

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

In the Matter of)	
)	
N S)	OAH No. 16-1136-MDS
_____)	Agency No.

DECISION

I. Introduction

The issue in this case is whether the Division of Senior and Disabilities Services (Division) correctly assessed the amount of Medicaid Personal Care Assistance (PCA) services for which N S is currently eligible. The Division assessed Ms. S’s needs and concluded that she requires PCA services of only 1.75 hours per week.¹

Independent review of the evidence in the record indicates that the Division's determination of the level of PCA services for which Ms. S is currently eligible was partially correct, but partially incorrect. Accordingly, the Division's decision is reversed in part and affirmed in part.

II. Background (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 . . .”² 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.”³

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 other covered services.⁴ In general, if certain levels of assistance are required, the regulations prescribe a fixed number of PCA minutes to be assigned per instance of that activity.

¹ Ex. D.

² 7 AAC 125.010(a).

³ 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.*

⁴ *See* 7 AAC 125.024(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900.

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.⁵ 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 independent⁶ and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance⁷); **3** (the person requires extensive assistance⁸); **4** (the person is totally dependent⁹). 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).¹⁰

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 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).¹¹

⁵ Ex. E, pp. 6 – 11.

⁶ 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.

⁷ 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.”

⁸ 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.”

⁹ According to 7 AAC 125.020(a)(3), “dependent” as to an ADL, or dependent as to an IADL, “means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity.”

¹⁰ Ex. E, p. 18.

¹¹ Ex. E, p. 18.

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.¹²

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).¹³

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).¹⁴

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 assistance¹⁵ (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.¹⁶

The codes assigned to a particular ADL or IADL determine how much PCA service time a person receives for each occurrence of a particular activity. For instance, if a person is coded as

¹² Ex. E, p. 26.

¹³ Ex. E, p. 26.

¹⁴ Ex. E, p. 26.

¹⁵ 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.

¹⁶ Ex. E, p. 31. It is undisputed in this case that Ms. S remains eligible for PCA services.

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.¹⁷

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

III. Facts

The hearing in this matter was held on October 28, November 9, and November 17, 2016. Ms. S attended the hearing in person and was represented by her husband and power-of-attorney, F S. Their daughter, N S, and Mr. S both testified for Ms. S. The Division was represented at the hearing by Victoria Cobo. Division assessor Samantha Fili, reviewer Melissa Mead, and PCA agency representative M H testified for the Division.

Ms. S is a 42-year-old woman living in Anchorage, Alaska.¹⁸ Ms. S lives with her husband, F S, and their three children.¹⁹ Both Mr. and Ms. S have multiple physical and mental health problems.

Ms. S has numerous orthopedic and neurologic problems relating to a car accident in 2011 where she suffered serious injuries, including spinal and cervical fractures.²⁰ She has had multiple surgeries, including back and shoulder surgeries, since the car accident.²¹ She has a cardiac pacemaker in place, and, following the car accident, has developed an “unspecified seizure disorder,” whereby she experiences moderate seizures and tremors at random times about two to three times per week.²² She also has a diagnosis of “bipolar disorder, severe, with psychotic features.”²³

Ms. S previously received PCA services from the Division. Those services were discontinued and her PCA case was closed in September 2015.²⁴ Ms. S did not appeal the discontinuation of services, but it is unclear whether the Division gave notice of the case closure

¹⁷ See 7 AAC 125.024(a)(1) and the Division’s *Personal Care Assistance Service Level Computation* chart contained at Ex. B, pp. 34 - 36.

¹⁸ Ex. E, p. 1.

¹⁹ Ex. E, p. 1.

²⁰ Ex. E, p. 3; 10/27/16 No Name Neurology Clinic record, p. 3 of 13.

²¹ Ms. S testimony; 10/27/16 No Name Neurology Clinic record, p. 3 of 13.

²² Ex. E, p. 3; Ms. S testimony; 10/27/16 No Name Neurology Clinic record, p. 3 of 13. Although the frequency of 2-3 times per week is indicated in a recent No Name Neurology Clinic document, Mr. S testified that Ms. S experiences these seizures 2-3 times per day. Ms. S apparently experienced one of these seizures for several minutes in the hearing room during the third day of the hearing.

