

I find that the Division met its burden of proving that Mr. Q is functionally able to perform walking exercises and range of motion exercises without physical assistance. Therefore the Division may not authorize PCA services to assist him with the prescribed exercises.

All factual findings and legal conclusions contained in the ALJ's proposed decision that are not inconsistent with the above discussion are hereby adopted. This modified factual finding together with the ALJ's proposed decision constitutes the final decision of the Commissioner in this case.

DATED this 26th day of August, 2015.

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

APPEAL RIGHTS

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.

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

Mr. Q had been receiving PCA services to assist him with dressing, toileting, bathing, shopping, housework, and laundry.¹¹ He was also authorized to receive PCA time for assistance with range of motion and walking exercises.¹²

He was re-evaluated for services by SDS's nurse assessor Sheila Griffin on August 21, 2014.¹³ On that date, Mr. Q was 65 years old.¹⁴

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[.]¹⁵

SDS uses the Consumer Assessment Tool (CAT) to help assess the level of assistance needed.¹⁶ The amount of time allotted for needed assistance is determined by the Personal Care Assistance Service Level Computation chart.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰ 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

¹¹ Exhibit D8.

¹² *Id.*

¹³ Exhibit E1.

¹⁴ *Id.*

¹⁵ 7 AAC 125.010(a).

¹⁶ 7 AAC 125.020(b).

¹⁷ 7 AAC 125.024(1).

¹⁸ 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.

¹⁹ Exhibit E6.

²⁰ 7 AAC 125.020(a)(1); Exhibit E6.

week, but not all of the time.²¹ Full Assistance means the recipient has to rely entirely on the caretaker to perform the activity.²² To receive PCA time for ADLs, the applicant must have a performance code of at least 2 (limited assistance).²³

For IADLs, the self-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.²⁴ 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.²⁵ To receive PCA time for IADLs, the applicant must have a self-performance code of at least 2 (independent with difficulty), and a support code of at least 3 (physical assistance).²⁶

This case involves a reduction in benefits. Accordingly, the division has the burden of proving a material change in condition that justifies the reduction.²⁷ Because SDS notified Mr. Q of its decision on October 24, 2014, his condition on that date is used when determining the amount of services he is eligible to receive.²⁸

B. Admissibility of Evidence

Evidence is admissible in an administrative hearing such as this one if it is the type of evidence a reasonable person might rely on in the conduct of serious affairs.²⁹ Mr. Q's factual assertions in Exhibit 1 are based on his own personal knowledge, and he was available for cross examination by SDS if it had questions about the accuracy of those statements. Accordingly, a reasonable person would rely on them, although they are given less weight than his hearing testimony which was under oath and subject to the penalty of perjury.

Exhibit 2 contains two unsworn statements, but they are from medical providers, and are the type of information that people would commonly use to make decisions. In addition, the document from Mr. Q's physician is signed below an acknowledgment that any misrepresentation, omission, or concealment of a material fact could subject the doctor to civil

²¹ 7 AAC 125.020(a)(2); Exhibit E6

²² 7 AAC 125.020(a)(3); Exhibit E6.

²³ Exhibit B34 (Service Level Computation chart).

²⁴ Exhibit E26.

²⁵ *Id.*

²⁶ Exhibit B34.

²⁷ 7 AAC 49.135.

²⁸ *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. Q's condition as of the date of SDS's denial.

²⁹ 2 AAC 64.280(a)(1).

and criminal penalties. Page 1 of Exhibit 2 is given more weight because of this warning, which would normally encourage someone to be more careful when completing the form.

SDS's Exhibit E is the Consumer Assessment Tool completed by Sheila Griffin. The statements she makes in this exhibit are hearsay, but her job as a state employee is to complete forms such as this accurately. Her statements are also based on her personal observations of what she recorded. The document is admissible because reasonable people would rely on it. However, Ms. Griffin was not available at the hearing to be cross-examined. Accordingly, the statements in this form are given less weight than if she had testified at the hearing.

Mr. Cornell's testimony is admissible because it was sworn testimony. His testimony about how SDS normally conducts assessments, and what evidence it considers, provides useful context for understanding the statements in the CAT. On the other hand, his testimony is not accorded significant weight in evaluating Mr. Q's physical condition at the time of SDS's decision because the testimony is not based on personal knowledge. Mr. Cornell did not conduct the assessment or observe Mr. Q in his home.³⁰ His knowledge of Mr. Q's condition is based entirely on the documents in the record. The Administrative Law Judge can also read the CAT, and Mr. Cornell's testimony as to what the CAT says does not assist the ALJ in making factual findings as to Mr. Q's need for PCA services.

C. Issues in Dispute

SDS's decision terminated all PCA services for Mr. Q. In his appeal, Mr. Q only contested the denial of services for light housekeeping, laundry, and prescribed exercises.³¹

1. Light Housekeeping

The IADL of light housekeeping consists of picking up, dusting, vacuuming, floor cleaning, cleaning the kitchen, washing dishes, cleaning the bathroom, making the recipient's bed, trash removal, and service animal care.³² In his unsworn statement, Mr. Q stated:

I have constant back pain, lower and upper, and pain in my joints, like my shoulder region. That's why all of my housework is completed by my PCA. I suffer everyday with lower back pain that shoots down both of my legs and I

³⁰ Cornell testimony.

