

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

In the Matter of:)	
)	OAH No. 15-0602-MDS
M S)	Agency No.
_____)	

DECISION

I. Introduction

M S was receiving 88.00 hours per week of personal care assistance (PCA) services when she was reassessed to determine her continued eligibility for those services in 2015. Based primarily on a reassessment visit on April 7, 2015, the Division of Senior and Disabilities Services (Division) issued a decision on May 4, 2015 notifying Ms. S that her PCA services would be reduced to 30.25 hours per week. Some of the reduction resulted from regulatory changes since her prior assessment, and other parts were related to what the Division perceived as functional improvements in Ms. S’s condition. Ms. S requested a hearing.

The parties resolved many of their areas of disagreement, resulting in an agreement providing 57.5 hours of PCA assistance to Ms. S. However, the parties were unable to resolve their disagreement regarding Ms. S’s claim for PCA assistance for foot care. Ms. S’s hearing was held on July 7, 2015 regarding this single disputed issue. Ms. S was represented by her father, N S, and herself, and she testified on her own behalf. Laura Baldwin represented the Division. Health Program Manager Olga Ipatova testified for the Division.

Based upon the evidence presented, the Division’s denial of Ms. S’s PCA services for foot care is reversed. The Division is directed to provide Ms. S with services as specified in this decision.

II. The PCA Service Determination Process

The Medicaid program authorizes PCA services for the purpose of providing “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 . . .”¹ 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.”²

¹ 7 AAC 125.010(a).

² 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

The Division uses the Consumer Assessment Tool, or “CAT,” as a methodology to score a person’s 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.³ In general, if certain levels of assistance are required, the regulations prescribe a fixed number of PCA minutes to be assigned 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 these ADLs or IADLs, then the person is eligible for PCA services. Once eligibility is established, time for additional ADLs and IADLs, as well as certain other covered services, can be added to the PCA authorization.

The ADLs measured by the CAT are bed mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room), locomotion (between levels), locomotion (to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, personal hygiene-shampooing, and bathing.⁴ The CAT numerical coding system for ADLs has two components. The first component is the *self-performance code*. These codes rate how capable a person is of performing a particular ADL. The possible codes are: **0** (the person is independent⁵ and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance⁶); **3** (the person requires extensive assistance⁷); **4** (the person is totally dependent⁸). There are also codes which are not used in calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).⁹

The second component of the CAT scoring system is the *support code*. These codes rate the degree of assistance that a person requires for a particular ADL. The possible codes are: **0**

“supervision” as “observing and giving direction, as needed, so that the recipient can independently perform an ADL or IADL.” *Id.*

³ See 7 AAC 125.024(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900.

⁴ Exh. E, pp. 6 – 11.

⁵ A self-performance code of 0 is classified as “[I]ndependent – No help or oversight – or – Help/oversight provided only 1 or 2 times during the last 7 days.” See Exh. E, p. 6.

⁶ According to 7 AAC 125.020(a)(1), limited assistance with an ADL “means a recipient, who is highly involved in the activity, receives direct physical help from another individual in the form of guided maneuvering of limbs, including help with weight-bearing when needed.”

⁷ According to 7 AAC 125.020(a)(2), extensive assistance with an ADL “means that the recipient is able to perform part of the activity, but periodically requires direct physical help from another individual for weight-bearing support or full performance of the activity.”

⁸ According to 7 AAC 125.020(a)(3), dependent as to an ADL, or dependent as to an IADL, “means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity.”

⁹ Exh. E, p. 18.

(no setup or physical help required); **1** (only setup help required); **2** (one-person physical assist required); **3** (two or more person physical assist required). Again, there are additional codes which are not used to arrive at a service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).¹⁰

The CAT also codes certain activities known as “instrumental activities of daily living” (IADLs). These are light meal preparation, main meal preparation, housekeeping, laundry (in-home), laundry (out-of-home), and shopping.¹¹

The CAT codes IADLs slightly differently than it does ADLs. The *self-performance codes for IADLs* are: **0** (independent either with or without assistive devices - no help provided); **1** (independent with difficulty; the person performed the task, but did so with difficulty or took a great amount of time to do it); **2** (assistance/done with help - the person was somewhat involved in the activity, but help in the form of supervision, reminders, or physical assistance was provided); and **3** (dependent/done by others - the person is not involved at all with the activity and the activity is fully performed by another person). There is also a code that is not used to arrive at a service level: **8** (the activity did not occur).¹²

The *support codes* for IADLs are also slightly different than the support codes for ADLs. The support codes for IADLs are **0**: (no support provided); **1** (supervision/cueing provided); **2** (set-up help); **3** (physical assistance provided); and **4** (total dependence - the person was not involved at all when the activity was performed). Again, there is an additional code that is not used to arrive at a service level: **8** (the activity did not occur).¹³

