

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

In the Matter of)	
)	
J L)	OAH No. 15-1148/1343-MDS
<hr style="width:40%; margin-left:0"/>)	Agency No.

DECISION

I. Introduction

J L applied for Medicaid benefits under the Home and Community-based Waiver (Waiver) and personal care assistance (PCA) services programs. She was assessed by the Division of Senior and Disabilities Services (Division) to determine her eligibility and benefit level for both programs. The Division notified her on August 23, 2015 that she was authorized 12 hours per week of PCA services. On August 25, 2015, Ms. L was notified that she was not eligible for Waiver services. Ms. L requested a hearing to challenge both decisions. Inexplicably the PCA case was not referred to the Office of Administrative Hearings until after a hearing had been held on the Waiver determination. A separate hearing to address the level of PCA services was held. It was at this time that the PCA case¹ and the Waiver termination case² were consolidated.

The hearing process provides an opportunity for the parties to provide a more extensive and in-depth understanding of an applicant’s needs. After a review of the evidence presented in both proceedings, the Division’s denial of Ms. L’s eligibility for Waiver services is upheld. Its determination regarding her PCA services is affirmed in part and reversed in part, as discussed in detail below.

II. Background Facts³

Ms. L is an 80 year-old woman who suffers from macular degeneration which has left her legally blind. She also suffers from several other conditions including dizziness, giddiness, osteoporosis, congestive heart failure, hypertension, and liver cirrhosis.⁴ In September 2015, Ms. L underwent a total knee replacement. The impending surgery was known to the Division at the

¹ OAH Case No. 15-1343-MDS.

² OAH Case No. 15-1148-MDS.

³ Unless otherwise specified, all references to exhibits are to those contained in the position statement filed by the Division in OAH Case No. 13-1514-MDS.

⁴ July 29, 2015 Updated Verification of Diagnosis.

assessment interview on August 13, 2015 and at the time the Division denied her application for Waiver services and authorized 12 hours of PCA services, August 24, 2015.⁵

Ms. L applied for Medicaid services to help her with her Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs). Authorized services may include activities such as getting up out of a chair (transfers), toileting, bathing, meal preparation, laundry, etc. Medicaid services may also provide assistance with other covered activities such as medication, walking for exercise, etc.

Ms. L's daughter and Power of Attorney (POA), H Z, was present at the assessment and testified on behalf of her mother at the Waiver and the PCA hearings. She represented her mother at the Waiver hearing. Because Ms. Z owned the PCA agency that provided her mother's PCA services, she could not represent her mother at the PCA hearing. Ms. L's grandson and POA, S V, represented his grandmother at the PCA hearing. Ms. Z denied that she had anything more than a *de minimus* financial interest in her mother's PCA services because she had many clients.

Although the Waiver and PCA proceedings arise out of the same set of facts and involve the same parties, they were not consolidated for hearing purposes. The Waiver hearing occurred first. It was at the Waiver hearing, that it was discovered that Ms. L had also requested a hearing on her PCA application. The Division authorized 12 hours of PCA services per week but Ms. L thought she was eligible for more. Ms. Z was given the option of continuing the waiver hearing to consolidate it with the PCA matter. She declined and the Waiver hearing was held. English is Ms. Z's second language; Russian is her first. At the PCA hearing a Russian interpreter was used. The Waiver hearing was conducted without the services of an interpreter.

Throughout both proceedings, Ms. Z emphasized the difficulties encountered by her mother because of her blindness and dizziness. The Division agreed that Ms. L requires some physical assistance because it authorized PCA services in the amount of 12 hours per week. Medical records establish that Ms. L suffered from severe degeneration in her knee⁶ and was scheduled for a knee replacement at the time of the assessment interview.

Because the surgery was after the determination date, whether the surgery reduced Ms. L's need for physical assistance or her needs for assistance post-surgery is not relevant to her need at the time of determination. However, the fact that she required knee surgery is relevant to the amount of physical assistance she required at the time of the Division's determination.

⁵ This date is also known as the date of determination.

⁶ April 20, 2015 Diagnostic Imaging Report.

After the Waiver hearing, and prior to the PCA hearing additional medical records were filed in the PCA proceeding. It is unknown whether those records were in the Division's possession at the time of its determination. Regardless they are considered for purposes of this decision.

