

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

In the Matter of	)	
	)	
J Q	)	OAH No. 14-1792-MDS
_____	)	Agency No.

**DECISION**

**I. Introduction**

J Q receives Personal Care Assistance (“PCA”) services that are paid for by Medicaid. The Division of Senior and Disabilities Services (“Division”) reassessed her condition and reduced her PCA services. Ms. Q contested that decision and requested a hearing.

A hearing was held on December 1 and December 5, 2014. Ms. Q appeared telephonically, represented herself and testified on her own behalf. The Division was represented at the hearing by fair hearing representative Tammy Smith. Nurse assessor Scott Chow and health program manager Olga Ipatova testified for the Division.

This decision concludes that the Division did not meet its burden of proof to establish that its proposed reductions in Ms. Q’s PCA service were correct. Therefore the Division’s determination regarding Ms. Q’s PCA services is reversed in part and affirmed in part.

**II. Facts**

Ms. Q is 82 years old and has been diagnosed as suffering from osteoporosis, hypothyroidism, and hyperlipidemia.<sup>1</sup> In addition to these diagnoses, Ms. Q testified that she suffers from acute vision problems associated with “holes in the retinas” of both of her eyes, as well as severe pain and numbness in her legs and arms from arthritis.<sup>2</sup> These problems, however, are not reflected in the medical documentation included in the record. Prior to her reassessment Ms. Q received 31.0 hours of PCA services per week.<sup>3</sup> On May 2, 2014 Mr. Chow, a registered nurse, evaluated Ms. Q using the Division’s Consumer Assessment Tool (CAT).<sup>4</sup> H T, a representative of Ms. Q’s PCA agency, was present with

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<sup>1</sup> Exh. E3.  
<sup>2</sup> Q testimony.  
<sup>3</sup> Exh. D1.  
<sup>4</sup> Exh. E1.

Ms. Q for the reassessment.<sup>5</sup> After the reassessment the Division sent Ms. Q a letter dated September 5, 2014, stating that her PCA services would be reduced to 2.5 hours per week.<sup>6</sup> It is this decision that is the subject of Ms. Q's request for a hearing.

### 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[.<sup>7</sup>]

The Division uses the CAT to help it assess the level of assistance needed.<sup>8</sup> The amount of time allotted for needed assistance is determined by the Personal Care Assistance Service Level Computation chart.<sup>9</sup> 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.

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 independent<sup>10</sup> and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance<sup>11</sup>); **3** (the person requires extensive assistance<sup>12</sup>); **4** (the person is totally dependent<sup>13</sup>). 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).<sup>14</sup> In addition, the self-performance codes for the ADL of bathing differ somewhat from the above definitions: a **2**

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<sup>5</sup> Exh. E2; testimony of Mr. T.

<sup>6</sup> Exh. D.

<sup>7</sup> 7 AAC 125.010(a).

<sup>8</sup> 7 AAC 125.020(b).

<sup>9</sup> 7 AAC 125.024(1).

<sup>10</sup> 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.

<sup>11</sup> 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."

<sup>12</sup> 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."

<sup>13</sup> 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."

<sup>14</sup> Exh. E18.

denotes “physical help limited to transfer only,” and a **3** denotes “physical help in part of bathing activity.”<sup>15</sup>

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).<sup>16</sup>

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.<sup>17</sup> 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).<sup>18</sup>

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).<sup>19</sup>

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 (code of 4) with bathing, and he informs the assessor that he bathes every day, he would receive

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<sup>15</sup> Exh. E11.

<sup>16</sup> *Id.*

<sup>17</sup> Exh. E26.

<sup>18</sup> Exh. E26.

<sup>19</sup> *Id.*

30 minutes of PCA service per day for that ADL.<sup>20</sup> 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.<sup>21</sup> When the recipient is seeking additional time for specific services, the recipient has the burden of showing a change that would justify the need for the increase.<sup>22</sup> All of the service categories at issue in this case involve reductions by the Division – thus the burden was on the Division to justify those changes.

Because the Division notified Ms. Q of its decision on September 5, 2014, her condition on that date is used when determining the amount of services she is eligible to receive.<sup>23</sup> Ms. Q contested the service levels for certain IADLs: light meal preparation, main meal preparation, shopping, light housework, laundry, and shopping. She also disputed the denial of PCA time for the “other covered activity” of medical escort. The ADLs and other IADLs addressed in the reassessment were not contested and thus were not at issue in the hearing.

