

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

In the Matter of )  
 )  
 J C )  
\_\_\_\_\_)

OAH No. 14-1818-MDS  
Agency No.

**DECISION**

**I. Introduction**

J C has been receiving Personal Care Assistance (PCA) services paid for by Medicaid. Senior and Disabilities Services (SDS) reevaluated his condition and reduced the number of hours of services Mr. C would receive. Mr. C appealed that decision.

A hearing was held on December 2, 2014, and on January 15, 2015.<sup>1</sup> SDS was represented by a lay advocate, Tammy Smith. Mr. C represented himself. The proceedings were interpreted from English to Laotian, and from Laotian to English.

Based on the evidence presented, SDS’s decision is affirmed in part and reversed in part.

**II. Facts**

Mr. C is 92 years old.<sup>2</sup> He had been receiving 33.50 hours of PCA services each week.<sup>3</sup> He was reevaluated for services on May 12, 2014, by SDS’s nurse assessor Geetha Samuel.<sup>4</sup> On September 16, 2014, SDS informed Mr. C that it would be reducing his services to 19.75 hours per week.

**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>5</sup>]

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<sup>1</sup> The hearing was held before Administrative Law Judge Kay L. Howard. Upon ALJ Howard’s retirement, this matter was reassigned to ALJ Jeffrey A. Friedman. ALJ Friedman has reviewed the entire record, including the hearing recordings.

<sup>2</sup> SDS’s records show him as being 85 years old, but Mr. C testified that he had given an incorrect birth date when he came to this country because he was told he might not be allowed in if he gave his correct age.

<sup>3</sup> Exhibit D1.

<sup>4</sup> Exhibit E.

<sup>5</sup> 7 AAC 125.010(a).

SDS uses the Consumer Assessment Tool (CAT) to help assess the level of assistance needed.<sup>6</sup> The amount of time allotted for needed assistance is determined by the Personal Care Assistance Service Level Computation chart.<sup>7</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 different levels of required assistance are defined by regulation and in the CAT.<sup>8</sup> For each ADL or IADL, there is a self-performance code and an assistance code. For ADLs, the self-performance code describes the type of assistance needed, and the assistance code describes whether the assistance is set up help only, cueing only, or physical assistance from one or two people. With ADLs, Supervision is defined as oversight, encouragement, or cueing three or more times a week, with physical assistance no more than two times a week.<sup>9</sup> Limited Assistance is defined as requiring direct physical help or guidance from another individual three or more times a week, with weight bearing support no more than two times a week.<sup>10</sup> Extensive Assistance is defined as requiring direct physical help with weight bearing support at least three times a week, or full assistance without any involvement from the recipient at least three times a week, but not all of the time.<sup>11</sup> Full Assistance means the recipient has to rely entirely on the caretaker to perform the activity.<sup>12</sup> To receive PCA time for ADLs, the applicant must have a performance code of at least 2 (limited assistance).<sup>13</sup>

For IADLs, the performance code describes whether the individual can perform the activity independently, independently with difficulty, needs assistance, or is dependent on others to perform the activity.<sup>14</sup> The support code describes whether the support is in the form of supervision or cueing, set up help, physical assistance, or total performance by others.<sup>15</sup> To receive PCA time for IADLs, the applicant must have a performance code of at least 2 (independent with difficulty), and a support code of at least 3 (physical assistance).<sup>16</sup>

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<sup>6</sup> 7 AAC 125.020(b).

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

<sup>8</sup> The July 29, 2009 version of the CAT has been adopted by reference, 7 AAC 160.900(d)(6), and therefore the definitions in the CAT have the same effect as a regulation.

<sup>9</sup> Exhibit E6.

<sup>10</sup> 7 AAC 125.020(a)(1); Exhibit E6.

<sup>11</sup> 7 AAC 125.020(a)(2); Exhibit E6

<sup>12</sup> 7 AAC 125.020(a)(3); Exhibit E6.

<sup>13</sup> Exhibit B34 (Service Level Computation chart).

<sup>14</sup> Exhibit E26.

<sup>15</sup> *Id.*

<sup>16</sup> Exhibit B34.

