

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

In the Matter of:)
)
 T B) OAH No. 14-1276-MDS
) HCS Case No.
 _____) Medicaid ID No.

DECISION

I. Introduction

The issue in this case is whether the State of Alaska Division of Senior and Disabilities Services (Division) correctly assessed the amount of Medicaid Personal Care Assistant (PCA) services for which Ms. T B is currently eligible. The Division decreased Ms. B's PCA services from 25.0 hours per week to 7.25 hours per week effective July 24, 2014.¹

This decision concludes, based on the evidence in the record, that the Division's scoring of Ms. B's need for assistance with bathing was correct. However, the Division erred when it denied Ms. B PCA time for assistance with her instrumental activities of daily living (IADLs). Accordingly, the Division's decision is affirmed in part and reversed in part.

II. Facts

A. Ms. B's Medical Condition²

Ms. B is 58 years old and weighs 110 pounds.³ She lives in an apartment, which has ramp access to its front door, with R X (an unrelated adult), one adult child, and two minor children.⁴ She is wheelchair-bound due to neuropathy and loss of function in her lower extremities.⁵ Her diagnoses include alcohol dependence, obstructive chronic bronchitis with acute exacerbation, gallstones, an unspecified bone and cartilage disorder, peripheral neuropathy, and polyneuropathy.⁶ She takes a number of medications including Baclofen, Gabapentin, Phenergan, and Tylenol #3 with codeine.⁷ She also has a prescription for oxygen, to be used as needed.⁸

¹ Ex. D1.

² To avoid repetition, the testimony of Ms. B regarding her functional abilities and limitations is discussed in Section III, below.

³ Exs. E1, E9.

⁴ Exs. E1, E21. Whether or not Mr. X is married to Ms. B is one of the primary disputed factual issues in this case. It is a significant issue here because, if Ms. B and Mr. X are married, Ms. B would not be eligible to receive assistance with instrumental activities of daily living (IADLs), whereas, if the two are *not* married, Ms. B would be entitled to assistance with IADLs if she can prove that she cannot complete them without physical assistance.

⁵ Exs. E4, F21.

⁶ Ex. E3.

⁷ Ex. E20.

B. The Division's Findings Based on its Assessments

Ms. B was previously assessed as to her eligibility for PCA services on July 13, 2011.⁹ Based on her 2011 assessment, Ms. B was found to require the following levels of assistance with her ADLs:¹⁰ body mobility - limited one-person physical assistance (CAT score 2/2; frequency 14/week); transfers - extensive one-person physical assistance (CAT score 3/2, frequency 28/week); locomotion (in room) - extensive one-person physical assistance (CAT score 3/2, frequency 28/week); locomotion (to access medical appointments) - extensive assistance (CAT score 3, frequency 2/week); dressing - limited one-person physical assistance (CAT score 2/2, frequency 14/week); eating - independent with setup assistance (CAT score 0/1); toilet use - extensive one-person physical assistance (CAT score 3/2; frequency 28/week); personal hygiene - limited one-person physical assistance (CAT score 2/2; frequency 7/week); and bathing - extensive one-person physical assistance (CAT score 3/2; frequency 7/week).

At the same 2011 assessment, Ms. B was also found to require assistance with her IADLs.¹¹ She received CAT scores of 2/3 with regard to light meal preparation and main meal preparation, and CAT scores of 3/4 with regard to light housework, routine housework, grocery shopping, and laundry.

Ms. B also received PCA time, based on her 2011 assessment, for certain activities which are neither ADLs nor IADLs.¹² These were checking medical / care documentation (7 times/week), and escort to medical appointments (nine times/week).

Ms. B was most recently assessed for PCA eligibility on February 10, 2014 by S H, R.N. of DSDS.¹³ Present at the assessment, in addition to Ms. B and Mr. H, were Ms. B's Care Coordinator, Mr. X, and her daughter and PCA E Q.¹⁴ Ms. B reported that, in general, she had been feeling much weaker over the past year.¹⁵ Mr. H found Ms. B's memory to be intact.¹⁶ Mr. H reported that Ms. B was able to touch her hands over her head and behind her back, and touch her feet from a sitting position, but she could not stand up while her arms were crossed on her chest.¹⁷ Mr. H

⁸ Ex. E21.

