

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

In the Matter of )  
 )  
 Q U ) OAH No. 16-1345-MDS  
 ) Agency No.

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**DECISION**

**I. Introduction and Summary**

Q U is a 61-year-old gentleman in poor health 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 Mr. U on October 4, 2016, running a number of functional tests and interviewing the applicant. She concluded that Mr. U does not need hands-on assistance in his daily activities and therefore does not qualify for PCA services under the applicable regulations.<sup>1</sup> Notably, she has spent a lot of time with Mr. U, having also assessed him in November 2015 and June 2016.

The Division of Senior and Disabilities Services (Division) notified Mr. U on November 14, 2016 that his application would be denied. Mr. U, with the assistance of his proposed PCA provider, requested a hearing. The hearing took place on December 20 and 22, 2016. English is Mr. U's second language, and he was offered an interpreter, but both he and the administrative law judge felt that communication would be easier if no interpreter was used, since he had quite a good command of the language.<sup>2</sup> He testified on his own behalf, and asked for testimony from no one else.

This decision concludes that, while Mr. U is difficult to evaluate, the limited evidence available points to the conclusion that he does not currently meet the regulatory threshold for PCA services. However, this situation may change in light of his long-term medical problems. As discussed at the end of Part IV below, the Division can do a better job of assessing Mr. U, and it needs to make this improvement if he applies again in the future.

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<sup>1</sup> The assessment is found at Exhibit E.

<sup>2</sup> Although his speech was not perfectly grammatical, he was able to use a relatively sophisticated vocabulary at times, such as the word "stagger." He answered questions appropriately, indicating thereby that he understood them.

## 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 . . . .”<sup>3</sup> 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.”<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

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<sup>3</sup> 7 AAC 125.010(a).

<sup>4</sup> 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.*

<sup>5</sup> *See* 7 AAC 125.024(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900.

<sup>6</sup> Ex. E, p. 31.

<sup>7</sup> *See id.*

### III. Facts

Q U is in end-stage renal disease, requiring dialysis three times a week. He had an acute myocardial infarction recently, and suffers from perioding chest pain/angina and shortness of breath. He is also diabetic, with the diabetes controlled through once-daily medication requiring no blood sugar monitoring. He has a variety of lesser health troubles, including gout and reflux disease.

The big picture regarding Mr. U is that his true needs are difficult to gauge. In assessing him firsthand, Ms. Fromm developed the sense that he was exaggerating his disabilities, perhaps not performing the physical tests to the best of his ability. With that said, she has observed him to stand, walk, and climb stairs under his own power with a walker. At hearing, he reiterated over and over how hard it is for him to do things for himself, but there was not much supporting detail and the professions of helplessness sounded overstated.

And yet there is a cautionary tale in his recent background. From the fall of 2015 through the spring of 2016, he had a series of hospital admissions and emergency department visits for weakness, dizziness, hypotension, gastric complaints, and chest pain. The notes sometimes suggested that the caregivers may have felt the visits were unwarranted.<sup>8</sup> Nonetheless, on May 16, 2016, he presented with respiratory failure, an oxygen saturation of 72, and acute myocardial infarction, and was found to be “critically ill”;<sup>9</sup> it would appear, therefore, that there was some underlying reality to his prior sense of ill health. *Remarkably, the Division entirely failed to note the cardiac history, reporting in the CAT that Mr. U had had “no medical changes” since December of 2015,<sup>10</sup> and reiterating the same view in testimony at the hearing.*

After the crisis of May of 2016, Mr. U seemed to stabilize for a time. He had two fairly routine medical procedures to service issues with his dialysis port, one in late May and another in early August. These went well, and he successfully drove himself to and from the August procedure. So far as one can tell from the documents the Division has shared with OAH, he has done well with his dialysis visits, walking in and out on his own. Periodic chest pain has returned, with an E.R. visit for that problem on October 11, 2016 (for which we have incomplete records), and an instance of “angina” during a dialysis visit on November 30, 2016, for which oxygen was given.

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<sup>8</sup> E.g., Medical Record p. 196.

<sup>9</sup> Medical Record, pp. 234, 278.

<sup>10</sup> Ex. E, p. 3.

Some records have been withheld. At hearing, the Division presented testimony from reviewer Jerry Fromm, who indicated he had seen a record from dialysis showing that Mr. U was given oxygen for “anxiety” at a time when his oxygen saturation was 98. (Apparently, this testimony was offered to suggest that Mr. U’s needs are more psychological than physical). Unable to find such a record, the ALJ issued an order after the hearing asking the Division to submit all the records the reviewer examined, and to indicate on what page to find the saturation of 98 that the reviewer had mentioned in his testimony. The Division then submitted a set of records with the following note:

Good afternoon,

The O2 Saturation of at least 98 in the attached record is found in multiple pages, including pages # 305, 323, 325, 339.

Thank you,

Victoria Cobo

None of those pages is a record from dialysis, and none of them could possibly be the record Mr. Fromm was referring to in his testimony. I therefore am unable to make any inference that when Mr. U is given oxygen at dialysis, it is administered because of a merely psychological need.

At hearing, the Division alluded to the potential for testimony or a letter from Mr. U’s dialysis provider, who could provide some overall, long-term perspective based on thrice-weekly observations of Mr. U. However, neither side has actually submitted input from the dialysis provider.

#### **IV. Discussion**

In this case, in which he is seeking a benefit he has not previously received, Mr. U has the burden to prove, by a preponderance of the evidence,<sup>11</sup> facts that show he is eligible.<sup>12</sup> Mr. U can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs,<sup>13</sup> 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,<sup>14</sup> which in this case is November 14, 2016.

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<sup>11</sup> Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

<sup>12</sup> 7 AAC 49.135.

<sup>13</sup> 2 AAC 64.290(a)(1).

<sup>14</sup> 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>).

To qualify for PCA services, Mr. U would have to need hands-on physical help—something more than guidance or setup help—with one or more of the gateway activities mentioned above, notwithstanding any assistive devices he may have access to. The need for help needs to be physical. Thus, for example, the fact that a person might lack cooking or cleaning skills does not make the person eligible for a PCA to prepare meals or clean the house. This help is available only if the person has a physical impairment that prevents him or her from reasonably completing a gateway activity.

With Mr. U, the issue is periodic weakness or unsteadiness. Although he has been observed to walk, climb stairs under his own power, stand, sit down, and so forth, he contends that at times he is just too tired to perform some activities, such as housework, laundry, shopping, and bathing.

The evidence presented at hearing was not enough to persuade me that Mr. U has the required level of physical need at this time. He is a person who ordinarily can drive himself to medical appointments and walk in and walk out without assistance. There is insufficient basis to conclude that he needs physical help with such activities as locomotion, bathing, housekeeping, shopping, and laundry, although with the latter activities he may need to time them to occur on days when he is less exhausted.

Nonetheless, I am concerned about the cardiac issues, particularly since the Division failed to notice them in the medical history. Combined with the renal failure, these could eventually bring Mr. U to the point where he does need some PCA assistance. Should Mr. U reapply for PCA services, the Division is directed to make a thorough review of recent medical history and, if there is an appeal, it will be expected to be able to explain how all of his medical conditions affect his day-to-day physical needs.

## **V. Conclusion**

The November 14, 2016 decision denying eligibility for PCA services is affirmed.

DATED this 9<sup>th</sup> day of January, 2017.

*Signed*

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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 24<sup>th</sup> day of January, 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.]