This case involves a reduction in benefits. Accordingly, the division has the burden of proving a material change in condition that justifies the reduction.<sup>17</sup> Because SDS notified Mr. C of its decision on September 16, 2014, his condition on that date is used when determining the amount of services he is eligible to receive.<sup>18</sup>

***B. Admissibility of No Name Document***

No Name is a PCA agency which has been assisting Mr. C. On November 26, 2014, No Name submitted an “areas of disagreement” document outlining Mr. C’s disagreement with SDS’s decision. SDS objected to the admission of this document because Mr. C had not seen it or discussed it with No Name. In addition, Mr. C had testified that he “could not disagree” with SDS’s decision.<sup>19</sup>

The purpose of providing advance notice of the areas of disagreement is to assist in the presentation and consideration of issues at the hearing. For example, there is no need to present testimony about Locomotion if the appealing party agrees with SDS’s decision related to locomotion. Typically, such a document will not be binding on either party, but to the extent the appealing party agrees that the listed issues are the only issues in dispute, having these documents in advance can be very helpful. These documents can be helpful and admissible even if the appealing party has not seen or discussed the document before the hearing.<sup>20</sup>

The document submitted by No Name also contained factual assertions and legal arguments. Hearsay is not automatically excluded from evidence,<sup>21</sup> but the weight given to those statements will depend on several factors, including whether it is based on personal knowledge, and whether the statements are supported by other evidence in the record. In this case, the factual assertions in No Name’s document did not appear to be based on personal knowledge, and those assertions were given little weight in evaluating the evidence.

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<sup>17</sup> 7 AAC 49.135.

<sup>18</sup> See *In re T.C.*, OAH Case No. 13-0204-MDS (Commissioner of Health and Social Services 2013), page 7 (notice sent to recipient is the decision under review), available at <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf>. However, medical records after that date are relevant to the extent they tend to show Mr. C’s condition as of the date of SDS’s denial.

<sup>19</sup> In the context of his entire testimony, it was evident that Mr. C was saying he did not have the legal authority to make SDS change its decision. He was, however, asking that it be changed so that he could have more PCA time.

<sup>20</sup> Mr. C was asked several questions about whether he was his own decision maker or had granted someone else power of attorney to make decisions for him. These are not mutually exclusive. A person can be competent to make his own decisions and also grant someone else power of attorney to make those same decisions. See *In re B.A.*, OAH No. 13-1782-MDS (Commissioner of Health and Social Services 2014), p 5 (Discussing difference between power of attorney and legal guardian).

<sup>21</sup> 2 AAC 64.290(a)(1).

Legal arguments contained in the document submitted by No Name are not evidence. They have been considered like any other legal argument made during a hearing, but they are simply statements of what one party believes the final decision should be.

SDS's objection to the admission of No Name's document is overruled.

### ***C. Concessions During the Hearing***

During the hearing, SDS agreed to change Mr. C's Personal Hygiene score to a 2/2. It also agreed to change the scores for Light Housework and Laundry in Home to 3/4. Changing the Personal Hygiene score would also change the scoring for assistance with Medication because the Personal Hygiene score is used as a proxy for the amount of assistance needed with several covered activities, including medication.<sup>22</sup>

### ***D. Eligibility for Assistance with ADLs***

#### ***1. Bed Mobility***

Pursuant to regulation, a recipient is not entitled to time for Bed Mobility if he or she is ambulatory.<sup>23</sup> Mr. C is able to walk with assistance. Accordingly, he is not entitled to PCA services for bed mobility.

#### ***2. Transfers***

Transfers are the act of moving from one surface to another, such as from sitting in a chair to standing.<sup>24</sup> Mr. C was scored as needing limited assistance with this activity.<sup>25</sup> He was observed standing on his own with balancing assistance.<sup>26</sup> In the CAT, Ms. Samuel stated Mr. C received help raising his legs to the bed, but in her testimony she explained that this was just guidance for his legs, and not weight-bearing.

Mr. C testified that someone had to pull his hand and help him balance to get out of bed. He also said that he had to be pulled to stand up. Pulling is weight bearing support.<sup>27</sup>

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<sup>22</sup> Exhibit D8 & D11. As Health Program Manager David Chadwick testified, this score is only one step in determining the number of minutes to award for this activity. The first step is to determine if the recipient is eligible for any time. Section G of the CAT is used to see if the person needs any assistance with medications. Exhibits B34 & B35. If the individual is eligible for assistance, the personal hygiene score is used to determine how many minutes of service to award. Exhibit B 35. Despite his hygiene score, Mr. C is not eligible for any time because he is independent with his medications. Exhibit E20.

<sup>23</sup> 7 AAC 125.030(b)(1)(A).

<sup>24</sup> Exhibit E6.

<sup>25</sup> *Id.*

<sup>26</sup> Exhibit E6; Samuel Testimony.

<sup>27</sup> *In re M C*, OAH No. 13-1191-MDS (Commissioner of Health and Social Services 2014), p 3; *In re L D*, OAH No. 13-0306 (Commissioner of Health and Social Services 2014), p 10 (definition of weight bearing).