⁹ Ex. F. Ms. B's 2011 assessment was conducted prior to certain significant amendments to the regulations governing Alaska's PCA program which became effective in 2012.

¹⁰ Exs. F5 - F12.

¹¹ Ex. F26.

¹² Ex. D11.

¹³ Ex. E.

¹⁴ Ex. E2.

¹⁵ Ex. E3.

¹⁶ Ex. E4.

¹⁷ Ex. E4.

reported that Ms. B's arm functionality was normal, that she had good strength in both hands, and that she could support her weight using her hands ¹⁸

Mr. H's assessment was recorded and scored on the Division's Consumer Assessment Tool or "CAT." Mr. H found that Ms. B has the following abilities and limitations with regard to her activities of daily living (ADLs):¹⁹

Bed / Body Mobility:²⁰ Mr. H reported that Ms. B told him that (1) she sleeps in a regular bed located in her living room; (2) she can turn from side-to-side and sit up in bed without assistance; and (3) has no skin breakdown or decubitus ulcers. Mr. H reported that he observed Ms. B sitting upright in her wheelchair throughout the assessment, and repositioned herself in her wheelchair by gripping the arms of the wheelchair and pushing herself up (scored 0/0 - independent).

Transfers:²¹ Mr. H reported that Ms. B told him that she requires assistance to transfer from her bed to a chair and/or to her wheelchair. Ms. B estimated that her PCA accomplishes about 80% of the work involved in performing her transfers, with Ms. B able to provide only about 20% of the required effort. Mr. H reported that he observed Ms. B's daughter / PCA assist Ms. B to transfer from her wheelchair to her bed and back to the wheelchair. Mr. H reported that, during these transfers, the PCA held Ms. B around the trunk while Ms. B put her arms around the PCA's neck, and reported that Ms. B was "highly involved" with the transfers (scored 2/2, frequency 42 times per week).

Locomotion (walking):²² Mr. H reported that Ms. B told him (1) that she has been using a (manual) wheelchair for the last eight years; (2) that she can propel her wheelchair inside her home without assistance; (3) that she requires assistance with her wheelchair when going to medical appointments and when going shopping; and (4) that she uses her wheelchair outside her home three to four times per week. Mr. H reported that he observed Ms. B propel her wheelchair without assistance from her dining room to her living room (scored 0/0). With regard to locomotion to medical appointments, Mr. H scored Ms. B as going twice a day, one time per week.

¹⁸ Ex. E4.

¹⁹ Exs. E6 - E12.

²⁰ All references in this paragraph are based on Ex. E6 unless otherwise stated.

²¹ All references in this paragraph are based on Ex. E6 unless otherwise stated.

²² All references in this paragraph are based on Ex. E7 unless otherwise stated.

Dressing:²³ Mr. H reported that Ms. B told him that she can dress and undress herself without assistance, and that she has no special garments, braces, or prosthetics. Mr. H also reported that Ms. B's daughter / PCA agreed with these statements (scored 0/0).

Eating:²⁴ Mr. H reported that Ms. B told him that she can eat, drink, and take her oral medications independently; that she has no special dietary regimens or restrictions; and that she has smoked cigarettes for over forty years. Mr. H reported that he observed Ms. B drink coffee from a regular cup without assistance or difficulty (scored 0/0).

Toileting:²⁵ Mr. H reported that Ms. B told him that she uses a bedside commode for toileting exclusively; that she requires assistance with post-toileting cleanup when she has a bowel movement; and that she has at least one bowel movement per day (scored 2/2; frequency 42 times per week).

Personal Hygiene:²⁶ Mr. H reported that Ms. B told him that she can perform oral care, brush her hair, and wash and dry her hands and face without assistance. Mr. H reported that he observed Ms. B to be well groomed at the assessment, but that she might need nail care one or two times per week (scored 1/1).

Bathing:²⁷ Mr. H reported that Ms. B told him that (1) she does not take a traditional bath or shower due to her fear of falling on a wet surface; (2) she takes a sponge bath at the bathroom sink in her wheelchair at least every other day; and (3) she is able to wash the front parts of her body herself, but her PCA must wash and dry her back and sides because she can't reach them (scored 2/2, frequency four times per week).

