

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

In the Matter of	)	<b>CONSOLIDATED CASES</b>
	)	OAH Nos. 16-0658-MDS, 16-0789-MDS
K T	)	Agency Nos.
_____	)	

**DECISION**

**I. Introduction**

K T receives Personal Care Assistance (“PCA”) services that are paid for by Medicaid. The Division of Senior and Disabilities Services (“Division”) reassessed her condition and proposed reductions of her PCA services from 48.0 hours per week to 32.0 hours per week. Ms. T contested those decisions and requested a hearing.

Based upon the evidence in the record, and as further discussed below, the Division’s decision is reversed as to PCA services for locomotion and walking exercises.

**II. Facts**

Ms. T is 91 years old and is diagnosed as suffering from congestive heart failure, senility, dementia, Alzheimer’s disease, osteoarthritis, memory loss, cataracts, uterine cancer, abnormality of gait, and pressure ulcer.<sup>1</sup> Due to her age and medical conditions, Ms. T is completely non-verbal, and she is described as “functionally quadriplegic.”<sup>2</sup> At the time of her reassessment, Ms. T was receiving 48 hours of PCA services per week.<sup>3</sup> On September 3, 2015 nurse assessor Natasha Fromm reassessed Ms. T, using the Division’s Consumer Assessment Tool (CAT).<sup>4</sup> The Division took no action regarding Ms. T’s PCA services after the reassessment, however, due to current Division protocol under which assessment reviews are “on hold” while the PCA program “undergoes an evaluation and revision process.”<sup>5</sup> Subsequently, however, the Division noted as part of an internal review that Ms. T’s prescribed task form (PTF) for range of motion and walking exercises had expired.<sup>6</sup> As a result, the Division sent Ms. T a notice dated May 23, 2016, stating that her

---

<sup>1</sup> Exhibits E3, F3.

<sup>2</sup> Z testimony; L testimony.

<sup>3</sup> Exhibit D1; exhibit G.

<sup>4</sup> Exhibit H1.

<sup>5</sup> Exhibit O, p. 1. Exhibit O is a letter dated July 7, 2016 in which Ms. Shaffer explains the history of Ms. T’s PCA service hours and the Division’s proposed reductions.

<sup>6</sup> *Id.*

PCA hours would be reduced to 44.5 hours per week, due to the expired PTF.<sup>7</sup> A representative of Ms. T then submitted to the Division a proposed amendment for range of motion and walking exercise, with a renewed PTF.<sup>8</sup> This amendment request triggered a review by the Division of the September 23, 2015 reassessment. As a result of that review, the Division determined that Ms. T's PCA hours should be further reduced to 32 hours per week, and notice to that effect was sent to her representatives.<sup>9</sup>

Ms. T appealed both proposed reductions, under case numbers OAH 16-0658-MDS and 16-0789-MDS. Pursuant to an agreement reached by the parties, the two cases were consolidated for the hearing and decision.

Prior to the hearing, the parties were able to reach agreement on most of the issues raised in Ms. T's two appeals. Thus, the only issues remaining to be decided at the hearing were Ms. T's PCA services for locomotion and walking exercise.<sup>10</sup>

The hearing was held on July 13, 2016. Ms. T appeared, and she was represented by her daughter and guardian X Y. B Z, Ms. T's PCA agency representative, and Y L, Ms. T's care coordinator, also appeared and testified. Fair hearing representative Darcie Shaffer represented the Division at the hearing and testified on its behalf. Ms. Shaffer also called Ms. T's physical therapist, M R, to testify regarding walking exercises and locomotion.

### **III. Discussion**

#### **A. *The PCA Program***

The purpose of the PCA program

is to provide 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>11</sup>]

The Division uses the CAT to help it assess the level of assistance needed.<sup>12</sup> The amount of time allotted for needed assistance is determined by the Personal Care Assistance Service Level

---

<sup>7</sup> Exhibit I.

<sup>8</sup> Exhibit J.

<sup>9</sup> Exhibits K, L. A first notice sent to Ms. T, dated June, 8, 2016, contained an error and referred to reductions to both 33.5 hours and 32 hours. Exh. K. A corrected notice was sent on July 1, 2016, clarifying that the proposed reduction would be to 32 hours. Exh. L.

<sup>10</sup> The parties did not recite the specific terms of their agreement on the record, other than the specific agreement by the Division to concede Ms. T's scoring for bed mobility at a 3/2 and to restore her service time for that ADL to its previous level. Ms. Shaffer stated on the record, however, that the Division generally conceded that Ms. T's PCA services would be restored to their prior levels as to the other disputed ADLs; and the parties' specific agreements regarding those other ADLs were undoubtedly recorded in their correspondence prior to the hearing.

