

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

In the Matter of:)
) OAH No. 15-0873-MDS
C W) Agency Case No.
)
_____)

DECISION

I. Introduction

The issue in this case is whether the State of Alaska Division of Senior and Disabilities Services (DSDS or Division) correctly assessed C W's eligibility for Medicaid Personal Care Assistant (PCA) services. The Division conducted a functional assessment on June 16, 2015 and concluded that Ms. W does not require limited assistance with any activities of daily living (ADLs), and is either independent with, or requires only set-up assistance with, her instrumental activities of daily living (IADLs).¹ Accordingly, on June 25, 2015 the Division denied Ms. W's application for PCA services.²

This decision concludes that Ms. W may require assistance with some of her IADLs. However, because another person living in Ms. W's residence already receives PCA assistance with IADLs, Ms. W is, by regulation, ineligible to receive PCA assistance with her IADLs.³

This decision further concludes, however, that Ms. W requires limited assistance with the ADL of toilet use. Accordingly, the Division's denial of Ms. W's application for PCA services is reversed. However, because Ms. W is presently eligible for PCA assistance solely with the ADL of toilet use, she qualifies to receive only a small amount of PCA services at this time. Should Ms. W's medical condition and functional abilities decline in the future, she may submit a PCA Service Plan Amendment Request to the Division to obtain additional PCA services.⁴

II. Facts

A. Ms. W's Medical Diagnoses and Health Problems

Ms. W is 55 years old.⁵ She lives in an apartment with her older sister, who receives PCA services.⁶ Ms. W's medical diagnoses include anemia, chronic kidney disease, congestive

¹ Exs. D, E.

² Ex. D1.

³ See 7 AAC 125.040(a)(13)(C). Under this regulation, Ms. W cannot qualify for PCA assistance with her IADLs, *even if she were found to actually require assistance with her IADLs*. Accordingly, this decision does not analyze Ms. W's need for assistance with her IADLs, as any findings made on those issues would be irrelevant.

⁴ Ms. W experienced a medical emergency at the conclusion of the hearing in this case, and was transported from the hearing room by emergency medical personnel soon after the hearing. It is hoped that Ms. W's recovery from that incident has been (or will be) speedy and complete.

⁵ Ex. E1.

heart failure, coronary artery disease, carotid artery stenosis, cataracts, degenerative joint disease (left knee), depressive disorder, diabetes mellitus type II, dyspnea, edema, fibromyalgia, hypertension, hypercholesterolemia, gastroesophageal reflux disease (GERD), gout, headaches, lumbago, myositis, obstructive sleep apnea, proteinuria, pyelonephritis, and urinary tract infections.⁷ She takes approximately twelve prescription medications on a daily basis.⁸

On August 12, 2015 Ms. W's primary health care provider, S D, PA-C, submitted a letter to the Division on Ms. W's behalf.⁹ Ms. D's letter states in relevant part as follows:

[Ms. W] has been seen in our clinic since 2007 Over the last 7 years her health has declined She has chronic back pain, knee pain, and hip pain. She has attempted physical therapy without improvement. She has diabetes type 2 and is insulin-dependent. She has a [history] of depression and was admitted to [the hospital] in July of 2014 after an overdose suicide attempt. She has had recurrent, drug-resistant kidney infections and was admitted to [the hospital] on 9/22/14 with urosepsis. She ultimately had respiratory failure due to flash pulmonary edema and was intubated and admitted to the [intensive care unit]. There she had a cardiology consult and was found to have coronary artery disease, necessitating stent placement. She . . . has had a hard time caring for herself She needs assistance in the bathroom. She is not able to adequately clean herself. She has recurrent chest pain which limits her activity significantly. She continues to have angina despite having several stents placed. She is not able to prepare food - she is weak and is not able to stand for the length of time required to prepare food. She has dizziness from her medications She needs assistance with insulin administration.

On September 23, 2015 Ms. D submitted a second letter to the Division on Ms. W's behalf.¹⁰ Ms. D's letter states in relevant part as follows:

I have been [Ms. W's] primary care provider since 4/2013 but she has been a patient of our clinic . . . since 2007. Over the last two years her health certainly has declined and she has needed increasing assistance with ADLs.

Her disability is related to several specific issues: she has pain in the back and knees from arthritis which limits her ability to walk, use the stairs, bend, or stoop. She has recurrent chest pain, thought to be angina, and has had cardiac stent placement. She has recurrent urinary tract infections and has had urosepsis twice. This has not happened in the last 6 months, but when it has she has had prolonged hospital courses and has been weak on her return home, necessitating increased help with ADLs.

