

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

In the Matter of)	
)	OAH No. 14-1626-MDS
D H)	Agency No.
_____)	

DECISION

I. Introduction

D H applied for Personal Care Assistance (“PCA”) services that are paid for by Medicaid. The Division of Senior and Disabilities Services (“Division”) denied her application in August 2014. Ms. H contested that decision and requested a hearing.

The hearing was held over the course of six separate sessions, on December 10, 2014, and February 2, February 13, April 8, June 30, and July 23, 2015.¹ Ms. H appeared both telephonically and in person, and she represented herself and testified on her own behalf. Ms. H’s friends, N Q and L P, testified telephonically on her behalf. The Division was represented at the hearing by fair hearing representative Victoria Cobo. Nurse assessor Scott Chow and Division investigators A A, B B, C C, and D D testified for the Division.

This decision concludes that Ms. H did not meet her burden of proof establishing that the Division’s denial of her application for PCA services was incorrect. Therefore, the Division’s determination regarding Ms. H’s PCA services is affirmed.

II. Facts

Ms. H is 42 years old and has been diagnosed as suffering from thoracic or lumbosacral neuritis or radiculitis, lumbago, spondylosis, displacement of lumbar intervertebral disc, fibromyalgia, flank pain, hip pain, leg weakness and muscle spasms, severe low back pain and neck pain, carpal tunnel syndrome of left wrist, piriformis syndrome, peripheral edema, persistent insomnia, and degenerative disease of spinal facet joint.²

On July 22, 2014 Registered Nurse Chow conducted an assessment of Ms. H using the Division’s Consumer Assessment Tool (CAT).³ After this assessment, the Division sent

¹ In addition at least eight telephonic status conferences were held in this matter.

² Exh. E3; records from No Name Clinic.

³ Exh. E1.

Ms. H a letter dated August 21, 2014, stating that PCA services were denied.⁴ It is this decision that is the subject of Ms. H's request for a hearing, and it is Ms. H's medical condition and need for PCA services as of August 21, 2014 that are at issue in this matter.

Ms. H testified during the initial sessions of the hearing that she needs extensive assistance with most of the activities of daily living ("ADLs") and instrumental activities of daily living ("IADLs") paid for by Medicaid under the PCA program. The Division evaluated Ms. H's testimony⁵ and determined that there were discrepancies between her statements about her physical capabilities and the observations of Nurse Chow. As a result, the Division decided to have investigators conduct surveillance and take video of Ms. H in public places. The investigators observed Ms. H leaving her apartment building, walking to vehicles, getting in and out of vehicles, walking between vehicles and a medical office, and walking within the medical office complex. In addition, two investigators attended a women's makeup demonstration and sales event put on by Ms. H at a beauty salon in Anchorage.⁶ At that event, they observed her moving around a salon chair, bending over to pull products and promotional materials from boxes, and applying makeup to various individuals (including one of the investigators). Most of the various investigators' observations were recorded on video recordings.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 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

⁴ Exh. D.

⁵ Ms. Q and Ms. P also presented testimony corroborating Ms. H's testimony on these issues.

⁶ Ms. H is a representative of a line of makeup products and sells the products, in part, by conducting such events.

⁷ At the request of the Division, Ms. H was not given a copy of these recordings, and instead they were made available to her for viewing at the Office of Administrative Hearings ("OAH"). This limitation was imposed in response to the Division's "safety concerns" regarding potentially having the videos placed in the public domain. These issues were discussed in an Order dated May 15, 2015. Ms. H eventually viewed the videos at OAH on June 30, 2015.

⁸ 7 AAC 125.010(a).

⁹ 7 AAC 125.020(b).

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.

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.

The CAT numerical coding system has two components. The first component is the *self-performance code*. These codes rate how capable a person is of performing a particular activity of daily living (ADL). The possible codes are: **0** (the person is independent¹¹ and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance¹²); **3** (the person requires extensive assistance¹³); **4** (the person is totally dependent¹⁴). 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).¹⁵ In addition, the self-performance codes for the ADL of bathing differ somewhat from the above definitions: a **2** denotes “physical help limited to transfer only,” and a **3** denotes “physical help in part of bathing activity.”¹⁶

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

¹⁰ 7 AAC 125.024(1).

¹¹ 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 Exh. E6.

¹² Under 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.” The CAT further defines limited assistance to mean physical help at least three times per week, or weight-bearing physical help at least 1-2 times per week. See Exh. E10.

¹³ Under 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.” The CAT further defines extensive assistance to include weight-bearing physical help at least 3 times per week. See Exh. E10.

¹⁴ Under 7 AAC 125.020(a)(3), dependent as to an ADL, or dependent as to an IADL, “means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity.”

¹⁵ Exh. E18.

¹⁶ Exh. E11.

