

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

In the Matter of:)
)
 T J) OAH No. 16-0885-MDS
) Agency No.
_____)

DECISION

I. Introduction

T J was a PCA service recipient. Based primarily on an assessment visit on January 12, 2016, the Division of Senior and Disabilities Services (Division) notified Ms. J on August 1, 2016 that her PCA services were terminated. Ms. J requested a hearing.

Ms. J’s hearing was held on September 7, 2016. Ms. J was represented by Carlos Bailey with Alaska Legal Services. Assistant Attorney General Liz Smith represented the Division.

Based upon the evidence presented, Ms. J’s physical functionality has improved. However, she continues to be eligible for PCA services. The termination of her benefits is reversed and the Division is directed to provide Ms. J with PCA services as specified in this decision.

II. The PCA Service Determination Process

The Medicaid program authorizes PCA services for the purpose of providing “physical assistance with activities of daily living (ADLs), physical assistance with instrumental activities of daily living (IADLs), and other services based on the physical condition of the recipient . . .”¹ 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.”²

The Division uses the Consumer Assessment Tool, or “CAT”, as a methodology to score eligibility for the PCA program, and the amount of assistance, if any, that an eligible person needs to perform ADLs, IADLs, and the other covered services.³ In general, if certain levels of

¹ 7 AAC 125.010(a).

² 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.*

³ *See* 7 AAC 125.024(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900.

assistance are required, the regulations prescribe a fixed number of PCA minutes to be assigned per instance of that activity.

As a gateway to eligibility for PCA services, the CAT evaluates a subset of the ADLs and IADLs. If a person requires some degree of hands-on physical assistance with any one of these ADLs or IADLs, then the person is eligible for PCA services. Once eligibility is established, time for additional ADLs and IADLs, as well as certain other covered services, can be added to the PCA authorization.

The ADLs measured by the CAT are 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.⁴ The CAT numerical coding system for ADLs 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 independent⁵ and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance⁶); **3** (the person requires extensive assistance⁷); **4** (the person is totally dependent⁸). 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).⁹

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); **3** (two or more person physical assist required). Again, there are additional codes

⁴ Ex. E, pp. 6 – 11.

⁵ A self-performance code of 0 is classified as “[I]ndependent – No help or oversight – or – Help/oversight provided only 1 or 2 times during the last 7 days.” See Ex. E, p. 6.

⁶ According 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.”

⁷ According 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.”

⁸ According to 7 AAC 125.020(a)(3), dependent as to an ADL, or dependent as to and IADL, “means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity.”

⁹ Ex. E, p. 18.

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).¹⁰

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.¹¹

The CAT codes IADLs slightly differently than it does ADLs. The *self-performance codes 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 used to arrive at a service level: **8** (the activity did not occur).¹²

The *support codes* for IADLs are also slightly different than the support codes for ADLs. The support codes 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 is not used to arrive at a service level: **8** (the activity did not occur).¹³

In order to qualify for PCA services, a person must be coded as requiring limited or a greater degree of physical assistance (self-performance code of 2, 3, or 4, and a support code of 2, 3, or 4) in any one of the ADLs of transfers, locomotion, eating, toilet use, dressing or bathing. Similarly, if a person is coded as requiring some degree of hands-on assistance¹⁴ (self-performance code of 1, 2, or 3, and a support code of 3 or 4) with any one of the IADLs of light or main meal preparation, light housework, routine housework, grocery shopping or laundry, then he or she is eligible for PCA services.¹⁵

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

¹⁰ Ex. E, p. 18.

¹¹ Ex. E, p. 26.

¹² Ex. E, p. 26.

¹³ Ex. E, p. 26.

¹⁴ For the purposes of this discussion, “hands-on” assistance does not include supervision/cueing or set-up assistance (support codes of 1 or 2). See Ex. E, pg. 26.

¹⁵ Ex. E, p. 31.

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.¹⁶

For covered services beyond assistance with ADLs and IADLs, specific rules apply that will be discussed below.

