

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

In the Matter of	)	
	)	
B D	)	OAH No. 14-2043-MDS
<hr style="width:40%; margin-left:0"/>	)	Agency No.

**DECISION**

**I. Introduction**

B D has been receiving personal care assistant (PCA) services since 2008. The Division of Senior and Disabilities Services (Division) notified him on October 23, 2014 that his PCA services would be terminated, based primarily on information gathered in an assessment visit conducted five months earlier. Mr. D requested a hearing.

The hearing took place in three sessions, consisting of an initial hearing on January 5 and two testimonial sessions on January 14 and 21, 2015. For Mr. D’s benefit, the record was held open to February 2 for submission of records from Mr. D’s primary care physician. For the potential benefit of both parties, it was reopened on February 5 for submission of additional material relating to the same physician; the Division supplied that material on February 9, 2015.

In this case, the Division had the burden of proving that termination was appropriate. After weighing the evidence, the administrative law judge concludes that the Division’s showing was not quite sufficient to carry this burden. Accordingly, it is reversed. The Division did show that, as of the date of its decision, no PCA time is required for some of the activities at issue, and thus PCA time will be reduced.

There is a new diagnosis involving severe shoulder problems that falls outside the period considered for this case. Any new assessment of Mr. D will need to take that condition into account. Mr. D may submit a Change of Information to have that condition evaluated.

**II. The PCA Service Determination Process**

The Medicaid program authorizes PCA services for the purpose of providing “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>1</sup>

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

Accordingly, “[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.”<sup>2</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>3</sup> In general, if certain levels of assistance are required, 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, setup) with all of these specific ADLs and IADLs, the person is not eligible for PCA services.<sup>4</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>5</sup>

### **III. Background Facts**

B D began receiving PCA services in 2008, when he was 48 years old.<sup>6</sup> At that time, he suffered from spine degeneration and widespread joint pain. He was living alone but receiving some care from T F and other good Samaritans. He was given 20 hours of PCA services per week.<sup>7</sup>

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<sup>2</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;” “setup” 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>3</sup> *See* 7 AAC 125.024(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900.

<sup>4</sup> Ex. E, p. 31.

<sup>5</sup> *See id.*

<sup>6</sup> *See* Ex. F.

<sup>7</sup> *Id.*; Ex. D, p. 2.

This level of services remained constant for the next six years, during which the Division had suspended all PCA hours reductions while it worked on new regulations,<sup>8</sup> then worked through a backlog of deferred reassessments. On May 19, 2014, a Division nurse conducted an assessment visit with Mr. D under the new regulations.<sup>9</sup> Although the applicable regulatory text did not shift much in the regulations revision, and although there is no evidence or contention that Mr. D’s condition had improved in many respects, the 2014 assessor reached a different result from the 2008 assessor, finding that Mr. D qualified for no PCA services.<sup>10</sup> The decision was conveyed in a letter dated October 23, 2015.

After the decision letter was written, Mr. D appears to have had a new diagnosis or diagnoses relating to shoulder pain and/or shoulder stability. The details are uncertain as the documentation submitted is largely illegible.<sup>11</sup>

Mr. D is a chronic pain patient whose case is difficult to evaluate. There are some things that he can do, but only with considerable pain; the question then becomes whether he can “reasonably”<sup>12</sup> do them, with the Division needing to show that expecting him to do them without assistance is reasonable.

The quality of the evidence in this case is poor. The most recent assessment visit was done nine months ago, and the assessor did not testify. With no assessor to explain it, and with the assessment separated from the termination decision by many months, the value of the assessment observations as support for that decision is curtailed. As for other evidence, Mr. D’s physician feels Mr. D is “right on the edge” for needing or not needing PCA services, and felt he should be evaluated.<sup>13</sup> Mr. D’s own testimony was impressionistic and difficult to connect to specific activities. T F, a former PCA who is now one of his volunteer caregivers, gave clear testimony, but it was hard to separate the degree to which Mr. D’s limitations stem from his recent shoulder diagnoses as opposed to his problems that pre-dated the termination decision.

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<sup>8</sup> Ex. D, p. 2.

<sup>9</sup> Ex. E, p. 1.

<sup>10</sup> Ex. D.

<sup>11</sup> N’s Jan. 27, 2015 submission.

<sup>12</sup> See 7 AAC 125.040(a)(4).

<sup>13</sup> Division’s Feb. 9, 2015 submission. The physician indicated he would be inclined to defer to whatever the assessment showed.

#### IV. Discussion

In this case, in which the Division is seeking to terminate or reduce a benefit a citizen is already receiving, the Division has the burden to prove, by a preponderance of the evidence,<sup>14</sup> facts that show the citizen's level of eligibility has changed.<sup>15</sup> The Division can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs,<sup>16</sup> including such sources as written reports of firsthand evaluations of the patient. The relevant date for purposes of assessing the state of the facts is, in general, the date of the agency's decision under review.<sup>17</sup>

##### A. ADLs

###### 1. Body Mobility

The ADL of body mobility involves such operations as turning the client in bed.<sup>18</sup> Mr. D received a small amount of PCA time for body mobility in 2008.

The Division contends that this item was eliminated "due to new PCA regulations" under which "only nonambulatory recipients are allowed to receive time for this activity."<sup>19</sup> However, the regulation in effect in 2008 had the same limitation, allowing time only for "positioning or turning a nonambulatory recipient."<sup>20</sup> Thus, the Division's attribution of this exclusion to a regulations change is an incorrect explanation.

That said, current regulations continue to allow time for this activity only "if the recipient is nonambulatory." Since it is undisputed that Mr. D is ambulatory, he is not eligible for PCA assistance in this area. The award of time for this item in 2008 was an error that need not be perpetuated.

