

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

In the Matter of	)	
	)	
D K	)	OAH No. 14-1815-MDS
_____	)	Agency No.

**DECISION**

**I. Introduction**

D K was receiving Medicaid PCA services. The Division of Senior and Disabilities Services (Division) notified Ms. K that her PCA services were being terminated.<sup>1</sup> Ms. K requested a hearing.

Ms. K’s hearing was held on January 29, 2015. Ms. K represented herself and testified on her own behalf. Ms. K’s PCA, W S-D, testified on her behalf. Victoria Cobo represented the Division. Denise Kichura, R.N., and Angelika Fey-Merritt testified on behalf of the Division.

The job of an assessor can be difficult. An assessor is expected to determine a person’s need for physical assistance 24/7 in 90 minutes. It is especially difficult, when as here, the recipient is not a good historian and may tend to describe the abilities they wish they had or once did have rather than what their actual abilities are. The hearing process and the taking of additional evidence may reveal a more accurate picture of a person’s needs and abilities than what is derived from a 90 minute assessment interview. Such is the case here. The testimony presented and the introduction of May 2013 medical records submitted in support of Ms. K’s change of information reveal that Ms. K still requires physical assistance to complete the activities of toileting and bathing. The Division’s determination is affirmed in part and reversed in part.

**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. . . .”<sup>2</sup> Accordingly, “[t]he department will not authorize personal care services for a recipient if the

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<sup>1</sup> Ex. D.  
<sup>2</sup> 7 AAC 125.010(a).

assessment shows that the recipient only needs assistance with supervision, cueing, and set-up in order to independently perform an ADL or IADL.”<sup>3</sup>

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.<sup>4</sup> In general, if certain levels of assistance are required (limited, extensive, or full dependence), the regulations prescribe a fixed number of PCA minutes 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 the specific ADLs of transfers, locomotion, eating, toilet use, dressing, or bathing, or any one of the specific IADLs of meal preparation (either light or main meals), housework (either light or routine housework), grocery shopping, or laundry, then the person is eligible for PCA services. If a person is independent or only requires non-hands-on assistance (oversight, supervision, cueing, set-up) with all of these specific ADLs and IADLs, the person is not eligible for PCA services.<sup>5</sup>

PCA services can also be authorized for a few additional functions beyond direct performance of ADLs and IADLs, such as escort to medical appointments. These additional services are never available if the person has been determined to fall below the level for services in every one of the gateway ADL and IADL categories.<sup>6</sup>

A nurse assessor employed by the Division conducts an assessment interview. The assessor, relying on whatever medical records he or she reviews, the recipient’s responses to certain questions, and his or her own observations, scores the CAT. The CAT is then reviewed by another Division employee. If the reviewer questions a score, the reviewer will go back to the assessor and see if the assessor will agree to change the score. If the assessor does not agree, the CAT score will not be changed. If the assessor agrees, the score is changed. After the CAT is reviewed, the determination letter is issued.

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<sup>3</sup> 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;” “set-up” 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.*

<sup>4</sup> See 7 AAC 125.024(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900.

<sup>5</sup> Ex. E, p. 31.

<sup>6</sup> See *id.*

Once services have been authorized at a certain level and something changes and a recipient requires a different level of PCA services, a recipient may request an increase or decrease in PCA services by submitting a change of information (COI). The COI should be accompanied by medical or other information giving rise to the need for a different level of service. The Division will review the information submitted and if appropriate conduct another assessment interview with new CAT scores. Once the Division decides, it will issue a determination letter.

In either instance, it is the determination letter that triggers a person's right to a fair hearing to challenge the Division's decision.

### **III. Background Facts**

Ms. K suffered a stroke in 2011. She has residual cognitive, visual, and muscular deficits.<sup>7</sup> It is unknown when she was first authorized to receive PCA services, other than it was prior to 2013.

The Division provided a copy of her 2013 CAT.<sup>8</sup> This CAT is based upon a reassessment interview conducted by Susan Findley, R.N. Ms. Findley wrote that the reassessment occurred after Ms. K had undergone considerable post-stroke rehabilitation that resulted in increased functionality with her right hand but did not resolve visual or cognitive deficits. After conducting the assessment interview, Ms. Findley increased Ms. K's score in toileting from independent (score of 0/0) to limited assistance (score of 2/2).<sup>9</sup> In support of the increase, Ms. Findley wrote that Ms. K was at risk for poor hygiene and had balance problems related to her vision issues.<sup>10</sup> Ms. Findley reduced Ms. K's score for bathing from extensive assistance (score of 3/2) to limited assistance (score of 2/2) because the "PCA and client said [Ms. K] 'needs reminders and prompting to bathe' and can wash herself."<sup>11</sup> The score for personal hygiene remained unchanged at limited assistance (score of 2/2).<sup>12</sup>

On July 1, 2014, Ms. K submitted a change of information (COI) supported by two documents. One document is a chart note from a May 27, 2014 visit to her treating physician L B, M.D. The purpose of the visit was to discuss increased PCA hours and Ms. K's increased

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<sup>7</sup> See Ex. F; May 2014 documents submitted in support of July 2014 Change of Information.