III. Background Facts

Ms. J is 58 years old and lives by herself.¹⁷ Her health conditions include high cholesterol, fibromyalgia, gastroesophageal reflux disease, hypertension, diabetes with polyneuropathy, anxiety disorder, depressive disorder, osteoarthritis, and pain (unspecified myalgia and myositis). She has also had multiple heart surgeries.¹⁸ She uses a walker to locomote from room to room. She was receiving PCA services. Those services were provided after she was assessed for PCA services in 2014, following her discharge from the hospital for heart surgery.¹⁹ In addition to PCA services, Ms. J receives 9 hours per week of chore services through the Medicaid Home and Community-based Waiver program.²⁰

Ms. J was assessed on January 12, 2016 determine if she should continue to receive PCA services. During the assessment visit, Ms. J told the assessor that she was in pain, had just had a hip injection for bursitis the day before, and could not walk or stand.²¹ The assessor wrote:

[Ms. J] was observed to operate her electric recliner to lift position. The PCA held her under her arm while [Ms. J] pulled on the PCA's other arm to try to stand. Due to pain from a shot for bursitis yesterday, she can't stand today. No DX of bursitis in docs.²²

The assessor then concluded, based upon her visual observation, functional testing, and statements made by Ms. J, that Ms. J had a weak grip in both hands, could not raise her hands over her head, but could behind her back, and was capable of performing all of her activities of daily living, such as transferring, locomoting, bathing, dressing, personal hygiene, etc., without requiring hands-on physical assistance.²³

¹⁶ See 7 AAC 125.024(a)(1) and the Division's *Personal Care Assistance Service Level Computation* chart contained at Ex. B, pp. 44 - 46.

¹⁷ Ex. E, p. 1.

¹⁸ Ex. E, p. 3; Ex. F, p. 8; Ex. G; Ex. 1; Mr. Fromm's testimony.

¹⁹ Ex. 1;

²⁰ Ex. 6, p. 29.

²¹ Ex. E, p. 6.

²² Ex. E, p. 6.

²³ Ex. E, pp. 4, 6 - 11.

On August 1, 2016, the Division sent Ms. J notice that she no longer qualified for PCA services, and they would be terminated.²⁴

Ms. J disagreed with the termination of her PCA services. She specifically disputed the findings with regard to transfers, locomotion with the home, locomotion to access medical appointments, dressing, toileting, bathing, personal hygiene, and medication assistance.

The assessor did not testify at the hearing. Ms. J also did not testify. Ms. J's PCA, who was present at the 2016 assessment, testified as follows:

- She arrives to Ms. J's apartment five days per week, Monday through Friday, in the morning. Ms. J gets up by herself and comes to the door and opens it for the PCA. It can sometimes take Ms. J 15 to 20 minutes to come to the door.
- Ms. J is able to transfer herself some of the time. She, however, needs assistance transferring three to four times a week. That transfer assistance consists of weight-bearing assistance (bear hugs).
- Ms. J is able to use her walker for moving around in her one bedroom apartment. The walker has a seat on it. Ms. J gets tired and has to sit down on the walker, and the PCA has to push her. This happens approximately three or four times daily.
- Ms. J needs help locomoting to her medical appointments. She has to be pushed in her walker or in a wheelchair. Her appointments vary, but she has about 6 appointments per month.
- She helps to transfer Ms. J on and off the toilet, and to cleanse herself after toileting. That happens three or four times per day, and is also weight-bearing.
- Ms. J cannot bathe herself. She requires help to transfer in and out of the tub and also needs to be washed, and dried by the PCA.
- Ms. J needs help dressing. The PCA helps her with her socks, underwear, and clothes. Ms. J cannot bend down to put socks on.
- Ms. J can brush her teeth, but needs help brushing her hair. She needs to have lotion put on her. She can't reach her feet.
- Ms. J needs help with her medications. The PCA has to open the bottles. Ms. J's hands shake and she spills medications.

²⁴ Ex. D.

- Ms. J does not have a lift chair.

Ms. J's PCA, however, was not wholly credible. In her testimony, she stated that Ms. J did not have a lift chair. However, a review of the recording of Ms. J's 2016 assessment, at which the PCA was present, shows that Ms. J had and used a lift chair during that assessment.²⁵ In addition, Ms. J's physical therapy notes from January 7, 2016, which was less than a week before Ms. J's 2016 assessment visit, state that she has a lift chair.²⁶ The PCA's credibility is a factor that will be taken into account when discussing Ms. J's specific areas of disagreement.

