

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

In the Matter of)
)
 T E) OAH No. 16-1342-MDS
) Agency No.

DECISION

I. Introduction and Summary

T E is an 88-year-old widow who has made an initial application for personal care assistant (PCA) services. Natasha Fromm, who is trained to assess people for the need for PCA services, visited Ms. E on October 10, 2016, running a number of functional tests and interviewing both Ms. E and her son, D. She concluded that Ms. E has difficulty and needs assistance with a number of daily activities, but that her needs were not so great as to qualify her for PCA services under the applicable regulations.¹

The Division of Senior and Disabilities Services (Division) notified Ms. E 16 days later that her application would be denied. Ms. E requested a hearing. The hearing took place on December 14, 2016, using a Laotian interpreter. Ms. E's son assisted her during the hearing and testified on her behalf. He seemed to be quite a frank witness, willing to acknowledge without being pressed that his mother can do quite a lot for herself.

This decision concludes that the Division's assessment was largely on target, but Ms. E meets the threshold for PCA eligibility through qualifying scores for four gateway activities. She is therefore eligible for a small amount of PCA time.

II. The PCA Service Determination Process

The Medicaid program authorizes PCA services for the purpose of providing "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" ² Accordingly, "[t]he department will not authorize personal care services for a recipient if the

¹ The assessment is found at Exhibit E.
² 7 AAC 125.010(a).

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 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 the specific ADLs of transfers, locomotion, eating, toilet use, dressing, or bathing, or any one of the specific IADLs of meal preparation (either light or main meals), housework (either light or routine housework), grocery shopping, or laundry, then the person is eligible for PCA services. If a person is independent or only requires non-hands-on assistance (oversight, supervision, cueing, setup) with all of these specific ADLs and IADLs, the person is not eligible for PCA services.⁵

PCA services can also be authorized for a few additional functions beyond direct performance of ADLs and IADLs, such as escort to medical appointments. These additional services are never available if the person has been determined to fall below the level for services in every one of the gateway ADL and IADL categories.⁶

III. Background Facts

T E lives with her son and his family. She is reasonably healthy for an 88-year-old; her diagnosed medical problems are limited to high blood pressure and high cholesterol (both with no symptoms), as well as some trouble with reflux.⁷ However, she does walk with a cane, which

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.

⁵ Ex. E, p. 31.

⁶ See *id.*

⁷ Ex. C.

suggests some instability. She has a strong grip, and she is flexible enough to reach the tops of her feet while sitting and to touch her hands to her face.⁸

Ms. E has an attentive family who do a lot for her, and who feel that if she were left to perform many of these activities on her own, she would be a fall risk. A problem they point to in this regard is dizziness. Ms. E and her son told the assessor that sometimes she needs help getting up from a chair or a bed due to the dizziness.⁹ On the other hand, the assessor directly observed Ms. E stand twice from a couch with no assistance at all.¹⁰ The records of a very recent medical visit may shed some light on this situation: they record that Ms. E suffers dizziness “occasionally after taking meds,” which could indicate that the dizziness is a side effect of her treatment for high blood pressure or is otherwise related to the medications.¹¹ She seems to take the medications some days, but not others.¹² Thus, the dizziness is a condition that afflicts her only once in a while. Apart from the dizziness, she seems to have a balance issue that is the reason for her regular use of a cane.

D E takes his mother to the store from time to time to buy groceries with him. He testified that his mother *could* take items from the shelves on her own, but that he gets the items for her. He reports that his mother could carry one or two pounds of groceries, but that he does all the heavy carrying. For these and other outings in the car, he finds that he sometimes has to hold his mother’s hand getting to and from the car because of her unsteadiness, but sometimes he does not.

D’s wife does the housework for Ms. E, making her bed and wiping up messes. This, again, is because of a worry that Ms. E would fall. On the other hand, the family finds that she is able to make herself a snack or a cup of tea.¹³

The overall picture is of an elderly lady who can do a fair amount for herself, but is sometimes unsteady on her feet. In her October assessment, the Division’s assessor felt that although it was difficult and laborious for Ms. E to perform some tasks, she could accomplish them all without hands-on assistance.

⁸ Observations of Natasha Fromm (reported in the CAT and reiterated in testimony).

⁹ *E.g.*, Ex. E, p. 6.

¹⁰ *Id.*; Fromm testimony.

¹¹ Ex. C, p. 17 (Nov. 10, 2016 entry by O C, P.A.).

¹² Ex. C, p. 4 (treatment compliance “fair”), p. 9 (meds not taken Sept. 8), p. 14 (meds not taken Nov. 27-28).

¹³ Testimony of D E.

IV. Discussion

In this case, in which she is seeking a benefit she has not previously received, Ms. E has the burden to prove, by a preponderance of the evidence,¹⁴ facts that show she is eligible.¹⁵ Ms. E can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs,¹⁶ 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,¹⁷ which in this case is October 26, 2016.

