

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

In the Matter of: )  
 )  
 E T ) OAH No. 15-1161-MDS  
 ) Agency No.  
\_\_\_\_\_)

**DECISION**

**I. Introduction**

The issue in this case is whether the State of Alaska Division of Senior and Disabilities Services (Division) correctly assessed the amount of Medicaid Personal Care Assistant (PCA) services for which E T is currently eligible.<sup>1</sup> The Division decreased Ms. T's PCA services from 26.5 hours per week to 2.75 hours per week effective August 31, 2015.<sup>2</sup>

This decision concludes, based on the evidence in the record, that the Division's determination of the PCA services for which Ms. T is currently eligible was partially correct, but partially incorrect. Accordingly, the Division's decision is affirmed in part and reversed in part.

**II. Facts**

**A. Ms. T's Medical Diagnoses and Health Problems<sup>3</sup>**

Ms. T is 52 years old.<sup>4</sup> She lives in a home which she owns, along with one of her three children.<sup>5</sup> Her medical diagnoses include abnormality of gait, alopecia, arm joint pain, attention deficit disorder, carpal tunnel syndrome, cerebral cysts, cervicgia, cervical spine spondylosis and stenosis, chronic leg weakness and gait instability; chronic migraine headaches, chronic obstructive pulmonary disease (COPD), coccyx disorder, communicating hydrocephalus, constipation, dysarthria, depression, gastroesophageal reflux disease (GERD), goiter, history of intracranial injury, hyperlipidemia, kidney stones, neoplasm of the brain, renal failure, thyroid cancer, history of traumatic brain injury, urinary incontinence, and wheelchair dependence.<sup>6</sup> She takes at least six prescription medications daily.<sup>7</sup>

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<sup>1</sup> Ex. D.

<sup>2</sup> Ex. D1.

<sup>3</sup> Approximately 230 pages of medical records were submitted by Ms. T and/or the Division in this case. All of those records were reviewed and considered during the preparation of this decision.

<sup>4</sup> Ex. E1.

<sup>5</sup> Exs. E1, G32.

<sup>6</sup> Exs. E3, E4, G3, G5, G13, G39.

<sup>7</sup> Ex. G2.

Ms. T has a ventriculoperitoneal shunt (VP), a device for draining excess cerebrospinal fluid from the ventricles of her brain.<sup>8</sup> The VP was implanted in 2006 to treat a traumatic brain injury (TBI) which resulted from the surgical removal of a brain tumor or arachnoid cyst and a subsequent bacterial infection.<sup>9</sup> Ms. T has been confined to a wheelchair since the 2006 TBI.<sup>10</sup>

In October - November 2014 Ms. T underwent two surgeries for the removal of cancerous portions of her thyroid,<sup>11</sup> ultimately resulting in complete removal of her thyroid.<sup>12</sup>

The progress notes from a medical appointment on March 11, 2015 indicate that Ms. T's memory, concentration, and focus were improving as a result of drug therapy, but that Ms. T was using a wheeled walker and had difficulty walking and standing without support.<sup>13</sup>

In May 2015 Ms. T went to a hospital emergency room because she was having dizziness and nausea and thought her VP shunt needed replacement.<sup>14</sup> However, a CT scan of her brain revealed that the VP was working properly, and the treating physician concluded that Ms. T's symptoms were likely related to a urinary tract infection.

On May 28, 2015 Ms. T's cervical spine was x-rayed.<sup>15</sup> The x-rays indicated endplate degeneration and disc space narrowing at C3-C4, C4-C5, C5-C6, and C6-C7, with anterior osteophytes.

***B. The Division's Findings from its 2013 and 2015 Assessments***

Ms. T has received PCA services, as well as Home and Community-Based Waiver services ("waiver services"), since 2012 or before.<sup>16</sup> Ms. T was previously assessed as to her eligibility for those services on June 13, 2013 by Division nurse-assessor Marianne Sullivan, R.N.<sup>17</sup> Initially, in her 2013 assessment, Ms. Sullivan referenced ADL scores from the then-prior (presumably 2012) assessment.<sup>18</sup> Ms. Sullivan reported that the scores from the 2012 assessment were as follows: body mobility - independent (CAT score 0/0); transfers - required limited assistance (CAT score 2/2); locomotion - required limited assistance (CAT score 2/2); dressing - required limited assistance (CAT score 2/2); eating - was independent, requiring only set-up assistance (CAT score

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<sup>8</sup> All factual findings in this paragraph are based on Exs. G1 - G5 unless otherwise stated.