Ms. J began physical therapy on January 7, 2016, less than a week before her 2016 assessment occurred. The initial physical therapy evaluation notes state that she has pain, impaired range of motion, impaired muscle strength, impaired movement, functional limitations, bilateral lower extremity weakness, and "significantly impaired standing balance." She was able to walk 160 feet, but was a high fall risk. Those same notes do not show any impairment with her upper extremities.²⁷ Her physical therapy notes from January 13, 2016, the day after her 2016 assessment, show that she did sit to stand exercises, among others, and that she required "intermittent seated rest periods due to fatigue."²⁸ The January 26, 2016 physical therapy notes show that she is progressing, but continues to have bilateral lower extremity weakness and ongoing "significant standing balance impairments."²⁹ Ms. J's medical records show that she was having steroid shots for hip bursitis during the time period she was assessed.³⁰

IV. Discussion

When the Division is seeking to reduce or eliminate a benefit that a citizen is already receiving, the Division has the overall burden to prove, by a preponderance of the evidence,³¹ facts that show the citizen's level of eligibility has changed.³² In the context of PCA services, the showing required of the Division is that the recipient has had a "material change of

²⁵ At 30 minutes into the assessment, Ms. J is asked if she needs to sit up. At one hour and nine minutes into the assessment, Ms. J is asked to stand up. During each of these times, a motor noise consistent with a power lift chair being operated is heard in the background. Ex. 2.

²⁶ Ex. 3, p. 1.

²⁷ Ex. 3, pp. 2 - 3.

²⁸ Ex. 3, p. 6.

²⁹ Ex. 3, p. 8.

³⁰ Ex. 3, pp. 9 - 12.

³¹ Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

³² 7 AAC 49.135.

condition.”³³ The Division can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs,³⁴ including such sources as written reports of firsthand evaluations of the patient. The relevant date for purposes of assessing the state of the facts is, in general, the date of the agency’s decision under review.³⁵ In particular areas where a citizen seeks to increase services or add services that were not previously provided, the citizen has the burden of proof.³⁶

The specific areas of disagreement are transfers, locomotion with the home, locomotion to access medical appointments, dressing, toileting, bathing, personal hygiene, and medication assistance. Each of these are addressed below.

1. Transfers

Transfers are defined as how a “person moves between surfaces,” such as from a sitting to a standing position.³⁷ Ms. J was previously provided extensive assistance with transfers six times daily (42 times per week).³⁸ In 2016, the assessor observed Ms. J attempting to transfer but being unable to transfer. The assessor then determined that Ms. J only required supervision/standby assistance with transfers, which meant that she was not eligible for PCA services with this activity.³⁹ The Division eliminated all PCA assistance for transfers. It therefore has the burden of proof on this point. As discussed below, it established that services should be reduced, but it did not show that they should be eliminated.

Ms. J told the assessor that she was in a great deal of pain because she had just had an injection in her hip for bursitis the day before and was not able to participate in transfers. The assessor asked her to transfer, and as recorded in the assessment, Ms. J used a lift chair and was unable to transfer, even with her PCA help. The PCA assistance recorded in the assessment was that the “PCA held her under her arm while [Ms. J] pulled on the PCA’s other arm to try to stand.”⁴⁰ This would be a passive assist from the PCA, not active weight-bearing, and be more properly characterized as limited assistance. The PCA, however, testified that she had to provide

³³ 7 AAC 125.026(a). This is a term of art that encompasses not only changes in the patient’s situation, but also changes in regulations affecting the authorized level of services. See 7 AAC 125.026(d).

³⁴ 2 AAC 64.290(a)(1).

³⁵ See 7 AAC 49.170; *In re T.C.*, OAH No. 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013) (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf>).

³⁶ 7 AAC 49.135.

³⁷ Ex. E, p. 6.

³⁸ Ex. D, p. 10.

³⁹ Ex. E, p. 6.

⁴⁰ Ex. E, p. 6; Ex. 2 at 1:09:00.

active weight-bearing assistance (bear hugs, lifting). The PCA, however, as noted above, was not entirely credible. Ms. J's medical records show that she has significant bilateral lower extremity weakness, weakness with standing, and has bursitis in her hips. These combined with her PCA's testimony – which is not given full weight, and the fact that Ms. J is able to get up and answer her door in the mornings when the PCA shows up, support a finding that Ms. J only occasionally requires limited transfer assistance, consisting of four times per week.