The assessment of February 10, 2014 also scored Ms. B as follows with regard to her instrumental activities of daily living (IADLs):²⁸ independent as to telephone use and financial management (scored 0/0); independent with difficulty as to light meal preparation (scored 1/2); requiring physical assistance as to main meal preparation, light housework, grocery shopping, and laundry (scored 2/3); and dependent as to routine housework (scored 3/4).

²³ All references in this paragraph are based on Ex. E8 unless otherwise stated.

²⁴ All references in this paragraph are based on Ex. E9 unless otherwise stated.

²⁵ All references in this paragraph are based on Ex. E9 unless otherwise stated.

²⁶ All references in this paragraph are based on Ex. E10 unless otherwise stated.

²⁷ All references in this paragraph are based on Ex. E11 unless otherwise stated.

²⁸ Ex. E26.

C. Relevant Procedural History

Ms. B has received PCA services since July 2011 or before.²⁹ The Division performed the assessment at issue on February 10, 2014.³⁰ On July 14, 2014 the Division notified Ms. B that her PCA service level was being reduced from 25 hours per week to 7.25 hours per week effective July 24, 2014.³¹ Ms. B requested a hearing to contest the Division's reduction of her PCA services on July 18, 2014.³²

Ms. B's hearing was held on October 8, 2014. Ms. B participated in the hearing by phone, represented herself, and testified on her own behalf. C D, Ms. B's PCA agency representative, participated by phone and assisted Ms. B. Tammy Smith participated by phone and represented the Division. S H, Jan Bragwell, R.N., and Anita Halterman participated by phone and testified 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 assistant (PCA) services 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" ³³ [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."³⁴

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."³⁵ 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

²⁹ Ex. 1 p. 1.

³⁰ Ex. E.

³¹ Ex. D1.

³² Ex. C.

³³ 7 AAC 125.010(a).

³⁴ 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.*

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

(ADLs) and instrumental activities of daily living (IADLs).³⁶ The CAT seeks to make the assessment process more objective by attempting to standardize the assessment of an applicant or recipient's functional impairment.³⁷ The ADLs scored by the CAT are body mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room), locomotion (between levels), locomotion (to access living quarters), dressing, eating, toilet use, personal hygiene, and bathing.³⁸

The CAT's numerical scoring system has two components. The first component is the *self-performance score*. These scores rate how capable a person is of performing a particular activity. The self-performance scores for activities of daily living (ADLs) are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance³⁹); **3** (the person requires extensive assistance⁴⁰); and **4** (totally dependent).⁴¹

The second component of the CAT's scoring system is the *support score*. These scores rate the degree of assistance that a person requires for a particular activity. The support scores 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 CAT also scores certain activities known as "instrumental activities of daily living" (IADLs).⁴² These are light meal preparation, main meal preparation, light housekeeping, routine housekeeping, laundry, and grocery shopping. Finally, the CAT codes or scores one other IADL-like activity which is not technically an IADL (oxygen maintenance).

The CAT scores IADLs slightly differently than ADLs.⁴³ The *self-performance scores 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**

³⁶ See 7 AAC 125.010(a).

³⁷ Ex. E.

³⁸ See Division of Senior and Disability Services' *Personal Care Assistance Service Level Computation* (accessed online at <http://www.hss.state.ak.us/dsds/pca/documents/PCA%20Service%20Computation.pdf>) (accessed November 7, 2014); see also Exs. B34 - B36.

³⁹ 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." 7 AAC 125.020(a)(1).

⁴⁰ 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." 7 AAC 125.020(a)(2).

⁴¹ Total dependence for an ADL or an IADL "means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity." 7 AAC 125.020(a)(3).

⁴² Ex. E26.

⁴³ *Id.*

(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 scores* for IADLs also differ from the support codes for ADLs.⁴⁴ 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).

