

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

In the Matter of:)
)
 T D) OAH No. 14-1344-MDS
) Agency No.

DECISION

I. Introduction

T D received personal care assistant (PCA) services through the Division of Senior and Disability Services under 7 AAC 125.010-199 in 2011 and 2012.¹ In 2013 and 2014 the Division reassessed Ms. D’s functional abilities and determined that she was no longer eligible for PCA services. Ms. D filed an appeal from the 2014 denial.

The assigned administrative law judge conducted a telephonic hearing on September 15, 2014. Ms. D participated and testified and was assisted by representatives of her PCA agency, Consumer Direct, who also testified. Tammy Smith represented the Division. Leann McGahan, R.N., who conducted the reassessment, is no longer employed by the Division and did not testify. The Division presented testimony from Jan Bragwell, R.N., a nurse assessor supervisor, and from Katie Heaslet, who reviewed R.N. McGahan’s assessment for the Division.

II. Facts

A. Background Information

T D is 35 years old, five feet, one inch tall, and weighs 200 pounds.² She has been deemed disabled by the Social Security Administration.³ She first applied for PCA services in 2011, when she was authorized to receive 2.75 hours of PCA services weekly (medical documentation, light housework, shopping and escort). She was authorized for 7.5 hours in 2012 (locomotion to access medical appointments, light and main meal preparation, light housework, shopping, laundry and escort), but was denied authorization in 2013 and 2014.⁴

Ms. D’s primary diagnosis is enteritis (an inflammation of the intestine),⁵ with incontinence.⁶ She has secondary diagnoses of anxiety, depression, and cervical disc degeneration,⁷ and a history of seizures,⁸ post-traumatic stress disorder,⁹ and kidney stones.¹⁰

¹ See AS 47.07.045.

² Ex. E, pp. 1, 9.

³ See Ex. 1, p. 1.

⁴ T. Smith Statement.

⁵ Ex. E, p. 3. See Dorland’s Illustrated Medical Dictionary at 559 (27th ed. 1988). In 2012 she was diagnosed with Crohn’s disease, which is a form of this condition. *Id.* See Ex. 4, p.2.

⁶ See Ex. 4, p. 1.

⁷ Ex. E, pp. 3, 21. See also Ex. 5, p. 6.

She has been prescribed a variety of medications for those conditions and others, including medications for breathing (albuterol), mood stabilization (*e.g.*, citalopram, clonazepam), pain relief (*e.g.*, oxycontin, percocet), and seizures (lamotrigine).¹¹ Ms. D injured her right knee in a fall on ice,¹² and in her left knee she has bursitis, a progressive condition which was treated by surgery in 2009 and 2013.¹³ She was hospitalized for pneumonia in September, 2013, and has used a CPAP machine for assistance with breathing.¹⁴

Ms. D lives in a building on No Name Road in No Name.¹⁵ At the time she was assessed, a friend was living with her but she currently lives alone.¹⁶ Ms. D has multiple medical providers as a result of her varied conditions, with appointments at least twice weekly.¹⁷ In addition she receives aquatherapy from a qualified therapist twice weekly.¹⁸ Ms. D is unable to remain in a standing position for more than a few minutes at a time, due to her knee condition.¹⁹ On some days her back and knee pain prevents her from getting up and around unassisted.²⁰ Because of the number of medications, she has difficulty keeping track of her medications.²¹ She prefers to have an escort at her medical appointments in order to remember the doctors' instructions.

III. Discussion

The Department of Health and Social Services is authorized to provide eligible persons with personal care services.²² The Division provides compensation for personal care services in the form of physical assistance, based on an assessment of the recipient's ability to perform specified activities of daily living (ADL),²³ instrumental activities of daily living (IADL),²⁴ and

⁸ Ex. 5, p. 2. Ms. D testified that she has been diagnosed with Fetal Alcohol Syndrome, and that was told by Dr. K that her seizures are related to that condition. However, the medical documentation does not include any mention of Fetal Alcohol Syndrome or of the reason for her seizures.

⁹ Ex. 4, p. 2 (2012).

¹⁰ Ex. 4, p. 1.

¹¹ *See* Ex. E, p. 20.

¹² Ex. 2, p. 1.

¹³ Ex. 5, pp. 1, 3, 11.

¹⁴ *See* Ex. 5, p. 2.

¹⁵ Ex. E, p. 1.

¹⁶ *See* Ex. 1, p. 2.

¹⁷ S. D Testimony; Testimony of T. B.; Ex. 1, p. 2.