<sup>8</sup> Ex. F.

<sup>9</sup> Ex. F, p. 12 (The date of the assessment prior to the 2013 assessment is not apparent from the record).

<sup>10</sup> Ex. F, p. 12.

<sup>11</sup> Ex. F, p. 12.

<sup>12</sup> Ex. D, p. 8.

falls. As reported in the May 27, 2014 chart note, Ms. K was falling 1 – 2 times a week and she complained of dizziness unrelated to blood sugar or position. She was noted to be a poor historian and had memory issues.<sup>13</sup> Ms. K reported that she needed help getting dressed and undressed, but that once in the shower she could clean herself. Under review of symptoms it was noted that Ms. K has tunnel vision and glaucoma, uses incontinence products and leaks urine and leaves stool on the toilet seat and in her underwear, is unsteady when standing, and weak on her right side. She could, however, stand up without assistance and walk cautiously. As a result of the examination, Dr. B characterized Ms. K as suffering from overall deconditioning as well as needing oversight and instruction with public transportation, medications, and meal preparation.<sup>14</sup> Dr. B also wrote that Ms. K is “oblivious to soiling herself.”<sup>15</sup>

The Division took no action on the COI because on July 29, 2014, Denise Kichura conducted a reassessment interview to determine Ms. K’s need for ongoing PCA services using the CAT.<sup>16</sup> Neither Ms. Kichura, nor Angelika Fey-Merritt<sup>17</sup> reviewed the documents submitted in support of the COI as part of the assessment.

At the time of Ms. Kichura’s reassessment interview, Ms. K was 56 years old and lived with her mother who also received PCA services.<sup>18</sup> Ms. K’s mother passed away in October 2014. It was clear from the testimony that Ms. K misses her mother a great deal and that they were close.

Ms. K suffers from sleep apnea, stroke (2011), depression, visual field defects, mental processing defects, hypertension, and unspecified musculoskeletal symptoms referable to limbs.<sup>19</sup> She no longer drives and does not have transportation services. Ms. K is concerned for her own safety because she lives alone and is prone to dizzy spells. Sometimes she falls as a result of the spells. She testified that her fear of falling and forgetfulness result in her bathing once a week or so.

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<sup>13</sup> The PCA would disagree with many of Ms. K’s answers to the doctor. It was also noted that Ms. K was oriented to place and time but did not understand the situation.

<sup>14</sup> See May 27, 2014 Chart Note and May 30, 2014 Letter from Dr. B to “Whom It May Concern” submitted with COI.

<sup>15</sup> May 30, 2014 Letter.

<sup>16</sup> Ex. E.

<sup>17</sup> Ms. Fey-Merritt wrote the Division’s letter informing Ms. K that her PCA services were terminated.

<sup>18</sup> K Testimony.

<sup>19</sup> Ex. E., p. 3; May 30, 2014 Letter from L B, M.D.

Ms. K believes she should continue to receive PCA services and she should be authorized more than the 5 hours per week authorized in 2013. She is lonely and frustrated with her inability to drive, work, and do things like she once did. She has taken steps to change certain things so she can remain as independent as possible. For example, she places dirty clothing in the laundry basket to keep it separate from other clothing. She also has taken to making a shopping list to avoid purchasing the same item over and over again.

When asked why she assigned the scores she did, Ms. Kichura responded that she relied heavily on Ms. K's statements that she was caring for her mother in the evenings, (toileting, transfers, feeding) and her own observations. She found that Ms. K had the following abilities and limitations with regard to her Activities of Daily Living (ADLs):<sup>20</sup>

Transfers: Ms. Kichura reported that while Ms. K might need to use furniture for support and balance, she was able to transfer independently (scored 0/0).<sup>21</sup>

Locomotion: Ms. Kichura reported that Ms. K was able to walk with supervision and did use assistive devices (a cane and seated walker) (scored 1/1).<sup>22</sup>

Dressing: Ms. Kichura reported that she observed Ms. K pull her shirt on and could touch her feet. She found Ms. K was able to dress herself independently (scored 0/0).<sup>23</sup>

