

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

In the Matter of:)	
)	OAH No. 14-2191-MDS
N O)	Agency No.
_____)	

DECISION

I. Introduction

N O receives personal care assistant (PCA) services through the Division of Senior and Disabilities Services under 7 AAC 125.010-199.¹ The division reassessed Mr. O's functional abilities and determined that he was eligible for 26.25 hours of assistant services weekly rather than the 40.5 hours he had previously received. Mr. O filed an appeal.

Administrative law judge Andrew Hemenway conducted a telephonic hearing on February 12, 2015. Mr. O participated, as did his care coordinator (B C) and his personal care assistant (Q L). Terri Gagne represented the division. Administrative Law Judge Hemenway drafted a decision, but did not issue the decision before his resignation. Following Administrative Law Judge Hemenway's resignation, the case was reassigned to Administrative Law Judge Kurtz. Administrative Law Judge Kurtz has listened to the hearing, verified Administrative Law Judge Hemenway's factual findings, and edited the draft decision.

The division established grounds for reducing Mr. O's service level authorization to approximately 31 hours per week.

II. Facts

N O is 83 years old.² He is 5'10" and weighs 220 pounds.³ He lives by himself in an older mobile home in No Name.⁴ Mr. O's primary diagnosis is diabetes, and he has secondary diagnoses of congestive heart failure, coronary atherosclerosis, monoeuritis, monoclonal paraproteinemia, and hypertension.⁵ He has an unsteady gait, balance problems, and is prone to frequent falls.⁶

Based on an assessment in 2011, Mr. O was authorized to receive Choice Waiver services and 40.5 hours per week of personal care assistance.⁷ Mr. O was reassessed by R.N. Sherry Bartlett on June 3, 2014. Based on the results of that assessment and other information reviewed

¹ See AS 47.07.045.
² Ex. E, p. 1.
³ Ex. E, p. 9.
⁴ Ex. E, p. 1.
⁵ Ex E, pp. 3, 21.
⁶ See Ex. E, p. 23; Ex. F, p. 23.
⁷ See Ex. D, Ex. F.

by the division, on November 6, 2014 Mr. O was notified that his service level authorization would be reduced to 26.25 hours per week.⁸

A. Activities of Daily Living

In 2014 Mr. O was scored as requiring extensive assistance for all of his activities of daily living except for body mobility (scored as independent), with a two person assist for transfers and locomotion (increased from a one person assist in 2011).⁹ In 2011, Mr. O had been scored as requiring extensive assistance for all of the activities of daily living.¹⁰ The frequency of assistance was reduced from 56 to 42 times per week for transfers and locomotion, and increased from 49 to 56 times per week for toilet use, and was otherwise unchanged.¹¹

B. Instrumental Activities of Daily Living

Mr. O was scored as totally dependent for all of the instrumental activities of daily living in both 2011 and 2014.

C. Other Activities

Mr. O was scored as requiring assistance with medication, recording vital signs, and oxygen use in 2014. In 2011 he was scored as requiring assistance with medication, non-sterile bandages, and documentation.

Mr. O was scored as requiring an average of 46.73 minutes per week of escort services for medical appointments in 2014, as compared with 65 minutes in 2011.

Time provided for range of motion and other exercises in 2011 was removed following the 2014 assessment.

III. Discussion

The Department of Health and Social Services is authorized to provide eligible persons with personal care services in the recipient's home.¹² It 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),¹³ instrumental activities of daily living (IADL),¹⁴ and certain other functions.¹⁵ The assessment is conducted using the Consumer

⁸ See Ex. D.
⁹ See Ex. D, p. 9; Ex. E, p. 6.
¹⁰ See Ex. D, Ex. F.
¹¹ See Ex. D, p. 9.
¹² AS 40.07.030(b).
¹³ 7 AAC 125.030(b)(1)-(8).
¹⁴ 7 AAC 125.030(c)(1)-(5).
¹⁵ 7 AAC 125.030(d)(1)-(9), (e).

Assessment Tool (CAT),¹⁶ a form created by the Department of Health and Social Services to evaluate an individual's ability to care for himself.¹⁷

Department regulations provide 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.¹⁸ In addition, the regulations authorize 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.¹⁹ For escort services, the amount of time is determined by the individual's particular needs, consistent with the assessment.²⁰

The division bears the burden of proof with respect to a reduction in the amount of time provided for PCA assistance. To support its decision in this case, the division relied on the written record.

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.

Mr. O was scored as requiring extensive assistance with this activity in 2011, because although he reported that he could turn from side to side in bed without assistance, he also reported that he could not get from a lying to a sitting position without assistance.²¹ The 2014 assessment notes that Mr. O reported he could turn from side to side and makes no reference to whether he could sit up unassisted.²² Thus, the division did not prove that Mr. O requires any less assistance with this activity than he did in 2011.

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

¹⁷ *See generally*, <http://dhss.alaska.gov/dsds/Documents/docs/cat-pcatOnlineFlyer.pdf> (accessed June 19, 2013).

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

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

²⁰ Ex. B, p. 36.

²¹ Ex. F, p. 6.

²² Ex. E, p. 6.

