

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

In the Matter of)
)
N K) OAH No. 16-1327-MDS
) Agency No.
_____)

DECISION

I. Introduction

N K has been receiving services under the Personal Care Assistance (PCA) program for several years. His condition was reassessed in September 2016. As a result of this assessment, the division reduced his PCA time from 22.25 hours a week to 7.75 hours a week. Mr. K's sister, who holds a power of attorney for Mr. K, appealed.

The division's decision is affirmed in part and reversed in part.

II. Facts

N K is 58 years old. He has been diagnosed with dementia, cerebral infarction and cerebral atherosclerosis, as well as diabetes, chronic obstructive pulmonary disease, and hypertension.¹ He has had two transient ischemic attacks. Mr. K lives in No Name City with his sister. Before that, he lived in nursing homes for several years.² Mr. K has been receiving services based on an assessment done in 2013.³ The division reassessed Mr. K using the Consumer Assessment Tool (CAT) in September 2016, resulting in a reduction in PCA time for several activities of daily living (ADLs) and instrumental activities of daily living (IADLs).

A hearing was held on January 18, 2017. At the beginning of the hearing, the division announced that it had agreed to change Mr. K's score for dressing to 2/2, with a frequency of 14 times a week, and his personal hygiene score to 2/2, with a frequency of seven times a week. The parties then presented testimony and argument relating to the Mr. K's scores for bathing, laundry, light housework, prescribed range of motion and walking exercises, and foot care. Following the hearing, the parties briefed these issues, as well as the issue of the reduction of time for meal preparation.

Eric Vang of Alaska Legal Services Corporation represented Mr. K. Assistant Attorney General Elizabeth Smith represented the division. Mr. K's sister Q K C testified.

¹ Exhibit C at 14.
² Testimony of C.
³ Exhibit F.

Mr. K and Ms. C's husband T C were also present in the hearing room. Registered nurse Angela Hanley, who conducted the division's assessment of Mr. K, testified telephonically.

III. Discussion

The division used the 2013 CAT as the comparison year for the PCA service level authorization at issue in this case.⁴ The division bears the burden of supporting a reduction in benefits by a preponderance of the evidence; for additional benefits, the burden is on the recipient.⁵

A. Bathing

Mr. K received a score of 2/2 on the 2016 CAT for the activity of bathing.⁶ This score is unchanged from the 2/2 score resulting from a settlement following the 2013 CAT.⁷ Mr. K argues that he should receive a score of 3/2 for bathing. Because this is a request for additional PCA benefits, Mr. K has the burden of proof.⁸

The self-performance scoring for the activity of bathing is different from other activities. A person who needs physical help with transferring only is scored a 2; a person who needs physical help with part of the bathing activity is scored a 3. The bathing ADL covers how a person takes a full-body bath or shower and transfers in and out of the tub or shower. By regulation, "[w]ashing only the back and hair does not constitute bathing."⁹

Ms. C testified Mr. K needs physical assistance with washing parts of himself that he cannot reach -- the back of his head, the perianal region, and his calves. Additionally, Ms. C testified that Mr. K sometimes cannot process verbal cues -- for instance, an instruction to wash his right arm might need to be supported with a physical cue. Ms. Hanley testified that during the assessment, she was told he needed help washing his hair, his back, and the backs of his legs. Based on this testimony, Mr. K requires physical assistance in bathing. His score should be increased to 3/2, with a frequency of seven times a week.

⁴ Exhibit C at 2 - 11.

⁵ 7 AAC 49.135

⁶ Exhibit C at 22.

⁷ Exhibit F at 10; Exhibit F at 32.

⁸ 7 AAC 49.135. The 2/2 score is a reduction from a CAT score of 3/2 Mr. K received from Ms. Hanley in 2014. Hearing Brief for K, Exhibit 1. However, the 2013 CAT, not the 2015 CAT was the basis of comparison for purposes of determining whether there was a change in PCA service level authorization.

⁹ 7 AAC 125.030(b)(8).

B. Laundry

Mr. K was scored a 1/3 for laundry.¹⁰ This is a reduction from his 2013 score of 2/3.¹¹ When the division reduces the time allotted for an activity, the division has the burden of proving a change of condition justifying that reduction.¹² The division did not provide any explanation of how Mr. K' condition had changed to support this change in his score.