2. Locomotion – In Home

Locomotion is the act of moving about in the home. It may involve the use of an assistive device such as a cane, walker, or a wheelchair.⁴¹ Ms. J was previously provided limited assistance with locomotion six times daily.⁴² The 2016 assessor determined that Ms. J only needed standby/supervision assistance, but no hands-on physical help. However, she did not observe Ms. J walking.⁴³ The Division then eliminated this service altogether. As discussed below, the Division has met its burden of this point.

The PCA's finding that Ms. J did not require hands-on physical assistance with locomotion was not based upon her observation of Ms. J walking. Ms. J, however, stated that she had poor balance and uses her walker. She also said that she could not walk the day of the assessment.⁴⁴ Ms. J's PCA testified that she walks behind Ms. J, but that Ms. J gets tired and needs to sit down on and be pushed on her walker about three times per day. Ms. J's physical therapy notes show that she gets tired and needs to have a seated rest, during her physical therapy session. However, Ms. J has a one bedroom apartment, and moving around in her apartment would consist of very short distances, and as noted above, her PCA was not wholly credible. Accordingly, the Division has met its burden on this point. Ms. J is no longer entitled to receive PCA assistance with locomotion within her home.

3. Locomotion to Access Medical Appointments

Ms. J was not previously provided with PCA assistance for locomotion to access her medical appointments. She therefore has the burden of proof to establish her eligibility for this service.

⁴¹ Ex. E, p. 7.

⁴² Ex. D, p. 10.

⁴³ Ex. E, p. 7.

⁴⁴ Ex. E, p. 7.

The evidence shows that Ms. J has significant bilateral lower extremity weaknesses, and hip bursitis. She has trouble standing for long periods of time, and required rest during her physical therapy sessions. She also had two falls in November 2015, one of which resulted in hospitalization.⁴⁵ Although she was found to not require assistance locomoting within her home, that was due to the short distances involved, locomotion to access medical appointments requires moving over much longer distances than involved in just moving in a one bedroom apartment. Her PCA's testimony was that Ms. J had medical appointments approximately six times per month, although she occasionally would have a week go by without an appointment. The PCA further testified that Ms. J could not move herself. The PCA was, as noted above, not wholly credible. However, given Ms. J's medical history, it is more likely true than not true that Ms. J does require some degree of hands-on physical assistance for locomotion to access medical appointments approximately once per week. She, most likely is neither entirely dependent nor requiring weight-bearing assistance three or more times per week for medical locomotion. Ms. J has therefore met her burden on this point, and established that she requires limited assistance with locomotion to access medical appointments once weekly.

4. Dressing

Dressing is how a "person puts on, fastens, and takes off all items of street clothing."⁴⁶ Ms. J had been receiving limited assistance with this task twice daily (14 times per week).⁴⁷ The assessor determined, based upon her observation of Ms. J moving in her chair and moving her arms and touching her knees, that Ms. J was able to dress herself. The assessment then provides that Ms. J is able to dress herself with only supervision/standby assistance and this assistance was eliminated.⁴⁸

Ms. J's assessment shows that she told the assessor that she could not lift her arms and that she could not pull her pants up or down.⁴⁹ She has medically documented problems with prolonged standing, bilateral lower extremity weakness, and impaired range of motion.⁵⁰ Given these conditions, her PCA's testimony that she requires help with dressing and cannot bend down to put on her socks is credible. The Division had the burden of proof on this issue. It did

⁴⁵ Ex. E, p. 3.

⁴⁶ Ex. E, p. 8.

⁴⁷ Ex. D, p. 10.

⁴⁸ Ex. D, p. 10; Ex. E, p. 8.

⁴⁹ Ex. E, p. 8.

⁵⁰ Ex. 3, p. 3.

not meet it. Ms. J continues to be eligible for PCA services with dressing: limited assistance twice daily, seven days per week.

5. Toileting

Toileting is a complex process that combines locomotion, transfers, dressing, and cleansing.⁵¹ Ms. J was previously receiving extensive assistance with toileting six times daily (42 times weekly). The Division determined that she only required supervision/standby assistance with this task and eliminated her PCA assistance for it.⁵² As discussed above, Ms. J has a diminished range of motion and requires limited assistance with dressing. Given Ms. J's diminished range of motion, her bilateral lower extremity weakness and instability, her PCA's testimony that she needs some help cleansing is also credible. Even without addressing the issue of transferring on and off the toilet, the need for dressing/cleansing assistance shows that it is more likely true than not true that Ms. J continues to require extensive assistance with toileting. Ms. J's PCA testified that she needed toileting assistance three to four times daily, when the PCA was there. The Division has therefore not met its burden of proof to eliminate toileting assistance. However, given the PCA's testimony, the frequency is reduced to four times daily. Ms. J continues to be eligible for extensive assistance with toileting four times daily, seven days per week.