²³ Ex. E, p. 3.

²⁴ Mead testimony.

to the Ss that would have provided an opportunity for an appeal.²⁵ In any event, Ms. S later reapplied for PCA services. It is that new application which is the subject of this appeal.

Ms. S was assessed on August 4, 2016 by Division assessor Samantha Fili to determine her eligibility for the PCA program, and her benefit level, if any. Ms. S's daughter, N, who serves as her PCA, also attended the assessment.²⁶

At the assessment, Ms. S displayed good range of motion with her right arm, but was unable to lift her left arm past her face or pull back her left hand behind her back.²⁷ She also could not stand up with her hands across her chest.²⁸ She could bend down and touch her calves (while in a sitting position), but could not touch her feet.²⁹

Ms. Fili determined that Ms. S required some minimal hands-on physical assistance with transfers and dressing, but that she was capable of the ADLs of bed mobility, locomotion, eating, toilet use, personal hygiene, and bathing without requiring physical hands-on assistance.³⁰

In instrumental activities of daily living, Ms. Fili assessed Ms. S as being independent with difficulty (self-performance code of 1) and requiring physical assistance (support code of 3) with main meal preparation and light housework.³¹ However, the Division ultimately determined that Ms. S could not receive PCA services for these IADLs because she has a spouse, Mr. S, who is legally obligated to assist her with IADLs.³²

As a result of this assessment, including its determination about Mr. S's expected role with IADLs, the Division determined that Ms. S was eligible for PCA services, but only in the amount of 1.75 hours per week.

M H testified that, based on two very abbreviated observations, she observed that Ms. S was able to transfer and locomote with stand-by assistance only, without hands-on physical assistance.

IV. Discussion

Although Ms. S previously received PCA services, those services were discontinued and she later reapplied. This application was therefore treated as a new application for services.

²⁵ Although at the hearing the Ss disputed the manner in which the case was closed in 2015, they did not present evidence that indicated the closure was an issue that could appropriately be reviewed in this case.

²⁶ Ex. E, p. 2. Mr. S was home at the time of the assessment, but was in the bedroom asleep. Fili testimony.

²⁷ Ex. E, p. 2.

²⁸ Ex. E, p. 2.

²⁹ Ex. E, p. 2; Fili testimony.

³⁰ Ex. E, pp. 6 – 11, 18, 31.

³¹ Ex. E, p. 26.

³² Mead testimony.

Consequently, Ms. S has the burden of proving by a preponderance of the evidence that the Division erred in its determinations.³³

At various points during the hearing, the Ss attempted to present evidence regarding alleged failures by the Division to pay their daughter, N, for PCA services she apparently rendered prior to the discontinuation of Ms. S's services in September 2015. The undersigned ALJ, however, explained on several occasions that this hearing was not the proper forum for raising the issue of N's PCA compensation. The Ss were encouraged to raise the issue with the Division's quality assurance manager.

The Division's determinations as to the ADLs of transfers, dressing, and bathing, and the IADLs of main meal preparation and housework, were disputed at the hearing. Ms. S met her burden of proof, as discussed below.

Transfers. In the ADL of "transfers" – that is, how a person "moves between surfaces," such as to and from bed, a chair, or a standing position – Ms. S told Ms. Fili that she needs assistance getting to and from a standing position due to pain in her back and hips.³⁴ She indicated that her daughter pulls her into a standing position while she pushes up.³⁵ Ms. Fili recorded in the CAT that she observed Ms. S and N demonstrate N pulling up on her left arm while Ms. S used her other arm to push off the couch.³⁶ Although Ms. Fili determined that Ms. S required hands-on physical assistance in the ADL of transfers – a score of 2/2 – she characterized her as only requiring this help twice a day.³⁷ When questioned about this portion of the assessment, Ms. Fili indicated this was because of Ms. S's self-report that she does not move around the house much because she is unable to do so.³⁸ When pressed, Ms. Fili seemed to admit that the frequency assessment was erroneous, testifying that it "was my overlook," while also trying to explain that it was due to her observation that Ms. S appeared to be able to sometimes transfer independently. In this context, it appeared that Ms. Fili's testimony on this issue conflated the assessment of Ms. S's need for assistance with the frequency of assistance required. In addition, by basing the frequency assessment on Ms. S's self-report, the assessor failed to take into account the activity Ms. S might engage in if she had the hands-on assistance she requires.

