

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

Prior to his reassessment, Mr. S received 79.5 hours of PCA services per week.⁴ On January 28, 2014 a registered nurse evaluated Mr. S using the Division’s Consumer Assessment Tool.⁵ Mr. S’s parents and Ms. U were present with him for the reassessment.⁶ After the reassessment, the Division stated in a letter dated June 19, 2014 that Mr. S’s PCA services would be reduced to 62.5 hours 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.* at p.2; exhibit E4; testimony of D S.

⁴ Exhibit D1.

⁵ Exhibit E1.

⁶ Exhibit E2.

⁷ Exhibit D1.

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).

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 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.¹⁶ 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).

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.¹⁷ 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.¹⁸

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 *Id.*

¹⁷ See former regulations 7 AAC 43.750, 7 AAC 43.751, 7 AAC 43.752, and 7 AAC 43.755.

¹⁸ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart.

The Division may change the number of hours of allotted PCA services if there has been a material change in the recipient's condition.¹⁹ A material change means that the recipient's medical condition has changed, or his living conditions have changed.²⁰ 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.²¹ 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.²² The service categories at issue in this case involve reductions by the Division – thus the burden was on the Division to justify those changes.

Because the Division notified Mr. S 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.²³ 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. Middlestadt. As a result, only the service levels for the ADLs of body mobility, transfers, locomotion and documentation were at issue in the hearing.

B. Body Mobility

Body mobility, also referred to as bed mobility, is defined as “how a person moves to and from lying position, turns side to side and positions body while in bed.”²⁴ The Division's adverse action letter, dated June 19, 2014,²⁵ informed Mr. S of the Division's decision to reduce his PCA hours. Regarding “body mobility,” the letter stated as follows:

On your 2008 assessment you were assessed as being totally dependent with Body mobility, 56 times per week for a time allowed of 280 min/week. On your most current assessment of 2014, you were assessed as being **totally dependent with the same activity 0 times per week**, due to current regulations that state Body mobility-positioning is reduced due to position changes provided as a part of other activities like transfers, toileting, locomotion, bathing, etc. as referenced in the

¹⁹ 7 AAC 125.026(a).

²⁰ 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).

²¹ 7 AAC 49.135.

²² *Id.*

²³ *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>.

²⁴ Exhibit E6.

²⁵ Exhibit D.

PCA Service Level Computation. (7 AAC 125.024(a)(1)). Time for this activity has been removed. As a result, your service level authorization has decreased.²⁶

The adverse action letter provided no other justification for the reduction in body mobility service time.

The Division's reassessment gave Mr. S a score of 4/2, or "total dependence," for body mobility.²⁷ No evidence was presented at hearing to contradict this score for Mr. S.

During the hearing the Division's evidence focused only on the rationale stated in the adverse action letter regarding the denial of body mobility services; in other words, there was no evidence presented regarding the frequency of Mr. S's actual body mobility needs. The CAT indicates "0" for the frequency of authorized body mobility services, and the assessor's notes in the CAT state "no time authorized."²⁸ Prior to the reassessment, Mr. S was authorized for 56 body mobility assists per week.²⁹

Ms. Middlestadt testified, consistent with the adverse action letter, that no time was authorized for body mobility because Mr. S already receives more than 12 body movement assists per day in other activities such as transfers, toileting, bathing and locomotion.³⁰ This reflects the Division's position that the PCA Service Level Computation chart allows a **maximum** of 12 body position changes per day.³¹ 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."³²

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

²⁶ Exhibit D2 (emphasis added).

²⁷ Exhibit E6.

²⁸ *Id.*

²⁹ Exhibit D10.

³⁰ Testimony of S. Middlestadt.

³¹ 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).

³² March 20, 2012 Personal Care Assistance Service Level Computation chart, page 1 of 3 (emphasis added).

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 mobility assists during the daytime will not receive any body mobility assists at night (i.e. "bed mobility"), when he or she may truly need assistance to shift position in bed in order to be able to prevent bed sores, achieve comfortable sleep, etc. The Commissioner's rationale in adopting the decision in 14-0630-MDS is hereby incorporated in this Decision by reference.³³ 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 gave Mr. S a score of 4/2, with a frequency of "0 times per week," regarding body mobility. Because the Division's determination of the frequency of his body mobility service needs is incorrect,³⁴ and the Division offered no other evidence of the appropriate frequency, it is reasonable and appropriate to rely upon the estimate described by his caregiver, Mrs. S, who typically repositions Mr. S about four times per night.³⁵ The Division, therefore, should authorize body mobility services for Mr. S based on his score of 4/2 and a frequency of four per day, or 28 per week.³⁶

C. Transfers

Transfers are defined in the CAT as "how a person moves between surfaces – to/from bed, chair, wheelchair, standing position (excluding to/from bath/toilet)."³⁷ After reassessing Mr. S, the Division gave him a score of 4/2 and a frequency of 42 "mechanical lift" transfer assists per week, for a total authorized time of 630 minutes.³⁸ He had previously been assessed with a score of 4/2 and 84 non-mechanical transfer assists per week.³⁹ Apparently the time authorized

³³ The decision in 14-0630-MDS 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.

³⁴ The Division did not argue that Mr. S actually needs less frequent body mobility services.

