

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

In the Matter of)	
)	
K C)	OAH No. 16-1315-MDS
<hr style="width:45%; margin-left:0"/>)	Agency No.

DECISION

I. Introduction

K C requested a fair hearing after the Division of Senior and Disabilities Services reduced her personal care assistance benefits from 36 to 14 hours per week. The only issue at the fair hearing was whether Ms. C qualified for medical escort benefits. In the past, Ms. C had received escort benefits. Escort benefits, however, are available only for those individuals who require an attendant to be safe while being transported to a medical appointment or who need assistance in communicating with a medical provider. The evidence in Ms. C’s fair hearing showed that Ms. C is able to communicate with her medical providers. Therefore, she is not eligible for escort services.

II. Facts

K C is a 63-year-old resident of No Name City, a small settlement in the northern part of the No Name. Ms. C lives alone in a two-story residence. She does not use the upper floor of her residence.

Ms. C suffers or has suffered from several health problems, including osteoarthritis in her knee, fibromyalgia, depression, hypertension, restless leg syndrome, and sleep apnea.¹ She has a severe reaction to fragrances.² Because of her health problems, Ms. C needs assistance to complete many of her activities of daily living and household chores. She is Medicaid eligible, and has received personal care assistance (PCA) benefits from Medicaid in the past.

Since 2012, Ms. C has been receiving 36 hours of PCA services per week. Her condition has improved since then, however, in part because she had gastric-bypass surgery and lost weight. Although she has been evaluated by the Division for continued eligibility since 2012, and the Division determined in those evaluations that she actually qualified for less PCA time, the Division did not take action to reduce her PCA benefits until this year.³

To determine how many hours of PCA benefits that Ms. C qualified for in the current year, Marianne Sullivan, a nurse with the Division, visited Ms. C on April 22, 2015. She

¹ Division Exhibit E at 3.
² *Id.*
³ Sullivan testimony.

evaluated Ms. C's physical ability to do her activities of daily living (ADLs) by having her do some of these activities, asking questions about her functional ability, and having her demonstrate functional ability. She also evaluated Ms. C's ability to do what are called "instrumental activities of daily living" (IADLs)—household chores, such as laundry, shopping, and preparing a meal. The Division uses a standardized assessment format, called the Consumer Assessment Tool (CAT), to assess how much assistance an applicant needs.⁴ Under the CAT, the assessor will assign a numerical score for each of several ADLs and IADLs. The Division then uses the scoring on the CAT, and other information it may have, such as medical records, to determine the level of assistance the recipient needs.

Ms. Sullivan observed that Ms. C had good range of motion. Ms. Sullivan recorded in the CAT that Ms. C could touch her hands over her head, and behind her back, although she could not touch her feet while in a sitting position.⁵ She recorded that her grip was strong, and bilateral. Ms. C was oriented and could respond appropriately to questions designed to test her cognitive ability.⁶ Ms. Sullivan noted significant improvement with regard to many of Ms. C's activities of daily living. For example, Ms. C was able to walk in her own home without assistance by using a unique system of cords that were placed strategically for her to grip.

Based on the CAT, and on its evaluation of other documents in the record, on November 3, 2016, the Division notified Ms. C that it was reducing her PCA benefits from 36 to 14 hours per week.⁷ Ms. C requested a fair hearing to contest the reduction.⁸ A hearing was held on December 21, 2016. The issues raised at the hearing are discussed below.

III. Discussion

At outset of the hearing, Ms. C identified that only two issues were in dispute: toilet use and escort benefits. The parties discussed the two issues in an informal off-the-record meeting out of the presence of the administrative law judge. They resolved the issue of toilet use, agreeing that the score should be 2/2, with a frequency of 42 times per week. That left only the issue of escort to be resolved in this fair hearing.

The department's regulations permit escort services as follows: "personal care services include . . . (9) 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

⁴ Division Exhibit E.

⁵ Division Exhibit E at 4

⁶ Division Exhibit E at 4.

⁷ Division Exhibit D. It is not clear why the Division waited 18 months to issue the reduction notice.

⁸ Division Exhibit C.

appointment.”⁹ The regulations prohibit a PCA from providing Medicaid transportation services.¹⁰

Previous decisions have held that these regulations do not allow an award of escort services from a PCA when a client’s need is limited to being transported.¹¹ In order to be eligible for escort, the client must need supervision during the transportation for safety reasons or must have cognitive limitations that make it imperative to have an escort communicate with the medical provider.¹² Although there was some suggestion that if Ms. C took public transportation to a medical appointment she might be at risk for a medical emergency from her reaction to fragrances, this theory was not pursued with sufficient detail for it to be at issue.¹³ Therefore, this decision will discuss only the issue of communication, which was well-developed in Ms. O’s testimony.

In Ms. C’s case, escort services have been provided in the past. Because the Division is seeking to reduce Ms. C’s PCA benefit, the Division has the burden of proving that she no longer qualifies for the same level of benefits that she received in the past.¹⁴ To meet that burden, the Division was asked to explain what had changed since 2012, when Ms. C had been given 481.5 minutes per week in escort benefits. If Ms. C had cognitive issues in the past that justified escort benefits, the Division would be required to prove that those cognitive issues no longer exist.

The Division explained that the change in benefit level was due to a change in the definition of escort in the Department’s regulations. It provided a copy of the former regulations, which defined escort services as follows: “accompanying the recipient to a medical clinic or physician’s office or on other trips that are reasonably necessary for the purpose of obtaining medical diagnosis or treatment.”¹⁵ Because this regulation did not require a need to communicate with the medical provider, escort was formerly allowed for a person who needed to be accompanied. Given Ms. C’s condition in 2012, she may have met this requirement in 2012 even if she did not have cognitive impairments.