#### ***B. Eligibility - IADLs***

On her previous assessment, dated December 23, 2009, Ms. Q had been given scores of **3/3** for each of the IADLs at issue here, meaning that she was deemed to be fully dependent on the physical assistance of others to perform each of those activities. On the current CAT, she was scored as follows: **0/0** for light meal preparation (independent/no help provided); **1/2** for main meal preparation, shopping, and laundry in-home (independent with difficulty, supervision/cueing provided); and **1/3** for light housework (independent with difficulty, physical assistance provided).<sup>24</sup> Only the **1/3** score for light housework qualified her for PCA services; she was approved for 45 minutes per week for this IADL.

In support of its proposed reductions in Ms. Q’s IADL service levels, the Division presented very little evidence that specifically addressed the physical demands of any of the

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<sup>20</sup> See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart contained at Exh. B34-36.

<sup>21</sup> 7 AAC 49.135.

<sup>22</sup> *Id.*

<sup>23</sup> See *In re T C*, OAH Case No. 13-0204-MDS (Commissioner of Health and Social Services 2013), page 7 (finding that the notice sent to recipient is the decision under review). OAH cases are available online at <http://aws.state.ak.us/officeofadminhearings/categoryList.aspx>.

<sup>24</sup> Exhs. D9, E26.

IADLs (the exception being some very brief questioning of Ms. Q at the hearing regarding her ability to prepare meals or participate in shopping). Nor did the Division's evidence address in any manner how Ms. Q's condition changed to the extent that she went from a **3/3** for each of the IADLs to a **0/0, 1/2** or **1/3**. Because the Division's evidence had only general applicability to the five IADLs, this decision will address the IADLs collectively.

The CAT records Mr. Chow's observations that Ms. Q "communicates needs [and] makes decisions regarding her care," and that she "is a good historian."<sup>25</sup> The CAT also provides the following pertinent information:

- Nurse Chow evaluated Ms. Q's overall physical functioning by asking her to perform some basic physical movements. He found that Ms. Q was able to touch her hands over her head and touch her hands behind her back, but she could not place her hands on her chest and stand up; that she had a strong grip in both hands, and she could touch her feet while sitting.<sup>26</sup>
- Nurse Chow recorded that Ms. Q "displayed strong grips, good fine motor skills and no limitations to her range of motion with her extremities." He also noted that Ms. Q "reported pain with movement due to her arthritis but takes pain medication and reports it is effective."<sup>27</sup>

The CAT, however, includes no notes or comments by nurse Chow that directly relate to the scoring for IADLs. During the hearing, nurse Chow testified that he believed the scoring on the CAT accurately represented Ms. Q's abilities to perform the IADLs, i.e., that as of the date of the assessment she was generally able to perform the IADLs "with difficulty," if given supervision or cueing by another person. However, he did not provide any specific testimony regarding each of the IADLs, e.g., relating to the specific physical requirements associated with them.

Ms. Q, on the other hand, testified emphatically and credibly that due to her arthritis pain and rapidly deteriorating eyesight, she is unable to meaningfully participate in the disputed IADLs. She explained that she had several rounds of cataract surgery on her left eye in the period 2004-2006, that her vision in that eye has deteriorated since that time, and that she more recently developed a "hole in the retina" of her right eye.<sup>28</sup> Nurse Chow testified that he recalled

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<sup>25</sup> Exh. E4.

<sup>26</sup> Exh. E4.

<sup>27</sup> *Id.*

<sup>28</sup> Q testimony.

Ms. Q telling him during the May 2, 2014 assessment visit that she was experiencing “difficulty [with] reading due to her cataracts.”<sup>29</sup> The CAT, however, describes Ms. Q’s vision as “moderately impaired – limited vision; not able to see newspaper headlines, but can identify objects,”<sup>30</sup> a description that goes well beyond “difficulty with reading.” Ms. Q explained that her vision problems make it very difficult for her to cook, to use a knife to prepare foods, to distinguish the height of stairs or steps if she were to go out shopping, or to wash dishes or wipe down surfaces at home. In addition when she goes out she cannot look at light and she keeps her eyes closed much of the time when she is inside. Ms. Q also explained that her arthritis pain makes it difficult for her to walk, and combined with her vision problems causes her to be at risk of falling if she goes out shopping or to a medical appointment.

The Division devoted the bulk of its presentation during the hearing to attempting to establish that the deterioration of Ms. Q’s eyesight occurred after the September 5 adverse action letter and therefore is not within the purview of this hearing. In making this argument the Division focused on Ms. Q’s testimony regarding a November 2014 appointment with her physician at which her deteriorating eyesight issues apparently were confirmed. But this focus on the November physician meeting misses the point that Ms. Q’s eyesight was deteriorating long before the September 5<sup>th</sup> adverse action letter. Nurse Chow was on notice of Ms. Q’s vision issues at the time of the assessment in early May, as evidenced by his notation that her vision was “moderately impaired” in the CAT.<sup>31</sup> It is reasonable to conclude that as of September 5, 2014 her eyesight had not improved, and it is likely that it had further deteriorated.