. . .

⁶ Ex. E1; Ex. H; Ex. I; C W's hearing testimony. There may or may not be a third person living in the apartment, but that is immaterial to the matters at issue in this decision.

⁷ Ex. E3; Ex. 1 pp. 5, 49, and 51; Ex. 2 pp. 2 and 5; Ex. 3 p. 6.

⁸ Ex. E20.

⁹ All factual findings in this paragraph are based on Ex. 2, pages 2 - 3 unless otherwise stated.

¹⁰ All factual findings in this paragraph are based on Exs. G2 - G3 unless otherwise stated.

While she has pain and weakness in the shoulders from arthritis and general deconditioning this should not limit her ability to do simple tasks such as wash her face or brush her teeth. In June of this year we had a discussion about her ability to shower. She has a shower chair and I helped her order a hand-held shower head and grab-bars At that time it was my impression that she was able to wash herself (and based on her medical conditions I think she can) but that the hand-held shower head would allow her to sit to do this.

It sounds like she has difficulty opening medication bottles . . . and there are several different caps that can be used to fix this issue I do not think that she needs a PCA to assist with this on a regular basis but [the] PCA could help with set-up.

In regard to her memory/cognition . . . [s]he understands English and I have given instructions in English that she has been able to follow. She is able to manage her own medications and has been taking them correctly. She is able to give herself insulin, adjust doses, and keeps an excellent record of her blood sugars.

C has severe anxiety which has contributed to her perception of the severity of her medical issues. She sees herself as gravely disabled even though this is not necessarily the case. She certainly has some major medical issues but her inability to cope and her lack of social support has been overwhelming for her. In my opinion, what is best for [Ms. W] is for her to maintain some of her autonomy and that caring for her personal hygiene and managing her own medications and appointments is a good way to prevent further decline.

B. Relevant Procedural History

Ms. W applied for PCA services and was assessed on June 16, 2015.¹¹ The Division denied her application on June 25, 2015.¹² Ms. W requested a hearing on July 1, 2015 to contest the Division's determination.¹³

Ms. W's hearing was held on September 16, 2015 and October 1, 2015. Ms. W attended the hearing, represented herself, and testified on her own behalf. T N-E, her PCA agency representative, assisted Ms. W in presenting her case and testified on her behalf. Darcie Shaffer attended the hearing and represented the Division. Geetha Samuel, R.N. and Olga Ipatova testified on behalf of the Division. The record closed at the end of the hearing.

III. Discussion

A. The PCA Program - Overview

The Medicaid program provides personal care assistant (PCA) services to eligible persons; "[t]he purpose of personal care services is to provide to a recipient *physical assistance* with activities of daily living (ADL), *physical assistance* with instrumental activities of daily

¹¹ Ex. D1, Ex. E. The exact date that Ms. W's application was submitted to DSIDS is not in the record.

¹² Ex. D.

¹³ Ex. C.

living (IADL), and other services based on the *physical condition* of the recipient" ¹⁴
[Emphasis added]. 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." ¹⁵

B. Alaska's PCA Program - Use of the Consumer Assessment Tool (CAT)

The Department of Health and Social Services (DHSS) conducts an assessment for PCA services using the Consumer Assessment Tool or "CAT." ¹⁶ The goal of the assessment process is to determine the level of physical assistance that an applicant or recipient requires in order to perform their activities of daily living (ADLs) and instrumental activities of daily living (IADLs). ¹⁷ The CAT seeks to make the assessment process more objective by standardizing the evaluation of the applicant or recipient's functional impairments. ¹⁸

The ADLs scored by the CAT are body mobility, transfers, locomotion (in room), locomotion (between levels), locomotion (to access medical appointments), dressing, eating, toilet use, personal hygiene, and bathing. ¹⁹ In addition, the CAT scores five other ADL-like activities which are not technically ADLs. These are assistance with medications, assistance checking vital signs/glucose levels, assistance changing dressings/bandages/oxygen, assistance with sterile wound care, and assistance with medical documentation.

The CAT numerical scoring system for ADLs has two components. The first component is the *self-performance score*. These scores rate how capable a person is of performing a particular ADL. The relevant scores are **0** (the person is independent and requires no help oversight); **1** (the person requires supervision); **2** (the person requires limited assistance ²⁰); **3** (the

¹⁴ 7 AAC 125.010(a).

