

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

In the Matter of)
)
 H W)
_____)

OAH No. 14-1382-MDS
Agency No.

DECISION

I. Introduction

H W was receiving 15.25 hours per week of personal care assistance (PCA) services when he was reassessed to determine his continued eligibility for those services in 2014. Based primarily on a reassessment visit on March 3, 2014, the Division of Senior and Disabilities Services (Division) issued a decision on July 21, 2014 notifying Mr. W that his PCA services would be reduced to .75 hours per week. The reduction resulted from what the Division perceived as improvements in Mr. W's condition. Mr. W requested a hearing.

Mr. W's hearing was held on November 5, 2014. Mr. W was represented by M F, who is his sister and court-appointed guardian. Victoria Cobo represented the Division. Denise Kichura, R.N., testified for the Division.

At hearing, the parties resolved a good portion of the case, agreeing to the degree and frequency of the assistance that Mr. W receives for dressing, personal hygiene, medication assistance, and taking vital signs. This left the items of medical escort, light meal preparation, main meal preparation, light housework, and laundry in dispute.

Mr. W is physically capable of engaging in most of his own care needs. However, his severe mental illness prevents him from doing so. Consequently, the evidence demonstrates that the Division's assessment of and provision for Mr. W's PCA service needs, as modified at hearing, was correct in part and incorrect in part. The Division's allocation of PCA service time is therefore affirmed in part and reversed in part as discussed below.

II. The PCA Service Determination Process

The Medicaid program authorizes PCA services for the purpose of providing "physical assistance with activities of daily living (ADLs), physical assistance with instrumental activities of daily living (IADLs), and other services based on the physical condition of the

recipient”¹ 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.”²

The Division uses the Consumer Assessment Tool, or “CAT”, as a methodology to score eligibility for the PCA program, and the amount of assistance, if any, that an eligible person needs to perform ADLs, IADLs, and the other covered services.³ In general, if certain levels of assistance are required, the regulations prescribe a fixed number of PCA minutes to be assigned per instance of that activity.

As a gateway to eligibility for PCA services, the CAT evaluates a subset of the ADLs and IADLs. If a person requires some degree of hands-on physical assistance with any one of these ADLs or IADLs, then the person is eligible for PCA services. Once eligibility is established, time for additional ADLs and IADLs, as well as certain other covered services, can be added to the PCA authorization. In Mr. W’s case, there is no dispute that he needs hands-on help with some of the gateway ADLs and IADLs.

The ADLs measured by the CAT are bed mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room), locomotion (between levels), locomotion (to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, personal hygiene-shampooing, and bathing.⁴ The CAT numerical coding system for ADLs has two components. The first component is the *self-performance code*. These codes rate how capable a person is of performing a particular ADL. The possible codes are **0** (the person is independent⁵ and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance⁶); **3** (the person requires extensive assistance⁷); **4** (the person is totally dependent⁸).

¹ 7 AAC 125.010(a).

² 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.*

³ See 7 AAC 125.024(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900.

⁴ Ex. E, pp. 6 – 11.

⁵ A self-performance code of 0 is classified as “[I]ndependent – No help or oversight – or – Help/oversight provided only 1 or 2 times during the last 7 days.” See Ex. E, p. 6.

⁶ According to 7 AAC 125.020(a)(1), 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.”

There are also codes which are not used in calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).⁹

The second component of the CAT scoring system is the *support code*. These codes rate the degree of assistance that a person requires for a particular ADL. The possible codes are **0** (no setup or physical help required); **1** (only setup help required); **2** (one-person physical assist required); **3** (two or more person physical assist required). Again, there are additional codes which are not used to arrive at a service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).¹⁰

The CAT also codes certain activities known as “instrumental activities of daily living” (IADLs). These are light meal preparation, main meal preparation, light housekeeping, laundry (in-home), laundry (out-of-home), and shopping.¹¹

The CAT codes IADLs slightly differently than it does ADLs. 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). There is also a code that is not used to arrive at a service level: **8** (the activity did not occur).¹²

The *support codes* for IADLs are also slightly different than the support codes for ADLs. 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). Again, there is an additional code that is not used to arrive at a service level: **8** (the activity did not occur).¹³

⁷ According to 7 AAC 125.020(a)(2), 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.”