In 2011 Mr. O was provided 56 minutes per week for this activity.²³ Following the 2014 assessment, the division removed time for this activity, on the ground that there had been a change in the applicable regulation.²⁴ In fact, there has been no change in the relevant regulation since the 2011 assessment. A prior regulation, repealed in 2010, had provided compensation for “physical assistance with positioning or turning a nonambulatory patient in a bed or chair.”²⁵ This is in substance the same as the current regulation.²⁶ Nonetheless, under the current regulation Mr. O is eligible for assistance with this activity only if he is “nonambulatory” within the meaning of 7 AAC 125.030(b)(1).

The term “nonambulatory” has not been defined for purposes of the PCA program. A person who is capable of moving about while erect, even if with the aid of an assistive device such as crutches, braces, or a walker, would be considered ambulatory under a common understanding of the term.²⁷ This is so even if such a person cannot ambulate effectively, that is, walk a significant distance or over rough ground.²⁸ Applying that definition Mr. O is ambulatory, and accordingly ineligible for assistance with body mobility under 7 AAC 125.030(b)(1).

2. *Transfers*

Following the 2014 assessment, the division increased the amount of service for transfers from a one person to a two person assist.²⁹ However, the adverse action letter notified Mr. O that the weekly frequency would be reduced from 56 to 42. Prior to the hearing, the division agreed to provide assistance at the same frequency as previously, 56 times per week, and that agreement was placed on the record at the hearing.

3. *Locomotion*

Following the 2014 assessment, the division increased the amount of service for locomotion from a one person to a two person assist.³⁰ However, the adverse action letter notified Mr. O that the weekly frequency would be reduced from 56 to 42. Prior to the hearing, the division agreed to provide assistance at the same frequency as previously, 56 times per week, and that agreement was placed on the record at the hearing.

²³ Ex. D, p 2.

²⁴ *Id.*

²⁵ 7 AAC 43.752(a)1)(E) (repealed 2/1/2010).

²⁶ See, e.g., *In Re W. X.*, at 5, OAH No. 13-1094-MDS (Commissioner of Health and Social Services 2014).

²⁷ See *In Re W. X.* at 5-6.

²⁸ See *In Re E.C.*, at 8-9, OAH No. 13-0438-MDS (Commissioner of Health and Social Services 2014).

²⁹ Ex. D, p. 9.

³⁰ Ex. D, p. 9.

4. *Toileting*

The division did not reduce the level of assistance for this activity. It increased the frequency of assistance from 49 to 56 times per week.

5. *Dressing*

The level, frequency, and amount of assistance provided for this activity in 2014 was unchanged from 2011.

6. *Bathing*

The level, frequency, and amount of assistance provided for this activity in 2014 was unchanged from 2011.

7. *Personal Hygiene*

The level, frequency, and amount of assistance provided for this activity in 2014 was unchanged from 2011.

B. Instrumental Activities of Daily Living

The scores provided to Mr. O for the instrumental activities of daily living in 2014 were unchanged from 2011. However, due to a regulation change, assistance with light meals, which was previously provided by a personal care assistant as an activity of daily living, is now provided under the Choice Waiver program.³¹

C. Other Activities

In 2014, the division removed time for activities it had provided time for in 2011: non-sterile bandages, documentation, prescribed exercises, and foot care. It reduced the frequency for escort services.

As to non-sterile bandages, the 2011 assessment states that Mr. O had a skin breakdown, which may have required changing a bandage.³² At the time of the 2014 assessment, he had no such condition,³³ and there is no other evidence of a need for assistance with a bandage. Based on that evidence the division could remove time for assistance with a non-sterile bandage. Similarly, with respect to documentation, the 2011 assessment notes a need for Coumadin checks,³⁴ while no such need is noted on the 2014 assessment. Based on that evidence the division could remove time for documentation.

³¹ 7 AAC 125.030(f)(1); 7 AAC 130.245(b)(3). *See* Ex. D, p. 3.

³² *See* Ex. F, p. 24.

³³ *See* Ex. E, pp. 6, 24.

³⁴ Ex. F, p. 15.

As for prescribed activities, following the 2011 assessment Mr. O was provided 350 minutes per week of personal care assistance with prescribed range of motion and walking exercises. At the time of the 2014 assessment Mr. O had active prescriptions for walking exercise (210 minutes per week) and foot care (105 minutes per week).³⁵ On November 6, 2014, the date of the reduction in service level notification, Mr. O had an active prescription for foot care (105 minutes per week).³⁶ Because Mr. O had an active prescription for foot care on the date of the reduction in service letter, time for this prescribed activity should be restored.

Lastly, for escort services, in both 2011 and 2014 the division provided 90 minutes for each medical appointment listed by Mr. O.³⁷ The reduction in the time allowed reflects a reduction in the number of his medical appointments as reported on the CAT in 2014, as compared with 2011.

IV. Conclusion

As set forth in the foregoing discussion, the division established that Mr. O is ineligible for assistance with body mobility, and it did not err in removing time for light meal preparation, non-sterile bandages, and documentation and in reducing time authorized for escort services. The division shall revise the service level authorization in accordance with this decision, including time agreed to at the time of the hearing for transfers and locomotion.

DATED: August 4, 2015.

Signed

Kathryn L. Kurtz
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 27th day of August, 2015.

By: *Signed*

Name: Bride Seifert
Title/Division: ALJ/OAH

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

³⁵ See Ex. E, p.5.

³⁶ Prescribed task form dated 8/07/2015 signed by Dr. K L, submitted the day of the hearing.

³⁷ See Ex. E, p. 5; Ex. F, p. 5.