

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

In the Matter of:)
)
 Q J) OAH No. 15-1363-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 Q J is currently eligible.¹ The Division conducted an assessment on February 10, 2015 and subsequently decreased Ms. J's PCA service level from 24.25 hours per week to 12.25 hours per week effective October 10, 2015.²

During the hearing process, medical records were submitted on behalf of Ms. J which were not available to the Division at the time of the assessment at issue. In addition, testimony was received at hearing which provided information not originally available to the Division. This decision concludes, based in large part on Ms. J's more recently-produced medical records, that the Division's determination of the PCA services for which Ms. J is currently eligible was partially correct, but also partially incorrect. Accordingly, the Division's decision is affirmed in part and reversed in part.

II. Facts

A. Ms. J's Medical Diagnoses and Health Problems³

Ms. J is 78 years old.⁴ She lives in an assisted living facility (ALF) in which each resident has a separate apartment.⁵ Her medical diagnoses include anemia, asthma, angina, anxiety, atherosclerosis with intermittent claudication, atrial fibrillation, cardiac pacemaker, congestive heart failure n.o.s., coronary artery disease, chronic anticoagulation, chronic kidney disease, stage III, chronic obstructive pulmonary disease (COPD), chronic pain, constipation, degenerative joint disease, dementia, dizziness, dysmetabolic syndrome, dyspnea, edema, gastroesophageal reflux disease (GERD), heart failure (systolic and diastolic), history of closed head injury, history of gastric bypass procedure, hyperkalemia, hyperlipidemia,

¹ Ex. D.

² Exs. D1, E.

³ Approximately 160 pages of medical records were submitted by Ms. J and/or the Division in this case. All of those records were reviewed and considered during the preparation of this decision.

⁴ Ex. E1.

⁵ Ex. E1; undisputed hearing testimony.

hyperparathyroidism, hypertension, impaired mobility, impaired renal function, obesity, osteoarthritis of the pelvis and thigh, peripheral vascular disease, Prinzmetal angina, shortness of breath, urinary incontinence, venous insufficiency, and weakness in both legs.⁶ She takes about 18 prescription medications each day.⁷

On April 14, 2015, Ms. J attended an appointment at a hospital senior care center.⁸ She told the treating physician that she was feeling drunken or dizzy, particularly after getting up from a lying or sitting position.⁹ She also complained about constipation and GERD. Ms. J's physician adjusted her medications in an effort to alleviate these problems.¹⁰

On October 29, 2015, Ms. J was seen at a kidney and hypertension clinic due to edema and itchy/tingly sensations in both legs, right shoulder pain, fatigue, and other problems.¹¹ At that time, she reported that she had been to hospital emergency rooms twice in the past two weeks for edema and right shoulder pain. At the appointment, she was assessed as being at a high risk for falls, and her advanced nurse practitioner (ANP) opined that "her dementia necessitates assistance with meal preparation and medication administration to ensure safety."¹²

On November 3, 2015, Ms. J attended an appointment at a heart and vascular clinic.¹³ At that appointment, the treating ANP found that Ms. J had tremors and concluded that she required assistance with personal hygiene tasks, meal preparation, and medication management.

B. The Division's Findings from its 2012, 2013, and 2015 Assessments

Ms. J has received PCA services since 2012 or before.¹⁴ Ms. J was previously assessed as to her eligibility for PCA services on May 30, 2013 by Division nurse assessor Amanda McCrary, R.N.¹⁵ Initially, in her 2013 assessment, Ms. McCrary referenced ADL scores from the then-prior (presumably 2012) assessment.¹⁶ Ms. McCrary reported that the scores from the 2012 assessment were as follows: body mobility - required limited assistance (CAT score 2/2); transfers - required extensive assistance (CAT score 3/2); locomotion - required extensive assistance (CAT score 3/2); dressing - required limited assistance (CAT score 2/2); eating - was

⁶ Ex. 5 p. 1; Ex. 9 p. 2; Ex. 14 p. 4; Ex. 16 p. 2; Ex. E3.

⁷ Ex. 16 pp. 2 - 3; Ex. E20.

⁸ All factual findings in this paragraph are based on Ex. 3 pp. 1 - 15 unless otherwise stated.

⁹ Ex. 3 p. 2.

¹⁰ Ex. 3 p. 6.

¹¹ All factual findings in this paragraph are based on Ex. 16, pp. 1 - 4 unless otherwise stated.