⁸ According to 7 AAC 125.020(a)(3), dependent as to an ADL, or dependent as to and IADL, “means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity.”

⁹ Ex. E, p. 18.

¹⁰ Ex. E, p. 18.

¹¹ Ex. E, p. 26.

¹² Ex. E, p. 26.

¹³ Ex. E, p. 26.

The codes assigned to a particular ADL or IADL determine how much PCA service time a person receives for each occurrence of a particular activity. For instance, if a person were coded as requiring extensive assistance (self-performance code of 3) with bathing, he would receive 22.5 minutes of PCA service time each time he was bathed.¹⁴ The regulations do not provide the Division with the discretion to change the amounts specified by the formula.

For covered services beyond assistance with ADLs and IADLs, specific rules apply that will be discussed below.

III. Background Facts

Mr. W is 47 years old. He is diabetic, obese, and has lumbago and joint pain. He also has severe chronic paranoid schizophrenia. His schizophrenia manifested itself in adulthood. He lives with his sister, M F, and her family.

Mr. W was receiving 15.25 hours of weekly PCA services in 2014 based on a March 2013 assessment. Denise Kichura, a Division nurse, made a visit to reassess Mr. W's PCA service needs on March 3, 2014. She recorded the assessment visit in the CAT. Her findings resulted in a reduction of Mr. W's PCA services to .75 hours per week.¹⁵ In general, the assessment shows that Ms. Kichura found that Mr. W's physical functionality had increased, which resulted in a decrease in both the degree of assistance required and the number of times weekly that assistance was required.

At hearing, the parties resolved their disputes with regard to dressing, personal hygiene, medication assistance, and taking vital signs. While the Division also stated that it was increasing the time provided for medical escort to 90 minutes per week, Mr. W did not agree that this increase was sufficient. This left the items of medical escort, light meal preparation, main meal preparation, light housework, and laundry in dispute. Those portions of the assessment and the associated PCA time awards not in dispute will not be discussed.

IV. Discussion

When the Division is seeking to reduce or eliminate a benefit a citizen is already receiving, the Division has the overall burden to prove, by a preponderance of the evidence,¹⁶

¹⁴ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart contained at Ex. B, pp. 34 - 36.

¹⁵ Ex. D, p. 10.

¹⁶ Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

facts that show the citizen's level of eligibility has changed.¹⁷ In the context of PCA services, the showing required of the Division is that the recipient has had a "material change of condition."¹⁸ The Division can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs,¹⁹ including such sources as written reports of firsthand evaluations of the patient. The relevant date for purposes of assessing the state of the facts is, in general, the date of the agency's decision under review.²⁰

In particular areas where Mr. W seeks to increase services or add services that were not previously provided, Mr. W has the burden of proof.²¹

A. Medical Escort

Mr. W was receiving 160.38 minutes of PCA assistance weekly for medical escort. After the 2014 assessment, the Division reduced that time to .38 minutes per week, based upon a finding that he had 2 doctor appointments per year, which each required 10 minutes of escort time.²² At hearing, the Division increased that time to 90 minutes weekly. That figure was arrived at by providing Mr. W with 30 minutes of medical escort services each for three therapy appointments per week.²³

Ms. F testified that Mr. W has three psychiatric appointments per week, with an additional appointment regarding his psychiatric medications every two to four weeks. In addition, he sees his medical care doctor every three to six months, which would come to two to four appointments yearly.²⁴ When his psychiatric and medical appointments are totaled, Mr. W has a minimum of 171 and a maximum of 186 appointments per year.²⁵ Ms. F testified that it takes between 20 to 25 minutes to drive one way from Mr. W's home in No Name to No Name. This is not an unrealistic amount of time. Allowing 20 minutes one way (40 minutes total) per appointment for the minimum 171 appointments yearly, Mr. W's total yearly minutes for

¹⁷ 7 AAC 49.135.

¹⁸ 7 AAC 125.026(a). This is a term of art that encompasses not only changes in the patient's situation, but also changes in regulations affecting the authorized level of services. See 7 AAC 125.026(d).

¹⁹ 2 AAC 64.290(a)(1).

²⁰ See 7 AAC 49.170; *In re T.C.*, OAH No. 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013) (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf>).

²¹ 7 AAC 49.135.

²² Ex. D, pp. 4, 9.