<sup>11</sup> 7 AAC 125.010(a).

Computation chart.<sup>13</sup> The Service Level Computation chart shows the amount of time allotted for each ADL or IADL, depending on the level of assistance needed for each task.

The different levels of assistance with ADLs are defined by regulation and in the CAT.<sup>14</sup> “Supervision” is defined as oversight, encouragement, or cueing three or more times a week, with physical assistance no more than two times a week.<sup>15</sup> “Limited assistance” is defined as requiring direct physical help or guidance from another individual three or more times a week, with weight-bearing support no more than two times a week.<sup>16</sup> “Extensive assistance” is defined as requiring direct physical help with weight-bearing support at least three times a week, or full assistance without any involvement by the recipient at least three times a week, but not all of the time.<sup>17</sup> “Full assistance” means the recipient has to rely entirely on the caretaker to perform the activity.<sup>18</sup>

The Division may change the number of hours of allotted PCA services if there has been a *material change* in the recipient’s condition.<sup>19</sup> A *material change* means that the recipient’s medical condition has changed, or her living conditions have changed.<sup>20</sup> When the Division wishes to reduce the amount of allotted time, it has the burden of proving a change of condition justifying that reduction by a preponderance of the evidence.<sup>21</sup>

### **B. 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.<sup>22</sup> The documents in the record of this matter offer a somewhat confused picture of Ms. T’s ability to locomote on her own.<sup>23</sup> Taking all of the documents and testimony into account, however, it is clear that Ms. T is completely dependent on her caregivers for locomotion. She cannot walk (or even stand erect without

---

<sup>12</sup> 7 AAC 125.020(b).

<sup>13</sup> 7 AAC 125.024(1).

<sup>14</sup> The July 29, 2009 version of the CAT has been adopted by reference, 7 AAC 160.900(d)(6), and therefore the definitions in the CAT have the same effect as a regulation.

<sup>15</sup> Exhibit E6.

<sup>16</sup> 7 AAC 125.020(a)(1); Exhibit E6.

<sup>17</sup> 7 AAC 125.020(a)(2); Exhibit E6.

<sup>18</sup> 7 AAC 125.020(a)(3); Exhibit E6. Bathing and the IADLs have their own assistance level definitions.

<sup>19</sup> 7 AAC 125.026(a).

<sup>20</sup> 7 AAC 125.026(d). A material change also exists if the services were based on a prescription that has since expired, there was a time-limited amendment to the plan of care, or the services are no longer authorized by regulation. 7 AAC 125.026(d)(3).

<sup>21</sup> 7 AAC 49.135.

<sup>22</sup> See Exhibit I, p.7.

<sup>23</sup> Compare, e.g., exhibit Q, p.10, describing Ms. T’s mobility as only “slightly limited” and stating she “walks occasionally,” with exhibit Q, p.15, noting her “functional quadriplegia.”

significant support), she is confined to a wheelchair for locomotion, and she is completely reliant on caregivers to push her in the wheelchair, as she cannot propel herself at all.

Although the Division did not dispute this conclusion at the hearing, nonetheless on the latest assessment Ms. T was given a score of 3/2 (extensive assistance with one person physical assist) for locomotion, with a frequency of 14 per week or two per day.<sup>24</sup> This conclusion by the Division's assessor that Ms. T requires only extensive assistance with locomotion is at odds with the fact that Ms. T is completely dependent on her caregivers for locomotion in her wheelchair.<sup>25</sup> Based on the witnesses' cumulative testimony, it appeared that the assessor concluded that if Ms. T were to be deemed eligible for walking exercise, then by definition she could not be scored as totally dependent for purposes of locomotion, and therefore she was given the 3/2 score on the CAT.<sup>26</sup> Regardless of the logic followed by the assessor, however, Ms. T's complete dependence clearly translates into a correct score of 4/2 for locomotion.

In addition, the frequency of twice per day shown on the September 23, 2015 CAT is unreasonably low. The assessor's basis for recording this frequency was not made clear at the hearing. The testimony of Ms. Y was clear and credible and established that the appropriate frequency for locomotion should be increased to six per day.<sup>27</sup>

The Division, therefore, did not meet its burden of establishing by a preponderance of the evidence that Ms. T should be scored at 3/2 for locomotion, with a frequency of twice per day. She should be given a score of 4/2, with a frequency of six times per day.<sup>28</sup>

### ***C. Prescribed Tasks***

The second issue raised by Ms. T's appeal concerns her prescription for walking exercise. As mentioned above, one of the Division's actions to reduce Ms. T's PCA services was the result of the expiration of her prescription for range of motion and walking

---

<sup>24</sup> *Id.*

<sup>25</sup> It was noted by Ms. T's witnesses that she can occasionally take a few very slow steps, with extensive assistance, but this does not amount to locomotion; it simply means she can slowly shuffle her feet and move forward a short distance (perhaps five or six feet) over a period of perhaps 20-30 minutes.