¹² All factual findings in this paragraph are based on Ex. 9 pp. 3 - 7 unless otherwise stated.

¹³ All factual findings in this paragraph are based on Exs. G1 - G13, I8, and J9 unless otherwise stated.

¹⁴ Exs. F31 - F61.

¹⁵ Exs. F31 - F61.

¹⁶ All factual findings in this paragraph are based on Ex. F41 unless otherwise stated.

independent, requiring only set-up assistance (CAT score 0/1); toilet use - required extensive assistance (CAT score 3/2); 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. McCrary found that Ms. J required the following levels of assistance with her ADLs:¹⁷ body mobility - independent (CAT score 0/0); transfers - required extensive assistance 21 times per week (CAT score 3/2, frequency 3/7); locomotion - required limited assistance 14 times per week (CAT score 2/2, frequency 2/7); 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 - independent (CAT score 0/0); and bathing - required extensive assistance seven times per week (CAT score 3/2, frequency 1/7).

Ms. J was most recently assessed for continuing PCA services eligibility on February 10, 2015 by Paula Ray, R.N. of DSDS.¹⁸ Ms. Ray found that Ms. J has the following physical abilities and limitations:¹⁹

Functional assessment:²⁰ Ms. Ray reported that Ms. J 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:²¹ Ms. Ray reported that Ms. J told her that she does not require assistance to reposition herself in bed. Ms. Ray reported she observed Ms. J reposition herself in her recliner independently several times during the assessment (scored 0/0).

Transfers:²² Ms. Ray reported that Ms. J told her that she can transfer independently, except sometimes in the morning, when she uses an electric lift chair. Ms. Ray reported that she observed Ms. J transfer four times, from a soft recliner to her walker, with no hands-on assistance/independently (scored 0/0).

¹⁷ All factual findings in this paragraph are based on Exs. F35 - F41 unless otherwise stated.

¹⁸ Ex. E.

¹⁹ Exs. E4 - E11.

²⁰ All references in this paragraph are based on Ex. E4 unless otherwise stated.

²¹ All references in this paragraph are based on Ex. E6 unless otherwise stated.

²² All references in this paragraph are based on Ex. E6 unless otherwise stated.

Locomotion (walking):²³ Ms. Ray reported that Ms. J told her that she is able to move about inside her home using her four-wheeled walker, and is able to go to doctor appointments using her four-wheeled walker, but had to use a wheelchair (with someone pushing it) when she went to the fair. Ms. Ray reported that she observed Ms. J propel her four-wheeled walker inside her apartment without any hands-on assistance (scored 0/0).

Dressing:²⁴ Ms. Ray reported that Ms. J told her that she is able to put on her own underwear, but that she requires PCA assistance to put on her pants, shirts, socks, and shoes. Ms. Ray reported that she observed Ms. J put on and take off a winter coat independently during the assessment (scored 2/2, frequency 2/7).

Eating:²⁵ Ms. Ray reported that Ms. J told her that her PCA sets up her food for her at the table, but that she is then able to feed herself and swallow her medications independently. Ms. Ray reported that she observed Ms. J drink sweet tea during the assessment (scored 0/1).

Toileting:²⁶ Ms. Ray reported that Ms. J told her that (1) she wears pads during the day, and adult diapers at night, due to urinary incontinence; (2) she can change her incontinence products by herself; and (3) she can perform post-toileting hygiene by herself, but sometimes needs assistance if she needs to shower afterwards. Ms. Ray reported that she observed Ms. J stand up and walk into the bathroom, without hands-on assistance, three times during the assessment (scored 2/2 for those times when she needs assistance with post-toileting hygiene).

Personal Hygiene:²⁷ Ms. Ray reported that Ms. J told her that she can perform her own personal hygiene tasks (brush her teeth, comb her hair, and wash her hands) independently/without hands-on assistance. Ms. Ray reported she observed Ms. J raise her left hand to her head, and comb her short hair, during the assessment (scored 0/0).

Bathing:²⁸ Ms. Ray reported that Ms. J told her that she takes three to four showers per week, and can wash the front of her body, but requires assistance from her PCA to wash her back and her bottom. Ms. Ray reported that she observed Ms. J transfer, ambulate, climb into bed, and drink independently during the assessment (scored 3/2, frequency 1/4).

²³ All references in this paragraph are based on Ex. E7 unless otherwise stated.

²⁴ All references in this paragraph are based on Ex. E8 unless otherwise stated.

