

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

In the Matter of	)	
	)	
H D	)	OAH No. 14-2350-MDS
_____	)	Agency No.

**CORRECTED DECISION**

**I. Introduction**

H D appealed the decision by the Division of Senior and Disability Services to reduce her personal care assistance benefits from 18 to 13.25 hours per week. At a fair hearing regarding her benefit level, the evidence showed that Ms. D qualified for limited assistance to access medical appointments and to go up and down stairs. The Division was unable to prove that frequencies for assistance for transfers and toilet use should be reduced to four times per week. The Division proved that she does not qualify for benefits for prescribed foot care and escort services. Ms. D established, however, that she does need assistance for personal hygiene three times per week, and assistance in performing her prescriptions for range of motion exercises and walking for exercise.

**II. Facts**

H D is a 55-year-old woman who lives in in Anchorage. Ms. D occupies the upper half of the house. Her son and his family members have the lower floor.<sup>1</sup>

Ms. D suffers from Multiple Sclerosis. She has breathing difficulties that may be related to asthma. She has double vision. She is being treated for pain and had one visit to the emergency room in 2014 to deal with her pain issues. She takes pain medication, which has side effects. She walks with a limp and has sciatic pain, mostly in her left leg. As is typical of many MS patients, she experiences weakness, tingling in her limbs, and coordination problems. She has problems with urinary incontinence, for which she uses pads during the day and pull-ups at night.<sup>2</sup>

Because Ms. D needs help with many different activities, in 2012 the Division of Senior and Disability Services determined that she was eligible for personal care assistance benefits. At that time, she was eligible for 18 hours of PCA benefits. This benefit level continued in 2013. For 2014, however, the Division was required to reassess Ms. D.

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<sup>1</sup> Division Exhibit E at 3; D testimony.  
<sup>2</sup> D testimony.

To determine the level of PCA benefits for which Ms. D qualified in 2014, Sam Cornell, a nurse with the Division, met with Ms. D at the Division's office on October 28, 2014. He evaluated Ms. D's physical ability to do her activities of daily living (ADLs) by having her do some of these activities, asking questions about her functional ability, and having her demonstrate function such as range of motion. He also evaluated Ms. D's ability to do what are called "instrumental activities of daily living" (IADLs)—household chores, such as laundry, shopping, and preparing a meal. The Division uses a standardized assessment format, called the Consumer Assessment Tool (CAT), to assess how much assistance an applicant needs.<sup>3</sup> Under the CAT, the assessor will assign a numerical score for each of several ADLs and IADLs. The Division then uses the scoring on the CAT, and other information it may have, such as medical records, to determine the level of assistance the recipient needs.

While Ms. D was in the Division office, Mr. Cornell observed that she had adequate range of motion. Mr. Cornell recorded in the CAT that Ms. D could touch her hands over her head, and behind her back. She could not, however, touch her feet while in a sitting position, and she complained of back pain when she attempted to do so. He recorded that her grip was strong. She was oriented and could respond appropriately to questions designed to test her cognitive ability. She was alert and a good historian of her health history. She makes her own financial decisions.<sup>4</sup>

With regard to Ms. D's ability to perform her ADLs, based on his observations and interviews with the family, Mr. Cornell found that Ms. D could complete the ADLs of bed mobility and eating without any assistance. This finding of independence is scored on the CAT as "0/0." He determined that she needs limited assistance with the ADLs of transfers (getting up out of a bed or a chair), dressing, and toilet use. He scored these ADLs as "2/2." He found that she could walk in the home and do her own personal hygiene without any hands-on assistance, needing only supervision and setup help, a score of "1/1." For bathing, Mr. Cornell found that she needed extensive assistance, a score of "3/2." When walking outside to attend medical appointments, Ms. D needed supervision or oversight, as score of "1." He found she needed no help to go up or down stairs, a score of "0."<sup>5</sup>

For the household chores of light meal preparation, main meal preparation, grocery shopping, and laundry, Mr. Cornell found that Ms. D fit in the category of "assistance/done with

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<sup>3</sup> Division Exhibit E.

<sup>4</sup> Division Exhibit E at 4.