A self-performance score of "1" for an instrumental activity of daily living (IADL), including laundry, corresponds to "independent with difficulty: Person performed task, but did so with difficulty or took a great deal of time to do it." A self-performance score of "2" corresponds to "[a]ssistance/done with help: Person involved in activity but help (including supervision, reminders, and/or physical 'hands-on' help) was provided."¹³

The division argues that Mr. K is physically capable of performing the tasks involved in doing laundry, and the reduced score of 1/3 should stand.¹⁴ However, the division's argument goes to the support score, not the self-performance score. The division gave Mr. K a support score of "3," indicating that he received physical assistance with the task in the last seven days.¹⁵ Mr. K is not challenging the support score of 3.

Mr. K is challenging the self-performance score of 1. Therefore, the issue is whether Mr. K performs the task independently with difficulty, which corresponds to a self-performance code of 1, or requires assistance, which corresponds to a self-performance code of 2.

According to Ms. C, Mr. K does not know how to operate the washing machine. If directed to, he could push the button that says "on." But he would be confused about how to program the machine. He would not be able to follow through the process of making all of the necessary choices about water temperature and fabric type and programming them into the washing machine. More importantly, it would never occur to him to launder his clothing on his own.¹⁶

¹⁰ Exhibit C at 37.

¹¹ Exhibit C at 11.

¹² Under 7 AAC 125.026, the division may reduce a recipient's number of hours of service if the division "confirms that [the] recipient has had a material change in condition." See *In re P.L.*, OAH No. 13-1684-MDS at 2.

¹³ Exhibit C at 37.

¹⁴ Closing Brief at 6 - 7 ("He may need to be told what to do but does not need physical assistance, and therefore the self-performance score of 1 (independent with difficulty) should stand.")

¹⁵ *Id.*

¹⁶ Testimony of C.

The program will not provide PCA time for “a task that the department determines could reasonably be performed by the recipient.”¹⁷ In a previous case where a recipient “was not capable of participation in laundry, because he cannot operate machinery, or differentiate between clean and dirty clothing,” it was held that the division had not met its burden of proving that the task could “reasonably be performed” by the recipient.¹⁸ Mr. K cannot reasonably perform the task of doing his own laundry because he is not capable of recognizing that the laundry needs to be done, and he is also not capable of running the washing machine.

The reduction of Mr. K’ self-performance score from “2” to “1” in the 2016 assessment is not supported by the evidence in this case. The division has not shown that Mr. K has gone from needing help to being independent with difficulty in this task. Mr. K is not in any sense “independent” in the activity of doing laundry; he is simply not capable of doing his laundry on his own. He may be able to participate to some degree in the process, but he clearly needs extensive assistance in initiating and completing this activity.

Mr. K’ score for this IADL should be 2/3 instead of 1/3.

C. Light housework

As with laundry, Mr. K’ score for the IADL of light housework was reduced from 2/3 in 2013 to 1/3 in 2016.¹⁹ The division argued that Mr. K was “physically able” to clean, so the score of “1” for “independent with difficulty” was appropriate. However, here again, the contested score is the self-performance score, not the support score.

The division has not demonstrated that Mr. K is capable of independently performing light housework. He cannot reliably ascertain when something is clean. According to Ms. C, after Mr. K washes a dish, it may not be clean enough to use. Mr. K is not able to put dishes away because he does not know where they go. If someone sprays cleaner on a mirror, he can take a paper towel and wipe the mirror. However, it might not occur to him to wipe the whole mirror, he might just wipe one section and need to be cued to wipe the rest. He needs to be told to throw the paper towel away.²⁰

As with laundry, Mr. K is not “independent” in any meaningful sense in the activity of light housework. He cannot tell what is clean. Although he may be able to participate in

¹⁷ 7 AAC 125.040(a)(4).

¹⁸ *In re H.W.*, 14-1382-MDS at 6- 7.

¹⁹ Exhibit C at 11.

²⁰ Testimony of C.

light housework to some degree, he cannot reasonably be expected to get anything clean on his own. He should be scored 2/3 for the IADL of light housework.