²⁵ All references in this paragraph are based on Ex. E9 unless otherwise stated.

²⁶ All references in this paragraph are based on Ex. E9 unless otherwise stated.

²⁷ All references in this paragraph are based on Ex. E10 unless otherwise stated.

²⁸ All references in this paragraph are based on Ex. E11 unless otherwise stated.

Ms. Ray also scored Ms. J as to her ability to perform Instrumental Activities of Daily Living (IADLs).²⁹ Ms. Ray scored Ms. J as independent as to telephone use and financial management (CAT score 0/0); requiring physical assistance as to light and main meal preparation, grocery shopping, and laundry (CAT score 2/3); and dependent as to housework (CAT score 3/4).

C. Relevant Procedural History

The Division performed the assessment at issue on February 10, 2015.³⁰ Sometime between August 27 and September 14, 2015, Ms. J submitted a request to amend her PCA service plan due to declining health.³¹ Ms. J requested PCA assistance with personal hygiene, locomotion to access medical appointments, light and main meal preparation, light housework, grocery shopping, medications, walking for exercise, and escort to medical appointments.³² On September 30, 2015, the Division notified Ms. J that her PCA service level was being reduced from 24.25 hours per week to 12.25 hours per week effective October 10, 2015.³³ Ms. J's representatives requested a hearing to contest the Division's reduction of her PCA services on October 19, 2015.³⁴

Ms. J's hearing was held on November 25, 2015. Ms. J did not participate in the hearing, but was represented by her son and power of attorney holder G J, and by her daughter and power of attorney holder W K, both of whom attended the hearing and testified on Ms. J's behalf. Mr. J's fiancée, N N, and Ms. J's PCA agency representative, D N, participated in the hearing but did not testify. Laura Baldwin participated in the hearing by phone and represented the Division. Paula Ray, R.N. and Phillip Martinez participated in the hearing by phone and 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

²⁹ All references in this paragraph are based on Ex. E26 unless otherwise stated.

³⁰ Ex. E.

³¹ Exs. F1 - F4.

³² Exs. F1 - F4. This case concerns Ms. J's February 2015 assessment rather than her September 2015 amendment request. However, the additional services sought by way of the amendment request generally parallel the services at issue in this case.

³³ Ex. D1.

³⁴ Ex. C.

living (IADL), and other services based on the *physical condition* of the recipient"35
[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."36

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."37 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).38 The CAT seeks to make the assessment process more objective by attempting to standardize the assessment of an applicant's or recipient's functional impairments.39

The ADLs scored by the CAT are body mobility, transfers, locomotion, dressing, eating, toilet use, personal hygiene, and bathing.40 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 assistance41); **3** (the person requires extensive assistance42); or **4** (the person is totally dependent43). There are also codes that are not treated as numerical scores for

³⁵ 7 AAC 125.010(a).

³⁶ 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.*

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

³⁸ *See* 7 AAC 125.010(a).

³⁹ Ex. E.

⁴⁰ *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 28, 2015); *see also* Exs. D4, D5, D7, and D10.

⁴¹ 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).

⁴² 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).

⁴³ 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).

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).⁴⁴ These are light meal preparation, main meal preparation, light housekeeping, routine housekeeping, laundry, and grocery shopping. The CAT scores IADLs slightly differently than ADLs.⁴⁵ 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.⁴⁶ The 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). Again, there is an additional code that does not add to the service level: 8 (the activity did not occur).

Finally, the CAT scores ten other activities which are technically neither ADLs nor IADLs. 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

⁴⁴ Ex. E26.

⁴⁵ *Id.*

⁴⁶ *Id.*

documentation, PCA escort to medical appointments, and assistance with range of motion exercises, walking for exercise, and foot care.⁴⁷

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.⁴⁸ 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*.⁴⁹

C. Applicable Burden of Proof and Standard of Review

The Division is seeking to reduce Ms. J's existing PCA service 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. J's need for PCA services has decreased since her last assessment.⁵⁰

The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.⁵¹ 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. J Eligible to Receive in This Case?

On November 4, 2015, Ms. J submitted a written statement outlining the particular activities that she asserts were improperly scored by the Division in calculating her PCA time.⁵² Based on that document, the activities at issue are transfers, locomotion, toilet use, bathing, main meal preparation, in-home laundry, and escort to medical appointments. At the beginning of the hearing, however, the parties reached an agreement as to bathing and laundry, so those activities are no longer at issue. The remaining five activities are discussed separately below.