<sup>5</sup> Division Exhibit D at 9.

help.” This means that she needed and received physical assistance. For these IADLs, the score entered in the CAT was “2/3.” For housework, the score was “3/4,” meaning that Ms. D was dependent on others to do the task.<sup>6</sup>

On December 3, 2014, based on the CAT and a review of medical records, the Division reduced Ms. D’s PCA benefits from 18 hours per week to 13.25 hours per week. On December 8, 2014, Ms. D appealed the reduction in her benefits and requested a fair hearing.

A hearing was held on February 20, 2015, before Administrative Law Judge Jay Durych. Ms. D represented herself, assisted by Care Coordinator S F. Terri Gagne represented the Division. On June 21, 2015, the case was reassigned to Administrative Law Judge Stephen C. Slotnick. ALJ Slotnick listened to the recording of the hearing.

### **III. Discussion**

The Medicaid program authorizes PCA services for “physical assistance with activities of daily living (ADLs), physical assistance with instrumental activities of daily living (IADLs), and other services based on the physical condition of the recipient.”<sup>7</sup> As a general matter, personal care assistance minutes are assigned for scores that show that the recipient needs actual hands-on assistance to accomplish the ADL. Scores that show independence or need for only supervision, set-up help, or cueing will not qualify for assistance.<sup>8</sup>

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<sup>6</sup> Division Exhibit at 26.

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

<sup>8</sup> Scoring for ADLs is based on the following self-performance codes:

0. Independent.
1. Supervision - Oversight.
2. Limited Assistance.
3. Extensive Assistance.
4. Total Dependence.
5. Cueing.
8. Activity Did Not Occur During Entire 7 Days.

And the following self performance codes:

0. No setup or physical help from staff
1. Setup help only
2. One-person physical assist
3. Two+ persons physical assist
5. Cueing - cueing support required 7 days a week
8. Activity did not occur during entire 7 days

Scoring for IADL is based on the following Self-Performance Codes:

0. Independent.
1. Independent with difficulty.
2. Assistance / done with help.
3. Dependent / done by others.
8. Activity did not occur.

And the following IADLS Support Codes:

0. No support provided.

Ms. D accepts the scoring in the CAT for many of her ADLs and all of her IADLs. She argues that the frequencies of assistance were incorrect for transfers and toilet use. She also thinks the score should be higher for locomotion-multilevel, locomotion-access medical appointments, and personal hygiene. She requests that benefits be allowed for escort, range of motion exercises, and walking for exercise. The issues raised by Ms. D are discussed below. Because the division is seeking to reduce Ms. D's PCA benefit, it has the burden of proving that she no longer qualifies for the same level of service that she received in the past.<sup>9</sup>

*Transfers.* Ms. D agrees that Mr. Cornell correctly scored transfers as 2/2, meaning that she needs limited hands-on assistance of guiding her limbs, and occasional weight-bearing help (not more two times per week), in order to get up out of a chair or bed. She disagreed, however, with the reduction of the frequency of her assistance from 14 times per week to four times per week.

Mr. Cornell testified that the reason he changed the frequency to four times per week is that Ms. D told him, and he recorded several times in the CAT, that she had bad days only one to two times per week. He understood that she needed help with transfers only on bad days. He therefore took the previous frequency of help—two transfers per day—and multiplied it times what he thought was the maximum number of days needing help—two—to arrive at four transfers per week.<sup>10</sup>

Ms. D explained that Mr. Cornell misunderstood what she told him during the assessment visit. She agreed that her need for help was variable, and that she needed additional help on bad days. She was not requesting assistance for every transfer—she gets up out of a chair or bed more often than two times per day, but she was asking for help on only 14 transfers per week. In her view, the 14 times per week recognized that on most, if not all days, she needs assistance to get up first thing in the morning. On normal days she may need assistance on transfers once or twice. On bad days, she will need assistance throughout the day. The 14 instances of assistance represented the frequency of her need for help in a typical seven-day period. She testified that

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1. Supervision / cueing provided.
  2. Set-up help only.
  3. Physical assistance was provided.
  4. Total dependence - the person was not involved at all when the activity was performed.
  8. Activity did not occur.

<sup>9</sup> *Id.*

<sup>10</sup> Cornell testimony.

sometimes the assistance needed was weight-bearing, but she was not requesting an increase in scoring to extensive assistance.

