

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

In the Matter of)
)
 E C)
_____)

OAH No. 14-1641-MDS
Agency No.

DECISION

I. Introduction

E C applied for personal care assistance benefits. The Division of Senior and Disability Services denied the application. E appealed, and the issue at her fair hearing was whether her need for assistance on shopping, cleaning, and cooking qualified her as eligible for assistance. Because the evidence did not prove that E needed hands-on physical assistance to do her own shopping, cleaning, and cooking, the Division’s denial is affirmed.

II. Facts

E C has suffered from schizophrenia since she was 19 years old. She is now 58. For a short time during her adulthood, she lived in an assisted living home. When that did not work out, she moved in with her parents. For many years, E was able to cope because her mother assisted her in activities of daily living. With her parents no longer in the home, however, she is now living alone. Her sisters, who are her legal guardians, live out of state, and cannot help E on a regular basis.¹

Using an income stream from their father’s retirement, E’s sisters have hired a private personal care assistant to assist E with what are called “instrumental activities of daily living.” T C, E’s sister and guardian, described the assistance provided by the assistant as follows:

- Usually visits E daily (weekdays).
- Checks on E taking her medicine at least once a day, usually twice a day, either by phone or in person. Her pill checks include weekends.
- All shopping for food and staples. She often takes E with her.
- Cooks or prepares several meals a week for E and monitors what, and how much, she eats.
- Mops floors, dusts, cleans counters, cleans bathrooms and does dishes when they are left (though usually E does most of the dishes).
- Usually once a week she ventures into E's room to straighten things up and clean, including clearing out ashtrays and trash cans of cigarettes.
- Provides E with transportation whenever she asks.

¹ T. C testimony.

- Takes E to see father.
- Spends time entertaining E with her coloring and watching an occasional movie or TV show with her.
- Provides E with daily companionship talking with her and listening to her concerns.
- Checks and monitors E's safety, particularly from falls. Makes sure she uses bannisters and bath mats.
- Monitors and picks up E's medicine for her.
- Takes her for doctor visits when needed. Is arranging and checking on a flu shot, which E has requested.
- Occasionally, she takes care of "incidents" such as E dealing poorly with neighbors and such by smoothing things over.
- Keeps an eye open for any problems and calls E's guardian right away if something is out of the ordinary. (She has called multiple times about events with neighbors and such.)²

E has some physical health problems. For example, she has balance issues and now walks with a cane. She is able, however, to complete all of her physical activities of daily living (ADLs)—task such as walking, dressing, eating, and using the toileting—without assistance. The tasks in which E needs assistance are what are called “instrumental activities of daily living” (IADLs) These include tasks that involve manipulating one’s physical environment rather than just physically manipulating one’s own body. IADLs include tasks such as cooking, cleaning, shopping, and laundry.

For many IADLs, E will either not do them or will do them in a way that is unsafe or insufficient to provide proper care for herself. For example, when it comes to shopping, E finds a large grocery store overwhelming. She becomes confused, and does not know what to buy. If left on her own, she will take a taxi to a small convenience store located at a gas station, where she will purchase cigarettes and Coca-Cola. E will not cook her own meals because she is afraid of burning the house down. She is able to do her own laundry, but does not clean other than to do some dishes. When she did not have a private assistant in to help her, she would generally stay in bed all day.³

E’s guardians have been concerned that E would have no in-house help after the income stream from their father is no longer available for E’s benefit. They applied to the Division of

² Email from T C entitled “Current support for E C case number 14-1641-MDS” (Oct. 28, 2014).

³ T. C testimony.

Senior and Disability Services for personal care assistant service benefits for E under Medicaid. Registered Nurse Margaret Rogers visited E on July 2, 2014, and assessed her need for assistance using the standardized format called the “Consumer Assessment Tool,” or “CAT.” Because E was able to physically function well enough to do ADLs and IADLs, her scores on the CAT showed that she was not eligible for personal care assistance benefits. On August 21, 2014, the Division notified E’s guardian, T, that E’s application was denied.⁴ T appealed the denial, and requested a fair hearing.⁵

A telephonic hearing was held on October 29, 2014. T C represented E, and testified. Angela Ybarra represented the Division, and presented the testimony of Ms. Rogers.

III. Discussion

The Medicaid program authorizes personal care 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.”⁶ Under the regulations governing the Medicaid program, “[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.”⁷

T did not dispute that E was able to accomplish all of her ADLs at the time of the adverse action letter in August. She noted that E’s physical condition has deteriorated, and it was explained that she could file a change of information if she believed that E was no longer able to perform her ADLs without physical assistance.

T does contend, however, that E needs assistance to accomplish the IADLs of shopping, cleaning, and cooking. First she argues that because she has proved that E needs help, the Division should provide benefits. Second, she disputes whether E can accomplish the tasks of shopping, cleaning, or cooking with only supervision, set-up help, or cueing assistance.

As a threshold matter, T argued that because she has proved that E cannot accomplish IADLs without assistance, and will tend to just lie in bed if not provided with assistance, E ought

⁴ Division Exhibit D.