###### 2. Transfers, Locomotion, Dressing, Toilet Use

The best evidence is that Mr. D does manage to get himself to and from the bathroom, dress himself, and get himself from place to place in his house.<sup>21</sup> Although painful, these

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<sup>14</sup> Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

<sup>15</sup> 7 AAC 49.135.

<sup>16</sup> 2 AAC 64.290(a)(1).

<sup>17</sup> See 7 AAC 49.170; *In re T.C.*, OAH No. 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013) (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf>). The Division's argument in this case that the relevant date is the date of the assessment visit is rejected.

<sup>18</sup> See 7 AAC 125.030(h)(1).

<sup>19</sup> Ex. D, p. 2.

<sup>20</sup> Former 7 AAC 43.752(a)(1)(E) (Reg. 184).

<sup>21</sup> Testimony of F, D; Ex. E.

relatively brief efforts seem to be reasonable for him, and it is slightly more likely than not that he does not need PCA assistance to accomplish them within acceptable pain limits.

### 3. *Other ADLs*

Mr. D received no time for any of the other ADLs in 2008, and no case was made that he needs help with them now.

#### **B. *IADLs***

In 2008, Mr. D was assessed as needing assistance with light and main meal preparation, shopping, housework, and in-home laundry. Non-qualifying scores were given on all of these items in 2014.

Division witness David Chadwick explained the elimination of these items as being due to the 2012 regulations change, which he believed had introduced the concept of awarding time only for tasks the recipient *could not* do, rather than what he or she merely *did not* do.<sup>22</sup> This is not a persuasive explanation, because the applicable regulation is unchanged. In 2008, the regulation said that PCA services would not be provided for “a task that the department determines could reasonably be performed by the recipient.”<sup>23</sup> Today the regulation has a different number but it reads, word for word, identically to the earlier version.<sup>24</sup>

Factually, the Division’s contention on the IADLs was essentially that Mr. D can walk, and therefore can take care of his household duties.<sup>25</sup> In this area, however, Ms. F’s testimony and explanation was more specific and convincing, and the Division’s second-hand, broad-brush explanation based on an assessment many months old fell slightly short of proving by a preponderance of the evidence that Mr. D can “reasonably” perform these more extended ambulatory tasks, in light of his pain issues.

#### **C. *Other Activities***

Mr. D received a little time in 2008 for documentation of vital signs<sup>26</sup> by the PCA. The regulation for this item has changed in at least one significant respect: in 2008, documenting

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<sup>22</sup> Chadwick testimony.

<sup>23</sup> Former 7 AAC 43.755(a)(4) (Reg. 184).

<sup>24</sup> 7 AAC 125.040(a)(4) (Reg. 204).

<sup>25</sup> Kichura testimony (surmising the explanation for entries on CAT prepared by another nurse).

<sup>26</sup> The regulations since 2007 have never authorized time for documentation of routine, non-medical information, and thus this decision infers that the “documentation” time given in 2008 was for documenting items for which documentation was authorized for a time award under the regulations. However, it is possible that Mr. D was erroneously given “documentation” time for routine paperwork in 2008. If this occurred, it was an error, and it need not be perpetuated at this time.

vital signs could be included in PCA time if the documentation was “medically necessary,”<sup>27</sup> whereas the regulation now allows time for this item only “if ordered by the recipient’s physician.”<sup>28</sup> Mr. D does not have a physician’s order for this activity. Moreover, the current regulations tie eligibility to the personal hygiene score,<sup>29</sup> and Mr. D’s score on that axis—in both 2008 and 2014—fell far short of the level needed to support an award of time under current law.

Mr. D received 30 minutes a week for escort services in 2008, based on weekly visits to his primary care physician.<sup>30</sup> The hearing testimony in this case made it clear Mr. D does not make weekly visits (or frequent visits on any schedule) to Dr. U, so this item will be deleted.

## V. Conclusion

The Division did not prove that Mr. D no longer qualified, as of the date of its decision, for PCA services for the gateway IADLs of light and main meal preparation, light housework, grocery shopping, and in-home laundry. Because he apparently has needs relating to five gateway IADLs, Mr. D qualifies for PCA services and his PCA services may not be terminated. The decision to terminate his services is reversed.

The Division did demonstrate that Mr. D no longer qualifies for PCA services for any of the ADLs or other activities.

Since it has not disproved their validity, the Division must recalculate Mr. D’s PCA time for IADLs using the scores and frequencies entered on the 2008 assessment (Ex. F, p. 14, blocks 1 and 2). There are five of these IADLs.<sup>31</sup> Beyond these five IADLs, no additional PCA time should be awarded. The total awardable time appears to be 460 minutes per week, but the Division is authorized to make this calculation on its own and is not bound by the ALJ’s estimate.

This decision does not preclude the Division from reassessing Mr. D.

DATED this 12<sup>th</sup> day of February, 2015.

*Signed*

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Christopher Kennedy  
Administrative Law Judge

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<sup>27</sup> Former 7 AAC 43.752(a)(3)(A) (Reg. 184).

<sup>28</sup> 7 AAC 125.030(d)(3) (Reg. 204).

<sup>29</sup> The current regulation adopts the March 20, 2012 *Personal Care Assistance Service Level Computation* (7 AAC 160.900(d)(29) and 7 AAC 125.024(a)(1)), which in turn makes the tie to the personal hygiene score. The ALJ believes (but has not been able to verify) that the pre-2012 version of this adopted computation did not have that tie-in.

<sup>30</sup> Ex. F, p. 2.

<sup>31</sup> See Ex. B, p. 34.

## 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 23<sup>rd</sup> day of February, 2015.

By: Signed \_\_\_\_\_  
Name: Christopher M. Kennedy  
Title: Administrative Law Judge

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