⁹ 7 AAC 125.030(d)(9).

¹⁰ 7 AAC 125.040(a)(11).

¹¹ *E.g., In re J.T.*, OAH No. 13-1482-MDS at 9 (Dep’t Health and Soc. Servs. 2014); *In re W.X.*, OAH No. 13-1597-MDS at 5 (Dep’t Health and Soc. Servs. 2014).

¹² *In re E.Q.*, OAH No. 13-1185-MDS at 12 (Dep’t Health and Soc. Servs. 2014).

¹³ This issue appears to raise a transportation issue not a PCA issue. In any event, it was not shown that public transportation was a viable option or that Ms. C would be unsafe if public transportation were a viable option.

¹⁴ 7 AAC 49.135. (“For actions involving termination or reduction of benefits, the burden of proving evidence supporting the termination or reduction is on the department and is by a preponderance of evidence, unless otherwise provided by law.”).

¹⁵ 7 AAC 43.750(d)(6) (2012).

In fact, however, the regulations were changed effective January 1, 2012. Ms. C's 2012 assessment visit occurred on March 2, 2012. Therefore, the 2012 escort decision should have been under the same standard that governs escort today. Therefore, the change in regulations alone does not support the Division's case or explain what is different. Nevertheless, the Division can meet its burden of proof if it can show that today Ms. C does not have a cognitive impairment that creates a need for an escort to provide communication with the medical providers.¹⁶

At the hearing, Ms. C's PCA, her daughter, T O, testified that she accompanies her mother to about 80 percent of her medical appointments. If Ms. O cannot attend, Ms. C's other PCA attends so that Ms. C has 100 percent coverage. Ms. O explained that she does not interfere when her mother is communicating, but will talk to the medical providers when her mother gets confused. She said that she serves as an advocate for her mother at these appointments.¹⁷

Ms. Sullivan testified, however, about Ms. C's ability to communicate during the assessment visit. Ms. C was fully able to express herself and to understand what was being said to her. Ms. C was in command during the assessment. In addition to knowing her surroundings, she knew her medications. Ms. Sullivan noted that Ms. C's daughters were very protective of their mother, and did serve as good advocates. Given Ms. C's obvious intelligence and articulateness, however, she felt in her professional judgment that Ms. C did not have a cognitive impairment that required communication assistance.¹⁸

Ms. Sullivan further testified that she had reviewed over 200 pages of medical records in this case. Although the records frequently noted that Ms. C was accompanied by one of her children or grandchildren, the records never indicated that anyone other than Ms. C was providing information to the medical provider. In Ms. Sullivan's opinion, a medical provider would always record the source of the information in the record if it was from a person other than the patient.¹⁹ S J, the representative of Ms. C's PCA agency, ResCare, testified that she, too, had reviewed the medical records. She confirmed that these records do not state or imply that anyone other than Ms. C is communicating with the medical providers.²⁰

Although Ms. C allowed others to represent her at this hearing, she did speak up on one occasion to correct the record, in particular with regard to some testimony made by Ms. Sullivan.

¹⁶ If the Division can prove that Ms. C does not meet the current standards today, she is not eligible. The 2012 score may have been an error in applying the regulation or it may be that she has improved. The point is that the burden is on the Division.

¹⁷ O testimony.

¹⁸ Sullivan testimony.

¹⁹ *Id.*

²⁰ J testimony.

She made the corrections in an articulate and persuasive manner. First, she disputed Ms. Sullivan's characterization that Ms. C prefers to have her daughters drive her to her medical appointments. She likes to drive, but needs a driver because of safety concerns. Second, she strongly controverted Ms. Sullivan's account that Ms. C had asked her to have the state pave her driveway. Third, she noted that if Ms. Sullivan was implying that people who live in remote areas always have the option to move to the city, she strongly disagreed with that notion, particularly in her case. Finally, she noted that she maintained her relationship with her pain doctor in No Name City 2 because she is very cautious about medications, and she has a doctor in No Name City 2 who knows her and whom she trusts.²¹

Ms. C's correction of the record raises doubt about the accuracy of Ms. Sullivan's testimony. Furthermore, Ms. O was persuasive when she explained her concern that her mother could be confused at times. Nevertheless, three aspects of this record establish that Ms. C does not qualify for escort services. First, the main argument raised by Ms. C and Ms. J related to her need for transportation, not escort. Second, the medical records reflect that Ms. C is able to communicate with her medical providers. If she was relying on others for communication, it would likely be noted in those records. Third, when Ms. C spoke at the hearing, she was articulate and persuasive. In my view, she communicates well. That she may occasionally misunderstand or become confused is not unusual, and not likely to be a problem because, as she showed at this hearing, she will ask for clarification if she does not understand. Therefore, based on the record as a whole, the Division has met its burden of proving that Ms. C does not qualify for escort services.

IV. Conclusion

1. K C does not qualify for escort services.
2. As agreed to by the Division and Ms. C, Ms. C's score for PCA services for toilet use is 2/2, with a frequency of 42 times per week.

DATED this 4th of January, 2017.

By: Signed _____
Stephen C. Slotnick
Administrative Law Judge

²¹ C testimony.

Adoption

Under a delegation from the Commissioner of Health and Social Services and under the authority of AS 44.64.060(e)(1), I adopt this decision 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 20th day of January, 2017.

By: *Signed* _____
Name: Stephen C. Slotnick
Title: Administrative Law Judge

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