³¹ Exhibit 1.

³² 7 AAC 125.030(c)(3). The CAT divides these housekeeping tasks into routine housework and light housework. Exhibit E26.

cannot stand or bend over for any length of time, plus my balance isn't the greatest.^[33]

He was less specific at the hearing, stating that doing housework “just kills me, kills my back.”³⁴ He also stated that the angle is wrong for him to stand at the sink and wash dishes, and while he probably could wipe a countertop, he could not clean it. Finally, he stated several times that he cannot bend down.³⁵

Ms. Griffin noted in the CAT that Mr. Q had a strong grip in both hands, and no limitation to range of motion with his arms or legs.³⁶ He was also able to stand up on his own, walk, use the toilet, shower, and eat without assistance.³⁷ There is no indication in the CAT that Ms. Griffin observed Mr. Q performing any housekeeping tasks. Mr. Q's assertion that he cannot do any housekeeping is consistent with his medical condition and his statements about his back and shoulder pain. While he might have the range of motion to perform housekeeping, it does not appear that SDS adequately considered Mr. Q's pain and difficulty with bending, and how that might impair the ability to perform a task that took longer to perform than the quick tests given during the CAT. Mr. Q's level of pain and impaired bending ability would likely preclude him from actually performing tasks such as floor cleaning and bathroom cleaning, and might preclude him from performing any housekeeping tasks.

Mr. Q had previously been scored as needing physical assistance to perform light housekeeping.³⁸ It was SDS's burden to prove that Mr. Q was able, on the date of its decision, to do housekeeping without assistance. The evidence presented by SDS was insufficient to meet its burden of proof, and Mr. Q's score for light housekeeping should remain at 3/3 with a frequency of once per week.

2. *Laundry*

The IADL of laundering consists of changing a recipient's bed linens and laundering bed linens and clothing.³⁹ Mr. Q stated that he can't carry the laundry basket because of his neck and back pain, and he can't fold or hang up clothing because his neck and shoulders

³³ Exhibit 1, page 1.

³⁴ Q testimony.

³⁵ *Id.*

³⁶ Exhibit E4.

³⁷ Exhibit E. Mr. Q did not claim a need for physical assistance with any of the ADLs.

³⁸ Exhibit F27.

³⁹ 7 AAC 125.030(c)(4).

get stiff from the constant movement.⁴⁰ At the hearing, Mr. Q testified that doing laundry “kills me.”

As with the housekeeping tasks, there is no evidence that Ms. Griffin observed Mr. Q attempting to lift a laundry basket, fold clothes, or hang clothes. Mr. Q had previously been scored as being able to do his own laundry with physical assistance from another.⁴¹ While Mr. Q might be able to fold one shirt, or hang one pair of pants, his pain may very well prevent him from changing bed linens or washing, drying, and folding a week’s worth of laundry without help. SDS has not met its burden of showing that he was, on the date of its decision, able to do laundry without physical assistance from another. His score should remain at 2/3 with a frequency of once per week.

3. *Prescribed Exercises*

Exhibit 2, page 1 is a Request for Prescribed Personal Care Activities dated November 19, 2014. This form is signed by a doctor, and prescribes 60 minutes a week of passive range of motion exercise and 60 minutes a week of walking exercise. However, this is not the Prescribed Task form that was considered by SDS. Instead, SDS apparently received a form dated May 27, 2014, that prescribed 60 minutes of range of motion and 60 minutes of walking exercises.⁴² That form is not in the record. The reason for denying both the range of motion and the walking exercises was that Mr. Q is “functionally able” to complete them without physical assistance.⁴³

Mr. Q had previously been approved for 150 minutes per week of range of motion exercise and 150 minutes per week of walking exercise.⁴⁴ The record does not disclose what those exercises were, or whether they are the same exercises that were prescribed on either May 27, 2014, or November 19, 2014. Without knowing what the exercises are, it is not possible to evaluate Mr. Q’s ability to complete them. SDS has not met its burden of proof on this issue. However, because the new prescription is for less time, SDS is not required to authorize the prior 150 minutes of time. Instead, it should authorize 60 minutes per week of range of motion exercise and 60 minutes each week of walking exercise.

⁴⁰ Exhibit 1, page 1.

⁴¹ Exhibit E26.

⁴² Exhibit D3.

⁴³ *Id.*

⁴⁴ Exhibit D8.

IV. Conclusion

SDS terminated all of Mr. Q's PCA services. Mr. Q did not claim to need all the services he had been receiving, but did claim a continued need for some services. SDS had the burden to prove that Mr. Q no longer needed those services. Based on the evidence presented, SDS's decision to terminate PCA services for light housekeeping, laundry out-of-home, and prescribed range of motion and walking exercises is REVERSED.

Dated this 21st day of July, 2015.

Signed _____
Jeffrey A. Friedman
Administrative Law Judge

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