

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 recipient⁷

SDS uses the Consumer Assessment Tool (CAT) to help assess the level of assistance needed.⁸

The amount of time allotted for needed assistance is determined by the Personal Care Assistance Service Level Computation chart.⁹ 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. These times are then combined into a weekly total of authorized PCA hours.

The different levels of required assistance are defined by regulation and in the CAT.¹⁰ For each ADL or IADL, there is a self-performance code and a support code. For ADLs, the self-performance code describes the type of assistance needed, and the support 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.¹¹ 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.¹² 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.¹³ Total dependence means the recipient has to rely entirely on the caretaker to perform the activity.¹⁴ To receive PCA time for ADLs, the applicant must have a performance code of at least 2 (limited assistance).¹⁵

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.¹⁶ The support code describes whether the support is in the form of

⁷ 7 AAC 125.010(a).

⁸ 7 AAC 125.020(b).

⁹ 7 AAC 125.024(1).

¹⁰ 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.

¹¹ Exhibit E6.

¹² 7 AAC 125.020(a)(1); Exhibit E6.

¹³ 7 AAC 125.020(a)(2); Exhibit E6.

¹⁴ 7 AAC 125.020(a)(3); Exhibit E6.

¹⁵ Exhibit B34 (Service Level Computation chart).

¹⁶ Exhibit E26.

supervision or cueing, set up help, physical assistance, or total performance by others.¹⁷ To receive PCA time for IADLs, the applicant must have a self-performance code of at least 1 (independent with difficulty), and a support code of at least 3 (physical assistance).¹⁸

This case involves a reduction in benefits. Accordingly, the division has the burden of proving a material change in condition that justifies the reduction.¹⁹ Because SDS notified Mr. C of its decision on November 19, 2014, his condition on that date is used when determining the amount of services he is eligible to receive.²⁰

B. Mr. C's PCA Services

Prior to the hearing, Mr. C submitted a spreadsheet showing his CAT scores from 2012 and 2014, and indicating which reductions he disagreed with.²¹ As noted on the record during the hearing, Mr. C was not bound by this submission. He was free to add additional disputed items – or to concede disputed items – during the hearing. Mr. C did not ask to modify his list, but his testimony did address other areas, and those are also addressed below.²²

1. Transfers

In 2009, Mr. C had been scored as needing limited assistance with transfers.²³ In 2012, Mr. C was also scored as needing limited assistance, and the CAT noted that he could stand independently, but needed help a few times a day because of pain and weakness.²⁴ In 2014, SDS found that he did not need any assistance.²⁵ According to notes in the CAT, Mr. C said he was

¹⁷ *Id.*

¹⁸ Exhibit B34.

¹⁹ 7 AAC 49.135. For specific increases in services, Mr. C has the burden of proving facts to support the increase. *Id.*

²⁰ *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, Mr. C's condition after that date may be relevant to the extent it tends to show his condition as of the date of SDS's denial.

²¹ Exhibit J, page 2.

²² Mr. C was not represented by counsel. He may not have realized the need to specifically add additional items to the areas of dispute.

²³ Exhibit F6. This assessment notes that Mr. C needed weight-bearing assistance, which would have been scored as extensive assistance if he needed weight-bearing support three or more times a week.

²⁴ Exhibit H6. Although this CAT was not used to reduce services in 2012, the scoring used the same criteria as was used in 2014. Chadwick testimony. It is evidence of SDS's view concerning Mr. C's functional abilities in 2012.

²⁵ Exhibit E6.

able to stand on his own and that he could get in and out of a car on his own.²⁶ He was observed to stand without physical assistance.²⁷

Mr. C testified that his difficulties are primarily caused by his neck and shoulder pain, which makes it difficult for him to perform some activities, especially when the pain is worse. He takes medication for this pain, which helps him.²⁸ Mr. C testified that he sometimes needs help transferring out of bed and getting up from a chair. On the other hand, he testified that he could stand using a cane or other objects, rather than physical assistance from someone else. In addition, it was not always clear whether Mr. C was talking about the help he needed as of the date of the hearing, or what he needed in November of 2014, when SDS notified him of its decision. SDS is not required to prove facts to a certainty. It only has to show that something is more likely true than not true. Here, it is more likely true that in November of 2014, Mr. C could transfer independently by using his cane or other furniture to help him stand or sit down.