In order to qualify for PCA services, a person must be coded as requiring limited or a greater degree of physical assistance (self-performance code of 2, 3, or 4, and a support code of 2, 3, or 4) in any one of the ADLs of transfers, locomotion, eating, toilet use, dressing or bathing. Similarly, if a person is coded as requiring some degree of hands-on assistance¹⁴ (self-performance code of 1, 2, or 3, and a support code of 3 or 4) with any one of the IADLs of light or main meal preparation, housework, grocery shopping or laundry, then he or she is eligible for PCA services.¹⁵ It is undisputed that Ms. S remains eligible for PCA services.

¹⁰ Exh. E, p. 18.

¹¹ Exh. E, p. 26.

¹² Exh. E, p. 26.

¹³ Exh. E, p. 26.

¹⁴ For the purposes of this discussion, “hands-on” assistance does not include supervision/cueing or set-up assistance (support codes of 1 or 2). See Exh. E, pg. 26.

¹⁵ Exh. E, p. 31.

The codes assigned to a particular ADL or IADL determine how much PCA service time a person receives for each occurrence of a particular activity. For instance, if a person is coded as requiring extensive assistance (code of 3) with bathing, he or she would receive 22.5 minutes of PCA service time every day he or she was bathed.¹⁶

III. Background Facts

Ms. S is 46 years old. She lives in a first floor, handicap accessible apartment.¹⁷ Her health conditions include osteoporosis, multiple sclerosis, and asthma.¹⁸

Prior to her current assessment, Ms. S was receiving 88.00 hours of PCA services per week based on a 2009 assessment. Ms. S was reassessed on April 7, 2015 to determine both her ongoing eligibility for the PCA program and her benefit level. Ms. S used a wheelchair during the assessment. Based upon visual observation, functional testing, and statements made by Ms. S, the assessor determined that Ms. S had limited range of motion, could not touch her hands over her head, but could touch her hands behind her back. She had a strong grip in both hands and was capable of using her legs to steer her wheelchair.

The assessor determined that Ms. S needs only supervision for eating, but she needs limited assistance for performing transfers, locomotion, dressing, toilet use, and personal hygiene.¹⁹ The assessor also found that Ms. S requires extensive physical hands-on assistance with bathing.²⁰

IV. Issues Resolved Prior to Hearing

The Division and Ms. S agreed to a resolution of all of their areas of disagreement, with the exception of the issue of foot care as a prescribed task. The parties agreed to a total of 57.5 hours of PCA services. Ms. S agreed to her 2015 assessed weekly minutes for body mobility, locomotion-in room, locomotion-multi level dressing, eating, personal hygiene, and bathing. For all IADLs, Ms. S agreed to the minutes authorized by her 2015 assessment. She also agreed to no PCA time for oxygen use, sterile wound care, documentation, and oxygen maintenance, as assessed in 2015.

In addition, the Division and Ms. S negotiated the following agreement prior to the hearing:

¹⁶ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart contained at Exh. B, pp. 34 – 36.

¹⁷ Exh. E, p. 1.

¹⁸ Exh. E, p. 21.

¹⁹ Exh. E, pp. 6 – 11, 18, 31.

²⁰ Exh. E, pp. 11.

For transfers, a self-performance score of 3 and a support score of 2, with a frequency of 70 per week, totaling 262.50 minutes. For locomotion in-room, a self-performance score of 2 and a support score of 2, with a frequency of 56 per week, totaling 280 minutes. For locomotion access to medical appointments, a self-performance score of 3 with a frequency of 4 per week totaling 30 minutes. For toilet use, a self-performance score of 3 and a support score of 2, with a frequency of 98 per week, totaling 882 minutes. For shampooing hair (separate from bathing), a frequency of 3 times per week, totaling 22.5 minutes. For medication, a frequency of 21 times per week, totaling 42 minutes. For vital signs, a frequency of 7 times per week, totaling 14 minutes. For non-sterile dressing bandages, a frequency of 7 times per week, totaling 17.5 minutes. For escort to medical visits, a yearly total of 1960 minutes, divided by 52 weeks and rounded up, totaling 38 minutes per week. For range of motion exercises, 280 minutes per week. And for walking/simple exercise, 420 minutes per week.