<sup>26</sup> The 3/2 score may also have been the result of the assessor feeling constrained by conclusions that might be drawn from some of the confusing medical documents in the record, discussed above. The nurse assessor did not testify at the hearing.

<sup>27</sup> Ms. Y testified that Ms. T requires locomotion assistance more than eight times per day, but on further inquiry it became clear that several of these daily occurrences involve helping Ms. T with locomotion to the bathroom; these instances of assistance are properly included under the ADL of toileting.

<sup>28</sup> 7 AAC 49.135.

exercises. Her PCA representative submitted a new prescribed task form (PTF) filled out by Ms. T's physician; the form was subsequently amended to clarify the frequency and duration of the prescribed walking exercises.<sup>29</sup> The Division's adverse action letter reducing Ms. T's PCA hours, however, denied PCA time for range of motion and walking exercises, based on the amounts being deemed excessive.<sup>30</sup> The issue of PCA time for range of motion exercise was resolved as part of the parties' settlement negotiations; walking exercise, however, remained in dispute.

Ms. Shaffer testified that the problem with walking exercise, from the Division's perspective, arises from Ms. T's status as a functional quadriplegic, i.e., if Ms. T is confined to a wheelchair, the Division's position is that she cannot logically benefit from walking exercise. Ms. Shaffer also testified, however, that there is no regulation or rule regarding PCA services that categorically prohibits walking exercise for PCA recipients who cannot walk. And Ms. R, Ms. T's physical therapist, testified that even though Ms. T functionally cannot walk, she can still derive benefit from a walking motion type of exercise, where a caregiver bears her weight, stands her up and helps her to move her feet and slowly move forward. Ms. R testified this type of exercise, done for no more than 10 minutes per attempt; once per day, would be beneficial to Ms. T.

The Division's justification for denying PCA assistance to Ms. T for this prescribed task is problematic because it appears to accord little weight to the fact that the exercise was prescribed by Ms. T's medical providers. The overall Medicaid statutory and regulatory scheme creates a presumption in favor of the medical judgment of the attending physician in determining the medical necessity of treatment.<sup>31</sup> Both Ms. T's physician and physical therapist have concluded that she will benefit from walking exercise, and the Division did not present evidence that would rebut the presumption in favor of their medical judgment. Nor did the Division present any legal authority, whether in a regulation, agency rule, or agency manual, that requires that a PCA recipient be deemed ambulatory in order to receive PCA assistance with

---

<sup>29</sup> Exhibit J.

<sup>30</sup> Exhibit K.

<sup>31</sup> *Pinneke v. Preisser*, 623 F.2d 546, 549 (8th Cir. 1980); *Smith v. Rasmussen*, 249 F.3d 755, 759 (8th Cir. 2001); *Weaver v. Reagan*, 886 F.2d 194, 200 (8th Cir. 1989); *A.M.L. v. Department of Health, Div. of Health Care Financing*, 863 P.2d 44 (Utah App. 1993). See also *Snyder v. Florida Dept. of Children and Family District V, Pinellas Unit*: 89262, 705 So.2d 1067, 1069 (Fla. App. 1st Dist. 1998) (“[u]nder controlling federal case law, the agency must give considerable and substantial weight to the opinions of treating physicians.”) (internal citations omitted).

walking exercise. In addition, it just makes sense that the walking type of exercise discussed at the hearing would benefit Ms. T, notwithstanding the fact that she is a functional quadriplegic and achieves locomotion only by being pushed in her wheelchair. Accordingly, the Division should authorize PCA services for Ms. T for walking exercises consistent with Ms. R's testimony, at a frequency of once per day, ten minutes per attempt.

#### **IV. Conclusion**

The Division failed to meet its burden of proving that Ms. T requires only extensive assistance with the ADL of locomotion. In addition, the evidence at hearing established that Ms. T should be allowed PCA services for the prescribed task of walking exercise. Accordingly, Ms. T's PCA service levels should be recomputed in accordance with the discussion above. The Division's assessment decision is reversed as to locomotion and walking exercise, and is affirmed in all other respects, to include the off the record agreements reached by the parties regarding the other ADLs in dispute.

Dated this 31<sup>st</sup> day of August, 2016.

*Signed* \_\_\_\_\_  
Andrew M. Lebo  
Administrative Law Judge

### **Adoption**

The undersigned, by delegation from of the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 14<sup>th</sup> day of September, 2016.

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

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