<sup>9</sup> Ex. G13.

<sup>10</sup> Ex. H2.

<sup>11</sup> Exs. G14, G41.

<sup>12</sup> Exs. G51, G52, G57, G58, K65, K66, K71, K72.

<sup>13</sup> Ex. G13.

<sup>14</sup> All factual findings in this paragraph are based on Exs. G1 - G13, I8, and J9 unless otherwise stated.

<sup>15</sup> Exs. G10, I13, J13. A CT scan was also taken of Ms. T's cervical spine on the same date (Exs. G35, L3).

<sup>16</sup> Ex. F.

<sup>17</sup> Exs. F1 - F31.

<sup>18</sup> All factual findings in this paragraph are based on Ex. F12 unless otherwise stated.

0/1); toilet use - required limited assistance (CAT score 2/2); personal hygiene - was independent, requiring set-up help only (CAT score 0/1); and bathing - required extensive assistance (CAT score 3/2).

Based on her own 2013 assessment, Ms. Sullivan found that Ms. T required the following levels of assistance with her ADLs:<sup>19</sup> body mobility - still independent (CAT score 0/0); transfers - required extensive assistance 56 times per week (CAT score 3/2, frequency 8/7); locomotion - required extensive assistance 28 times per week (CAT score 3/2, frequency 4/7); locomotion to access medical appointments - required limited assistance twice per week (CAT score 2/2, frequency 2/1); dressing - required limited assistance 14 times per week (CAT score 2/2, frequency 2/7); eating - was still independent, requiring only set-up assistance (CAT score 0/1); toilet use - required extensive assistance 42 times per week (CAT score 3/2, frequency 6/7); personal hygiene - was still independent, requiring only set-up assistance (CAT score 0/1); and bathing - required extensive assistance seven times per week (CAT score 3/2, frequency 1/7).

At the same 2013 assessment, Ms. Sullivan found that Ms. T required the following levels of assistance with her IADLs:<sup>20</sup> physical assistance as to financial management and grocery shopping (CAT score 2/2); physically dependent on others as to light meal preparation, main meal preparation, light housework, routine housework, and laundry (CAT score 3/4).

Ms. T was most recently assessed for continuing PCA and waiver services eligibility on February 20, 2015 by Kelley Russell, R.N. of DSDS.<sup>21</sup> Ms. Russell found that Ms. T has the following physical abilities and limitations:<sup>22</sup>

Functional assessment:<sup>23</sup> Ms. Russell reported that Ms. T has strong grip strength in her left and right hands, can touch her hands together over her head or behind her back, and can touch her feet while in a sitting position, but cannot stand up with her hands crossed on her chest.

Body Mobility / Bed Mobility:<sup>24</sup> Ms. Russell reported that Ms. T told her that she does not require assistance to reposition herself in bed. Ms. Russell reported she observed Ms. T demonstrate the use of her arms and hands during the assessment (scored 0/0).

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<sup>19</sup> All factual findings in this paragraph are based on Exs. F6 - F12 unless otherwise stated.

<sup>20</sup> All factual findings in this paragraph are based on Ex. F26 unless otherwise stated.

<sup>21</sup> Ex. E.

<sup>22</sup> Exs. E5 - E12.

<sup>23</sup> All references in this paragraph are based on Ex. E5 unless otherwise stated.

<sup>24</sup> All references in this paragraph are based on Ex. E7 unless otherwise stated.

Transfers:<sup>25</sup> Ms. Russell reported that Ms. T told her that she can transfer independently, but sometimes has problems maintaining her balance. Ms. Russell reported that she observed Ms. T transfer herself from her wheelchair to a lift recliner with no hands-on assistance (scored 0/0).

Locomotion (walking):<sup>26</sup> Ms. Russell reported that Ms. T told her that she is able to move about inside her home using her wheelchair, and is able to move about outside her home using a scooter. Ms. Russell reported that she observed Ms. T propel her wheelchair indoors without any hands-on assistance (scored 0/0). Ms. Russell also scored Ms. T as requiring limited assistance to move between levels of her home (CAT score 2, frequency 1/7).