Ms. D's testimony is reasonable. Because of her incontinence and sciatic pain, she does not sit still for long. She must get up out her chair, or a bed if she is lying down, frequently throughout the day. The 14 times per week for which she is requesting *limited* assistance takes into account that she does not need help on all or even most of her transfers—it recognized a need for help on all transfers on her bad days and fewer times on a moderate or good day. The Division has not met its burden of proving that she needs limited assistance to transfer only four times per week. The score on this ADL will be 2/2, 14 times per week.

*Toilet use.* For the ADL of toilet use, the issue again is frequency. Using the same logic as described above, Mr. Cornell reduced assistance for toilet use to eight times per week, based on a previous award of four times per day, and his understanding that she needed assistance only on bad days. Again, however, Ms. D explained that her need for assistance is variable. Given her incontinence (which can vary from one instance of incontinence to six per day), she will need to either use the toilet or change her pads more frequently than four times per day. At times, she will need assistance to pull up her underwear after inserting a new pad.<sup>11</sup> At times, she needs assistance to sit on the toilet and to stand up again, using the bar on one side and the assistant on the other. She uses the toilet immediately after getting up in the morning, and she described that on most, if not all mornings, she needs assistance. On bad days, she needs assistance throughout the day. On other days, her need is variable.<sup>12</sup> The Division has not met its burden of proving that she needs limited assistance to use the toilet only eight times per week. The score on this ADL will remain 2/2, with a frequency of 28 times per week.

*Locomotion-multilevel.* Mr. Cornell recorded in the CAT that Ms. D had told him that she did never goes downstairs to her son's living area. At the hearing, he further explained that he understood that when Ms. D goes up and down the stairs, she supports herself using the railing. He believed that any assistance provided by the PCA would be standby assistance, for

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<sup>11</sup> Mr. Cornell had understood that she needed help changing the pad, and one reason he denied additional assistance was because she had the range of motion and grip strength to change the pad without help. Cornell testimony. Ms. D explained that he misunderstood—she can change the pad without help, but because she cannot reach her feet from a sitting position, her daughter-in-law then helps with getting her underwear pulled up to her knees. Ms. D can then finish the task of dressing after toilet use. D testimony.

<sup>12</sup> D Testimony. Mr. Cornell had recorded in the CAT that Ms. D's PCA will assist in toilet use by laying out the new pad and underwear for Ms. D to use after finishing toilet use. The Division is correct that this assistance is setup help and not compensable as a PCA benefit. As the Division's own score of 2/2 recognizes, however, the PCA does provide additional assistance that is compensable.

comfort and assurance, not physical assistance to accomplish the task. He expressed doubt that a PCA could provide additional assistance on climbing stairs reliably and safely.<sup>13</sup> He described the assistance provided as “contact guard,” by which he meant that even though the PCA was physically touching Ms. D, the PCA was only providing assurance and oversight, not actual physical assistance to complete the task.

In her letter protesting the Division’s reduction in benefits, Ms. D wrote:

In my current location, the residence is two stories, with six stairs from the entryway up to the living quarters. I need help going both up and down. More often than not, with my MS, my muscles give out which creates a problem when I go up and down the stairs. My caregiver helps me going up the stairs by either standing behind me, supporting me from the back, or I’m holding on to her if my legs give out. I don’t require this help every day, but I do require this weekly, up to about four times per week.<sup>14</sup>

This request is consistent with the evidence. Here, Ms. D is requesting relatively little help on this ADL—limited assistance, four times per week. Because this is only two round trips, she is asking for help on this ADL only on bad days. Although her testimony appeared to describe the assistance as weight-bearing, she has asked only for limited assistance (score of 2). In short, Ms. D appears to agree with Mr. Cornell—even though the PCA may be in physical contact with her as she climbs or descends on other days, except for the bad days, PCA assistance is more in the nature of oversight (what Mr. Cornell calls “contact guard”) not actually physical assistance of guiding limbs. Yet, on bad days, weight-bearing help is needed for her to climb or descend the stairs. Limited assistance is the correct score, because the weight-bearing help is needed so infrequently. Score on this ADL will be 2, with a frequency of four times per week.

*Locomotion-access medical appointments.* Mr. Cornell determined that Ms. D needed only oversight or supervision in order to access medical appointments, and scored this ADL as “1.” He based this conclusion on his own observation. He was able to watch Ms. D as she arrived at the Division office. He saw her get out the car without assistance by using the car door to pull herself up with her upper body. He reported that she needed some nonweight-bearing assistance to step up on the curb. She then walked without assistance using her walker, which her driver had retrieved from the car and set up for her.<sup>15</sup>

Ms. D testified that in general when going to a medical appointment she needs help getting in and out of the car. Her testimony was a little unclear on whether the help was weight-

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<sup>13</sup> Cornell testimony.