¹⁵ 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 "supervision" as "observing and giving direction, as needed, so that the recipient can independently perform an ADL or IADL." *Id.*

¹⁶ 7 AAC 125.020(b). The CAT has been adopted into DHSS regulations by reference. *See* 7 AAC 160.900(d)(6).

¹⁷ *See* 7 AAC 125.010(a).

¹⁸ Ex. E.

¹⁹ *See* Division of Senior and Disability Services' *Personal Care Assistance Service Level Computation* (accessed online at <http://www.hss.state.ak.us/dsds/pca/documents/PCA%20Service%20Computation.pdf>) (accessed October 26, 2015); *see also* Ex. E.

²⁰ Pursuant 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."

person requires extensive assistance²¹); and **4** (the person is totally dependent)²².

The second component of the CAT scoring system for ADLs is the *support score*. These scores rate the degree of assistance that a person requires for a particular ADL. The relevant scores are **0** (no setup or physical help required); **1** (only setup help required); **2** (one person physical assist required); and **3** (two or more person physical assist required).

The CAT also scores certain activities known as "instrumental activities of daily living" (IADLs).²³ These are light meal preparation, main meal preparation, light housekeeping, routine housekeeping, laundry, and grocery shopping. Finally, the CAT scores one other IADL-like activity which is not technically an IADL (oxygen maintenance).

The CAT scores IADLs slightly differently than ADLs.²⁴ The *self-performance scores 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). The *support scores* for IADLs are also slightly different than the support scores for ADLs.²⁵ The relevant support scores 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).

If a person receives self-performance scores of 2, 3, or 4 and support scores of 2, 3, or 4 as to *any one* ADL, then the person is eligible to receive PCA services.²⁶ Alternatively, an applicant can also qualify for PCA services by being independent with difficulty as to at least one IADL, by needing assistance with at least one IADL, or by being dependent as to at least one

²¹ Pursuant 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."

²² Pursuant 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."

²³ Ex. E28.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 7 AAC 125.020. The CAT PCA scoring matrix at page 31 of the CAT attempts to restrict the ADLs through which one may qualify for PCA services to transfers, locomotion, eating, toilet use, dressing, and bathing. This is contrary to the express terms of the regulation, which indicates that a person can qualify to receive PCA services by receiving a score of 2/2 or better as to "any" ADL. Accordingly, the limitation stated in the CAT may not be valid.

IADL (*i.e.* by having self-performance scores of 2, 3, or 4), *and* by requiring physical assistance for support or being totally dependent for support (*i.e.* by having support scores of 3 or 4).²⁷

C. *Applicable Burden of Proof and Standard of Review*

Pursuant to applicable state and federal regulations, Ms. W, as the applicant, bears the *burden of proof* in this case.²⁸ The *standard of review* in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.²⁹

D. *Is Ms. W Eligible for PCA Assistance with her ADLs or IADLs?*

In her statement of issues dated September 9, 2015 Ms. W stated that she requires assistance with the ADLS of dressing, personal hygiene, and bathing; with the IADLs of light meal preparation, main meal preparation, shopping, and laundry; and with taking medications; she also stated that she needs a PCA escort to her medical appointments.³⁰ At hearing, she stated that she also requires assistance with toilet use. Each of these activities is addressed separately below.

1. Dressing and Undressing

For the ADL of dressing, PCA time is allowed for the donning, fastening, unfastening, and removal of the recipient's street clothing, support hose, or prosthesis.³¹ Ms. Samuel found that Ms. W requires only set-up assistance with dressing (CAT score 0/1).³²

At hearing, Ms. W's testimony regarding why she needs help with dressing, and the degree to which she needs assistance, was fairly vague. On the other hand, Ms. Samuel's testimony on this issue was credible and persuasive. Most importantly, Ms. W's primary healthcare provider did not, in either of her letters, indicate that she believes Ms. W requires assistance with dressing. Accordingly, the preponderance of the evidence indicates that Ms. W requires only set-up assistance with dressing (CAT score 0/1).

2. Toilet Use

For the ADL of toilet use, PCA time is limited by regulation to time spent moving to and from the toilet, transfers on and off the toilet, general hygiene care of a colostomy, ileostomy, or

²⁷ See Ex. E-31 and 7 AAC 125.020(a). The minimum standard applicable to IADLs, "independent with difficulty," is defined by 7 AAC 125.020(a)(4) as a situation in which "the recipient can perform the activity without the help of another individual, but does so with difficulty or takes a great amount of time to perform it."