¹⁸ Ex. E, p. 5.

¹⁹ S. D Testimony.

²⁰ S. D Testimony; Testimony of T. B.

²¹ S. D Testimony.

²² AS 40.07.030(b).

²³ 7 AAC 125.030(b)(1)-(8).

²⁴ 7 AAC 125.030(c)(1)-(5).

certain other functions.²⁵ The assessment is conducted using the Consumer Assessment Tool (CAT),²⁶ a form created by the Department of Health and Social Services to evaluate an individual's ability to care for herself.²⁷

One section of the CAT covers the individual's physical abilities with respect to the eight ADL's: body mobility, transfers, locomotion, dressing, eating and drinking, toileting, personal hygiene, and bathing.²⁸ Individuals are given two scores reflecting their ability to perform these activities, one for their ability to perform the activity (self-performance), and the other for the degree of assistance they require (support). A score of two zeros indicates the individual performs the activity independently (self-performance) with no setup or physical help (support). Increasing inability to perform and need for assistance result in progressively higher scores. A minimum score of two for self-performance of an ADL (indicating a need for some degree of weight bearing physical assistance) or of three for support for an IADL (indicating physical assistance was provided) is required to qualify for PCA services for an ADL or an IADL.²⁹

Ms. D had previously received assistance with medical documentation, light housework, locomotion to access medical appointments, light and main meal preparation, shopping, laundry and escort. At the hearing she sought reinstatement of those services, as well as assistance with transfers and locomotion in the home. Because Ms. D was not receiving services at the time of her application, she bears the burden of proof to establish her eligibility for those services.

A. Activities of Daily Living

1. *Transfers*

7 AAC 125.030(b)(2) states that personal care services for transferring include physical assistance for "moving between one surface and another, including to and from a bed, chair, or wheelchair" and for "moving from a lying or sitting position to a standing position."³⁰

Ms. D has not previously been provided this service. However, when assessed she was unable to stand from a seated position without a handhold,³¹ and she testified that she has good

²⁵ 7 AAC 125.030(d)(1)-(9), (e).

²⁶ 7 AAC 125.020(b); 7 AAC 160.900(d)(6).

²⁷ See generally, <http://dhss.alaska.gov/dsds/Documents/docs/cat-pcatOnlineFlyer.pdf> (accessed June 19, 2013).

²⁸ Ex. E, pp. 6-11. The CAT terminology does not precisely track the regulatory language for each ADL. For one example, the ADL of "body mobility" is described in the regulation as positioning or turning in a bed or a chair, while the CAT uses the term "bed mobility" and omits any reference to a chair. Compare, 7 AAC 125.030(b)(1), with Ex. E, p. 6. For another, for the ADL of "toileting", the CAT expressly includes how the recipient "adjusts clothes", and the regulation does not mention that action. See *In Re V.W.* at *2, OAH No. 12-0957-MDS (Commissioner of Health and Social Services 2013); compare, 7 AAC 125.030(b)(6) with Ex. E, p. 9.

²⁹ See Ex. B, pp. 34-36; Ex. E, pp. 9-11, 26.

³⁰ 7 AAC 125.030(b)(2)(A), (B).

and bad days and that on bad days she cannot get up and out of bed without assistance, due to vertigo and pain in her back and knee.³² Notwithstanding Ms. D's testimony, vertigo seems unlikely to substantially interfere with an individual's ability to move between surfaces or to stand from a lying or seated position, since by definition a chair, sofa, bed or other surface is available as a balance support. Notably, in this regard, Ms. D did not assert that she requires assistance with toileting, even though toileting requires transfers on and off a toilet. Beyond this, the medical documentation in the record does not include any imaging studies to establish the nature and extent of any sort of progressive degenerative bone or joint condition. Moreover, no assessor has ever observed or reported a need for physical assistance with this activity, and Ms. D was on this occasion reportedly observed to transfer independently.³³ Ms. D has not shown, by a preponderance of the evidence, that she requires physical assistance with this activity.

2. *Locomotion*

7 AAC 125.030(b)(3) provides that personal care services for locomotion include physical assistance to walk with the support of a walker, cane, gait belt, braces, crutches or manual wheelchair either in the home or outside the home to access medical appointments.

Ms. D, by her own testimony, is generally able to move about inside her residence without an assistive device, by bracing herself on adjacent furniture and walls. However, Ms. D has regularly reported falls, which in 2013 she attributed to her balance, stating that "her balance has been 'off' since she was a kid"³⁴ and which in 2014 she attributed to "a bad hip."³⁵ Moreover, she was provided assistance for locomotion to access medical appointments in 2012.