³³ 7 AAC 49.135.

³⁴ Ex. E, p. 6.

³⁵ Fili testimony.

³⁶ Ex. E, p. 6; Fili testimony. Ms. S questioned the accuracy of this observation by Ms. Fili; she testified that her left arm was injured in the auto accident and cannot be "pulled."

³⁷ Ex. D, p. 6; Ex. E, p. 6.

³⁸ Fili testimony.

On the other hand, Ms. S did not present specific evidence indicating the frequency of her need for physical assistance with transfers. It is self-evident, however, that Ms. S must get up and down from chairs, from her bed, or from a couch, more often than twice per day. It is reasonable, therefore, to assess her as needing physical assistance with transfers at least four times per day, seven days per week.³⁹

Dressing. In the ADL of dressing, Ms. Fili scored Ms. S as 2/2 because she needs assistance with buttons, shoes and socks.⁴⁰ However, Ms. Fili only scored Ms. S as needing assistance five days per week.⁴¹ At the hearing, she acknowledged that this was an error and that this assistance should be provided seven days per week.⁴² Ms. S's PCA authorization should be amended to reflect this change.

Bathing. Ms. Fili noted in the CAT that Ms. S's daughter assists her in bathing and that there were no assistive devices in the shower area, such as grab bars or a bath bench. Nonetheless, she scored her as a 1/1, i.e., needing supervision only. This score was apparently based only on the functional assessment findings that Ms. S could ambulate independently, could touch her calves while sitting, and could "use both arms but only right arm can lift over head." The discrepancy between the assessor's notations and the score here are self-evident, in light of the fact that the Ss have a walk-in platform type shower that Ms. S must step up and into in order to enter the shower, the absence of assistive devices in the shower, and the fact that the Ss reported numerous recent falls by Ms. S. The assessor apparently just discounted these reports, as well as the report that Ms. S's daughter provides hands-on assistance to her in the bathing process. Ms. S, therefore, should have been scored as a 3/2 for bathing, with a frequency for bathing assistance of seven times per week.⁴³

Instrumental Activities of Daily Living. The primary issue regarding IADLs concerns the Division's determination that because Mr. S is capable of performing the tasks, no PCA time can

³⁹ I find that Ms. H's testimony regarding transfers was based on too limited a sample of observations to outweigh Ms. Fili's observations and the testimony of Ms. S and N S.

⁴⁰ Fili testimony; Ex. D, p. 6.

⁴¹ Ex. D, p. 6.

⁴² Fili testimony.

⁴³ Self-performance is scored differently for bathing than for the other ADLs. A self-performance score of 2 means "physical help limited to transfer only," while a score of 3 means "physical help in part of bathing activity" in addition to the transfer assistance. Ex. E, p. 11.

be awarded under the Division's regulations governing the PCA program.⁴⁴ The Ss contend that Mr. S cannot perform the IADL tasks, primarily due to his own mental health disabilities.

This issue came up when Ms. S was previously receiving Medicaid-reimbursed PCA services, prior to the closure of her case in 2015. At that time, the Division had denied PCA time for IADLs based on the view that Mr. S could perform the IADL tasks, so the Ss submitted a letter from Mr. S's medical provider stating that "he has his own mental health issues and has difficulty caring for himself," and that "[h]e should not be put in the position of caring for his wife ... as he is incapable with his medical and psychological needs."⁴⁵ The provider's letter specified Mr. S's relevant "active problems" to include anxiety - generalized disorder, bipolar affective - NOS, hypertension - NOS, insomnia, and obstructive sleep apnea.⁴⁶ The Division responded to this letter by awarding PCA time for the IADLs, interpreting the letter to mean that Mr. S "is not capable of rendering the duty to support for IADLs."⁴⁷