⁵ Division Exhibit C.

⁶ 7 AAC 125.010(a).

⁷ 7 AAC 125.020(e). “Cueing” means “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.” *Id.* “Setup” means “arranging items for use or getting items ready for use so that the recipient can independently perform an ADL or IADL.” *Id.* “Supervision” means “observing and giving direction, as needed, so that the recipient can independently perform an ADL or IADL.” *Id.*

to qualify for personal care assistance benefits from Medicaid. She considers it illogical to disqualify someone who needs assistance based on the level of assistance that the person needs.

T is correct that she has identified a conundrum. The regulations cut off services when a person is physically able to perform the task without physical assistance, even if the person needs a third party to cue or supervise the task.⁸ Having a cut-off in compensable services at an identifiable low-level, however, is not unusual in benefits administration. In addition, in general, the regulations require that, to the extent possible, a person should be involved in performing his or her own ADLs and IADLs. Assistance time, however, is based on the recipient's ability, not actual time required to assist the recipient. This is not illogical, but it may have the consequence that time allotted is not the same as time needed. For many situations, it would take much less time for the assistant to simply to do the task without involving the participant. Here, for example, it would probably take less time for E's assistant to simply do the shopping on E's behalf than to supervise and cue E's shopping for herself. This may be cold comfort to E's guardians, but it is necessary to draw lines and set limits in benefits cases. Although E does need assistance, the personal care assistance program is generally for services based on an applicant's physical condition.

With regard to the three IADLs in dispute, the Division argued that E has the physical functionality to perform the tasks of shopping, cleaning, and cooking. In the Division's view, E has made a choice to not do the tasks. Therefore, in the Division's view, she does not qualify for assistance.

The department addressed this situation in *In re C.L.*, in which an applicant with schizophrenia requested assistance on his IADLs.⁹ Although the decision found that C.L.'s illness and his medications made him forgetful, drowsy, and unfocused, C.L. had not proved that he needed hands-on assistance rather than supervision and cueing to accomplish his IADLs.¹⁰ Therefore, it denied his request for assistance.

Under 7 AAC 125,010(a), personal care assistance services appear to be limited to situations in which the services are "based on the physical condition of the recipient." Here, E's need is based on her mental condition, not her physical condition. Whether a physically-intact

⁸ 7 AAC 125.020(e).

⁹ OAH No. 13-1323-MDS (Dep't of Health and Soc. Serv. 2013).

¹⁰ *Id.* at 4.

person with schizophrenia could ever qualify for personal care services, however, is not clear.¹¹ Therefore, this decision will address the question of whether E could show that because of her illness she was unable to accomplish an IADL even with cueing and supervision. If E cannot make that showing, that would provide a second ground for finding her ineligible.

For the IADL of shopping, E is able to shop unaccompanied at a small store, but makes bad choices. She is overwhelmed by a large store, but not to the point where she is unable to enter the store if she has someone with her.¹² This testimony makes it appear that she could physically do her shopping if she was given support and direction. No testimony was received that she could not complete her shopping, and shop for appropriate items, with supervision and cueing.¹³ Therefore, E has not met her burden of proving that she needs physical assistance in shopping.

For the IADL of cleaning, E is able to do her dishes. She is also able to do her laundry (which is a different IADL, but it shows that her illness does not prevent her from doing household chores). No testimony provided any explanation why E's illness allowed her to do these two chores, but prevented her from doing other chores with supervision or cueing.

For the IADL of cooking, E does not cook other than warming items in the microwave. T explained that E is afraid of setting the house on fire if she were to use the stove. Yet, this testimony does not address whether E could cook if she had someone supervising her (who would be able to prevent a fire from occurring). No testimony established that E's illness creates a barrier to cooking that E is unable to cross without physical, hands-on assistance.

In sum, on this record, the evidence does establish that E has barriers and difficulty with the IADLs of shopping and cooking. This difficulty is likely related to her illness. The evidence does not prove, however, E cannot accomplish her IADLs with supervision and cueing assistance.

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¹¹ The regulation is ambiguous. The question here is whether the clause "based on the physical condition of the recipient" modifies the clause "physical assistance with instrumental activities of daily living," or does it just modify the clause "other services." Because the regulation is ambiguous, this decision will analyze E's eligibility as if a recipient's mental condition could be the basis of an award of services.

¹² T. C testimony.

¹³ T did testify that E refused to go to the store with her sisters when they were visiting. Yet, her email indicates that E does accompany the private personal assistant to the grocery store. On the evidence in this record, E has not met her burden of proof.

IV. Conclusion

The Division's adverse action letter of August 21, 2014, denying E C's application for personal care assistance services is **AFFIRMED**.

DATED this 10th of November, 2014.

By: Signed _____
Stephen C. Slotnick
Administrative Law Judge

Adoption

Under a delegation from the Commissioner of Health and Social Services, I adopt this Decision as the final administrative determination in this matter, 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 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 _____
Name: Rebecca L. Pauli
Title: Administrative Law Judge

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