²³ Denise Kichura's testimony.

²⁴ Ms. F's testimony.

²⁵ 3 weekly therapy appointments for 52 weeks totals 156 appointments. Assuming one psychiatric medication appointment every four weeks comes to 13 appointments. One medical appointment every six months is 2 appointments. That totals 171. If he has psychiatric medication appointments every two weeks and a medical appointment every three months, that would be an additional 15 appointments.

medical escort totals 6,840. This results in him receiving 131.5 minutes per week. As a result, the Division demonstrated that it is more likely true than not true that Mr. W's medical escort time should be reduced from the 160.38 minutes per week previously allowed. However, the weight of the evidence demonstrates that he should receive 131.5 minutes per week rather than the 90 minute figure proffered by the Division at hearing.

B. Instrumental Activities of Daily Living

Mr. W was previously provided the maximum assistance available with his IADLs of main meal preparation and light housework, based upon a previous determination that he was fully dependent in regard to them. He was previously provided assistance with light meal preparation and laundry based upon a previous determination that while he required assistance with those tasks, he was capable of participating in them (self-performance code 2, support code 3). Mr. W's assistance with all four of those IADLs was eliminated based upon the nurse-assessor's determination that he was either capable of performing them without help (light meal preparation), or did not require physical assistance, merely setup assistance (main meal preparation, light housework, and laundry).²⁶

It is undisputed that Mr. W has the physical capability to perform his IADLs. The question is whether his mental illness limits his capacity to perform his IADLs. Ms. F testified that Mr. W cannot be trusted to perform any task involving a knife, such as food preparation, because of an incident once where his internal voices told him to cut the dog's ear. She said that he cannot otherwise participate in food preparation because he cannot operate machinery and has trouble figuring out how to open items such as a yogurt container or peeling a banana.²⁷

Mr. W is also not capable of participation in laundry, because he cannot operate machinery, or differentiate between clean and dirty clothing. He, however, can do light housework items such as dusting or placing dirty dishes in the sink, although that depends upon his condition from day to day, and may require a great deal of cueing. However, on his bad days, which come to approximately three days per week, he does not respond to cueing and is incapable of performing tasks. Ms. F recited the example of him walking into the kitchen with dirty dishes in hand, and then walking away with his dirty dishes still in his hands. She additionally testified that Mr. W will become catatonic for short periods of time on a daily basis:

²⁶ Ex. D, p. 9; Ms. Kichura's testimony.

²⁷ Ms. F's testimony.

he essentially freezes in place.²⁸ Ms. F's testimony regarding Mr. W's catatonic behaviors is corroborated by his psychiatrist's written statement, his clinician's written statement, and his PCA's written statement.²⁹

A person is not entitled to receive PCA assistance if the task can "reasonably be performed by the recipient."³⁰ A review of the evidence demonstrates that the Division has not met its burden of proof to demonstrate that Mr. W can "reasonably" perform his IADLs of light and main meal preparation, light housework, and laundry without physical assistance. Given Mr. W's limitations, as described by Ms. F, Mr. W continues to be dependent with light meal and main meal preparation. The evidence presented by Ms. F shows that, although his participation is limited and sporadic, Mr. F is not completely dependent with regard to light housekeeping chores or laundry. However, the Division has not met its burden of proof with regard to reducing his assistance in those tasks. Accordingly, he should be coded with a 2 in self-performance and a 3 in support, and receive assistance commensurate with that coding for light housework and laundry.

V. Conclusion

Mr. W's PCA assistance for medical escort is reduced to 131.5 minutes per week. His IADLs of light meal preparation, main meal preparation, light housekeeping, and laundry remain unchanged. His PCA benefit time is to be recalculated consistent with this decision and the parties' agreement, recited at hearing, regarding his assistance with the tasks of dressing, personal hygiene, medication assistance, and taking vital signs.

DATED this 25th day of November, 2014.

Signed

Lawrence A. Pederson
Administrative Law Judge

²⁸ Ms. F's testimony.
²⁹ Ex. 2 (documents filed on November 5, 2014), pp. 2, 4, 6.
³⁰ 7 AAC 125.040(a)(4).

Adoption

The undersigned 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 16th day of December, 2014.

By: Signed
Signature
Christopher Kennedy
Name
Administrative Law Judge
Title

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