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).¹⁷

The CAT also codes certain activities known as “instrumental activities of daily living” (IADLs). These are light meal preparation, main meal preparation, housework, grocery shopping, and laundry.¹⁸ The CAT codes for IADLs differ slightly from those for 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).¹⁹

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).²⁰

In order to qualify for PCA services, a person must be coded as requiring limited or a greater degree of physical assistance (self-performance code of 2, 3, or 4, and a support code of 2, 3, or 4) in any one of the ADLs of transfers, locomotion, eating, toilet use, dressing or bathing. Similarly, if a person is coded as requiring some degree of hands-on assistance²¹ (self-performance code of 1, 2, or 3, and a support code of 3 or 4) with any one of the IADLs of light or main meal preparation, housework, grocery shopping or laundry, then he or she is eligible for PCA services.²²

The codes assigned to a particular ADL or IADL are used to determine how much PCA service time a person receives for each occurrence of a particular activity, through a formula set out in Division regulations. For instance, if a person is coded as being completely dependent

¹⁷ *Id.*

¹⁸ Exh. E26.

¹⁹ Exh. E26.

²⁰ *Id.*

²¹ For the purposes of this discussion, “hands-on” assistance does not include supervision/cueing or set-up assistance (support codes of 1 or 2). *See* Exh. E26.

²² Exh. E31.

(code of 4) with bathing, and she informs the assessor that she bathes every day, she would receive 30 minutes of PCA service per day for that ADL.²³ Even if the Division agrees that the amount of time provided by the formula is insufficient for a PCA recipient's actual needs, the regulations do not provide the Division with the discretion to change the amounts specified by the formula.

When the Division wishes to reduce the amount of allotted time for PCA services, the Division has the burden of proving a change of condition justifying that reduction by a preponderance of the evidence, *i.e.*, that it is more likely true than not true.²⁴ When the claimant is contesting a denial of an initial application, as Ms. H is doing in this case, the claimant has the burden of showing that the Division's determination was incorrect, also by a preponderance of the evidence.²⁵

Ms. H contested the Division's determination that she is ineligible to receive PCA services as to most of the so-called gateway ADLs: transfers, locomotion, toilet use, dressing and bathing. She also contested the Division's findings as to the ADL of locomotion-medical, and as to certain IADLs: main meal preparation, housework, laundry, and shopping.

B. Eligibility

With regard to all of the ADLs and IADLs at issue in this case, the Division took the position that Ms. H was physically able to perform the activity in question, but she was apparently hindered in her ability to perform the activity due to anxiety or some other psychological impairment. In the alternative, the Division essentially took the position that Ms. H was not being honest regarding her need for PCA services for the ADLs and IADLs in question.

The Division's nurse assessor scored Ms. H for each of the activities as follows: transfers, 1/1; locomotion, 1/1; dressing 0/1; toilet use 0/0; bathing, 1/1; main meal preparation, 1/2; housework, 1/2; laundry, 1/2; and shopping, 1/2. All of these scores indicate a need for, at most, supervision and cueing assistance, and none of them qualify Ms. H for PCA assistance.

In contrast to the nurse assessor's scoring, Ms. H and her two witnesses testified under oath that she needs at least limited assistance, and in many cases extensive assistance, with each

²³ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart contained at Exh. B34-36.

²⁴ 7 AAC 49.135.

²⁵ *Id.*

of the activities listed above. For example, Ms. H testified²⁶ that she cannot do laundry on her own at all, because her laundry room is in a different part of her apartment building and she cannot walk there with her walker and cannot stand at the laundry machines due to nerve damage in her legs and back. She testified that due to her carpal tunnel syndrome, she cannot operate the controls of the machines; in addition, she cannot load laundry from a basket on the floor into a washing machine, due to her inability to bend over and lift the clothes. She testified that she cannot lift up many items of laundry to fold them, other than perhaps “small towels,” due to pain in her arms and back.

Other examples include Ms. Q’s testimony on Ms. H’s behalf regarding transfers. Ms. Q testified that usually someone has to physically help Ms. H get up out of a chair; in response to the question of whether she has ever seen Ms. H transfer independently, she stated that independent transfers by Ms. H have been “rare” over the past year, and there have been no independent transfers at all over the prior six months. Regarding locomotion-medical, Ms. Q testified that Ms. H needs help getting into and out of vehicles, in the form of having her feet lifted into the car and physical support in exiting the vehicle.²⁷ Ms. Q further testified that Ms. H requires weight-bearing, physical assistance in walking from the car to the medical office, and then back out to the car after the appointment.

In contrast to Ms. H’s presentation, Nurse Chow testified that although it may be difficult for Ms. H to transfer from a chair or walk without assistance, she is capable of doing so. He testified that during his assessment visit, he observed Ms. H walking and transferring with only “supervision” and without weight-bearing assistance. Nurse Chow also testified that he spoke with a physical therapist who had previously treated Ms. H, and the physical therapist offered the opinion that the limitations on Ms. H’s ability to perform activities of daily living were due to anxiety and psychological issues rather than physical limitations.²⁸

²⁶ Rather than providing an exhaustive recitation of the testimony of Ms. H and her witnesses regarding the contested ADLs and IADLs, this decision cites illustrative examples of their testimony in order to demonstrate the contrast between Ms. H’s presentation and the observations and video recordings of the Division’s investigators.