Dressing:<sup>27</sup> Ms. Russell reported that Ms. T told her that she is able to dress herself once her PCA lays-out her clothes for her. Ms. Russell reported that she observed that Ms. T has strong grips and "good use of hands" (scored 0/1).

Eating:<sup>28</sup> Ms. Russell reported that Ms. T told her that that she is able to feed herself and can swallow her medications. Ms. Russell reported that she observed Ms. T feed herself during the assessment (scored 0/0).

Toileting:<sup>29</sup> Ms. Russell reported that Ms. T told her that (1) she is incontinent of urine at night; (2) she can get on and off the toilet by herself; (3) she can perform post-toileting hygiene by herself; and (4) she can adjust her clothing as necessary before and after toilet use. Ms. Russell reported that she observed Ms. T transfer from her wheelchair to a recliner without hands-on assistance (scored 0/0).

Personal Hygiene:<sup>30</sup> Ms. Russell reported that Ms. T told her that she can perform her own personal hygiene tasks independently / without hands-on assistance. Ms. Russell reported she observed that Ms. T has a strong grip and decent upper body functionality (scored 0/0).

Bathing:<sup>31</sup> Ms. Russell reported that Ms. T told her that she can bathe herself independently. Ms. Russell reported that she observed Ms. T transfer from her wheelchair to her recliner without hands-on assistance (scored 0/0).

Ms. Russell also scored Ms. T as to her ability to perform Instrumental Activities of Daily Living (IADLs).<sup>32</sup> Ms. Russell scored Ms. T as follows: independent with difficulty, requiring set-

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<sup>25</sup> All references in this paragraph are based on Ex. E8 unless otherwise stated.

<sup>26</sup> All references in this paragraph are based on Ex. E8 unless otherwise stated.

<sup>27</sup> All references in this paragraph are based on Ex. E9 unless otherwise stated.

<sup>28</sup> All references in this paragraph are based on Ex. E10 unless otherwise stated.

<sup>29</sup> All references in this paragraph are based on Ex. E10 unless otherwise stated.

<sup>30</sup> All references in this paragraph are based on Ex. E11 unless otherwise stated.

<sup>31</sup> All references in this paragraph are based on Ex. E12 unless otherwise stated.

up assistance as to financial management, light meal preparation, and light housework (CAT score 1/2); and requiring physical assistance as to main meal preparation, routine housework, grocery shopping, and laundry (CAT score 2/3).

### **C. Relevant Procedural History**

The Division performed the assessment at issue on February 20, 2015.<sup>33</sup> On August 21, 2015 the Division notified Ms. T that her PCA service level was being reduced from 26.5 hours per week to 2.75 hours per week effective August 31, 2015.<sup>34</sup> Ms. T requested a hearing to contest the Division's reduction of her PCA services on August 26, 2015.<sup>35</sup>

While Ms. T's PCA services case (this case) was pending, the Division also terminated Ms. T's waiver services.<sup>36</sup> Ms. T requested a hearing to contest the Division's termination of her waiver services, resulting in the referral of Case No. 15-0942-MDS to the Office of Administrative Hearings (OAH). Neither Ms. T nor the Division requested consolidation of the PCA case with the waiver services case. The waiver services case went to hearing first, resulting in a decision dated October 14, 2015, by Administrative Law Judge (ALJ) Stephen C. Slotnick, which affirmed the Division's termination of Ms. T's waiver services.

Ms. T's PCA services hearing was held on November 16, 2015. Ms. T participated in the hearing by phone, represented herself, and testified on her own behalf. Ms. T's PCA, H H, and Ms. T's care coordinator, S D, participated in the hearing by phone and testified on Ms. T's behalf. Laura Baldwin participated in the hearing by phone and represented the Division. Kelley Russell, R.N. and Angelika Fey-Merritt participated in the hearing by phone and testified for 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 living (IADL), and other services based on the *physical condition* of the recipient . . . ." <sup>37</sup> [Emphasis added]. Accordingly, "[t]he department will not authorize personal care services for a recipient if

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<sup>32</sup> All references in this paragraph are based on Ex. E27 unless otherwise stated.

<sup>33</sup> Ex. E.