C. *Applicable Burden of Proof*

In this case, because the Division is seeking to reduce existing PCA services (services which Ms. B is now receiving), the Division has the burden of proving, by a preponderance of the evidence, that Ms. B's need for PCA services has decreased to the extent asserted.⁴⁵

D. *How Much PCA Time is Ms. B Eligible to Receive in This Case?*

At the hearing, Ms. B confirmed that the only areas of the Division's assessment with which she disagrees are the findings concerning the ADL of bathing, and her IADLs.⁴⁶ Each of these activities will be addressed separately below.

1. *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."⁴⁷ As indicated in Section II, above, in his February 2014 assessment, Mr. H found that Ms. B requires limited assistance with bathing every other day (scored 2/2, frequency four times per week).⁴⁸

At hearing, Ms. B did not contest the Division's findings regarding the degree of assistance that she requires with bathing, or the frequency with which she actually bathes. Rather, she asserted, probably correctly, that the amount of PCA time awarded to her for bathing is simply not sufficient to actually accomplish the task.

Ms. B's complaint, that the amount of PCA time allowed for a given activity is inadequate, is a complaint often heard from PCA recipients during the last two years. The complaint stems from regulation changes in 2012 which fundamentally altered the way time is awarded for ADLs under the PCA program. 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

⁴⁴ *Id.*

⁴⁵ 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).

⁴⁶ See digital recording of hearing at approx. 13:00 - 13:30.

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

⁴⁸ All references in this paragraph are based on Ex. E11 unless otherwise stated.

regulation) *to perform the activity at issue*.⁴⁹ 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 awarded.⁵⁰ In other words, since 2012, it is no longer necessary to determine how much PCA time is actually needed to assist the recipient with the activity at issue; instead, once the self-performance and support scores have been determined, the amount of time provided for the activity is simply a matter of multiplication. There is no provision in the new regulations allowing the assessor (or administrative law judge) to award additional PCA time to a recipient based on his or her unique circumstances.⁵¹

Accordingly, based on the Division's assessment and Ms. B's hearing testimony, the undersigned finds that the Division properly scored that portion of Ms. B's February 10, 2014 CAT pertaining to bathing. The amount of PCA time resulting from these scores may well be inadequate to compensate the PCA for the amount of time *actually needed* for four sponge baths per week. Again, however, the current regulations do not require that the amount of time awarded actually be sufficient; rather, they require only that the proper scores be inserted into the CAT scoring formula applicable to the particular ADL. Because the Division properly scored Ms. B's assessment as to bathing, and utilized the correct formula / calculations, the amount of PCA time which the Division awarded to Ms. B for bathing must be affirmed.

2. Instrumental Activities of Daily Living (IADLs)

As discussed in Section II, above, the assessment of February 10, 2014 found that Ms. B needs assistance with most of her instrumental activities of daily living (IADLs):⁵² Nevertheless, the Division did not award Ms. B any PCA time for IADLs. In its service level reduction letter, the Division stated that it had authorized PCA time for IADLs in 2011 because Ms. B was then "listed as single and not married."⁵³ As of 2014, however, the Division's "verification through the

⁴⁹ See former regulations 7 AAC 43.750, 7 AAC 43.751, 7 AAC 43.752, and 7 AAC 43.755.

⁵⁰ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart.

⁵¹ On July 24, 2014, in *P.B. v. State of Alaska Department of Health and Social Services et. al.*, Case No. 1JU-13-739 Civil, an Alaska Superior Court judge issued a declaratory judgment which held that application of the Division's 2012 PCA regulations to a disabled person, who is placed at serious risk of institutionalization by a reduction in PCA services caused by the arbitrary operation of those regulations, violates the federal Americans with Disabilities Act. If the record in this case indicated Ms. B to be at serious risk of being institutionalized as a result of the arbitrary application of the Division's 2012 PCA regulations, I would apply the *P.B.* decision and recalculate Ms. B's PCA time for bathing based on the amount of time actually required. However, Ms. B's functional abilities are much greater than those of the recipient in *P.B.*, and I find that application of the Division's current PCA regulations, though arbitrary, do not put Ms. B at serious risk of being institutionalized. Accordingly, I find that the declaratory judgment issued in *P.B.* does not apply on the facts of this case.

⁵² Ex. E26.

⁵³ Ex D4.

