

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

In the Matter of:)
)
 P C) OAH No. 14-2035-MDS
) DSDS No.

DECISION AFTER RETURN

I. Introduction

P C was the recipient of 37.25 hours per week of personal care assistant (PCA) services through the Division of Senior and Disabilities Services under 7 AAC 125.010-199.¹ The Division reassessed Ms. C’s functional abilities and determined that her condition had materially improved to the point that she required only 4.5 hours per week of those services, and Ms. C filed an appeal.

The assigned administrative law judge conducted a telephonic hearing. Ms. C participated and testified, as did H U of No Name. Gena O’Neal represented the Division. Mary Tanaka, R.N., who performed the reassessment, testified for the Division, as did David Chadwick.

A proposed decision was issued on April 13, 2015. The Division filed a proposal for action objecting to the proposed decision. The Commissioner’s delegee returned the decision to the Office of Administrative Hearings for the administrative law judge to reevaluate the evidence and the law regarding locomotion, toileting, personal hygiene, bathing, prescribed tasks, and medication assistance, and issue a revised decision. After consideration, the Division’s reduction of Ms. C’s PCA benefits is upheld in part and reversed in part, as discussed below.

II. Facts

A. Background Information

P C is 66 years old.² She is four feet, eight inches tall.³ Her left leg was amputated above the knee in 2011.⁴ Ms. C lives alone in a single story residence in No Name.⁵ Ms. C’s

¹ See AS 47.07.045.

² Ex. E, p. 1.

³ See Ex. F, p. 9 (57 inches); Ex. 1 (documents faxed 1/5/2015), p. 3. The reassessment erroneously states that she is 62 inches (five feet, two inches) tall. Ex. E, p. 9.

⁴ Ex. E, p. 3.

⁵ Ex. E, p. 1.

current diagnoses include pancreatitis, diabetes, and kidney disease.⁶ She has asthma.⁷ Prior diagnoses (2011) include hypertension (high blood pressure), hypothyroidism, arthritis, and osteoporosis.⁸ Ms. C has an ileostomy and collection bag for bodily wastes. Despite wearing glasses, she has moderately impaired vision, such that she can see objects but not newspaper headlines.⁹

B. Activities of Daily Living

1. *Body Mobility*

Ms. C is able to reposition her body in bed, and to move to and from a lying position on a bed, without physical assistance.

2. *Transfers*

Ms. C has balance problems when standing, due in part to dizziness and in part to weight imbalances related to her ileostomy and amputee status.¹⁰ In addition, her poor vision affects her ability to transfer.¹¹ She transfers by pivoting on her single leg, and she has fallen about once a month.¹² She is not able to transfer to and from a seated or lying position to a standing position without physical assistance at least three times a week.

3. *Locomotion*

Ms. C has a prosthetic leg, which is largely unusable due to an improper fit.¹³ Instead, Ms. C uses a manual wheelchair. Because of her small stature, the wheelchair (which is not designed for a small person) is difficult for her to operate, and she has a shoulder injury that makes all day operation of the wheelchair even more problematic.¹⁴ On multiple occasions, her foot has become stuck underneath the wheelchair or she has slipped from the seat, and she has fallen from the wheelchair.

4. *Dressing*

Ms. C requires limited assistance in order to dress and undress.

⁶ Ex. E, p. 3.

⁷ Ex. 1, p. 15.

⁸ Ex. E, p. 3.

⁹ Ex. E, p. 22.

¹⁰ Ex. 1, pp. 14, 15 (X. E, M.D.) (“balance issues with amputee status and ostomy”; “She is a left Above the Knee amputee and has an ostomy on her right side that throws her balance off with the variable volume in the ostomy.”).

¹¹ Ex. 1, p. 2 (H. U statement). *See also, id.* at p. 15 (“Has a central vision loss due to prior stroke”).

¹² *See* Ex. E, pp. 6, 23.

¹³ *See* Ex. E, p. 3; P. C Testimony.

¹⁴ Ex. 1, p. 14 (X. E, M.D.).

5. *Eating*

Ms. C is independent in the activity of eating food after it is served.

6. *Toileting*

Ms. C has an ileostomy for bodily wastes. Her wastes discharge into a bag which must be emptied into the toilet and cleaned four to eight times daily. Transfers and locomotion in connection with toileting are problematic in the same degree for toileting as for other locations, more so when the bathroom floor is wet. Ms. C can change the bag without physical assistance, but needs physical assistance in order to cleanse it. When she is incontinent, which occurs frequently, she is unable to cleanse herself without physical assistance. She also requires physical assistance to change her clothing when incontinent.