²⁷ In a related context, Ms. P testified that Ms. H cannot go grocery shopping because it is too painful for her to get in and out of vehicles.

²⁸ The physical therapist later submitted a letter, which the Division submitted as an exhibit, in which she confirmed and expanded upon this opinion. This letter has been made part of the record of this matter. However, because the physical therapist was not available to testify and be cross-examined by Ms. H, her opinion is accorded little weight in this Decision.

More telling, however, are the observations of Ms. H reported by the Division's investigators. As mentioned above, the investigators observed Ms. H leaving her apartment building, walking to vehicles, getting in and out of vehicles, walking between vehicles and a medical office, and walking within the medical office complex; Ms. H accomplished all of these movements without any assistance from anyone, not even supervision. In contrast to the testimony presented by Ms. H's witnesses, she was able to get in and out of vehicles without anyone lifting her feet or otherwise assisting her. Similarly, the investigators who attended Ms. H's makeup demonstration and sales event observed her moving around a salon chair without use of any assistive device (not even a cane); they watched her bend over and lift products and promotional materials from boxes on the floor; they watched her demonstrate the use of her products and apply makeup to people attending the event. Overall, the investigators' observations of Ms. H's physical movements were not consistent with what one would expect to see from a person claiming to be disabled to the extent indicated by Ms. H's testimony and that of her witnesses.²⁹

The administrative law judge ("ALJ") was able to closely view the video recordings recorded by the investigators. The recordings clearly corroborated the investigators' testimony regarding their observations of Ms. H's ability to move around and perform physical activities without physical assistance. The recordings demonstrate that, at least on the days when the investigators observed Ms. H's activities, she was able to walk using her walker, without physical assistance; she was able to lift up her walker over a standard height parking lot curb; she was able to open a door and walk through it with her walker, without assistance; she was able to transfer in and out of a car without any assistance (not even supervision).³⁰ Ms. H was able to apply makeup to the faces of her customers at the makeup demonstration event, including the face of one of the investigators. The ability to perform this type of activity demonstrates fine motor skills and the ability to hold and manipulate small objects that are not consistent with a professed inability to perform a simple physical task such as operating the controls on a washing machine or drier.

²⁹ The disparity between her testimony, on the one hand, and these observations and recordings, on the other hand, led the Division's lead investigator to state that Ms. H's case will generate a Medicaid fraud referral from the Division.

³⁰ Arguably, transferring in and out of a car could be considered more difficult than simply transferring from and to a couch, chair or bed, because one needs to turn or twist at the same time that one rises up from a vehicle seat to exit the car or lowers down into the seat from outside the car.

In general, the video recordings recorded by the Division’s investigators and presented for the ALJ’s review show Ms. H, on the days when the recordings were made, to have the physical capabilities necessary to perform all of the ADLs and IADLs at issue in this hearing. The disparity between the video recordings and the manner in which Ms. H and her witnesses portrayed her level of pain and its impact on her ability to perform physical tasks is profound.

There are several conclusions that one can draw from the marked inconsistency between the recordings and Ms. H’s testimony. One could conclude that Ms. H and her witnesses testified falsely, as the Division has apparently concluded. One could conclude that Ms. H and her witnesses have an exaggerated (or understated) conception of the level of disability a person must experience in order to require PCA assistance. In either case, obviously Ms. H would not be deemed eligible for the PCA program. Alternatively, one might conclude that, by sheer coincidence, the investigators happened to observe Ms. H when she was having “good days”³¹ in terms of her pain and the resulting limitations on her physical capabilities. Even if that were the case, however, because Ms. H has the burden of proof in this matter, it was incumbent on her to establish the frequency of her “bad days” and demonstrate that they are frequent enough to meet the definitions of limited or extensive assistance discussed above.³² Ms. H did not make a credible showing on this point – her testimony, and that of her witnesses, was that most of her days were bad days. This type of testimony is simply inconsistent with the video record.

After reviewing all of the testimony and documents, and particularly the video recordings by the Division’s investigators, the profound inconsistency between the recordings and Ms. H’s evidence makes it impossible for the ALJ to find that Ms. H met her burden of proof to establish that her disabling conditions rise to the level necessary for her to be eligible for the PCA program.

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³¹ The investigators observed and video-recorded Ms. H on four separate days: March 1 (Ms. H’s makeup demonstration), March 4, March 16, and April 1, 2015.

³² See definitions in footnotes 12 and 13 above.

IV. Conclusion

Ms. H did not meet her burden of proof establishing that the Division's denial of her application for PCA services was incorrect. Therefore, the Division's determination regarding Ms. H's PCA services is affirmed.

DATED this 30th day of September, 2015.

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 14th day of October, 2015.

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

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