Natasha Fromm conducted the assessment interview. She recorded her observations and impressions on the Division's Consumer Assessment Tool (CAT). The CAT was then scored, the scores were reviewed by a nurse, and a determination was made. Ms. Fromm testified consistent with her observations recorded in the CAT. Upon hearing the testimony and reviewing additional medical records she did testify that minor changes to the CAT were appropriate. These changes are discussed below.

III. Discussion

In this case, because she is seeking benefits, Ms. L has the burden of proof by a preponderance of the evidence. Section A of this decision will provide an overview of the scoring for Waiver and PCA services. Section B will discuss the specific scores assigned to each ADL and IADL.

A. Eligibility Overview for Waiver and PCA Programs

1. Waiver Services

The Alaska Medicaid program provides Waiver services to adults with physical disabilities who require "a level of care provided in a nursing facility."⁷ The purpose of these services is "to offer a choice between home and community-based waiver services and institutional care."⁸

The nursing facility level of care⁹ requirement is determined in part by an assessment which is documented by the CAT.¹⁰ The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,¹¹ and whether an applicant has impaired cognition or displays problem behaviors.¹² Each of the assessed items is coded and contributes to a final numerical score. For instance, if an individual required 5 days or more of therapies

⁷ 7 AAC 130.205(d)(1)(B) and (d)(2).

⁸ 7 AAC 130.200.

⁹ See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

¹⁰ 7 AAC 130.230(b)(2)(B).

¹¹ Ex. E, pp. 15 - 17.

¹² Ex. E, pp. 18 - 19.

(physical, speech/language, occupation, or respiratory therapy) per week, he or she would receive a score of 3.¹³

The CAT also bases Waiver eligibility upon the coding provided for five specified activities of daily living (ADLs): body mobility, transfers, locomotion, toileting, and eating. The CAT numerical coding system 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 independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance¹⁴); **3** (the person requires extensive assistance¹⁵); and **4** (the person is totally dependent¹⁶). 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).¹⁷

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** (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). 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).¹⁸

If a person has a self-performance code of 2 (limited assistance, which consists of non-weight bearing physical assistance three or more times during the last seven days, or limited assistance plus weight-bearing assistance one or two times during the last seven days), or 3 (extensive assistance, which consists of weight-bearing support three or more times during the past seven days, or the caregiver provides complete performance of the activity during a portion of the past seven days), plus a support code of 2 (physical assistance from one person) or 3 (physical assistance from two or more persons) with any of the five specified ADLs, that person receives points toward his or her total eligibility score on the CAT. A person can also receive

¹³ Ex. E, p. 31.

¹⁴ 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.”

¹⁵ 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.”

¹⁶ 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.”

¹⁷ Ex. E, p. 20.

¹⁸ Ex. E, p. 20.

points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive behaviors, etc.), and required assistance with any of the five specified ADLs.¹⁹

In order for a person who only has physical assistance needs to score as eligible for Waiver services on the CAT, he or she would need a self-performance code of 3 (extensive assistance) or 4 (total dependence) and a support code of 2 or 3 for three or more of the five specified ADLs (bed mobility, transfers, locomotion within the home, eating, and toileting).²⁰

The results of the assessment portion of the CAT are then scored. If an applicant's score is 3 or higher, the applicant is medically eligible for Waiver services.²¹

2. PCA Services

The Medicaid program authorizes PCA services for the purpose of providing “*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 recipient”²²

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.”²³

As with the Waiver program, the Division uses the CAT to determine the level of physical assistance that an applicant or recipient requires in order to perform their ADLs and their IADLs.²⁴ The list of ADLs measured by the CAT for PCA services is more extensive than for the Waiver program. The PCA program measures 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.²⁵

¹⁹ Ex. E, p. 31.

²⁰ Ex. E, p. 31.

²¹ Ex. E, p. 31.

²² 7 AAC 125.010(a) [emphasis added].

²³ 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.*

²⁴ See 7 AAC 125.020(a) and (b).

²⁵ Ex. E, pp. 6 – 11.

The CAT also codes certain activities known as “instrumental activities of daily living” (IADLs). These are light meal preparation, main meal preparation, light housekeeping, laundry (in-home), laundry (out-of-home), and shopping.²⁶ Here, the IADLs are not in dispute.

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.²⁷

B. Scoring of ADLs, Other Covered Activities and Prescribed Tasks

1. *Bed Mobility*

The ADL of body mobility includes the activity of positioning or turning in a bed or chair.²⁸ The CAT refers to this as bed mobility, which is described as how a person moves to or from a lying position, or turns side to side, or positions his or her body while lying in bed.²⁹ Ms. L can reposition herself without assistance. The Division’s score of 0/0 is correct.