7. *Personal Hygiene*

Ms. C is unable to attend to personal hygiene tasks while seated in her wheelchair because she cannot get to the bathroom sink while seated. Because of balance issues combined with weakness in her only leg it is not safe for her to perform personal hygiene tasks while standing at her bathroom sink.

8. *Bathing*

Ms. C bathes in a bathtub, while seated in a shower chair, using a hand held shower. She cannot safely transfer in and out of the bathtub without physical assistance. She is unable to cleanse the back of her legs and other parts of her body without physical assistance.¹⁵

C. Other Activities

1. *Prescribed Exercises*

Ms. C has a current prescription (August 25, 2014) for passive range of motion exercises (one hour daily) and physically assisted walking exercise (two hours daily).¹⁶

2. *Foot Care*

Ms. C has a current prescription (August 25, 2014) for foot care (one hour weekly).¹⁷

3. *Medication*

Ms. C uses a nebulizer infrequently. She is able to prepare and self-administer medication using the nebulizer, but requires assistance to clean it after each use.

¹⁵ See Ex. E, p. 12.

¹⁶ Ex. 1, p. 7.

¹⁷ Ex. 1, p. 7.

4. Escort

Ms. C has medical appointments about four times weekly.¹⁸ She lives close to her providers, about ten minutes each way.¹⁹ She is unable to access her medical appointments without physical assistance for transfers and locomotion. Because she experiences periodic confusion during the daytime as a result of fluctuating blood sugar levels, and has difficulty following written instructions, she requires an escort's presence when consulting with her doctor.²⁰

III. Discussion

The Department of Health and Social Services is authorized to provide eligible persons with personal care services in the recipient's home.²¹ The Division provides compensation for personal care services in the form of physical assistance, based on an assessment of the recipient's ability to perform specified activities of daily living (ADL),²² instrumental activities of daily living (IADL),²³ and certain other functions.²⁴ The assessment is conducted using the Consumer Assessment Tool (CAT),²⁵ a form created by the Department of Health and Social Services to evaluate an individual's ability to care for himself.²⁶

The Division provides a specified amount of time for PCA assistance with each ADL, depending on the scores provided and the frequency with which the activity occurs, in accordance with the Personal Care Assistance Service Level Computation form (service level chart) devised for that purpose.²⁷ In addition, the Division provides a specified amount of time for other services provided by a PCA (not ADL or IADL), based on the scores provided for the ADL of personal hygiene, with or without variation for frequency depending on the service provided.²⁸

¹⁸ P. C Testimony.

¹⁹ P. C Testimony.

²⁰ See, e.g., Ex. E, pp. 3, 5 ("today she was confused & blood sugars over 400"; "PC was very confused today"); Ex. 1, p. 15 ("Gets confused with instructions, new prescriptions and complex instructions."; "With fluctuating metabolic state from her renal condition has intermittent confusion and needs assistance for following through with medication directions and medical visits.") (X. E, M.D.).

²¹ AS 40.07.030(b).

²² 7 AAC 125.030(b)(1)-(8).

²³ 7 AAC 125.030(c)(1)-(5).

²⁴ 7 AAC 125.030(d)(1)-(9), (e).

²⁵ 7 AAC 125.020(b); 7 AAC 160.900(d)(6).

²⁶ See generally, <http://dhss.alaska.gov/dsds/Documents/docs/cat-pcatOnlineFlyer.pdf> (accessed August 31, 2014).

²⁷ 7 AAC 125.024(a)(1); 7 AAC 160.900(d)(29). See Ex. B, pp. 34-36.

²⁸ 7 AAC 125.030(d)(1)-(9), (e). See Ex. B, pp. 35-36; Ex. D, p 8.

When the Division reduces a recipient's services, it has the burden of proof to establish the facts justifying the reduction.

A. Activities of Daily Living

1. *Body Mobility*

7 AAC 125.030(b)(1) states that personal care services for the activity of body mobility include "positioning or turning in a bed or chair, if the recipient is nonambulatory." 7 AAC 125.030(h)(1)(A)-(B) state that "body mobility" means moving a recipient to and from a lying position, turning a recipient from side to side, and positioning a recipient in a bed or chair.

Ms. C was scored as independent with this activity in 2011 and in 2014. The Division did not reduce the level or frequency of assistance for this activity, and Ms. C did not dispute the current scoring.

