¹⁷ A material change means that the recipient's medical condition has changed, or his living conditions have changed.¹⁸ 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.¹⁹ When the recipient is seeking additional time for specific services, the recipient has the burden of showing the material change that would justify the need for the increase.²⁰ 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.

Because the Division notified Mr. T of its decision on June 19, 2014, his condition on that date is used when determining the amount of services he is eligible to receive.²¹

¹³ 7 AAC 125.020(a)(2); Exhibit E6.

¹⁴ 7 AAC 125.020(a)(3); Exhibit E6.

¹⁵ See former regulations 7 AAC 43.750, 7 AAC 43.751, 7 AAC 43.752, and 7 AAC 43.755.

¹⁶ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart.

¹⁷ 7 AAC 125.026(a).

¹⁸ 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).

¹⁹ 7 AAC 49.135.

²⁰ *Id.*

²¹ See *In re T C*, OAH Case No. 13-0204-MDS (Commissioner of Health and Social Services 2013), page 7 (finding that the notice sent to recipient is the decision under review). OAH cases are available online at <http://aws.state.ak.us/officeofadminhearings/categoryList.aspx>.

As mentioned above, prior to the start of the hearing the parties reached a resolution of some of the areas in dispute, and the terms of that resolution were stated on the record during the hearing by Ms. Smith. As a result, only the service level for the ADL of bathing was at issue in the hearing.

B. Bathing

Bathing is defined as “how [a] person takes full body bath/shower, sponge bath, and transfers in/out of tub/shower.”²² The CAT’s self-performance scoring for bathing differs somewhat from the scoring for the other ADLs.²³ For bathing, self-performance scores are as follows: A self-performance code of **1**, labeled as “Supervision,” is defined to mean “oversight help only.”²⁴ A self-performance code of **2** is defined as “physical help limited to transfer only.”²⁵ A self-performance code of **3** is defined as “physical help in part of bathing activity.”²⁶ A self-performance code of **4** is defined as “total dependence” with bathing.²⁷

The Division’s adverse action letter, dated June 19, 2014,²⁸ informed Mr. T of the Division’s decision to reduce his PCA hours. Regarding “bathing,” the letter stated as follows:

On 10/12/2012, you were assessed as needing extensive assistance with one-person physical assist. On your most current assessment of 01/22/2014, you were assessed as needing limited assistance and one-person physical assist. The frequency for this activity has remained the same. As a result of your service level need decreasing, time for this activity has been reduced from 157.50 to 105 weekly minutes; therefore, your service level authorization has decreased.²⁹

At the hearing the Division presented evidence that Mr. T can follow directions to make a sandwich, so if he is being supervised by a PCA he should be able to follow directions regarding his bathing needs.³⁰ In response, Mr. T’s parents testified that Mr. T has tactile deficiencies, such that he is limited in his ability to feel things with his fingers. This results in him not being able to wash himself properly, particularly in areas of his body below the waist.³¹ In addition, Mr. T has trouble balancing himself when standing up, so when he is in the shower he has to

²² Exhibit E11.

²³ Mr. T’s support score for bathing, a **2** (one-person physical assist), was not disputed at the hearing.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Exhibit D.

²⁹ Exhibit D3.

³⁰ Testimony of Sam Cornell.

³¹ Testimony of B and D T.

support himself with one hand against the wall. If he is using his other hand to hold the hand-held shower head, he will not be able to wash himself without physical assistance from his PCA.³²

The Division's self-performance score of **2** for Mr. T for bathing means that physical assistance will be limited to only transfers in and out of the shower or tub. Mr. T's physical limitations, however, dictate that he must have physical assistance with the act of washing himself if he is to be properly bathed. The Ts' testimony on this point was not contested or impeached by the Division. Therefore, the Division did not meet its burden of establishing by a preponderance of the evidence that Mr. T was properly given a self-performance score of **2**. He should be given a score of self-performance score of **3**,³³ and an overall score of **3/2** for bathing.

IV. Conclusion

The Division erred by reducing Mr. T's PCA service level for the ADL of bathing. His PCA service levels should be recomputed in accordance with the discussion above and with the parties' settlement agreement. The Division's reassessment decision is reversed as to bathing.

Dated this 23rd day of March, 2014.

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 10th day of April, 2015.

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

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

³² *Id.*; testimony of H L.

³³ A self-performance score of **4** would not be appropriate, because Mr. T is not totally dependent, i.e., he is able to physically perform part of the bathing activity.