Significant balance issues or a susceptibility to falls due to seizures could warrant assistance with locomotion. However, the evidence of vertigo and seizures in this case is largely self-reported and unpersuasive.³⁶ Moreover, the medical documentation in the record does not include a diagnosis of vertigo or a seizure disorder, or any information concerning the injuries

³¹ Ex. E, p. 4 ("Client was unable to cross her arms across her chest and stand up").

³² See also Ex. 1, p.2.

³³ Ex. E, p. 6.

³⁴ Ex. 5, p.11.

³⁵ Ex. E, p. 7 ("Client reports she falls often due to a bad hip."), p. 23 ("Fell in past 31-180 days"; but no reported danger of fall) (2014); Ex. 2, p. 4 ("Fell in past 30 days"; "Fell in past 31-180 days"; "Has balance problems when standing").

³⁶ Ms. D's testimony that she has multiple seizures weekly is inconsistent with her own report to Dr. K on December 10, 2013, mentioning only a single episode some four weeks previously. See Ex. 5, p. 2.

she asserts that she incurred due to balance-related falls.³⁷ Notably, the assessor recorded observing Ms. D walk unassisted with a steady gait, and did not report any balance issues.³⁸

In the absence of any diagnosis of a seizure or balance-related medical condition or of any medical documentation relating to treatment of such a condition, given the assessor's observations as recorded in the assessment, and absent evidence that Ms. D would require physical assistance to use an assistive device such as a walker, Ms. D has not established, by a preponderance of the evidence, that she qualifies for assistance for locomotion.

B. Instrumental Activities of Daily Living

1. *Meal Preparation*

Meal preparation consists of two separate IADLs, one for light meal preparation and the other for main meal preparation.³⁹ For IADLs, a person is assessed as independent,⁴⁰ independent with difficulty,⁴¹ needing physical assistance,⁴² or dependent.⁴³ Ms. D was assessed as requiring physical assistance with meal preparation in 2012, but not in 2011, 2013 or 2014.

Nothing in the assessor's report from 2012 indicates the basis for the conclusion Ms. D required physical assistance for meal preparation. In that year, the assessor scored Ms. D as independent in all of her activities of daily living, which absent any explanation seems inconsistent with a need for physical assistance with the instrumental activities of daily living. In any event, Ms. D testified that she is able to prepare sandwiches and cut up vegetables, which are the types of activities required for meal preparation. Ms. D's primary concern regarding meal preparation was an alleged inability to remain in a standing position for more than a short period of time, but many aspects of food preparation can occur while seated and many meals can be cooked without substantial time in a standing position. Ms. D asserted that she is unable to lift items over five pounds, but this would not preclude meal preparation. That Ms. D is unable to stand for more than a few minutes at a time would of course mean that meal preparation may be

³⁷ See Ex. 1, p. 2 ("She has fallen in the past and reinjured her knees resulting in additional surgeries."). The only reference to a knee injury in the medical records attributes an injury to her right knee to a fall on ice, not a balance problem. See Ex. 2, p. 1.

³⁸ Ex. E, pp. 7, 23.

³⁹ 7 AAC 125.030(c)(1), (2).

⁴⁰ See, e.g., Ex. E, p. 26 (score of 0).

⁴¹ 7 AAC 125.020(a)(4). See, e.g., Ex. E, p. 26 (score of 1).

⁴² 7 AAC 125.020(a)(5). See, e.g., Ex. E, p. 26 (score of 2).

⁴³ 7 AAC 125.020(a)(3). See, e.g., Ex. E, p. 26 (score of 3).

difficult and time consuming, but Ms. D did not prove that she requires physical assistance to prepare light meals or a main meal.

2. *Laundry*

The IADL of laundering includes changing bed linens and in- or out-of-home laundering of bed linens and clothing.⁴⁴ Ms. D's laundering facility is outside her residence.⁴⁵ She was assessed as requiring physical assistance for laundry in 2012, but not in 2011, 2013, or 2014. In 2014 she was assessed as independent with difficulty, which indicates ability to perform the task without physical assistance, although it may take a great amount of time. This is consistent with the evidence, discussed above, regarding meal preparation, as well as transfers and locomotion. Ms. D did not prove that she requires physical assistance for to perform this task, even though it may be difficult and require a considerable period of time.