2. *Transfers*

7 AAC 125.030(b)(2) states that personal care services for transferring include physical assistance for "moving between one surface and another, including to and from a bed, chair, or wheelchair" and for "moving from a lying or sitting position to a standing position."²⁹

Ms. C was scored as requiring limited assistance with this activity in 2011, both before and after the amputation, and as independent in 2014. The parties agreed, in a private conference, to maintain the prior level and frequency of assistance for this activity: limited assistance 42 times per week.

3. *Locomotion*

7 AAC 125.030(b)(1)(A) states that personal care services for locomotion include physical assistance for "walking with support of a walker, cane, gait belt, braces, crutches or manual wheelchair (i) between locations in the recipient's home; or (ii) outside the home to keep a medical or dental appointment."

Ms. C was scored as requiring limited assistance in 2011 both before and after the amputation, and as independent in 2014. The score provided in 2014 was based on the assessor's observation of Ms. C successfully moving about her residence in her wheelchair on the date of the assessment.³⁰ Ms. C testified that the wheelchair is not the proper size for a person of her stature, and added that her foot sometimes gets stuck under it. She testified that she has fallen

²⁹ 7 AAC 125.030(b)(2)(A), (B).

³⁰ Ex. E, p. 7; M. Tanaka Testimony.

from the chair on multiple occasions. There is evidence that she tires and cannot operate the wheelchair all day long.

Given Ms. C's ability to propel the wheelchair by herself, although complicated by equipment issues and fatigue, it is more likely true than not true that she is independent with its operation. The wheelchair's malfunction, in itself, could possibly support a need for supervision, although this would be better addressed by obtaining properly functioning equipment. However, PCA support is not allowed for supervision. Accordingly, the Division's elimination of PCA services for locomotion is upheld.

4. *Dressing*

AAC 125.030(b)(4) states that the activity of dressing includes "donning, fastening, unfastening, and removal of the recipient's street clothing, support hose, or prosthesis."

Ms. C was scored as requiring limited assistance with this activity in 2011, both before and after the amputation, and in 2014. In 2011, however, she was provided assistance seven times a day, to account for occasions on which she was incontinent and a change of clothes was needed,³¹ while in 2014 she was provided assistance only twice daily, the standard amount (dressing in the morning, and preparing for sleep at night). The activity of toileting includes routine incontinence care,³² and the CAT describes toileting as including how a person cleanses and adjusts clothes.³³ Given this language, as established in a prior Commissioner's decision, the activity of toileting includes a partial change of clothing associated with incontinence.³⁴ Thus, Ms. C is entitled to no more than the standard frequency for this activity, which is twice daily.

5. *Eating*

Ms. C was scored as independent in this activity in both 2011 and 2014. The Division did not change its scores, and Ms. C did not assert she is entitled to a higher score than was given.

³¹ D. Chadwick Testimony.

³² 7 AAC 125.030(b)(6).

³³ Ex. E, p. 9.

³⁴ See, *In Re V.W.*, pp. 2-3, OAH No. 12-0957-MDS (Commissioner of Health and Social Services 2013); <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/PCA/MDS120957.pdf>.

6. *Toileting*

7 AAC 125.030(b)(6) states that personal care services for toileting include moving to and from the toilet or commode,³⁵ transfers on and off the toilet or commode,³⁶ and routine incontinence care.³⁷

In 2011, prior to the amputation, Ms. C was scored as independent in this activity.³⁸ Subsequently, she was found to require extensive assistance 35 times per week.³⁹ She was assessed as requiring only supervision in 2014.

The assessor's score in 2014 was based on Ms. C's report to her that she managed this task herself.⁴⁰ Ms. C testified, however, that she is independent only in emptying and changing her ileostomy bag. She added that she needs assistance to clean the bag a minimum of four times per day. Ms. C informed the assessor, during the assessment, that she urinated from one to three times daily.⁴¹ She also testified that she could hold on to bathroom fixtures to transfer on and off the toilet, but that she had fallen many times. As Ms. C notes, transfers on a wet bathroom floor are inherently more difficult than other transfers. In light of Ms. C's testimony, her established need for limited assistance with transfers and dressing, it is more likely true than not true that she requires limited assistance, rather than extensive assistance, with toileting. When the minimum of four daily ileostomy cleanings and the minimum of once daily urination are combined, these amount to a minimum of five times toileting assistance is required daily. It is therefore more likely true than not true that Ms. C requires toileting assistance 35 times per week.

7. *Personal Hygiene*

7 AAC 125.030(b)(7)(A)-(G) provide that the activity of personal hygiene includes washing and drying face and hands, nail care (if not diabetic), skin care, mouth and teeth care, brushing and combing hair, shaving (if separate from bathing), and shampooing (if separate from bathing).⁴² In 2011, prior to the amputation, Ms. C was scored independent in this activity.⁴³

³⁵ 7 AAC 125.030(b)(6)(A).