Eating: Ms. Kichura reported that Ms. K is independent with regard to eating (scored 0/0).<sup>24</sup>

Toileting: Ms. Kichura reported that Ms. K could use the toilet with supervision and set-up help (scored 1/1).<sup>25</sup>

Bathing: Ms. Kichura reported that Ms. K could bathe with supervision and set-up help (scored 1/1).<sup>26</sup>

Regarding her need for PCA assistance to complete IADLs, the Division scored Ms. K as follows: independent in light meal preparation (score 0/0); independent with difficulty and requiring supervision with main meal preparation (score 1/1); independent with difficulty and requiring supervision with light housework (score 1/1); independent with difficulty and requiring

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<sup>20</sup> Ex. E, pp. 6 - 11; *See* 7 AAC 125.199(1).

<sup>21</sup> Ex. E, p. 6.

<sup>22</sup> Ex. E, p. 7.

<sup>23</sup> Ex. E, p. 8.

<sup>24</sup> Ex. E, p. 9.

<sup>25</sup> Ex. E, p. 9.

<sup>26</sup> Ex. E, p. 11.

set-up assistance with routine housework (score 1/2); independent with difficulty and requiring set-up assistance with grocery shopping (score 1/2); and independent with difficulty and requiring supervision with laundry (score 1/1).<sup>27</sup>

On September 12, 2014, the Division notified Ms. K that it was reducing her PCA services from 5 hours per week to 0 hours per week, thereby terminating her PCA services.<sup>28</sup>

#### **IV. Discussion**

The issue presented for resolution is whether Ms. K is eligible to receive PCA services based upon her need for assistance with either her ADLs or her IADLs.

In this case, in which the Division is seeking to terminate or reduce a benefit a recipient is already receiving, the Division has the burden to prove, by a preponderance of the evidence,<sup>29</sup> facts that show the recipient's level of eligibility has changed.<sup>30</sup> The Division may change the number of hours of allotted PCA services if there has been a *material change* in the recipient's condition.<sup>31</sup> A *material change* means that the recipient's medical condition has changed, or his or her living conditions have changed.<sup>32</sup> The Division can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs,<sup>33</sup> including such sources as written reports of firsthand evaluations of the patient.

##### **1. ADLs**

Ms. Kichura testified that the CAT scores are supported by her observing Ms. K crawling over clothing on the floor, and reaching up in a cupboard for a glass and filling it with water. Ms. Kichura also relied on Ms. K's statements that she cared for her mother and Ms. K's knowledge of hygienic tasks such as washing her hands. Ms. Kichura also considered Ms. K's representation that she had been in PT but did not need to continue because Ms. K was told she was o.k.<sup>34</sup>

Ms. S-D, who was Ms. K's mother's PCA and is now Ms. K's PCA, expressed her concern for Ms. K's safety getting in and out of the tub. Ms. S-D corroborated the physician's

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<sup>27</sup> Ex. E, p. 26.

<sup>28</sup> Ex. D.

<sup>29</sup> Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

<sup>30</sup> 7 AAC 49.135.

<sup>31</sup> 7 AAC 125.026(a).

<sup>32</sup> 7 AAC 125.026(d). A material change also exists if the services were based on a prescription that has since expired, there was a time-limited amendment to the plan of care, or the services are no longer authorized by regulation. 7 AAC 125.026(d)(3).

<sup>33</sup> 2 AAC 64.290(a)(1).

<sup>34</sup> Ex. E p. 12.

statement that after a bowel movement there is stool left on the toilet or on Ms. K's under-clothing. Ms. S-D testified credibly that the PCAs, not Ms. K, prepared the meals for her mother. Ms. S-D testified she would help Ms. K to get into and out of the tub. Finally, Ms. S-D testified that Ms. K was weaker, and identified dropped and broken items as evidence of a decline in upper body strength.

Ms. K agreed that when it came to personal hygiene she could benefit the most from prompting, supervision, and set-up help (score of 1/1). She did not require hands-on physical or weight-bearing assistance to complete her personal hygiene.

However, the evidence does not support the Division's scoring of toileting and bathing. The May 27, 2014 chart note does not corroborate Ms. Kichura's scoring. An explanation given by the Division in support of its decision to terminate was that Ms. K required less assistance because her PT had improved her conditioning. However, Dr. B wrote that Ms. K's falling "seems to be due to right weakness from her stroke worsened by overall deconditioning."<sup>35</sup> This appears to be decline in health from the 2013 CAT and an issue not adequately addressed by the Division. There are no PT records in evidence. There is no mention of PT in the note sections under the specific ADLs or in the functionality test area of the CAT. If PT played such an important role in supporting termination of Ms. K's PCA services, it should have been referenced in the CAT.