The Division also argued at the hearing that Ms. Q could not be authorized for PCA services for the disputed IADLs because she resides with her husband, who also was recently reassessed for PCA services and allegedly was found capable of performing the IADLs at issue here. The Division pointed to regulations that mandate that if a claimant’s spouse can perform disputed IADLs, the claimant cannot receive PCA services for those activities. There are two primary problems with the Division’s arguments on this point. First, Ms. Q’s husband’s CAT was not made part of the record of this hearing, and the administrative law judge cannot draw

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<sup>29</sup> Chow testimony.

<sup>30</sup> Exh. E22.

<sup>31</sup> *Id.*

conclusions from a document that is not in the record. Second, the Division’s adverse action letter did not mention this argument as a rationale for the proposed reduction in Ms. Qs’ PCA hours. The letter only states in general terms that “your medical or living condition has changed since the last assessment such that you need less PCA; then as to each of the disputed IADLs it simply states that Ms. Q had been assessed as independent, or independent with difficulty, and therefore her service time had been removed for the IADL.<sup>32</sup> The letter concludes by stating “[y]ou are not eligible to receive PCA services for ... IADLs where the assessment shows you only need assistance with supervision, cueing, and setup in order to independently perform” the IADL.<sup>33</sup> The letter makes no mention of Ms. Q’s husband’s ability to perform IADLs.

The Division’s hearing regulations require that the Division provide a written notice of an action to deny or reduce assistance, and it must “state in the written notice the reasons for the proposed action, including the statute, regulation, or policy upon which that action is based.”<sup>34</sup> Therefore, the bases for the Division’s proposed reduction in services must be limited to those expressed in the September 5, 2014 letter; stated differently, the Division cannot assert at a hearing a new basis for a reduction in services.<sup>35</sup> The Division, therefore, cannot rely upon Ms. Q’s husband’s alleged ability to perform IADLs to reduce Ms. Q’s services.

Based upon a careful review of all of the evidence in the record,<sup>36</sup> the Division did not meet its burden of establishing by a preponderance of the evidence that Ms. Q’s PCA services for the disputed IADLs should be reduced. Although as of September 5, 2014 her medical and physical condition was undoubtedly worse than when she was previously assessed in December, 2009, Ms. Q did not request more PCA time for the IADLs at issue. Therefore her scores for each of the disputed IADLs should be set at the level set forth in her previous assessment: i.e., the Division should score her at **3/3** for light meal preparation, main meal preparation, shopping, laundry, and light housework.

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<sup>32</sup> Exh. D2-3.

<sup>33</sup> Exh. D5.

<sup>34</sup> 7 AAC 49.070.

<sup>35</sup> See *Allen v. State, Dept. of Health and Social Services, Division of Public Assistance*, 203 P.3d 1155, 1167-1168 (Alaska 2009); *Baker v. State, Dept. of Health and Social Services*, 191 P.3d 1005, 1009 (Alaska 2008); see also OAH Case No. 13-1517-MDS, p. 10 (Commissioner of Health & Social Services 2014); *In re U.W.*, OAH Case No. 13-0796-MDS (Commissioner of Health and Social Services 2013), page 6.

<sup>36</sup> Mr. T’s credible testimony corroborated that of Ms. Q regarding her ability to perform the disputed IADLs.

**C. Eligibility – Medical Escort**

The Division presented no evidence or argument at the hearing that was specific to the service area of medical escort. The September 5, 2014 adverse action letter notes that she had previously been assessed as needing 19 minutes of assistance weekly for accessing routine medical and dental appointments, and it states that the current assessment assessed her “as needing transportation, not an escort,” therefore her time for this service had been removed.<sup>37</sup> The rationale for concluding that Ms. Q does not need escort assistance for her medical and dental appointments, however, does not appear in the CAT. In the absence of any evidence or argument at the hearing, and of any support in the CAT, the Division cannot be said to have met its burden of establishing by a preponderance of the evidence that Ms. Q’s PCA services for medical escort should be removed. Therefore, her services for medical escort should be set at the level previously authorized.

**IV. Conclusion**

The Division’s determination to reduce Ms. Q’s PCA services for light meal preparation, main meal preparation, shopping, laundry, light housework, and medical escort is reversed. The Division’s reassessment decision as to the other service areas covered in her CAT is affirmed.

Dated this 27<sup>th</sup> day of April, 2015.

Signed  
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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 13<sup>th</sup> day of May, 2015.

By: Signed  
\_\_\_\_\_  
Name: Andrew M. Lebo  
\_\_\_\_\_  
Title: Administrative Law Judge  
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[This document has been modified to conform to the technical standards for publication.]

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<sup>37</sup> Exh. D4.