2. Toileting

SDS determined that Mr. C did not need assistance with toileting.²⁹ The notes in the CAT say he was observed to stand without assistance, and said that he could use the toilet by himself.³⁰ During the hearing, Mr. C testified that he sometimes needed help with transfers on and off the toilet. But, as with his other transfers, his testimony was inconsistent. It is more likely true than not true that in November of 2014, he could transfer to and from the toilet without assistance.

3. Dressing

Dressing was identified as one of the items in dispute.³¹ SDS found he was independent with this ADL.³² According to the notes in the CAT, Mr. C stated he could dress himself but had trouble getting his clothes on when his legs were swollen.³³ In 2009, Mr. C reported needing

²⁶ *Id.*

²⁷ *Id.* The assessor, Ms. Russell-Brown, did not testify at the hearing. Her notes are admissible evidence, but are given less weight because she was not available for cross-examination.

²⁸ C testimony.

²⁹ Exhibit E9.

³⁰ *Id.*

³¹ Exhibit J, page 2.

³² Exhibit E8.

³³ *Id.*

assistance with a neck brace he was wearing at the time, and also changing his outer clothing.³⁴ He was also scored as needing limited assistance with dressing in 2012.³⁵

During the hearing, Mr. C testified that he needed assistance dressing and undressing because of his neck pain, which also caused numbness in his hands and feet. He stated that he cannot raise his arm to put it through a sleeve. He did acknowledge that if he absolutely had to, he could get dressed without help.

Based on the medical documents submitted as part of Exhibit J, Mr. C does have limited range of motion intermittently. Notes dated December 19 and October 17, 2014, both state “no limitation of range of motion.”³⁶ The notes dated September 23, 2014 and July 16, 2014 both state “pain in muscles/joints, positive limitation of range of motion.”³⁷

Mr. C has been diagnosed with joint pain and cervical pain.³⁸ He has been prescribed hydrocodone to help relieve his pain.³⁹ In support of the conclusion that Mr. C could dress independently, the notes in the CAT say “Observed to touch overhead, behind back & feet from a sitting position. Grips are strong & uniform bilaterally. Able to reach for, grasp, hold & manipulate a pencil.”⁴⁰ Grip strength and fine motor control are certainly helpful for putting on and fastening clothing. However, one must also be able to guide arms and legs into the clothing. This is something Mr. C has difficulty with, at least some of the time.⁴¹

SDS has the burden of proving that Mr. C’s ability to dress himself has improved. Here, the evidence of improvement is equally balanced by evidence that Mr. C does need at least limited assistance with dressing and undressing three or more times each week. Because SDS did not meet its burden of proof, Mr. C should have received his prior score of 2/2, with a frequency of 14 times a week.

4. *Bathing*

Mr. C testified that he sometimes needs help transferring into and out of the shower. People sometimes need help getting into and out of a shower even when they can manage other

³⁴ Exhibit F8.

³⁵ Exhibit H8.

³⁶ Exhibit J, pages 6 & 7. A March 14, 2014, note also says there is no limitation in range of motion. Exhibit J, page 13.

³⁷ Exhibit J, pages 8 & 10.

³⁸ Exhibit E3.

³⁹ Exhibit E20; C testimony.

⁴⁰ Exhibit E8.

⁴¹ C testimony.

transfers independently. Mr. C said he needed help once a week, but sometimes more often and sometimes less often.

In 2009 and 2012, Mr. C needed physical help with bathing, and not just the transfers into the shower.⁴² Based on his recent testimony, he now only needs help with transfers.⁴³ While SDS has met its burden of proving a reduction in this activity, it has not proven that Mr. C should receive no time for this ADL. Instead, Mr. C should have been scored a 2/2, and a frequency of one time a day, one day each week.

5. *Independent Activities of Daily Living*

Mr. C previously qualified for assistance with meal preparation, housework, shopping, and laundry. He asks that he continue to receive time for these IADLs. Mr. C lives with his wife. By regulation, the PCA program does not pay for any IADL if that activity is provided by the recipient's spouse.⁴⁴ This regulation has previously been interpreted to exclude services for any IADL if the recipient lives with a spouse who is capable of performing that service.⁴⁵ Because the current regulations do not allow time for these IADLs, SDS properly removed any time for IADLs.⁴⁶

6. *Prescribed Task Form*

Mr. C requested time for performing prescribed walking exercises.⁴⁷ Because this time was not previously authorized, he has the burden of proving this PCA service should have been allowed.⁴⁸

Mr. C submitted a prescribed task form (PTF) dated May 27, 2014.⁴⁹ Mr. C's doctor prescribed walking exercise once a day, seven days a week, for thirty minutes at a time.⁵⁰ SDS did not allow PCA time for this activity because Mr. C can walk independently, and therefore would not need physical assistance to perform the walking exercise.