<sup>34</sup> Ex. D1.

<sup>35</sup> Ex. C.

<sup>36</sup> See OAH Case No. 15-0942-MDS.

<sup>37</sup> 7 AAC 125.010(a).

the assessment shows that the recipient only needs assistance with supervision, cueing, and setup in order to independently perform an ADL or IADL."<sup>38</sup>

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

The Department conducts an assessment for PCA services using the Consumer Assessment Tool or "CAT."<sup>39</sup> 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).<sup>40</sup> The CAT seeks to make the assessment process more objective by attempting to standardize the assessment of an applicant or recipient's functional impairments.<sup>41</sup>

The ADLs scored by the CAT are body mobility, transfers, locomotion, dressing, eating, toilet use, personal hygiene, and bathing.<sup>42</sup> In addition, the CAT scores ten other ADL-like activities which are not technically ADLs. These are assistance with medications, assistance with taking and recording vital signs and glucose levels, assistance with non-sterile dressing / bandage changes, assistance with oxygen tank / equipment maintenance or use, assistance with sterile wound care, assistance with medical documentation, PCA escort to medical appointments, and assistance with range of motion exercises, walking for exercise, and foot care.<sup>43</sup>

The CAT's numerical scoring system for ADLs has two components. The first component is the *self-performance score*. This score rates how capable a person is of performing a particular ADL. The possible scores for ADLs are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance<sup>44</sup>); **3** (the

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<sup>38</sup> 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.*

<sup>39</sup> 7 AAC 125.020(b). The CAT has been adopted into DHSS regulations by reference. See 7 AAC 160.900(d)(6).

<sup>40</sup> See 7 AAC 125.010(a).

<sup>41</sup> Ex. E.

<sup>42</sup> 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 December 15, 2015); see also Exs. D4, D5, D7, and D10.

<sup>43</sup> *Id.*

<sup>44</sup> 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 AAC 125.020(a)(1).

person requires extensive assistance<sup>45</sup>); or **4** (the person is totally dependent<sup>46</sup>). There are also codes that are not treated as numerical scores for purposes of calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).

The second component of the CAT's scoring system for ADLs is the *support score*. This score rates the degree of assistance that a person requires for a particular ADL. The possible scores for ADLs are **0** (no setup or physical help required); **1** (only setup help required); **2** (physical assistance from one person required); or **3** (physical assistance from two or more persons required). Again, there are additional codes that do not add to the service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).

The CAT also scores activities known as "instrumental activities of daily living" (IADLs).<sup>47</sup> These are light meal preparation, main meal preparation, light housekeeping, routine housekeeping, laundry, and grocery shopping. The CAT scores IADLs slightly differently than ADLs.<sup>48</sup> 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). There is also a code that is not treated as a numerical score for purposes of calculating a service level: **8** (the activity did not occur).

The *support scores* for IADLs are also slightly different than the support codes for ADLs.<sup>49</sup> The support scores for IADLs are 0 (no support provided); 1 (supervision / cueing provided); 2 (setup 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 does not add to the service level: 8 (the activity did not occur).

Under the PCA regulations in effect prior to January 26, 2012, the Division would provide a recipient with time for an ADL based on *the assessor's perception of how much time would reasonably be required* (up to a maximum level specified by regulation) *to perform the activity at*

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<sup>45</sup> 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." 7 AAC 125.020(a)(2).

<sup>46</sup> Total dependence for an ADL or an IADL "means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity." 7 AAC 125.020(a)(3).

<sup>47</sup> Ex. E26.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

issue.<sup>50</sup> However, in January 2012 the PCA regulations were amended to implement a new system in which the self-performance score and support score for the specific activity *automatically dictate* the amount of PCA time awarded.<sup>51</sup> For example, a CAT score of three as to non-mechanical transfers gives a recipient 3.75 minutes of PCA time *regardless of the actual amount of time it takes to perform the transfer*; a CAT code of four as to non-mechanical transfers gives a recipient five minutes of PCA time *regardless of the actual amount of time it takes to perform the transfer*.<sup>52</sup>

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

The Division is seeking to reduce Ms. T's existing PCA services level, which has been in effect since June 2013. The Division therefore has the burden of proving, by a preponderance of the evidence, that Ms. T's need for PCA services has decreased since her last assessment.<sup>53</sup>

The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.<sup>54</sup> In this case, evidence was presented at hearing that was not available to the Division's reviewers. The administrative law judge may independently weigh the evidence and reach a different conclusion than did the Division's staff, even if the original decision is factually supported and has a reasonable basis in law.