⁴⁷ *Id.*

⁴⁸ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart.

⁴⁹ *Id.*

⁵⁰ 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).

⁵¹ 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).

⁵² Ex. 15 pp. 1 - 2.

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.⁵³ In 2012 and 2013, the Division found that Ms. J required extensive physical assistance with transfers a total of 21 times per week (CAT score 3/2, frequency 3/7).⁵⁴ In 2015, Ms. Ray found that Ms. J is now independent with transfers (CAT score 0/0).

Ms. Ray's scoring was based on her observation of Ms. J transferring during the assessment, and on Ms. J's report that she can transfer independently except sometimes in the morning, when she uses an electric lift chair.⁵⁵ Initially, it should be noted that, in 2013, Ms. J received a score of 14 on the Division's supplemental screening tool (SST) for cognitive issues.⁵⁶ Based on Ms. J's significant cognitive problems, not much weight should be placed on her own statements concerning her abilities and disabilities.

At hearing, G J testified that his mother has difficulty transferring by herself and that she had four falls during the current assessment period which required trips to a hospital emergency room.⁵⁷ This testimony was credible. Also, Ms. J has several diagnoses which would be expected to directly impact her ability to transfer independently (chronic pain, degenerative joint disease, dizziness, osteoarthritis of the pelvis and thigh, and weakness in both legs). In addition, there is no evidence of a general improvement in Ms. J's medical condition over the past two years which would explain the fairly drastic improvement asserted here by the Division (from requiring extensive assistance to being fully independent).

I do not doubt the assessor's testimony that she saw Ms. J transfer independently during the assessment. However, Ms. J may have been having a better-than-normal day. Also, testimony from numerous Medicaid hearings indicates that many recipients put forth a level of effort when an assessor is present that they would not be able to sustain on an everyday basis.

Overall, the preponderance of the evidence indicates that Ms. J still requires extensive assistance with transfers (CAT score 3/2). Neither party put on persuasive evidence as to Ms. J's

⁵³ 7 AAC 125.030(b)(2).

⁵⁴ Exs. F35, F41.

⁵⁵ Ex. E6.

⁵⁶ Ex. F46.

⁵⁷ *See also* Exs. F16 - F17.

current required frequency for help with transfers. Accordingly, the preponderance of the evidence indicates that Ms. J still requires extensive assistance with transfers at the same frequency (21 times per week) indicated in her 2013 assessment (CAT score 3/2, frequency 3/7).

2. Locomotion/Walking

For the ADL of locomotion, PCA time is allowed when a person requires assistance with walking (whether with the support of a walker, cane, gait belt, braces, crutches, or manual wheelchair), either between different locations in the recipient's home, outside the home to keep a medical or dental appointment, and/or when walking and simple exercises have been prescribed by a physician.⁵⁸ In 2012, the Division found that Ms. J required extensive assistance with locomotion (CAT score 3/2).⁵⁹ In 2013, the Division found that Ms. J required limited assistance with locomotion (CAT score 2/2, frequency 2/7).⁶⁰ In 2015, Ms. Ray found that Ms. J is completely independent with locomotion (CAT score 0/0).⁶¹

In 2013, Ms. J was found to require limited assistance with locomotion because she had to be pushed in her wheelchair when too fatigued to use her walker or propel herself in her wheelchair. At hearing, Mr. J testified that his mother requires assistance with locomotion about 75% of the time. Ms. J has several diagnoses which would be expected to directly impact her ability to use a walker or wheelchair (chronic pain, degenerative joint disease, dizziness, osteoarthritis of the pelvis and thigh, and weakness in both legs). In addition, there is no evidence of a general improvement in Ms. J's medical condition over the past two years which would explain the improvement asserted here by the Division.

I do not doubt the assessor's testimony that she saw Ms. J use her walker independently during the assessment. However, for the reasons discussed in the preceding section, the abilities which Ms. J demonstrated during the assessment may not have been representative of her normal abilities. Accordingly, the preponderance of the evidence indicates that Ms. J still requires limited assistance with locomotion (CAT score 2/2).

Neither party put on persuasive evidence as to Ms. J's current required frequency for assistance with locomotion. Accordingly, the preponderance of the evidence indicates that Ms. J still requires limited assistance with locomotion at the same frequency (14 times per week) indicated in her 2013 assessment (CAT score 2/2, frequency 2/7).

⁵⁸ 7 AAC 125.030(b)(3).