³⁶ 7 AAC 125.030(b)(6)(B).

³⁷ 7 AAC 125.030(b)(6)(D).

³⁸ Ex. F, p. 9.

³⁹ See Ex. D, p.10.

⁴⁰ See Ex. E, pp. 9, 12; M. Tanaka Testimony.

⁴¹ Ex. E, p. 9.

⁴² 7 AAC 125.030, *am.* 1/26/2012, Register 201.

⁴³ Ex. F, p. 10.

Later that year, after the amputation, her service level authorization was amended to provide limited assistance.⁴⁴ She was assessed as independent in 2014.

The assessor's score in 2014 was based on Ms. C's report to her that she can perform this activity, and her observation of Ms. C's range of motion and ability to use her hands and arms.⁴⁵ Ms. C testified that she cannot stand at the sink and she cannot reach the sink from her wheelchair. However, she developed coping mechanisms, including a gripper for turning on water, an accessible washcloth, and a long toothbrush, etc.⁴⁶ Given Ms. C's enhanced coping skills, and the assessor's observations of her independence, it is more likely true than not true that Ms. C is now independent with personal hygiene.

8. *Bathing*

7 AAC 125.030(b)(8) provides that bathing includes a full body bath and the required transfers in and out of the bathtub. In 2011, prior to the amputation, Ms. C was scored as requiring only supervision with this activity.⁴⁷ After the amputation, and again in 2014, Ms. C was scored as requiring extensive assistance. However, in 2011 Ms. C was provided assistance 35 times per week, as she was with dressing, in order to accommodate additional bathing necessitated by incontinence, while in 2014 the Division provided assistance only the standard amount of time, once daily or seven times a week.⁴⁸

As previously observed, the activity of toileting includes routine incontinence care,⁴⁹ and the CAT describes toileting as including how a person "cleanses" and adjusts clothes.⁵⁰ "Cleansing" is a general term that encompasses bathing, if necessary. As a prior Commissioner's decision makes clear, a person is not allowed extra time for bathing if it is to "cleanse" following toileting:

The ADL of bathing considers how a person takes a full bath/shower, sponge bath, and transfers in and out of the tub or shower. The testimony established that it is more likely than not that Ms. T requires assistance cleaning after an episode of bowel incontinence. This type of "bathing" falls under the ADL of toileting and is addressed there.⁵¹

⁴⁴ Ex. D, p. 3.

⁴⁵ See Ex. E, p. 10.

⁴⁶ Ms. C's testimony beginning at 59:53.

⁴⁷ Ex. F, p. 12.

⁴⁸ See Ex. D, pp. 4, 10; D. Chadwick Testimony.

⁴⁹ 7 AAC 125.030(b)(6).

⁵⁰ Ex. E, p. 9.

⁵¹ *In re J. T.*, p. 7, OAH No. 13-1482-MDS (Commissioner of Health & Soc. Serv. 2014); <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/PCA/MDS131482.pdf>

In addition, the regulations changed in 2012, to allow only a fixed amount of time, based upon the degree of assistance required, for bathing daily. For a person such as Ms. C, who requires extensive assistance with bathing, she is only authorized to receive 22.5 minutes per day for bathing.⁵² That is the maximum time available for a person with extensive assistance needs. As a purely legal matter, based upon the prior Commissioner's decision and the regulation change, the Division's action reducing Ms. C's PCA assistance for bathing to once daily, seven times per week, is upheld, even though the time awarded may not be adequate for the task in her individual case

B. Other Activities

1. *Prescribed Exercises*

7 AAC 125.030(e) states that "the department will pay for range-of-motion and stretching exercises only if those services are . . . (2) prescribed by a physician."

Dr. X E issued a prescription on August 25, 2014 for passive range of motion and physically assisted walking exercise.⁵³ However, Ms. C was not receiving this type of assistance at the time of the assessment and this **new** prescription was not submitted for the Division's review prior to this hearing being requested.⁵⁴ A hearing is available only to someone who has had a request for benefits denied, or an existing benefit suspended, terminated, or reduced.⁵⁵ Because this is a request for a new benefit, which has not reviewed or acted on by the Division, it is not a properly hearable issue. The Division is therefore directed to review the prescribed task form, on an expedited basis, and notify Ms. C of its decision allowing, modifying, or denying the prescribed range of motion exercises and walking exercise. If Ms. C disagrees with the Division's decision regarding range of motion exercises and walking exercises, she has the right to request a new hearing to contest that decision.