### **D. How Much PCA Time is Ms. T Eligible to Receive in This Case?**

Initially, it must be noted that factual findings concerning the degree of assistance which Ms. T requires with bed / body mobility, transfers, locomotion, and eating were previously made in the context of Ms. T's waiver services case (OAH No. 15-0942-MDS). Two related legal doctrines come into play when a party seeks to re-assert claims or issues which have been determined in a prior proceeding. These two doctrines are *res judicata* and *collateral estoppel*.

The broader doctrine, *res judicata*, "generally bars litigation of an issue which has already been decided or which could have been decided in a prior proceeding."<sup>55</sup> The goal of *res judicata*

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<sup>50</sup> See former regulations 7 AAC 43.750, 7 AAC 43.751, 7 AAC 43.752, and 7 AAC 43.755.

<sup>51</sup> See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart.

<sup>52</sup> *Id.*

<sup>53</sup> See 42 CFR 435.930, 2 AAC 64.290(e), 7 AAC 49.135, and *Alaska Alcoholic Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985).

<sup>54</sup> 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).

<sup>55</sup> *Commercial Fisheries Entry Commission v. Byayuk*, 684 P.2d 114 (Alaska 1984). In *State v. Baker*, 393 P.2d 893, 896-897 (Alaska 1964), the Alaska Supreme Court defined the application and purpose of *res judicata* as follows:

This doctrine bars a second suit between the same parties on the same subject matter resolving the same issues between the parties in the same capacity or quality. It is founded upon the principle that parties ought not to be permitted to litigate the same issue more than once and that when a right or fact has been judicially determined by a court of competent jurisdiction or an opportunity for such



and collateral estoppel is finality: both doctrines “aim to prevent parties from again and again attempting to reopen a matter that has been resolved . . . .”<sup>56</sup> The two doctrines “bind the parties and their privies to factual findings, as well as legal conclusions, that have been the subject of prior litigation.”<sup>57</sup> The principles of *res judicata* and collateral estoppel apply in administrative proceedings as well as in court proceedings.<sup>58</sup>

Accordingly, I must accept the findings from the decision in Ms. T's waiver services case, concerning the appropriate self-performance and support scores for bed / body mobility, transfers, locomotion, and eating, in this PCA case. However, I may consider the scores and frequencies as to all other PCA services on a *de novo* basis.

Ms. T did not submit any statement outlining the particular activities that she asserts were improperly scored by the Division in calculating her PCA time. However, review of Ex. D10 indicates that Ms. T's PCA scores were reduced as to either level or frequency of assistance in the following areas: transfers (frequency only), dressing, toilet use, bathing, light meal preparation, main meal preparation, light and routine housework, grocery shopping, laundry, assistance with medications, and medical escort. Each of these 12 activities is discussed separately below.

#### 1. Transfers

For the ADL of transferring, PCA time is allowed when a person requires physical assistance to move between one surface and another (including to or from a bed, chair, or wheelchair), and/or when a person requires physical assistance to move from a lying or sitting position to a standing position.<sup>59</sup> The decision issued in Ms. T's waiver services case found that Ms. T currently requires limited assistance with transfers (CAT score 2/2). That finding is determinative here. However, because frequency was not at issue in Ms. T's waiver services case, the appropriate frequency for transfers must still be determined for purposes of Ms. T's PCA services. Because the Division's 2015 assessment found that Ms. T is independent with transfers, the Division in essence found that Ms. T's current transfer frequency is zero. However, the ALJ in the waiver case found

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trial has been given, the judgment of the court, so long as it remains unreversed, should be conclusive upon the parties and those in privity with them . . . . [footnotes omitted].

<sup>56</sup> *Alaska Public Interest Research Group v. State of Alaska*, 167 P.3d 27 (Alaska 2007).