The evidence does not support the Division's decision to reduce Ms. K's PCA services for toileting and bathing. Ms. K agreed with the Division that if prompted she will remember to clean after toileting but that even if reminded, her poor vision and inability to reach to her anus interfere with her ability to adequately clean herself. In response to the testimony and doctor's notes regarding Ms. K's inability to notice that she has soiled herself after stooling, the Division responded that people do not always adequately clean themselves, which may be true. However, Ms. K's inability to properly clean is not a periodic event; rather, it appears to be the norm. She also suffers from urinary incontinence. Therefore, the Division has not met its burden regarding toileting. Ms. K's score and frequency shall remain unchanged.

As for bathing, in 2013, Ms. K's score was reduced from extensive assistance (score of 3/2) to limited assistance (score of 2/2). It was also noted that in 2013, Ms. Kichura does not deny that Ms. K suffers from dizzy spells. Rather, she focused on all that Ms. K can do such as

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<sup>35</sup> May 27, 2014 Chart Note p. 2.

locomotion outside to smoke and transferring independently. However, transferring into the tub or shower is different than transferring from a chair or from the bed.

Ms. Kichura testified that she observed Ms. K get in and out of the tub. Ms. K testified convincingly that when alone, she was afraid she would fall and not be able to get up. There is a record of Ms. K falling due to dizziness. Balancing the evidence, the scales fall just short of the Division establishing by a preponderance of the evidence that Ms. K can reasonably and safely get in and out of the tub without hands-on assistance. The record establishes that once in the shower, Ms. K is independent or requires supervision/set-up help. Ms. K's score of 2/2 and frequency shall remain unchanged.

Finally, Ms. K's statement indicating that she cared for her mother does not support the Division's decision to terminate PCA services. Ms. K was a poor historian. She did not cook or prep the food for cooking. The PCAs would prepare the food and Ms. K would take it to her mother. As for helping her mother transfer, Ms. K would help her mother up when a PCA was not present and would help her mother move from one room to another. What Ms. K did for her mother was assist in locomotion and transfers. Ms. K does not presently require assistance with either of these particular ADLs. Helping her mother when no one else was around does not detract from Ms. K needing limited assistance cleaning herself after toileting and assistance getting into and out of the tub.

2. IADLs

A. *Meal Preparation*

Ms. K and Ms. S-D testified consistently and credibly that Ms. K requires assistance with cooking, just not physical assistance. She requires assistance and set-up help to remind her to take the items off of the stove (score of 2/2).

B. *Laundry*

Ms. K has difficulty separating clean clothes from dirty clothes. She has come up with a system that works. The dirty clothes go in the basket. Rather than physical assistance, Ms. K would benefit from assistance and set-up help (score of 2/2).

C. *Grocery Shopping*

In the past, Ms. K was prone to purchasing items that she already had or multiples of items she did not need. As with the laundry, Ms. K has figured out a system that allows her to be

more independent. By making a list, she purchases what she needs and only requires set-up help (score of 1/2).

**D. Housework**

Ms. K testified that she is weak in her upper extremities, drops items and needs someone to come clean them up. The Division scored Ms. K as being independent and requiring set-up help. However, the evidence in the record establishes that it is more likely than not that Ms. K can perform housework with difficulty and requires supervision or cuing to remind her to pick up what she may have dropped or broken (score of 1/1).

The Division's scores for Ms. K's IADLs on the CAT are changed to a 2/2 for both meal preparation and laundry. Her score for grocery shopping should remain at a score of 1/2 and housework should be changed to 1/1. These score changes, however, do not result in a finding of PCA eligibility for Ms. K. In order for her to qualify for PCA services based upon her IADLs, she would need a self-performance code of 1, 2, 3, or 4 and a support code of 3 or 4 with regard to at least one of the scored IADLs (light meal, main meal, light housework, routine housework, grocery shopping, and laundry). Her scores are not high enough.

**V. Conclusion**

Ms. K is eligible for PCA services in the areas of toileting and bathing. The Division correctly determined that Ms. K is not currently eligible for assistance with the remaining ADLs or her IADLs. Accordingly, the Division's decision is affirmed in part and reversed in part.

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

Signed  
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Rebecca L. Pauli  
Administrative Law Judge

**Adoption**

The undersigned, by delegation from 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 27<sup>th</sup> day of May, 2015.

By: Signed  
\_\_\_\_\_  
Name: Rebecca L. Pauli  
Title: Administrative Law Judge

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