2. *Transfers*

Transferring is the act of moving between surfaces, such as getting out of or into a bed, or getting up from a chair to a standing position.³⁰ The Division scored Ms. L as requiring limited assistance (score 2/2) 28 times per week (four per day/seven days a week).³¹ Ms. Fromm testified consistent with her observation written in the CAT: “Daughter give JL hand up to give her boost to standing position.”³² It is more likely than not that the boost provided was weight bearing and the need for transfer assistance was associated with Ms. L’s knee condition.

Ms. L was in physical therapy for knee pain, stiffness of joint, and muscle weakness.³³ The physical therapist wrote that she observed Ms. L lacked full knee extension at heel strike and moved with a shortened stride and walked with a forward lean.³⁴ Finally, the physical

²⁶ Ex. E, p. 26.

²⁷ See 7 AAC 125.024(a)(1) and the Division’s *Personal Care Assistance Service Level Computation* chart contained at Ex. B, pp. 34 - 36.

²⁸ 7 AAC 125.030(b)(1).

²⁹ Ex. E, p. 6

³⁰ See Ex. E.

³¹ Ex. E, p. 6.

³² Ex. E, p. 6

³³ July 23, 2015 No Name Therapy Chart Note.

³⁴ *Id.*

therapist wrote as an objective comment “assist with transfers.”³⁵ An August 24, 2015 chart note reveals that Ms. L complained that she was “having significant limitations with range of motion and ambulation secondary to pain in her left knee...”³⁶

It is difficult to envision an 80 year-old person with knee pain so severe that joint replacement is called for but not needing weight bearing assistance to get up out of bed or a chair. Ms. L should be scored as requiring extensive assistance for transfers (score 3/2). As to frequency, the Division agrees that frequency should be increased to six times a day seven days a week.

3. *Locomotion*

The ADL of locomotion refers to the manner in which a person moves within his or her own room or other areas on the same floor.³⁷ Ms. L was observed walking in her apartment with her daughter holding her hand and guiding her. When they are outside, the daughter uses a wheelchair. The Division scored Ms. L as requiring supervision and setup help (Score 1/1).

Ms. Z testified that because of her mother’s vertigo and vision problems, she requires someone to help her stay upright and guide her. The Division cited to a medical record at hearing supporting the conclusion that Ms. L’s vertigo becomes worse with exertion. Ms. L has a walker available to assist her. However, even with the walker, Ms. L’s medical issues make it more likely than not that she requires some hands-on assistance to guide her and keep her from falling. Hands on assistance, however, does not rise to the level of weight-bearing, or extensive assistance. Ms. Z testified that her mother locomotes 10 to 12 times a day. The record does not support this frequency. Because many transfers are followed by locomotion, a frequency of six will be used. Therefore, having met her burden, Ms. L should be scored as requiring limited assistance (Score 2/2) six times a day.

3. *Locomotion to Medical Appointments*

Time for assisting with locomotion to medical appointments should be included. Ms. Fromm testified that she scored Ms. L a 1 because of her need for assistance associated with her lack of vision and her ability to use a walker. To locomote to a medical appointment, Ms. L must go down a flight of stairs. It is difficult to envision that a person with severe knee pain and vertigo that worsens with exertion could go down a flight of stairs

³⁵ *Id.*

³⁶ August 24, 2015 Chart Note Alaska Urological Institute.

³⁷ *See Ex. E, p. 7.*

without some sort of hands on assistance. Therefore, she is scored as requiring limited assistance (Score 2).

4. *Dressing*

The ADL of dressing refers to how a person puts on, fastens, and takes off all items of street clothing, including donning/removing a prosthesis.³⁸ The Division recognized that Ms. L requires limited assistance (Score 2/2) twice a day seven days a week. Ms. L disagreed and initially argued that she should receive a score of 3/2 because she cannot lean forward to put on pants or socks. Ms. Fromm testified that her score was based upon watching Ms. L don a sweater and Ms. L's ability to touch her feet during the assessment. After considering Ms. Fromm's testimony and understanding that the frequency was 14 times per week, Ms. L withdrew her objection to the Division's scoring. Accordingly the score is limited assistance (Score 2/2) fourteen times a week.

5. *Eating*

Ms. L agrees that the Division correctly scored her as independent with set-up help (Score 0/1).