D. Main meals and light meals

Mr. K was scored 2/3 for both light meal and main meal preparation on the 2013 CAT and the 2016 CAT, so there was no reduction in score for this item. However, the division reduced the weekly frequency for main meals from 7 to 2, and increased the light meal frequency from 9 to 14. The amount of time allotted for each light meal is 11.25 minutes, and for each main meal, 18.75 minutes. The division reduced the amount of time allotted to Mr. K for main meal preparation because Mr. K attends adult day care at The No Name and receives meals there once a day, five days a week.²¹ The issue is whether those meals should replace PCA time for main meal preparation or for light meal preparation.

The regulation provides that the PCA program will only pay for main meal and light meal preparation if the service is not duplicated by another meal service.²² Here, the question is which meal is being duplicated by the meal Mr. K has at The No Name, a main meal or a light meal.

The division has a policy of treating one delivered meal as the recipient's main meal. The second delivered meal is treated as a light meal.²³ In a 2013 training memorandum, the division specified that the first Meals on Wheels or congregate meal a PCA recipient received would replace a main meal under the PCA program.²⁴ The division interpretation of the regulation was upheld in an administrative decision by the commissioner's designee holding that "the first delivered meal counts as a main meal and any additional meal prepared through the PCA program would be a light meal."²⁵ Although the commissioner is not obliged to defer to the division's interpretation of a regulation, here, the commissioner's designee has expressly adopted the division's interpretation.

Mr. K argues that the text of the regulation defining covered activities specifying "one main meal per day" implies that PCA services should be allotted first to providing that main meal each day, and then to light meals.²⁶ Although this is a plausible interpretation,

²¹ Exhibit C at 13.

²² 7 AAC 125.030(f)(1).

²³ Division's Closing Brief at 12.

²⁴ Division's Closing Brief, Exhibit G: Rodney W. George, "Training Memo to PCA Unit" dated March 27, 2013.

²⁵ *In re R.N.*, OAH No. 14-2319-MDS.

²⁶ 7 AAC 125.030(c), (f), *cited in* Post-Hearing Brief at 10.

nothing in the text of the regulation or the service authorization chart compels the reading Mr. K proposes.

In his post-hearing brief, Mr. K also offered to make “the meal replacement issue a fact based inquiry.” This offer was not timely. Counsel for Mr. K raised the meal replacement issue at the beginning of the hearing, but elected not to present facts, and instead couched it as a legal issue relating to interpretation of the regulation.

Because the commissioner’s designee has already decided this issue, and Mr. K has not presented a compelling reason to apply a different rule in this case, the division’s decision that Mr. K’ meals at The No Name replace main meal preparation time under the PCA program should be upheld.

E. Prescribed activities

Mr. K’ physician prescribed range of motion exercises three times a week for 30 minutes each, and walking five times a week for 60 - 90 minutes. She also prescribed foot care twice a week for 30 minutes.²⁷ Each of the prescribed activities is analyzed below.

1. Range of motion exercises.

Mr. K’ physical therapist has prescribed a series of range of motion exercises for Mr. K. She wrote that Mr. K “cannot and will not be able to physically perform the prescribe[d] exercises without assistance due to his cognitive inability to focus, recall, or perceived need for physical activity.”²⁸ However, the division’s assessor found that Mr. K “is able to move his extremities and doesn’t require passive range of motion.”²⁹ She also noted that Mr. K had a home exercise program “done with PCA supervising and giving him step by step instructions due to cognition issues.”³⁰

The division acknowledged that the controlling regulation, 7 AAC 125.030(e), covers prescribed range of motion exercises and does not expressly limit PCA time to passive range of motion exercises.³¹ The issue, according to the division, is “whether the recipient needs hands-on assistance to complete the exercise.”³²

Ms. C testified that Mr. K required hands-on physical assistance with the prescribed exercises. Specifically, she said that sometimes Mr. K does not position his limbs correctly

²⁷ Exhibit F at 1 - 2.

²⁸ Exhibit F at 5 - 9.

²⁹ Exhibit C at 41.

³⁰ Exhibit C at 15.

³¹ Division’s Closing Brief at 7.

³² Division’s Closing Brief at 8, quoting *In re N.K.*, OAH No. 15-0760-MDS at 5.

to perform an exercise, and that hands-on realignment is required. She also testified that his need for hands-on assistance varied depending on the day, and that there are days when Mr. K needs physical hands-on assistance with all of the exercises because he does not understand what he is being asked to do through verbal instruction or demonstration. Ms. C testified that Mr. K requires physical assistance with his exercises due to his cognitive impairment.