2. *Foot Care*

7 AAC 125.030(d)(5) provides that personal care services include "prescribed foot care." Prior to the 2014 assessment, the Division provided time for prescribed foot care. Mr. Chadwick testified it was "1 times 15 times 5," which appears to be once daily, 15 minutes each day, five days per week, for a total of 75 minutes per week. That prescription was written on September

⁵² Ex. B, p. 34.

⁵³ Ex. 1, p. 7.

⁵⁴ D. Chadwick's testimony.

⁵⁵ 7 AAC 49.020.

13, 2013, and expired a year later.⁵⁶ Dr. E issued a renewed prescription for foot care on August 25, 2014, which was for an hour once per week.⁵⁷ It was contained in the same prescription form as the range of motion and walking exercises prescription, and was not presented to the Division until this hearing was requested. Although the Division cannot be faulted for not reviewing the new foot care prescription, since it was not presented to them prior to its October 22, 2015 reduction letter, foot care is a proper subject for this hearing, because it is a preexisting service and not a new one.

Mr. Chadwick testified that the one hour per week of foot care is an increase in time from the 2013 prescription. However, no one submitted the 2013 prescription into evidence, and there is no evidence in the record of the actual time provided for foot care from the 2013 prescription, other than Mr. Chadwick's testimony of "1 times 15 times 5."⁵⁸ The current prescription is for a total of one hour per week, as contrasted to the earlier prescription of 75 minutes per week. Ms. C is therefore not requesting an increase in foot care. Consequently, the Division has the burden of proof. The Division did not present any medical evidence or opinion to controvert the need for foot care. It should be noted that Ms. C is diabetic and has already had one amputation. Accordingly, it is more likely true than not true that Ms. C should receive prescribed foot care of one hour per week.

3. Medication

7 AAC 125.030(d)(1) and (2) provide for assistance with the self-administration or administration of medication. The service level chart provides that a score of four on the medication section of the CAT may indicate a need for assistance.⁵⁹ However, medication assistance is linked to the personal hygiene score. A person can only receive PCA services for medication assistance if he or she has a personal hygiene score of limited assistance (self-performance code of 2) or higher **and** requires some degree of assistance (scores of 1, 2, 4, 5, 6) with medication.⁶⁰ As found above, Ms. C is independent with her personal hygiene. She is therefore not eligible for medication assistance.

⁵⁶ Ex. D, p. 5; D. Chadwick's testimony at 09:22.

⁵⁷ Ex. 1, p. 7.

⁵⁸ The Division's PCA reduction letter does not state the amount of time provided for foot care. Ex. D, pp. 5, 10.

⁵⁹ See Ex. B, p. 35; Ex. E, p. 20.

⁶⁰ Ex. B, pp. 34 - 35; Ex. E, p. 20.

4. *Escort*

Ms. C requires the presence and physical assistance of another person for her medical appointments. In 2011 the Division allowed 90 minutes per week for escort services. Ms. C testified that she has about four doctor visits per week and that it takes ten minutes to get there. Allowing 20 minutes round trip for travel, plus 15 minutes for consultation, for each visit would result in 140 minutes per week for escort services. The Division did not prove that Ms. C requires less time for medical appointments than it approved in 2011.

IV. Conclusion

The Division conceded that Ms. C needs the same assistance with transfers as previously. As discussed above, the Division's reduction in Ms. C's assistance in other areas is upheld in part and reversed in part, as follows:

- A. Locomotion: the Division's elimination of assistance with locomotion is upheld.
- B. Dressing: the Division's reduction of dressing assistance (limited assistance) to 14 times weekly is upheld.
- C. Toileting: toileting assistance is reduced to limited assistance, 35 times per week.
- D. Personal Hygiene: the Division's elimination of personal hygiene assistance is upheld.
- E. Bathing: the Division's reduction of bathing assistance (extensive assistance) to 7 times per week is upheld.
- F. Medication Assistance: the Division's elimination of medication assistance is upheld.
- G. Medical Escort: 140 minutes of medical escort times is to be provided weekly.
- H. Prescribed Tasks – Range of Motion and Simple Exercises: this question is remanded to the Division to evaluate Ms. C's September 25, 2014 prescribed task form and issue its determination.
- I. Prescribed Tasks – Foot Care: Ms. C is to receive one hour per week of prescribed foot care.

DATED: August 31, 2015.

Signed

Lawrence A. Pederson
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 3rd day of September, 2015.

By: Signed
Jared C. Kosin
Executive Director, Office of Rate Review
Department of Health and Social Services

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