[Division] of Public Assistance and documentation on file explain that there is a spouse in the home and that [the spouse is] part of the household composition and capable of providing [assistance with] IADLs."⁵⁴

The Division is correct that 7 AAC 125.040(a)(13) requires the spouse of a PCA recipient to provide assistance with IADLs.⁵⁵ At hearing, however, there was a heated dispute over whether Ms. B is, in fact, legally married to a spouse in her home who can assist her, such that 7 AAC 125.040(a)(13) applies. The Division asserts that Ms. B is married to Mr. X, who lives in her home. The Division bases its assertion in part on records of the Division of Public Assistance (DPA), which the Division asserts list Ms. B as being married.⁵⁶ The Division also bases its assertion on various statements attributed to Ms. B reported in the CAT.⁵⁷

On the other hand, Ms. B testified under oath that she got married in Alaska many years ago, but that she was divorced in Kansas in or about 1986. She testified that she is not currently married to anyone, and specifically that she is not married to Mr. X, the man who currently lives with her. Ms. B testified that she may have used the term "spouse," in a non-technical, non-legal sense, to communicate that Mr. X is her domestic partner. However, she noted that common-law marriages are not recognized in Alaska, and so the fact that she and Mr. X may have cohabited for a number of years does not make her married in a legal sense.

In summary, the Division provided hearsay testimony, concerning documents which were never introduced into evidence, in support of its assertion that Ms. B is married to Mr. X. In contrast, Ms. B testified under oath that she is not married to Mr. X (or anyone else), and that she has no other familial relationship with Mr. X. Ms. B's testimony on this subject was credible. Accordingly, the preponderance of the evidence indicates that Ms. B is not legally married to Mr. X. This being the case, the Division erred when it denied Ms. B PCA time for assistance with her

⁵⁴ Ex. D4.

⁵⁵ 7 AAC 125.040(a)(13) states in relevant part that "personal care services reimbursable under Medicaid . . . do not include the following . . . (13) assistance with an IADL under 7 AAC 125.030 if . . . (B) provided by a spouse of the recipient . . ." Although the regulation is somewhat unclear on its face, the Commissioner of Health and Social Services interprets this regulation as meaning that, where a PCA applicant or recipient has an able-bodied spouse in the household who can provide assistance with IADLs, the applicant or recipient is not entitled to paid PCA assistance with his or her IADLs.

⁵⁶ The Division did not provide Ms. B or this Office with copies of the DPA records which it claims support its position. Even had the Division done so, however, the DPA records would not be definitive. Only court records, or records of the Bureau of Vital Statistics, would be definitive on this issue.

⁵⁷ The references in the CAT to Ms. B's marital status are conflicting. For example, at page 1, the CAT indicates that Ms. B is single / unmarried, but then, on the same page, lists a "spouse" as living in her home. Mr. H, the only Division employee who had first-hand knowledge of what was said at the assessment, did not testify; he was present at the beginning of the hearing, but had to leave for another assessment before he could testify.

IADLs. Following issuance of this decision, the Division must award Ms. B PCA time for assistance with IADLs based on the self-performance and support scores from the current assessment.

E. Has the Division Proven a Material Change in Ms. B's Condition?

Where (as here) the Division seeks to decrease 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.⁵⁸ When Ms. B's 2011 PCA assessment is compared with her current (2014) assessment, it is apparent that Ms. B's functional abilities have improved with regard to certain activities (as discussed above), but that her functional abilities have remained unchanged as to other activities (also discussed above). Accordingly, 7 AAC 125.026's "change in condition" requirement is satisfied as to those activities as to which this decision has approved reductions, but is not satisfied as to those activities for which this decision has found reductions to be inappropriate.

IV. Conclusion

The Division's scoring of Ms. B's need for assistance with the ADL of bathing was correct. However, the Division erred when it denied Ms. B PCA time for assistance with her instrumental activities of daily living (IADLs). Accordingly, the Division's decision is affirmed in part and reversed in part.

DATED this 20th day of November, 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 1st day of December, 2014.

By: *Signed* _____
Name: Jay D. Durych
Title: Administrative Law Judge

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

⁵⁸ 7 AAC 125.026(a), (d).