The division's notice of change implies that range of motion exercises are a new activity for Mr. K, and that the August 2, 2016 prescription was approved in error.³³ However, according to the division's service level authorization chart, Mr. K received time for range of motion exercises following the 2013 assessment.³⁴ Because the current assessment eliminates the time that had previously been allotted for this activity, the division has the burden of proving that there has been a material change in Mr. K's condition.³⁵ A material change is confirmed if a recipient was receiving care for exercises under a prescription and the prescription has not been renewed.³⁶ That is not the case here, since Mr. K has a current prescription. Furthermore, the division has not identified a change in Mr. K's medical condition indicating that range of motion exercises are no longer required.³⁷

Because there is some evidence indicating that Mr. K requires physical assistance in order to complete the range of motion exercises, and because the division has not identified a change in his medical condition, Mr. K should receive PCA time for range of motion exercises as prescribed.

2. Walking exercise.

Mr. K received 420 minutes a week for walking exercise in 2013.³⁸ Dr. U again prescribed walking for Mr. K on August 2, 2016.³⁹ The division denied PCA time for this activity because it found that Mr. K required supervision rather than physical assistance

³³ Exhibit C at 5 (“[o]n 01/18/2013, you were assessed as not needing ROM Exercise ... However, you submitted a PTF for ROM exercise dated 08/2/2016. That PTF was approved for 210 weekly minutes in error.”); Exhibit F at 13.

³⁴ Exhibit C at 11.

³⁵ 7 AAC 49.135.

³⁶ 7 AAC 125.026(d)(3)(A)(iii).

³⁷ See 7 AAC 125.026(d)(1) and (2).

³⁸ Exhibit F at 13, Exhibit C at 11.

³⁹ Exhibit F at 2.

with the activity, and also because Dr. U incorrectly wrote a range of time (60 - 90 minutes) for this activity.⁴⁰

Ms. C testified that Mr. K needs hands-on physical assistance while walking. For example, she will move his shoulder and guide him out of the path of an oncoming car or away from a ditch, because a verbal cue is insufficient -- he may hear the cue, but not be able to understand that he needs to move. Also, she testified that he needs someone to hold his hand when walking on uneven surfaces because he has trouble with balance.

As with the range of motion exercises, because there is some evidence indicating that Mr. K requires physical assistance with walking exercise, and because the division has not identified a change in his medical condition, Mr. K should receive 60 minutes of PCA time five times a week for walking.

3. Foot care.

Dr. U prescribed foot care twice a week “for the prevention of diabetes complications.”⁴¹ The division denied PCA time for foot care despite Dr. U’s prescription because there was no medical documentation to support a need for general foot care provided for under personal hygiene or bathing, and because foot care specifically related to Mr. K’ diagnosis of diabetes must be provided by a health care professional, not a personal care assistant.⁴²

The regulation governing personal care covered services addresses foot care and nail care. The ADL of personal hygiene includes “nail care, if the recipient is not diabetic.”⁴³ In addition, personal care services include “prescribed foot care” under 7 AAC 125.030(d)(5). Previous decisions have allotted PCA time for prescribed preventive foot care, including prescribed foot care for a diabetic recipient.⁴⁴ Prescribed foot care is within the scope of personal care services provided under the program. Mr. K should receive PCA time for foot care as prescribed.

IV. Conclusion

Mr. K met his burden of proving that he should receive an increased service level authorization for the ADL of bathing. The division did not meet its burden of showing that Mr. K’ service level authorization for the IADLs of light housework and laundry should be

⁴⁰ Exhibit C at 5.

⁴¹ Exhibit F at 2.

⁴² Exhibit C at 5 - 6; Testimony of Hanley.

⁴³ 7 AAC 125.030(b)(7)(B).

⁴⁴ *In re F.N.*, OAH No. 13-0994-MDS at 8; *In re S.M.*, OAH No. 14-0883-MDS at 7.

reduced. The division correctly concluded that Mr. K' meals at The No Name should replace PCA time for main meal preparation. Mr. K should receive time for the prescribed range of motion exercises, walking exercise, and foot care. Mr. K' service level authorization should be recalculated accordingly.

Dated: March 15, 2017.

Signed _____
Kathryn L. Kurtz
Administrative Law Judge

Adoption

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

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 27th day of April, 2017.

By: *Signed* _____
Signature
Douglas Jones
Name
Medicaid Program Integrity Manager
Title

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