<sup>14</sup> D Exhibit 1 at 2.

<sup>15</sup> Cornell testimony.

bearing—she described how she puts her weight on the door, which makes it appear that the assistance is not weight-bearing. She then said, however, that her PCA” helps pull me up.” Pulling a person up necessarily involves some degree of weight bearing.

This decision accepts Mr. Cornell’s testimony that he saw Ms. D get out of a car without assistance. This does not mean, however, that she is always able to get out of a car without assistance. Moreover, Mr. Cornell did report that Ms. D needed assistance to negotiate the curb. This is strong evidence that Ms. D needs some level of physical, hands-on assistance to access medical appointment.

The evidence is not clear on whether the assistance needed is weight-bearing (score of “3”), or guiding of limbs (score of “2”). Given Mr. Cornell’s observation that on at least some occasions she can get out of a car without help and needs only guiding/balance assistance to step up on the curb, and the fact that the 2012 CAT scored this ADL as limited (nonweight-bearing) assistance, the score will remain as 2. Frequency will remain the same as in 2012, at 10 minutes per week.

*Personal hygiene.* Mr. Cornell determined that Ms. D could accomplish her own personal hygiene with only setup help. This is consistent with the 2012 score. He based this determination on her self-report that she could brush her teeth and wash her face and hands without assistance, and on his observations that she had sufficient range of motion to complete personal hygiene.

Ms. D testified that she could do all of her personal hygiene for her upper body without assistance. On her lower extremities, however, she needed help. The help she described was for applying lotion to her lower legs and feet, which occurred every day, and clipping her toenails, which occurred less frequently.

Mr. Cornell gave contradictory explanations of how the Division treats the task of applying lotion. The subject of lotion first came up with regard to foot care. With a prescription for foot care, PCA benefits for foot care can be awarded in addition to PCA benefits for personal hygiene, if the foot care goes beyond routine care and is based on a medical diagnosis. Ms. D has a prescription for foot care. Mr. Cornell explained that in Ms. D’s case, however, her foot care is limited to applying lotion and clipping nails, and these tasks are considered routine, not medical. He further explained that lotion and nail care are covered under the ADL of personal hygiene. Later, when discussing personal hygiene, however, Mr. Cornell said that applying

lotion to the lower extremities was not an element of hygiene. Instead, he considered it part of the ADL of bathing.

The Division did not provide any authority to substantiate that applying lotion to skin is an activity of bathing. The regulations specifically define “personal hygiene” to include “skin care.”<sup>16</sup> Bathing, on the other hand, is defined to mean “the taking of a full-body bath, shower, or sponge bath and the required transfers in and out of the bathtub or shower; washing only the back and hair does not constitute bathing under this paragraph.”<sup>17</sup> Nothing in this definition implies that bathing includes skin care or application of lotion.

Here, Ms. D has a prescription for foot care, to be done three times per week.<sup>18</sup> This prescription appears to be for routine personal hygiene tasks, not a medical need. The facts, including Mr. Cornell’s observation of her range of motion, substantiate that Ms. D could not perform her own foot care. Based on Mr. Cornell’s explanation and the regulations, Ms. D qualifies for personal hygiene benefits.

With regard to Ms. D’s hair care, the parties had a misunderstanding about whether Ms. D had her hair done at a salon. Ms. D explained that although she went to a salon for hair care in 2012, in 2014 she did her own hair at home, with some help from her PCA to finish the task.

Based on the prescription for foot care, Ms. D needs to have lotion applied to her feet three times per week. With regard to her hair, the testimony indicated a need only for some limited help, which does not justify daily PCA benefits for personal hygiene. Ms. D’s score for personal hygiene will be 2/2, three times per week.

*Escort.* In 2012, Ms. D was awarded time for escort. In 2014, the Division denied this benefit. Ms. D argues that she needs this service because she needs help to access medical appointments.

Under the regulations, however, Ms. D does not qualify for escort services. She is able to communicate with her doctor.<sup>19</sup> Escort time is only for those who need assistance in communication. Her need for assistance with accessing medical appointments is covered in the ADL of accessing medical appointments, discussed above.