<sup>57</sup> *Id.*

<sup>58</sup> *Sublett v. State of Alaska Commercial Fisheries Entry Commission*, 773 P.2d 952 (Alaska 1989) (“principles of *res judicata* and collateral estoppel preclude collateral attack of a final agency decision made in an adjudicatory hearing”), citing *Jeffries v. Glacier State Telephone Company*, 604 P.2d 4, 8-9 (Alaska 1979); *Astoria Fed. Savings and Loan Association v. Solimino*, 501 U.S. 104, 107, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991) (unless contrary to legislative intent, collateral estoppel should be applied to decisions of administrative bodies that have attained finality); *Alaska Public Interest Research Group v. State*, 167 P.3d 27 (Alaska 2007).

<sup>59</sup> 7 AAC 125.030(b)(2).

that Ms. T still needs limited assistance with transfers. Neither party put on persuasive evidence as to Ms. T's required frequency of transfer in this (PCA) case. Accordingly, the preponderance of the evidence indicates that Ms. T requires limited assistance with transfers at the same 56-times-per-week frequency indicated in her 2013 assessment (CAT score 2/2, frequency 8/7).

### 2. 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.<sup>60</sup> In 2013 Ms. Sullivan found that Ms. T required limited physical assistance with dressing a total of 14 times per week (CAT score 2/2, frequency 2/7).<sup>61</sup> In 2015 Ms. Russell found that Ms. T requires only set-up help with dressing (CAT score 0/1, frequency 0/0). At hearing, Ms. T agreed that she is currently independent with dressing, requiring only set-up assistance. Accordingly, the preponderance of the evidence indicates that Ms. T requires only set-up help with dressing (CAT score 0/1, frequency 0/0).

### 3. 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 external catheter, and inserting and removal of a nonmedicated suppository, digital stimulation, or other routine incontinence care.<sup>62</sup> The CAT's definition of "toilet use" is somewhat broader, encompassing post-toileting hygiene and clothing adjustments.<sup>63</sup>

The Division's prior (2013) assessment found that Ms. T required extensive assistance with toileting (based primarily on a need for assistance transferring on and off the toilet, and a history of falls when performing this activity), at a frequency of 42 times per week (CAT score 3/2, frequency 6/7).<sup>64</sup> The Division's current (2015) assessment found that Ms. T is now independent with toilet use (CAT score 0/0).<sup>65</sup> At hearing, however, Ms. T's PCA, H H, and her most recent care coordinator, S D, both testified credibly that Ms. T's condition has not gotten better, but rather has deteriorated, since her 2013 assessment. Also, Ms. T's statements during the assessment (which were the primary basis for the toileting scores assigned by the Division) are suspect because (1) Ms.

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<sup>60</sup> 7 AAC 125.030(b)(4).

<sup>61</sup> Ex. F8.

<sup>62</sup> 7 AAC 125.030(b)(6).

<sup>63</sup> 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. E10).

<sup>64</sup> Ex. F9.

<sup>65</sup> Ex. E10.

T has significant cognitive problems as a result of her TBI; and (2) my experience from hearing a large number of PCA and waiver cases indicates that many people under-report their need for assistance with toileting due to embarrassment. Accordingly, the preponderance of the evidence indicates that Ms. T still requires extensive assistance with toileting. Also, there is no evidence in the record indicating that Ms. T's toileting frequency has decreased since 2013. Accordingly, I find that Ms. T needs extensive assistance with toilet use 42 times per week (CAT score 3/2, frequency 6/7).

#### 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."<sup>66</sup> The Division's prior (2013) assessment found that Ms. T required extensive assistance with bathing once per day, seven days per week (CAT score 3/2, frequency 1/7), based on Ms. T's need for assistance with bath-related transfers, washing parts of her body, and washing her hair.<sup>67</sup> The Division's current (2015) assessment found that Ms. T is now independent with bathing (CAT score 0/0). At hearing, however, Ms. T's PCA, H H, and her most recent care coordinator, S D, both testified credibly that Ms. T's condition has not gotten better, but rather has deteriorated, since her 2013 assessment. Also, Ms. T's statements during the assessment (which were the primary basis for the bathing scores assigned by the Division) are suspect because Ms. T has significant cognitive problems as a result of her TBI, and she testified at hearing that she still needs help with bathing. Accordingly, the preponderance of the evidence indicates that Ms. T still requires extensive assistance with bathing. Also, there is no evidence in the record indicating that Ms. T's bathing frequency has changed since 2013. I find that Ms. T needs extensive assistance with bathing 7 times per week (CAT score 3/2, frequency 1/7).