6. *Toilet Use*

Toilet use includes transfers on and off the toilet, cleaning oneself, and adjusting clothing and routine incontinence care.³⁹ The Division scored Ms. L as only requiring supervision and setup help (Score 1/1). Ms. L objected because the score does not accurately reflect her need for physical assistance.

Ms. Z testified how she helps her mother by pulling her up from the toilet and providing hands on assistance while sitting down. Ms. Z further explained that her mother requires assistance cleaning herself because she cannot accurately judge her state of cleanliness or whether the toilet has been adequately flushed.

As discussed with transfers above, Ms. L's medical conditions make it more probable than not that she requires extensive assistance with toileting (Score 3/2) six times a day.⁴⁰

7. *Personal Hygiene*

The Division scored Ms. L as requiring setup help (Score 1/1) to complete her personal hygiene tasks such as combing hair, brushing teeth, or shaving.⁴¹ The testimony

³⁸ Ex. E, p. 8.

³⁹ 7 AAC 125.030(b)(6).

⁴⁰ In other proceedings assessors have testified that a frequency of six is the standard absent evidence to the contrary.

established that the assistance provided is to turn on water and to hand Ms. L the items she needs for hygiene. Someone may stand by but Ms. L washes her own face and cleans her own dentures. The type of assistance described by Ms. Z is supervision and setup, not limited. Therefore the Division's scoring for this ADL should be affirmed.

7. *Bathing*

Ms. L agrees that the Division correctly scored this ADL. Therefore the score shall remain at limited assistance (Score 2/2) seven times a week.

8. *Other Covered Activities*

In addition to ADLs and IADLs there are additional personal care services that fall under the PCA services umbrella. There are medication, vital signs, sterile and non-sterile wound care, oxygen use and maintenance, documentation, and escort.⁴² The scoring for these services is tied to the personal hygiene score or to scoring that indicates the person has cognitive impairment. Ms. Fromm's testimony regarding Ms. L's ability to self-administer her medications is consistent with the record in all but one respect, eye drops. Two of her medications are eye drops. Therefore, a score of 1 indicating that Ms. L administered some of her own medications may result in a more accurate representation of her abilities when it comes to medication. Regardless, because the amount of time allotted is based upon the personal hygiene score; her score in that ADL is not high enough to authorize time for other covered activities.

9. *Prescribed Tasks*

Range of motion, walking and foot care are activities that are authorized when prescribed, consistent with the assessment, and meets the needs of the applicant/recipient. Here, all prescriptions were for 99 months. Prescriptions are typically for a 12 month period. While the 99 month prescription period is something that should not be approved, where otherwise indicated, the Division should accept the prescription as authorizing the activity until the next assessment date or, where appropriate one year from the date of prescription. In the alternative, the Division should approve the activity and obtain further information regarding duration from the provider.

Here, Ms. L provided a prescribed task form for passive range of motion exercises and walking exercises. The form is dated July 29, 2015 and is for 99 months. It was accompanied by a home exercise program from her physical therapist. As discussed above Ms. L was actively

⁴¹ Ex. E, p. 10; Ex. G, p. 3.

⁴² 7 AAC 125.030(d),

involved in physical therapy for her knee. Because of her physical ailments it is reasonable that she receive physical assistance with these prescribed tasks. Based on the information developed through the hearing process, Ms. L has met her burden and established that it is more likely than not that the prescribed tasks are appropriate for PCA services, but not for a 99 month period. The Division should either make further inquiry of the provider or appropriately limit the duration of the prescribed task until the next assessment.

IV. Conclusion

Although the evidence establishes that Ms. L requires extensive assistance with the shaded ADLs of transfer and toileting and limited assistance with the shaded ADL of locomotion, these scores do not make Ms. L eligible for Waiver services. In addition, the evidence in this record shows that Ms. L does not meet the cognitive impairment threshold. Therefore, the Division's denial of Ms. L's application to participate in the Waiver program is affirmed.

The Division's assessment of Ms. L's needs for PCA assistance was correct in part. It understated her need for assistance in transfer, locomotion, toileting, and range of motion and walking exercises. It is therefore reversed in part and upheld in part. The Division is to recalculate Ms. L's needs for PCA assistance consistent with this decision.

DATED: December 31, 2015.

By: Signed
Rebecca L. Pauli
Administrative Law Judge

Adoption

The undersigned, under the authority of AS 44.64.060(e)(1), adopts the foregoing 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 January, 2016.

By: Signed
Name: Rebecca L. Pauli
Title: Administrative Law Judge

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