A. ADLs

1. Bathing

Ms. E has contested the agency's assessment regarding only one ADL, that of bathing. The concern here is not with the undressing or washing of the body, which all agree that Ms. E can do on her own. Ms. E does seem to need some help with hair washing, but washing the hair is not part of the ADL of bathing for purposes of determining PCA eligibility;¹⁸ likewise, she says she sometimes needs assistance walking to the bathroom for bathing, but this is also not part of the ADL of bathing.¹⁹ The real concern is with unsteadiness, which can cause her to need assistance getting in and out of the tub.²⁰ One person supports her when she does this.²¹

On this issue, Ms. E's and her son's report that she needs help getting in and out of the tub was persuasive. Ms. Fromm, the assessor, noted that Ms. E generally transfers and walks on her own, but did not explain how this would rule out a reasonable concern for her safety with an unassisted transfer into and out of the tub. For a one-person physical assist "limited to transfer only" in connection with bathing, the CAT dictates a score of 2/2. For bathing, she qualifies for limited assistance, once daily, seven days per week.

¹⁴ Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

¹⁵ 7 AAC 49.135.

¹⁶ 2 AAC 64.290(a)(1).

¹⁷ 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>).

¹⁸ This is suggested by 7 AAC 125.030(b)(8), and is made clear by a notation on page 11 of the CAT, which has been adopted as a regulation in 7 AAC 160.900.

¹⁹ It is part of the ADL of locomotion; see 7 AAC 125.030(b)(3). In this case, Ms. E did not contest the assessment regarding locomotion, and this seems appropriate since it seems to be unusual that she would need assistance getting from place to place in her home.

²⁰ Ex. E, p. 11; testimony of D E.

²¹ Testimony of D E.

2. *Other ADLs*

Ms. E did not contest Ms. Fromm's conclusion that she is independent with the other ADLs. The areas of disagreement chart submitted on her behalf records a similar assessment.

B. IADLs

1. *Light Meal Preparation*

D E readily agreed that his mother can prepare and even "cook" snacks on her own. There is no basis to disturb Ms. Fromm's similar assessment, which was that Ms. E can perform this activity slowly or with difficulty, with nothing more than set-up help from others (score of 1/2).

2. *Main Meal Preparation*

D E reported that his wife does the main meal preparation, and indicated that he would be concerned about his mother's instability if she were to do the main cooking. However, he provided no reason to believe that she could not prepare a main meal, with some difficulty, if given setup help to do so primarily in a seated position. Ms. Fromm assessed that Ms. E could prepare a main meal "with assistance," potentially including reminders and hands-on help, as well as set-up help (score of 2/2). There is no basis to alter this score.

3. *Laundry*

In the E household, laundry is done inside the home. Similar to main meal preparation, there is no reason to believe Ms. E could not participate in many aspects of this job "with assistance," potentially including reminders and hands-on help, as well as set-up help—which is how Ms. Fromm assessed the activity. However, the evidence made it clear that Ms. E could not carry a laundry basket, and thus some hands-on help would be needed, yielding a score of 2/3. I am also doubtful that she could change her bed linens without hands-on assistance—a task that is included in laundering under 7 AAC 125.030(b)(4)(A)—but this is a close question that need not be resolved since it would not change the score beyond the 2/3 already noted.

4. *Light Housekeeping*

Light housekeeping involves things like dusting and making the bed. D E's wife does these activities for her mother-in-law, but the evidence in the case did not show that she really has to do the job for her elder, only that she does. A score of 2/2 (done with help, including supervision and cueing) is the most that could be awarded.

5. *Routine Housekeeping*

Routine housekeeping encompasses such activities as vacuuming and trash removal. The overall picture of Ms. E painted in this case makes it hard to conceive of her being able to perform these tasks without physical assistance, which means that a score of at least 2/3 is appropriate.

6. *Grocery Shopping*

Ms. E can participate quite actively in grocery shopping. The only area in which she needs hands-on help is carrying groceries, but that is enough to give her a qualifying score of 2/3.

C. *Medical Appointments*

Accompaniment to medical appointments is not one of the gateway ADLs or IADLs. Since the hearing was focused on whether Ms. E is eligible for PCA services in the first place, little evidence was taken regarding escort. If qualified for PCA services in general, however, Ms. E qualifies for time for escort to medical appointments.²² Ms. E has some impairment of cognition, being unable, for example, to say what state she is in.²³ Her medical records also show her to be a relatively poor historian in terms of remembering basic medical information about herself. It is more probable than not that she needs assistance in communicating well with her providers. On remand, the Division will need to evaluate the frequency and duration of this activity and provide appropriate PCA time.

D. *Overall Eligibility*

A person is eligible for PCA services if she has a score of 2/2 or higher in one of the six gateway ADLs or a score of 1/3 or higher in one of the six gateway IADLs. Ms. E has demonstrated that she should have qualifying scores in the ADL of bathing (2/2) and the IADLs of Routine Housekeeping (2/3), Laundry (2/3), and grocery shopping (2/3). She is therefore eligible for PCA services, and she will receive PCA time for these four activities and the activity of escort to medical appointments.

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²² This is discussed in *In re N.R.*, OAH No. 15-0549-MDS, Decision at 9 (Comm’r of Health & Soc. Serv. 2015) (Pederson, ALJ).

²³ Ex. E, p. 4.

V. Conclusion

The October 26, 2016 decision denying eligibility for PCA services is reversed. The Division shall calculate and award PCA time consistent with this decision.

DATED this 22nd day of December, 2016.

Signed

Christopher Kennedy
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 6th day of Januray, 2017.

By: *Signed*

Name: Christopher M. Kennedy
Title: Deputy Chief Administrative Law Judge

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