²⁸ 42 CFR § 435.930, 7 AAC 49.135.

²⁹ See 42 CFR 431.244; *Albert S. v. Dept. of Health and Mental Hygiene*, 891 A.2d 402 (2006); *Maryland Dept. of Health and Mental Hygiene v. Brown*, 935 A.2d 1128 (Md. App. 2007); *In re Parker*, 969 A.2d 322 (N.H. 2009); *Murphy v. Curtis*, 930 N.E.2d 1228 (Ind. App. 2010).

³⁰ Ex. 2 p. 1.

³¹ 7 AAC 125.030(b)(4).

³² Ex. E8.

external catheter, and inserting and removal of a nonmedicated suppository, digital stimulation, or other routine incontinence care.³³ The CAT's definition of "toilet use" is somewhat broader, encompassing post-toileting hygiene and clothing adjustments.³⁴

Ms. Samuel found that Ms. W is independent with toilet use.³⁵ At hearing, Ms. W testified that she can transfer on and off the toilet, and can adjust her clothing before and after using the toilet, but cannot clean herself after defecating. The translator's direct quote was that "she can wipe in front, but not in back." Ms. W testified that she can never clean herself, whether on good days or bad.

Ms. W's testimony regarding her need for assistance with this aspect of toileting was credible. First, there is no indication in the assessment that Ms. Samuel expressly asked Ms. W if she could perform post-toileting hygiene by herself. Second, Ms. W's medical diagnoses include fibromyalgia and lumbago. Back pain can certainly decrease range of motion to the extent that a person could need some assistance with the movements involved in toilet use. Finally, and most importantly, Ms. W's primary healthcare provider specifically stated, in her letter of August 12, 2015, that Ms. W "needs assistance in the bathroom" and "is not able to adequately clean herself."³⁶ Under federal Medicaid law, the opinion of a recipient's medical provider is generally entitled to significant weight. Accordingly, the preponderance of the evidence indicates that Ms. W requires limited assistance with toilet use (CAT score 2/2).

Neither party presented evidence concerning the frequency of assistance which Ms. W requires with toileting. However, the medical literature indicates that, in Western populations, a stool frequency from three times per week to three times per day is considered normal.³⁷ Averaging the highest normal frequency with the lowest normal frequency yields an average frequency of 12 times per week. Based on Ms. W's health problems, it seems likely that her needs are slightly above average. I find that the preponderance of the evidence indicates that Ms. W requires assistance with toileting 14 times per week (CAT score 2/2, frequency 2/7).

³³ 7 AAC 125.030(b)(6).

³⁴ The CAT form defines toilet use as "[h]ow person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, *cleanses* . . . manages ostomy or catheter, adjusts clothes" (Ex. E9).

³⁵ Ex. E9.

³⁶ Ex. 2 pp. 2 - 3.

³⁷ See Defecation Frequency and Stool Form in a Coastal Eastern Indian Population by Manas Kumar Panigrahi, Sanjib Kumar Kar, Shivaram Prasad Singh, and Uday C Ghoshal, published in the *J Neurogastroenterol Motil* 2013; 19(3): 374-380, (published 07-31-2013), accessed online at <http://dx.doi.org/10.5056/jnm.2013.19.3.374> (date accessed October 1, 2015).

3. Personal Hygiene

For the ADL of personal hygiene, PCA time is allowed for washing and drying the face and hands, nail care, skin care, mouth and teeth care, brushing and combing the hair, shaving when done separately from bathing, and shampooing the hair when done separately from bathing.³⁸

Ms. Samuel found that Ms. W is independent with personal hygiene (CAT score 0/0).³⁹ At hearing, Ms. W's testimony regarding why she needs help with personal hygiene, and the degree to which she needs assistance, was rather vague. On the other hand, Ms. Samuel's testimony on this issue was credible and persuasive. Most importantly, Ms. W's primary healthcare provider stated, in her letter of September 23, 2015, that "[w]hile [Ms. W] has pain and weakness in the shoulders from arthritis and general deconditioning this should not limit her ability to do simple tasks such as wash her face or brush her teeth."⁴⁰ Under federal Medicaid law, the opinion of a recipient's medical provider is generally entitled to significant weight. Accordingly, the preponderance of the evidence indicates that Ms. W is independent with her personal hygiene tasks (CAT score 0/0).