⁵⁹ Exs. F36, F41.

⁶⁰ Exs. F36, F41.

⁶¹ Ex. E7.

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.⁶² The CAT's definition of "toilet use" is somewhat broader, encompassing post-toileting hygiene and clothing adjustments.⁶³

The Division's 2012 and 2013 assessments found that Ms. J required extensive assistance with toileting, based primarily on a need for assistance transferring on and off the toilet, at a frequency of 42 times per week (CAT score 3/2, frequency 6/7).⁶⁴ The Division's current (2015) assessment found that Ms. J now requires limited assistance with toilet use (CAT score 2/2, frequency 1/7).⁶⁵ At hearing, Mr. J testified that his mother requires extensive assistance with toilet use, and that the only aspect of toileting she can usually perform herself is taking off her pants and putting them back on again before and after toileting. On the other hand, Ms. Ray testified at hearing that she observed Ms. J go back and forth to the bathroom three times during the assessment, and that, although she could not observe what was going on inside the bathroom, she did hear the toilet flush each time.

I find the testimony of both witnesses on this matter equally credible. However, taking a "big picture" view, there is a scarcity of evidence showing that Ms. J's medical condition has gotten better since her 2013 assessment. Also, because the Division seeks to reduce Ms. J's level of PCA assistance with toileting, the Division bears the burden of proving that Ms. J has a reduced need for assistance. Accordingly, the preponderance of the evidence indicates that Ms. J still requires extensive assistance with toileting. Finally, there is no evidence indicating that Ms. J's toileting frequency has decreased since 2013. Accordingly, I find that Ms. J still needs extensive assistance with toilet use 42 times per week (CAT score 3/2, frequency 6/7).

4. 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

⁶² 7 AAC 125.030(b)(6).

⁶³ 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).

⁶⁴ Exs. F38, F41.

⁶⁵ Ex. E9.

the health needs of the recipient.⁶⁶ The Division's prior (2013) assessment found Ms. J to be dependent on others for main meal preparation (CAT score 3/4).⁶⁷ The Division's current (2015) assessment found that Ms. J requires physical assistance with main meal preparation (CAT score 2/3).⁶⁸ At hearing, Mr. J credibly testified that his mother can prepare cold food (a salad, for example), but cannot safely use a regular oven or microwave oven due to her cognitive problems. Similarly, Ms. K testified that Ms. J has melted pans and set off fire alarms trying to cook for herself.

Based on the foregoing, it would clearly be unsafe for Ms. J to attempt to cook her own hot food. However, cooking is only one of the three aspects of main meal preparation as defined in the Division's regulations. There is no evidence that Ms. K cannot participate in the service or cleanup phases of the meal. The preponderance of the evidence therefore indicates that Ms. J requires assistance with main meal preparation (CAT score 2/3).

5. 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.

Based on Ms. J's 2013 assessment, the Division provided Ms. J with 15 minutes of PCA escort time per medical appointment.⁶⁹ Based on Ms. J's 2015 assessment, the Division found that Ms. J no longer requires a PCA escort when going to medical appointments. However, the Division subsequently approved Ms. J for 11 minutes of PCA escort time per medical appointment based on a service plan amendment request.

It is clear that Ms. J requires PCA escort to her medical appointments due to her cognitive problems. Exactly how much escort time Ms. J requires is difficult to tell on the record in this case. In 2013, Ms. J received escort time based on a total of 38 medical appointments per year.⁷⁰ At the time of her 2015 assessment, the Division recorded that Ms. J was attending 18 doctor's appointments per year, plus 52 physical therapy appointments per year (70 appointments

⁶⁶ 7 AAC 125.030(c)(2).

⁶⁷ Ex. F57.

⁶⁸ Ex. E26.

⁶⁹ Ex. D3.

⁷⁰ Ex. F34.

per year total).⁷¹ At hearing, Ms. J's representatives asserted that she is currently averaging 72 medical appointments per year.⁷² Based on the foregoing, the preponderance of the evidence indicates that Ms. J is eligible for PCA time for escort to 71 medical appointments per year, at the same average length (20 minutes per appointment) used in the Division's 2013 calculations,⁷³ for an average of 27 minutes of PCA escort time per week.

IV. Conclusion

The Division's determination of the PCA services for which Ms. J 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 8th day of January, 2016.

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 25th 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.]

⁷¹ Ex. E5.
⁷² See also Ex. 15 p. 2.
⁷³ Ex. F34.