3. *Shopping*

The IADL of shopping includes shopping for groceries, household necessities, and prescription drugs and medication.⁴⁶ Ms. D was assessed as requiring physical assistance for shopping in 2011 and 2012, but not in 2013 or 2014. Ms. D asserted she is unable to lift in excess of five pounds, but she provided no medical documentation to support her claim and in any event shopping for a single person with a cart typically would not require carrying or lifting in excess of five pounds at a time. Overall, the evidence with respect to shopping in substance is substantially the same as with respect to meal preparation, transfers and locomotion. It indicates that shopping can be expected be difficult and time consuming, but Ms. D did not prove that she cannot perform this activity without physical assistance.

4. *Light Housework*

The IADL of light housekeeping includes dusting, floor care, kitchen and bathroom cleaning, dish washing, making the bed and trash removal.⁴⁷ Recipients are scored separately for light housework (dishes, dusting, making the bed) and routine housework (floor care, kitchen and bathroom, trash).⁴⁸ Ms. D was assessed as requiring physical assistance for light housework in 2011 and 2012, but not in 2013 or 2014. Ms. D could not, given her knee conditions, be expected to kneel on a floor and scrub it, but it appears she could wield a broom, mop or vacuum

⁴⁴ 7 AAC 125.030(c)(4)(A), (B).

⁴⁵ Ex. E, p. 26.

⁴⁶ 7 AAC 125.030(c)(5).

⁴⁷ 7 AAC 125.030(c)(3).

⁴⁸ See Ex. E, p. 26.

cleaner for a few minutes at a time. She was assessed as able to reach, bend and grasp, and she provided no medical documentation of any restrictions or limitations in her ability to lift, bend, or grasp. As with other IADL's, the evidence indicates that Ms. D cannot perform this activity without great difficulty and a great deal of time, but she did not prove that she cannot perform the tasks of light housekeeping without physical assistance.

C. Other Services

1. *Escort*

Compensable personal care services include “traveling with the recipient to and from a routine medical or dental appointment outside the home and conferring with medical or dental staff during that appointment.”⁴⁹ Ms. D was provided this service in 2011 and 2012, but not in 2013 or 21014. At the assessment, she was reported unable to recall three items after five minutes and was deemed to have a degree of short term memory deficit.⁵⁰ However, the evidence does not show that she has been prescribed a course of treatment that requires regular consultation or monitoring with her medical providers, or that cannot be the subject of short, simple written directives. On balance, notwithstanding some apparent short-term memory deficit, Ms. D has not shown that she requires escort services.

2. *Medical Services*

Compensable personal care assistance includes a variety of services that may be provided in connection with medical care, such as documenting vital signs⁵¹ or reminding and setting up or assisting in the administration of medication.⁵² Ms. D has asked for assistance in reminding and setup of medications. However, she was assessed as self-administering and compliant with medication prescription instructions.⁵³ Medisets are available to assist in maintaining compliance, and there is no indication Ms. D has used them. She has not proven that she requires personal care assistance with this activity.

IV. Conclusion

Ms. D's eligibility has varied over the years, which is not surprising because scoring on the CAT is subjective, and may vary absent any actual change in the functional capacity of the individual being assessed. The most striking factor in this particular case is the absence of

⁴⁹ 7 AAC 125.030(d)(9).

⁵⁰ Ex. E, pp. 4, 16.

⁵¹ 7 AAC 125.030(d)(3).

⁵² 7 AAC 125.030(d)(1) (“assistance may include reminding the recipient and placing a medication within the recipient’s reach”), (2).

⁵³ Ex. E, p. 20.

medical documentation regarding the conditions that Ms. D has identified as most problematic for her, namely, balance and seizures. The record does not include imaging studies regarding her degenerative disc condition or knee, the Social Security Administration's findings regarding her disability, or any information regarding the alleged existence of Fetal Alcohol Syndrome, her apparent breathing problems, or possible side effects of her many medications. There was no independent testimony confirming her susceptibility to seizures, her falls, any injuries she may have incurred because of those falls. While there is substantial evidence that performing the assessed activities is painful, difficult and time consuming, in the absence of relevant medical documentation or other corroboration, in light of the record as a whole, Ms. D has not established that she requires physical assistance to perform those activities. The division's decision is therefore sustained.

DATED September 26, 2014.

Signed

Andrew M. Hemenway
Administrative Law Judge

Adoption

I hereby adopt this decision as final under the authority of AS 44.64.060(e)(1).

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date this decision is distributed to you.

DATED this 28th day of October, 2014.

By: *Signed*

William J. Streuer
Commissioner of Health and Social Services

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