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<sup>16</sup> 7 AAC 125.030(b)(7)(C).

<sup>17</sup> 7 AAC 125.030(b)(8).

<sup>18</sup> Division Exhibit F at 3. Although Ms. D received foot care benefits in 2012, she concedes that she is not eligible for foot care benefits in 2014-15. D Exhibit 1 at 3. The Division has met its burden of proving that she no longer qualifies for PCA benefits for foot care.

<sup>19</sup> 7 AAC 125.030(d)(9).

*Range of motion exercises and walking for exercise.* The regulations provide that the department will pay for range of motion exercises and walking for exercise only if they are provided by a personal care agency and prescribed by a doctor, physician assistant, or advance nurse practitioner.<sup>20</sup> The CAT clarifies that the prescription for range of motion exercises must “require[e] PCA hands-on assistance.”<sup>21</sup> Here, Ms. D has a prescription for range of motion exercises and for walking for exercise.

Mr. Cornell explained that the Division denied the range of motion exercises because, in its view, Ms. D does not need hand-on assistance to complete these exercises. He reviewed the exercises that were prescribed. As an example, he cited to the clamshell exercise, which involves lying on one’s side with bent knees, and then lifting a knee. In his view, given that Ms. D could turn in bed, she could get on her side and do this exercise without assistance. Similarly, he cited to mini-squats, which are done while standing, and for which Ms. D could keep a steady hand on a table. She does not need assistance to do this exercise.

Ms. D, however, testified that she cannot get into many of the positions required for these exercises without another person to move her limbs into the correct position.<sup>22</sup> This testimony is consistent with her muscle weakness, lack of coordination, and sciatic pain. No physical therapist or other medical provider has indicated that Ms. D could do these exercises without assistance. The Division has not met its burden of proving that Ms. D does not qualify for PCA benefits for range of motion exercises.

With regard to the ADL of walking for exercise, Mr. Cornell explained that because Ms. D can walk without assistance, she should be able to complete the prescribed task of walking for exercise without assistance. Ms. D testified, however, that she fatigues quickly, and needs assistance after fatiguing. Even when she is attending a physical therapy session, the therapist does not make her walk without assistance—she receives hands-on assistance from the therapist to walk for exercise.<sup>23</sup>

Mr. Cornell’s argument raises questions about the purpose of the prescription. It may be that in Ms. D’s case, her prescription is intended to push past her comfort zone, in order to build balance, strength, and stamina. If so, she would likely need physical, hands-on balancing assistance in order to keep going. On the other hand, the prescription may merely be for

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<sup>20</sup> 7 AAC 125.030(e).

<sup>21</sup> Division Exhibit E at 5.

<sup>22</sup> D testimony.

<sup>23</sup> *Id.*

maintenance purposes, and the exercise is not intended to push Ms. D past her ability. If so, she could complete her 15 minutes of walking by taking rests every time she felt dizzy, and she would not need any PCA assistance. No medical testimony was received on the issue of walking for exercise. Given that her medical provider prescribed direct physical help for walking for exercise, and that the Division approved this benefit in 2012, the Division has not met its burden of proving that she no longer qualifies for this benefit.

#### **IV. Conclusion**

The 2014 CAT for H D is amended to incorporate the following scores:

*Transfers.* Score is 2/2, frequency is 14 times per week.

*Toilet use.* Score is 2/2, frequency is 28 times per week.

*Locomotion-multilevel.* Score is 2, frequency is 4 times per week.

*Locomotion-access medical appointments.* Score is 2, for benefits of 10 minutes per week.

*Personal hygiene.* Score is 2/2, frequency is three times per week.

*Range of motion exercises.* Benefit will be for three days per week, 30 minutes per day, for a total of 90 minutes per week.

*Walking for exercise.* Benefit will be for five days per week, 15 minutes per day, for a total of 75 minutes per week.

All other findings in the 2014 CAT are affirmed. PCA benefits will awarded based on the amended CAT.

DATED this 22<sup>nd</sup> day of July, 2015.

By: Signed  
Stephen C. Slotnick  
Administrative Law Judge

## Adoption

The undersigned, by delegation from 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 20<sup>th</sup> day of August, 2015.

By: Signed  
Name: Jared C. Kosin, J.D., M.B.A.  
Title: Executive Director  
Agency: Office of Rate Review, DHSS

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