³⁵ Testimony of D S.

³⁶ In doing so, the Division should not reduce any other PCA services for Mr. S where body mobility may be a functional part of the task.

³⁷ Exhibit E6.

³⁸ Exhibit E6.

³⁹ Exhibit D10.

for transfers for Mr. S actually increased, because more time is allotted for mechanical assists than for non-mechanical assists. Mr. S nonetheless disputed the reassessment, arguing that 42 assists per week, or six per day, is not an accurate reflection of the number of times Mr. S needs assistance with transfers.

During the hearing, the Division could not explain the factual basis for the assessor's conclusion that Mr. S requires only 42 transfer assists per week. The assessor's notes in the CAT do not provide sufficient information to allow one to do more than speculate as to how she arrived at that number,⁴⁰ and Ms. Middlestadt had no knowledge of the factual basis of the assessed frequency.⁴¹ Mr. S's parents, however, explained that they typically assist Mr. S with transfers at least 10 times per day.⁴² Because the Division provided no reliable evidence of the basis for its determination of frequency of transfers, the Division did not meet its burden of proof on this issue.⁴³ Therefore, it is reasonable and appropriate for the Division to authorize mechanical transfer assists at a frequency of 10 per day, or 70 per week.

D. Locomotion

Locomotion is defined in the CAT as "how a person moves between locations in his/her room and other areas on the same floor - if in a wheelchair, self-sufficiency once in chair."⁴⁴ After the reassessment, the Division gave Mr. S a score of 4/2 and a frequency of 28 locomotion assists per week.⁴⁵ He had previously been assessed with a score of 4/2 and 56 locomotion assists per week.⁴⁶

As with transfers, during the hearing the Division could not explain the factual basis for the assessor's conclusion that Mr. S requires 28 locomotion assists per week, only half the frequency allotted in the previous assessment. Again, the assessor's notes in the CAT do not provide sufficient information to allow one to do more than speculate as to how she arrived at

⁴⁰ See Exhibit E6.

⁴¹ Testimony of S. Middlestadt.

⁴² This is the frequency figure requested by Mr. S in the letter of disagreement submitted by Ms. U on his behalf, prior to the hearing. See August 21, 2014 Letter of Disagreement, Exhibit 1, p. 2.

⁴³ In theory, the Division might have argued that the burden of proof regarding transfers should be on Mr. S, because his authorized time actually increased under the current assessment, and he was seeking additional time through this appeal. The Division did not raise this argument. In any event, to the extent Mr. S had the burden on this issue, he satisfied it through the testimony of his parents.

⁴⁴ Exhibit E7.

⁴⁵ *Id.*

⁴⁶ Exhibit D10.

that number,⁴⁷ and Ms. Middlestadt did not know the basis for the assessed frequency.⁴⁸ In the letter of disagreement submitted by Ms. U on Mr. S's behalf prior to the hearing, she requested a frequency of eight per day.⁴⁹ Her letter, however, cited to an attached letter from Mr. S's physician, which itself provides no factual support for this estimate.⁵⁰ At the hearing Mr. S's father explained that the frequency of Mr. S's need for assistance with locomotion can vary between four and eight times per day, which averages out to a frequency of six per day.⁵¹ Because the Division provided no reliable evidence of the basis for its determination of the frequency of locomotion assists, the Division did not meet its burden of proof on this issue. Therefore, it is reasonable and appropriate for the Division to authorize locomotion assists at a frequency of six per day, or 42 per week.⁵²

E. Documentation

The Division's adverse action letter indicated that under his previous assessment, Mr. S had been given 70 minutes per week for documentation, i.e., writing down the data of his vital signs and glucose levels.⁵³ The Division removed this time under the current assessment, because Mr. S did not have a current, written doctor's order or prescription for documentation. At the hearing, Mr. S's parents and Ms. U acknowledged the need for a current prescription and stated that they would submit one with a change of information amendment request. Consequently they withdrew Mr. S's appeal on this issue.

IV. Conclusion

The Division erred by reducing Mr. S's PCA service level for the ADLs of body mobility and locomotion, and by reducing his allowed frequency for the ADL of transfers, but it did not err in removing his PCA time for documentation. His PCA service levels should be recomputed in accordance with the discussion above and with the parties'

⁴⁷ See Exhibit E7.

⁴⁸ Testimony of S. Middlestadt.

⁴⁹ See August 21, 2014 Letter of Disagreement, Exhibit 1, p. 2.

⁵⁰ *Id.*, Exhibit 2, p. 2

⁵¹ Testimony of K S.

⁵² Mr. S also received a score of 8/2 on the CAT for "locomotion – access medical appointments." A score of 8 in self-performance means that the activity did not occur during the seven days preceding the assessment. Ms. U explained that Mr. S now sees a health care provider once every three weeks and that she planned to submit the doctor's information with a "change of information" amendment request on Mr. S's behalf in the near future.

⁵³ Exhibit D4.

settlement agreement. The Division's reassessment decision is reversed as to body mobility, transfers, and locomotion, and affirmed in all other respects.

Dated this 29th day of December, 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 13th day of January, 2015.

By: *Signed*

Andrew M. Lebo
Administrative Law Judge

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