V. Discussion

When the Division is seeking to reduce or eliminate a benefit a person is already receiving, the Division has the overall burden to prove, by a preponderance of the evidence,²¹ facts that show the person's level of eligibility has changed.²² In the context of PCA services, the showing required of the Division is that the recipient has had a "material change of condition."²³ The Division can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs,²⁴ including such sources as written reports of firsthand evaluations of the person. The relevant date for purposes of assessing the state of the facts is, in general, the date of the Division's decision under review (in most cases this would be the adverse action letter giving the person notice of the reduction in services).²⁵ In particular areas where a recipient seeks to increase services or add services that were not previously provided, the recipient has the burden of proof.²⁶

In this case, the only remaining dispute between the parties is the authorization of 210 minutes for prescribed foot care. Prior to Ms. S's 2015 assessment she was receiving 210

²¹ Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

²² 7 AAC 49.135.

²³ 7 AAC 125.026(a). This is a term of art that encompasses not only changes in the patient's situation, but also changes in regulations affecting the authorized level of services. See 7 AAC 125.026(d).

²⁴ 2 AAC 64.290(a)(1).

²⁵ 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>).

²⁶ 7 AAC 49.135.

minutes of prescribed foot care.²⁷ Ms. S contends that her physical condition, living situation, and medical documentation (including her doctor’s prescription) justify the approval of 210 minutes for foot care as a prescribed task. The Division counters that the type of foot care Ms. S receives is covered by bathing and personal hygiene, and therefore Ms. S should not receive an additional 210 minutes above the already agreed to 57.5 hours per week.

The Division denied Ms. S PCA services for foot care because she had “already been authorized time to wash, dry, and apply lotion to the feet” through PCA services for bathing, and because “no other medical documentation was submitted to justify additional time for foot care.”²⁸ The Division’s rationale is based on its view that PCA services for bathing necessarily include assistance with foot care during bathing and therefore satisfy the physician’s order for such services.²⁹ The Division further contends that application of medicated lotion should be considered application of medicine and therefore encompassed within the “Medication” category under “Other Covered Activities.”³⁰

There are several problems with the Division’s analysis. First, there is a fundamental flaw in the analysis: if prescribed foot care were included in bathing, it would not be identified in the CAT as a separate activity that requires a written order from a physician.³¹ Second, the stated requirement that “other medical documentation” be submitted to support the prescription fails to acknowledge the information regarding Ms. S’s prescription, medical documentation, and plan of care justified by her care provider in a letter dated December 31, 2014 from No Name.³²

Third, the Division’s denial of foot care fails to accord any deference to the physician’s medical judgment that foot care services are medically necessary. This approach is contrary to the overall Medicaid statute and regulatory scheme, which creates a presumption in favor of the medical judgment of the attending physician in determining the medical necessity of treatment.³³ In order to overcome this presumption, the Division must do

²⁷ Exh. D, page 11.

²⁸ Exh D, page 6.

²⁹ Ipatova Testimony.

³⁰ Testimony of Ms. Olga Ipatova.

³¹ See Exhibit E5; see also Exhibit E at 24 (identifying “foot problems or infections such as corns, calluses, bunions, hammer toes, overlapping toes, pain, structural problems, gangrene toe, foot fungus, onychomycosis.”).

³² Appellant response to agency position statement, Exhibit 2, Medical History, p. 16-18.

³³ *Pinneke v. Preisser*, 623 F.2d 546, 549 (8th Cir. 1980); *Smith v. Rasmussen*, 249 F.3d 755, 759 (8th Cir. 2001); *Weaver v. Reagan*, 886 F.2d 194, 200 (8th Cir, 1989); *A.M.L. v. Department of Health, Div. of Health Care Financing*, 863 P.2d 44 (Utah App. 1993). See also *Snyder v. FMda Dept. of Children and Family District V, Pinellas Unit*: 89262, 705 So.2d 1067, 1069 (Fla. App. 1st Dist. 1998) (“[u]nder controlling federal case law, the

more than just disagree with the physician’s determination that the prescribed tasks are medically necessary – the Division must present evidence that directly addresses, and contradicts, the basis for the physician’s determination. The Division did not meet this burden in this case.

Lastly, as a factual matter, the Division’s denial fails to account for the fact that Ms. S requires and uses a handicap accessible shower with insufficient depth to allow for Epsom salt bathing. This necessitates PCA assistance for her foot care that is separate from her bathing activities.³⁴

For all of these reasons, the Division has failed to meet its burden of establishing by a preponderance of the evidence that it appropriately denied PCA services for foot care called for by the prescription written by Ms. S’s physician.

VI. Conclusion

The Division’s removal of Ms. S’s PCA services for prescribed foot care is reversed.

DATED this 29th day of September 2015.

Signed _____
Andrew M. Lebo
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 14th day of October, 2015.

By: *Signed* _____
Name: Andrew M. Lebo
Title: Administrative Law Judge

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

agency must give considerable and substantial weight to the opinions of treating physicians. . . .Failure to credit these opinions must be accompanied by a showing of good cause.”) (internal citations omitted).

³⁴ M S Testimony.