#### 5. Light Meals

The PCA regulations define the IADL of light meal preparation as the preparation, serving, and cleanup in the recipient's home of any meal that is essential to meet the health needs of the recipient, and that is not the main meal of the day.<sup>68</sup> The Division's prior (2013) assessment found that Ms. T was totally dependent on others for light meal preparation (CAT score 3/4).<sup>69</sup> The Division's current (2015) assessment found that Ms. T is independent with difficulty, requiring only

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<sup>66</sup> 7 AAC 125.030(b)(8). The definition of bathing contained in the CAT is essentially identical (*see* Ex. E11).

<sup>67</sup> Ex. F11.

<sup>68</sup> 7 AAC 125.030(c)(1).

<sup>69</sup> Ex. F26.

set-up help, for light meal preparation (CAT score 1/2).<sup>70</sup> At hearing, Ms. H credibly testified that Ms. T cannot prepare her own meals because of her carpal tunnel syndrome, her vision problems, and her memory problems, and that Ms. T cannot safely heat her food because she is likely to leave the oven, stove, or microwave on. Ms. H's testimony is consistent with Ms. T's medical diagnoses. Accordingly, the preponderance of the evidence indicates that Ms. T is dependent on others for light meal preparation (CAT score 3/4).<sup>71</sup>

6. Main Meals

The PCA regulations define the IADL of main meal preparation as the preparation, serving, and cleanup in the recipient's home of one main meal per day that is essential to meet the health needs of the recipient.<sup>72</sup> The Division's prior (2013) assessment found Ms. T to be dependent on others for main meal preparation (CAT score 3/4).<sup>73</sup> The Division's current (2015) assessment found that Ms. T requires physical assistance with main meal preparation (CAT score 2/3).<sup>74</sup> At hearing, Ms. H credibly testified that, for the reasons discussed above as to light meals, it is unsafe for Ms. T to attempt to prepare her own main meals. This is consistent with what one would expect given Ms. T's medical diagnoses. The preponderance of the evidence therefore indicates that Ms. T is dependent on others for main meal preparation (CAT score 3/4).

7. Light Housework

The PCA regulations define the IADL of "light housekeeping" as (1) picking up, dusting, vacuuming, and floor-cleaning of the living spaces used by the recipient; (2) the cleaning of the kitchen and dishes used for preparation of the recipient's meals; (3) the cleaning of any bathroom used by recipient; (4) making the recipient's bed; (5) removing the recipient's trash; and (6) caring for the recipient's service animal.<sup>75</sup> The Division's prior (2013) assessment found that Ms. T was dependent on others for light housework (CAT score 3/4).<sup>76</sup> The Division's current (2015) assessment found that Ms. T is now independent with light housework, requiring only set-up help (CAT score 1/2).<sup>77</sup> At hearing, Ms. H credibly testified that Ms. T is not completely dependent on others as to housework, but still generally requires physical assistance with it. Accordingly, the

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<sup>70</sup> Ex. E27.

<sup>71</sup> Note that the CAT scores IADLs slightly differently than ADLs (see discussion in Section III(B), above).

<sup>72</sup> 7 AAC 125.030(c)(2).

<sup>73</sup> Ex. F26.

<sup>74</sup> Ex. E27.

<sup>75</sup> 7 AAC 125.030(c)(3).

<sup>76</sup> Ex. F26.

<sup>77</sup> Ex. E27.

preponderance of the evidence indicates that Ms. T currently requires physical assistance to perform her light housework (CAT score 2/3).

8. Routine Housework

The Division's prior (2013) assessment found that Ms. T was dependent on others for her routine housework (CAT score 3/4).<sup>78</sup> The Division's current (2015) assessment found that Ms. T requires physical assistance with routine housework (CAT score 2/3).<sup>79</sup>

Although *the CAT* differentiates between "light housework" and "routine housework," *the PCA regulation* includes all the constituent activities of these two "CAT categories" within a single definition of "light housekeeping."<sup>80</sup> Because Ms. T has already been scored 2/3 for the IADL of "light housekeeping" (above), the same score is appropriate for routine housework.