6. Bathing

Bathing involves transfers in and out of the tub or shower and the actual bathing process. It also includes sponge baths. It does not include washing a person's back or hair.⁵³ Ms. J was previously receiving extensive assistance with bathing seven times per week. The Division determined that she only required supervision/standby assistance with this task and eliminated her PCA assists with it.⁵⁴ The assessor was told by Ms. J that she could not wash or dry herself, that she was in pain, and she had limited range of motion. The assessor concluded, based upon her observations, that Ms. J was capable of bathing by herself, without requiring hands-on physical assistance.⁵⁵ The PCA testified that Ms. J required assistance with being bathed, dried off, and dressed. Given Ms. J's medical records showing physical instability, and a limited range of motion, the PCA was credible on this point.

⁵¹ Ex. E, p. 9.

⁵² Ex. D, p. 10.

⁵³ Ex. E, p. 11.

⁵⁴ Ex. D, p. 10.

⁵⁵ Ex. E, p. 11.

The Division had the burden of proof on this issue. It did not meet it. It is more likely true than not true that Ms. J requires physical assistance with actually being bathed. As a result, she continues to be eligible for extensive assistance with bathing once daily, seven days per week.

7. Personal Hygiene

Personal hygiene consists of basic grooming tasks: combing hair, brushing teeth, washing the face.⁵⁶ Ms. J was not receiving it and requested that it be added to her PCA service plan. She therefore has the burden of proof. The assessor found that Ms. J could perform her personal hygiene independently based upon her observation of using her hands and touching her face, although Ms. J did tell her that she could not raise her arms.⁵⁷ The PCA testified that Ms. J could take care of her own teeth but had a difficult time with brushing her hair. However, the medical information in the record shows primarily issues related to lower extremities and hip bursitis. And, as noted above, the PCA was not entirely credible. There is inadequate evidence to support the PCA's testimony. Consequently, Ms. J has not shown that it is more likely true than not true that she requires PCA assistance with personal hygiene.⁵⁸

8. Medication Assistance

Ms. J seeks to add medication assistance to her PCA service plan. She therefore has the burden of proof on this point. She has her medication in bottles, not in a medset. Her PCA testified that she isn't sure whether Ms. J can open the bottles and does it for her. The PCA further testified that Ms. J's hands shake and that she spills food, drink, and medications. However, nothing in the physical therapy notes support the PCA's testimony. Ms. J has therefore not met her burden of proof on this point. Additionally, in order for Ms. J to receive medication assistance, she must be eligible for personal hygiene assistance.⁵⁹ As found above, she is not eligible for personal hygiene assistance. As a result, she is not eligible for medication assistance.

⁵⁶ Ex. E, p. 10.

⁵⁷ Ex. E, p. 10.

⁵⁸ This finding is not incompatible with the finding that Ms. J requires limited assistance with dressing, given that personal hygiene requires a lesser range of motion and involves primarily upper body movement, whereas dressing involves lower extremities and bending.

⁵⁹ See Ex. B, p. 45, § 2(b)(i), *Personal Care Assistance Service Level Computation*, adopted in regulation 7 AAC 160.900(d)(29).

V. Conclusion

Ms. J’s physical functionality has improved since 2014. She, however, continues to be eligible for PCA assistance as follows:

- Transfers: limited assistance (self-performance code 2) 4 times weekly
- Locomotion - Medical: limited assistance (self-performance code 2) once weekly
- Dressing: limited assistance (self-performance code 2) 14 times weekly
- Toileting: extensive assistance (self-performance code 3) 28 times weekly
- Bathing: extensive assistance (self-performance code 3) 7 times weekly

DATED this 3rd day of October, 2016.

Signed _____
Lawrence A. Pederson
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 19th day of October, 2016.

By: *Signed* _____
Name: Lawrence A. Pederson
Title/Agency: Admin. Law Judge, OAH

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