At the time of the Division's assessment of Ms. S in August 2016, her file did not contain any more recent correspondence or diagnostic information regarding Mr. S's disabilities or his ability to perform IADL tasks.⁴⁸ The Division's reviewer, Ms. Mead, testified that the Division typically would not accord much, if any, weight to a provider letter dated three and a half years prior to the assessment. After the first day of the hearing, however, Mr. S's medical provider submitted a new letter, dated November 2, 2016, which contains language essentially identical to that in the 2013 letter regarding Mr. S's abilities and disabilities. Significantly, the "active problems" list in the 2016 letter is not identical; it includes "hypertension – poorly controlled," "bipolar affective disorder – in process of medication change," and "post-traumatic stress disorder." This would indicate that Mr. S's ability to perform IADL tasks for his wife has not improved since 2013, and in fact may have worsened.

The Division's arguments on this issue focused on whether Mr. S is physically capable of performing IADLs, an issue that really was not in dispute. The Division did not, however, present any authority for the proposition that physical ability, *per se*, is the only relevant criterion for whether a spouse can perform IADLs in order to meet the Division's regulation at 7 AAC

⁴⁴ See 7 AAC 125.040(a)(13)(B) (reimbursable PCA services do not include assistance with an IADL performed by a spouse of the recipient).

⁴⁵ 3/29/13 letter from No Name Health Center, p. 1.

⁴⁶ *Id.*

⁴⁷ 6/14/13 letter regarding PCA authorization amendment from Division to Ss, p. 2.

⁴⁸ There was a fair amount of testimony regarding the Division's inquiries to the Ss, through Ms. H, to attempt to obtain updated provider information regarding Mr. S; the Ss asserted that they were never asked. This issue, however, was mooted by the submission of the provider's November 2, 2016 letter.

125.040(a)(13)(B). The issue here is not Mr. S's physical ability to perform IADL tasks – it is whether his mental illness and related disabilities prevent him from being able to perform those tasks for Ms. S. I find that the letter from Mr. S's medical provider establishes that he cannot perform IADL tasks without exacerbating his own mental health issues.⁴⁹ The Division's regulation cannot be read in a manner that would require a spouse to make themselves sick or to worsen the symptoms of their own illness in order to meet the Division's IADL spousal duty requirements. Therefore, Ms. S is eligible to receive IADL PCA services under Medicaid.

For the IADL of "main meal preparation," Ms. Fili scored Ms. S as 1/3 because of Ms. S's report that standing for long periods is painful and that her hips "give out" sometimes.⁵⁰ This score means she could perform the IADL "with difficulty," and "physical assistance was provided." The Ss did not dispute the score.

For the IADL of "routine housework," Ms. Fili scored Ms. S as 1/3 because of her inability to stand for long periods and because of difficulties in using her left arm.⁵¹ The Ss did not dispute this score.

For the IADL of "light housework," Ms. Fili scored Ms. S as 1/0, meaning she could perform the IADL "with difficulty," but "no support provided."⁵² The basis for the support score of 0 is unclear. If Ms. S could not stand for long enough periods to prepare a main meal, and if her left arm difficulties caused her to need physical support with routine housework, there would be no basis for concluding that she needs no support for light housework tasks such as doing dishes, dusting on a daily basis, and making her bed.⁵³ Ms. S's score for this IADL, therefore, should be 1/3.

V. Conclusion

The Division's decision on Ms. S's application for PCA benefits is reversed as to the ADLs of transfers, dressing, and bathing, and the IADLs of main meal preparation, routine

⁴⁹ N S's testimony regarding her father's illness and related difficulties validates this conclusion.

⁵⁰ Ex. E, p. 26; Fili testimony.

⁵¹ Ex. E, p. 26; Fili testimony.

⁵² Ex. E, p. 26.

⁵³ *Id.*

housework, and light housework. Her PCA authorization should be adjusted to reflect the discussion of each activity above. The Division's decision is affirmed in all other respects.

DATED: March 1, 2017.

By: Signed
Andrew M. Lebo
Administrative Law Judge

Adoption

The undersigned 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 23 day of March, 2017.

By: Signed
Name: Douglas Jones
Title: Medicaid Program Integrity Manager

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]