9. Grocery Shopping

The PCA regulations define the IADL of grocery shopping as shopping in the vicinity of a recipient's residence for groceries and other household items required for the health and maintenance of the recipient, and prescribed drugs and medical supplies required by the recipient.<sup>81</sup> The Division's prior (2013) assessment found that Ms. T required physical assistance with grocery shopping (CAT score 2/3).<sup>82</sup> The Division's current (2015) assessment found that Ms. T still requires physical assistance with grocery shopping (CAT score 2/3).<sup>83</sup> At hearing, Ms. H confirmed that Ms. T can perform certain aspects of shopping, but requires help from her PCA to get things off the store shelves. Accordingly, the preponderance of the evidence indicates that Ms. T requires physical assistance with grocery shopping (CAT score 2/3).

10. Laundry

The PCA regulations define the IADL of laundry as the changing of a recipient's bed linens and the in-home or out-of-home laundering of a recipient's bed linens and clothing.<sup>84</sup> The Division's prior (2013) assessment found that Ms. T was dependent on others for her laundry (CAT score 3/4).<sup>85</sup> The Division's current (2015) assessment found that Ms. T currently requires physical assistance with her laundry (CAT score 2/3).<sup>86</sup> At hearing, Ms. H confirmed that Ms. T can

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<sup>78</sup> Ex. F26.  
<sup>79</sup> Ex. E27.  
<sup>80</sup> 7 AAC 125.030(c)(3).  
<sup>81</sup> 7 AAC 125.030(c)(5).  
<sup>82</sup> Ex. F26.  
<sup>83</sup> Ex. E27.  
<sup>84</sup> 7 AAC 125.030(c)(4).  
<sup>85</sup> Ex. F26.  
<sup>86</sup> Ex. E27.

perform some aspects of clothes laundering, but requires help from her PCA to carry her laundry to and from the laundry room. Accordingly, the preponderance of the evidence indicates that Ms. T requires physical assistance with clothes laundering (CAT score 2/3).

11. 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.<sup>87</sup> In this case, Ms. T received a score of four on her 2013 assessment,<sup>88</sup> and a score of one on her 2015 assessment.<sup>89</sup> Based on Ms. T's diagnoses of attention deficit disorder TBI, and after hearing Ms. T lose her train of thought multiple times during the hearing, I find it more probable than not that Ms. T should have received a score of four on this item in her current assessment. Accordingly, Ms. T is eligible for PCA time for medication administration because she received a score of four as to this item.

However, the *amount* of PCA time allowed for medication assistance is computed based on the recipient's personal hygiene score.<sup>90</sup> If the recipient's personal hygiene self-performance score is 0, 1, or 8, the recipient receives no time for medication assistance. In this case, Ms. T's current self-performance and support scores for personal hygiene are 0/0, and Ms. T did not contest her personal hygiene score. Accordingly, Ms. T is not currently eligible to receive PCA time for assistance with medications.

12. 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." This is usually provided only when, due to cognitive or behavioral issues, the recipient is unable to communicate effectively with the doctor.

In 2013, the Division provided Ms. T with 42.69 minutes of PCA escort time per weekly

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<sup>87</sup> Exs. B34, B35, E20.

<sup>88</sup> Ex. F20.

<sup>89</sup> Ex. E21.

<sup>90</sup> All findings and conclusions in this paragraph are based on the Division's Personal Care Assistance Service Level Computation Chart.

medical appointment.<sup>91</sup> In 2015, the Division found that Ms. T no longer required a PCA escort when going to medical appointments, and now only needs transportation to her medical appointments. At hearing, however, Ms. H and Mr. D each testified that Ms. T's memory and cognitive abilities are worsening, and just listening to Ms. T's hearing testimony confirms that she has difficulty conveying information accurately. Accordingly, Ms. T's PCA time for escort to medical appointments should remain at its prior level of 42.69 minutes per week.

#### **IV. Conclusion**

The Division's determination of the PCA services for which Ms. T is currently eligible was partially correct, but partially incorrect. Accordingly, the Division's decision is affirmed in part and reversed in part as indicated above.

DATED this 22nd day of December, 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 4<sup>th</sup> day of January, 2016.

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.]

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<sup>91</sup> Exs. D5, D10.