4. Bathing

For the ADL of bathing, PCA time is allowed for "the taking of a full-body bath, shower, or sponge bath and the required transfers in and out of the bathtub or shower."⁴¹

Ms. Samuel found that Ms. W requires only set-up assistance with bathing (CAT score 0/1).⁴² At hearing, Ms. W's testimony regarding why she needs help with bathing, and the degree to which she needs assistance, was somewhat vague. On the other hand, Ms. Samuel's testimony on this issue was credible and persuasive. Most importantly, Ms. W's primary healthcare provider stated, in her latter of September 23, 2015, that, based on Ms. W's medical condition, she believes Ms. W is able to bathe herself.⁴³ Under federal Medicaid law, the opinion of a recipient's medical provider is generally entitled to significant weight. Accordingly, the preponderance of the evidence indicates that Ms. W requires only set-up assistance with bathing (CAT score 0/1).

³⁸ 7 AAC 125.030(b)(7).

³⁹ Ex. E10.

⁴⁰ Exs. G2, G3.

⁴¹ 7 AAC 125.030(b)(8). The definition of bathing contained in the CAT is essentially identical (*see* Ex. E11).

⁴² Ex. E11.

⁴³ Exs. G2, G3.

5. Instrumental Activities of Daily Living (IADLs)

Ms. W seeks PCA assistance with the IADLs of light meal preparation, main meal preparation, shopping, and laundry. However, pursuant to PCA regulation 7 AAC 125.040(a)(13)(C), a person is not entitled to PCA time for assistance with IADLs if other recipients living in the same residence already receive IADL services. The Division asserts that Ms. W's older sister M, who lives with Ms. W, already receives PCA time for assistance with the household's IADLs. Ms. W acknowledged this in her testimony at hearing. Accordingly, under 7 AAC 125.040(a)(13)(C), Ms. W is not entitled to her own PCA time for assistance with IADLs because this would result in a duplication of services.

6. PCA Assistance with Medication/Medication Management

Pursuant to 7 AAC 125.030(d), PCA assistance is available for:

- (1) assisting the recipient to self-administer routine oral medication, eye drops, and skin ointments; that assistance may include reminding the recipient and placing a medication within the recipient's reach;
- (2) assisting the recipient with the administration of medication; the task may be performed only by a [PCA] working for a consumer-directed personal care agency;

PCA time is allowed for "medication assistance/administration" if the recipient receives a score of 1, 2, 4, 5, or 6 in Section G(1)(a) at page 20 of the CAT.⁴⁴ In this case, Ms. W received a score of zero for this item on her assessment. This score is supported by statements by Ms. W's primary healthcare provider, who stated in her letter of September 23, 2015 that Ms. W "is able to manage her own medications and has been taking them correctly," and that "[s]he is able to give herself insulin, adjust doses, and keeps an excellent record of her blood sugars." Under federal Medicaid law, the opinion of a recipient's medical provider is generally entitled to significant weight. Accordingly, Ms. W is not currently eligible for PCA assistance with the administration of her medications.

7. PCA Escort to Medical Appointments

Pursuant to 7 AAC 125.030(d)(9), PCA time is available for "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." However, this is usually only provided when, due to cognitive or behavioral issues, the recipient is unable to communicate effectively with his or her doctor. In this case, Ms. W's primary healthcare provider stated in her letter of September 23, 2015 that "[i]n regard to [Ms. W's] memory/cognition . . . [s]he understands

⁴⁴ See the Division's Personal Care Assistance Service Level Computation Chart and Ex. E20.

English and I have given instructions in English that she has been able to follow."⁴⁵ This indicates that Ms. W's medical provider believes that Ms. W does not need a PCA to escort her to her medical appointments. Under federal Medicaid law, the opinion of a recipient's medical provider is generally entitled to significant weight. Accordingly, the preponderance of the evidence indicates that Ms. W does not currently require PCA escort to her medical appointments.

IV. Conclusion

The preponderance of the evidence indicates that Ms. W requires limited assistance with the ADL of toilet use. Accordingly, the Division's denial of Ms. W's application for PCA services is reversed. However, because Ms. W is presently eligible only for PCA assistance with the ADL of toilet use, she qualifies to receive only a small amount of PCA services at this time. Should Ms. W's medical condition and functional abilities decline in the future, she may submit a PCA Service Plan Amendment Request to the Division to seek additional PCA services.

DATED this 27th day of October, 2015.

Signed

Jay Durych

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 5th day of November, 2015.

By: *Signed*

Name: Jay D. Durych

Title: Administrative Law Judge, DOA/OAH

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

⁴⁵ Exs. G2, G3.