Mr. C's daughter, T C, provides PCA services for Mr. C.<sup>28</sup> She testified that she has to physically lift him out into or out of a chair or his bed most of the time. She said she puts her hands under his armpits and lifts him up.<sup>29</sup>

The question in this case is whether Mr. C still needs weight bearing assistance to transfer at least three times each week.<sup>30</sup> SDS has the burden of proving by a preponderance of the evidence that Mr. C had sufficiently improved so he no longer needed that level of assistance. SDS did not meet its burden of proof on this issue. Mr. C should have been scored as needing extensive assistance. As determined by SDS, he should receive this assistance six times each day.<sup>31</sup>

### 3. *Locomotion*

Locomotion is the act of moving within one's room or between rooms on the same floor.<sup>32</sup> Ms. Samuel noted that Mr. C only needed someone to hold his up arm for balance when he walked.<sup>33</sup> Ms. C testified that she frequently walks behind Mr. C holding on to his shirt, or holding onto his waist. Ms. C did not explicitly say she provided weight bearing support, and her testimony is consistent with providing guidance and balancing support only. SDS has met its burden of showing material improvement with locomotion to justify the reduction in services.<sup>34</sup>

### 4. *Dressing*

Ms. Samuel testified that Mr. C needed someone to hold his clothing for him while he put his arms or legs through the openings. She also said he needed help with his shoes and socks because he could not reach down to his feet. She did not observe a need for weight-bearing support.<sup>35</sup> This evidence was not rebutted by Mr. C or his witnesses during the hearing. SDS has met its burden of proving the reduction in services for this activity.

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<sup>28</sup> Another daughter, N T, provides PCA services for about five hours each day. J. C testimony.

<sup>29</sup> T. C testimony.

<sup>30</sup> Exhibit E6 (definition of extensive assistance).

<sup>31</sup> Exhibit E6.

<sup>32</sup> Exhibit E7.

<sup>33</sup> Samuel testimony; Exhibit E7.

<sup>34</sup> Ms. Samuel testified that previously Mr. C was taking medication that made him dizzy. He is no longer on that medication, and the dizziness has gone away. It makes sense that he would need less weight bearing support now that he is no longer dizzy much of the time.

<sup>35</sup> Exhibit E8; Samuel testimony.

5. *Eating*

There was no change in the scoring for this activity, and Mr. C has not shown a material change that would justify an increase in services for assistance with Eating.

6. *Toileting*

SDS reduced the scoring from extensive assistance to limited assistance, and also reduced the frequency of assistance with Toileting. Toileting includes the act of transferring on and off the toilet.<sup>36</sup> Because Mr. C needs weight-bearing assistance with other transfers at least three times each week, he is likely to need weight-bearing assistance with toileting transfers. In any event, the limited evidence concerning his ability to perform this activity without extensive assistance was insufficient to meet SDS's burden of proof, and Mr. C's score should have remained at 3/2.

There was, however, sufficient evidence to support SDS's reduction in frequency. Ms. Samuel testified that Mr. C now uses a urinal while sitting up in bed, and that he is able to do so independently. This explains the reduction in frequency from eight times a day to four times a day.

7. *Bathing*

There was no change in scoring or frequency for this activity.

***E. Eligibility for Assistance with IADL's***

As discussed above, SDS agreed to increase Mr. C's scoring for Housework and Laundry to their previous levels. The changes for Meal Preparation and Shopping remain in dispute. Mr. C was given a self-performance score of 2 for these activities.<sup>37</sup> This score indicates that he could participate in those activities but needed some form of assistance to complete them. He previously was scored as completely dependent on others for these activities.

Mr. C testified that he has trouble washing his face and brushing his teeth because one hand is shaky, and both hands are shaky when he is tired. Ms. Samuel testified, however, that she observed him to have a strong grip and intact fine motor skills.<sup>38</sup> Although it is a close question, it is more likely true that Mr. C could assist with these IADLs. He would

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<sup>36</sup> Exhibit E9.

<sup>37</sup> Exhibit E11.

<sup>38</sup> See also Exhibit E4.

not be able to provide a lot of assistance, but he could do some of the tasks involved for meal preparation and shopping.

**IV. Conclusion**

SDS either conceded or did not meet its burden of proof to reduce services for the following activities: Personal Hygiene, Housework, Laundry, Transfers, and Toileting. Those portions of SDS’s decision are reversed and the scores for those activities are increased as discussed above. The remaining portions of SDS’s decision are affirmed. SDS should recalculate Mr. C’s service level authorization based on these changes.

Dated this 21<sup>st</sup> day of July, 2015.

*Signed* \_\_\_\_\_  
Jeffrey A. Friedman  
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 4<sup>th</sup> day of August, 2015.

By: *Signed* \_\_\_\_\_  
Name: Lawrence A. Pederson  
Title/Agency: Admin. Law Judge, OAH

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