⁴² Exhibit F11 & H11.

⁴³ His shower is a stand-alone shower with a step over lip, but that would not preclude him from occasionally needing assistance. Exhibit E11.

⁴⁴ 7 AAC 125.040(a)(13)(B).

⁴⁵ *In re G H*, OAH No. 13-1327-MDS (Commissioner of Health and Social Services 2013), page 3. Available at <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/PCA/MDS131327.pdf>.

⁴⁶ 7 AAC 125.026(d)(3)(C) (services may be reduced if the server is no longer authorized).

⁴⁷ Exhibit J, page 2.

⁴⁸ 7 AAC 49.135.

⁴⁹ Exhibit J, page 4. It was not received by SDS until July 25, so it was not referred to in the CAT. Chadwick testimony.

⁵⁰ Exhibit J, page 4.

The PTF is a form created by SDS. The section for walking exercise is called “Physically assisted Walking Exercise” and the directions say “Requires that the PCA give direct physical help to the recipient in completing the walking exercise.”⁵¹ In addition, the physician was required to attest, subject to civil and criminal penalties, that the prescribed task was medically necessary, and that the information provided was true, accurate, and complete.⁵²

The mere fact that Mr. C can walk without physical assistance does not establish that he can complete a particular prescribed walking exercise without assistance. To the extent SDS had questions about the need for physical assistance for this particular exercise, it could have contacted Mr. C’s physician. It did not do that.⁵³

It is, however, Mr. C’s burden to prove that he needs physical assistance to perform this particular exercise, and the fact that he can walk without assistance does raise a question about his need for assistance. Mr. C did not provide evidence to show what he is required to do as when performing this particular exercise.⁵⁴ On the other hand, his physician has certified that physical assistance is required. While the physician’s certification is given significant weight, so is Mr. C’s ability to walk. Where there is equally compelling evidence for and against a particular factual finding, the party asserting that fact has not met its burden of proof. Without more information about the nature of the prescribed exercise, it is not possible to determine whether Mr. C does in fact need physical assistance to perform it. SDS correctly denied time for this prescribed exercise.

7. *Escort Service*

PCA services include the time spent by a caretaker

Traveling with the recipient to and from a routine medical or dental appointment outside the recipient’s home and conferring with medical or dental staff during that appointment.^[55]

Mr. Chadwick testified that escort time is typically allowed when the recipient has mobility issues and needs help while traveling, or has cognitive deficits and needs help conferring with

⁵¹ *Id.*

⁵² *Id.*

⁵³ Chadwick testimony.

⁵⁴ The instructions on the PTF require an exercise plan for range of motion exercises, and medical justification for prescribed foot care, but are ambiguous as to what, if any, support should be submitted for physically assisted walking exercises. Unlike the other two categories, nothing is requested in the section devoted to walking exercises, but there is an earlier statement, that is possibly applicable, asking for supporting medical documentation.

⁵⁵ 7 AAC 125.030(d)(9).

the doctor. Here, Mr. C is able to get in and out of a car by himself, and can walk with a cane.⁵⁶ He drove his car himself a few times in January and February of 2015.⁵⁷ There is also no indication that he would need someone to help him confer with his doctor.⁵⁸ SDS correctly denied PCA services for this activity.

IV. Conclusion

Based on the evidence presented, Mr. C is still eligible for some PCA services, but the amount of time is less than he was previously receiving. SDS should recalculate his service level authorization in accordance with the rulings above.

Dated this 7th day of August, 2015.

Signed

Jeffrey A. Friedman

Administrative Law Judge

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 21st 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.]

⁵⁶ C testimony.

⁵⁷ *Id.*

⁵⁸ Mr. C appeared to understand the proceedings during the hearing, and the medical notes do not mention anyone assisting Mr. C during his examination.