

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

In the Matter of)
)
 B N) OAH No. 17-0733-MDS
) Agency No.

DECISION

I. Introduction

B N applied for Medicaid personal care assistance (PCA) services. On May 31, 2017, the Division of Senior and Disabilities Services (Division) assessed her to determine whether she was eligible for those services. On June 5, 2017, the Division notified her that her application was denied. Ms. N requested a hearing.

Ms. N’s telephonic hearing was held on August 15, 2017. Ms. N, her mother, Y Z, and her physician, D K, testified on her behalf. Victoria Cobo represented the Division. Rae Norton, assessor, and Jerry Fromm, reviewer, testified for the Division.

The evidence demonstrates that Ms. N is eligible for PCA services. The denial of those services is reversed and the Division is directed to provide Ms. N with PCA services in accordance with this decision.

II. 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”¹ 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.”²

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

¹ 7 AAC 125.010(a).

² 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.*

needs to perform ADLs, IADLs, and the other covered services.³ 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.

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.⁴ 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 independent⁵ and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance⁶); **3** (the person requires extensive assistance⁷); **4** (the person is totally dependent⁸). 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).⁹

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

³ See 7 AAC 125.024(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900.

⁴ Ex. E, pp. 6 – 11.

⁵ 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.

⁶ 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.”

⁷ 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.”

⁸ According to 7 AAC 125.020(a)(3), dependent as to an ADL, or dependent as to and IADL, “means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity.”

⁹ Ex. E, p. 18.

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).¹⁰

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.¹¹

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).¹²

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).¹³

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 assistance¹⁴ (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 the applicant is eligible for PCA services.¹⁵

The codes assigned to an ADL or IADL determine how much PCA service time a person receives for each occurrence of a particular activity. The PCA program also offers other

¹⁰ Ex. E, p. 18.

¹¹ Ex. E, p. 26.

¹² Ex. E, p. 26.

¹³ Ex. E, p. 26.

¹⁴ 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.

¹⁵ Ex. E, p. 31.

services, such as medication reminders and escort to medical appointments, which are governed by service-specific rules.

III. Facts

Ms. N is 36 years old. She was a climber, yoga teacher and runner before disease set in ten years ago.¹⁶ Ms. N no longer drives, and rarely leaves home. Ms. N's diagnoses are fibromyositis, anorexia nervosa, depression, pain self-management deficit, general muscle weakness, and myalgic encephalomyelitis/chronic fatigue syndrome (ME/CFS).¹⁷ Ms. N makes her own health care and financial decisions.¹⁸

Rae Norton assessed Ms. N via telehealth (over a computer link) on May 31, 2017, to determine her eligibility for the PCA program. Ms. Norton testified that assessments via telehealth are challenging. If it had been an in-person assessment, Ms. Norton would have observed Ms. N completing additional tasks, and viewed her more completely as she undertook those tasks. Ms. Norton also testified that Ms. N's diagnosis and resulting limitations are not as clear as other applicants. Ms. Norton reviewed some of Ms. N's medical records, which were received after the assessment.¹⁹ The medical records did not contain a functional assessment or other clear indication of Ms. N's abilities. Ms. Norton discussed Ms. N's case with two Division supervisors, who both agreed with the CAT's scoring.²⁰

During the assessment, Ms. Norton determined that Ms. N had a strong grip in both hands, could raise her hands to touch her head, and placed her foot upon her chair during the assessment.²¹ Based upon her visual observation and later review of medical records, Ms. Norton determined that although Ms. N experienced pain, fatigue, and had range of motion limitations, she could perform all ADLs and IADLs either independently, or with set up help only.²² As a result, the Division found that Ms. N did not qualify for PCA assistance, and her application was denied.²³

¹⁶ Z testimony.

¹⁷ Ex. 5; ME/CFS primer, signed by Dr. K, July 17, 2017.

¹⁸ Ms. N does not have a power of attorney. *See* Ex. E, p. 2.

¹⁹ Norton testimony.

²⁰ Norton testimony.

²¹ Ex. E, p. 4.; Norton testimony.

²² Ex. E, pp. 18 – 19, 26.

²³ Ex. D; Ex. E, p. 31.

Ms. N submitted a written statement disagreeing with many of the CAT's findings, and the assessment process.²⁴ Ms. N also submitted medical records, her verification of diagnosis form, a primer on ME/CFS for clinical practitioners, and a color photo of herself on the day of the assessment.²⁵

Ms. N can transfer and locomote in her home independently, although with difficulty. Her family prepares her food – cutting, cooking, opening nutritional bottles – and places food items in easy to open containers. Ms. N has not participated in grocery shopping, housework, or laundry for over a year. Ms. N attended physical therapy in the past, but no longer attends, because she was not making progress.²⁶

Ms. N has some days that are worse than others. On good days, Ms. N can lay on her bed, bring her foot up, and slip on a loose-fitting pair of socks.²⁷ On bad days, Ms. N is not able to put on socks independently.²⁸ Ms. N cannot bend over to touch her feet. Ms. Z puts on Ms. N's shoes by holding them open so she can slide her feet into them.

Dr. K testified that Ms. N experiences pain, fatigue, profound muscle atrophy and weakness, and joint contractions. Ms. N's range of motion is decreasing, particularly in her right shoulder.²⁹ According to Dr. K, Ms. N has been unable (not unwilling) to use stairs for years. Dr. K also testified that Ms. N cannot hold a soup pot or similar heavy item. Dr. K stated that Ms. N may be able to brush crumbs off a counter, but she could not scrub, push a vacuum, or make her own bed. Dr. K testified that Ms. N cannot hold her hands to her head well enough to wash her hair. Dr. K's testimony aligned with Ms. N and Ms. Z's.

After hearing, the record remained open until August 29, 2017, for the Division and Ms. N to submit additional information. The Division did not submit post-hearing information. On August 28, 2017, Ms. Z, on behalf of Ms. N, submitted an email which alleged that the Division failed to follow the CAT protocol. Ms. N also challenged Mr. Fromm's credentials and ability to interpret and analyze Ms. N's CAT and medical records.

²⁴ Ex. 2.

²⁵ Ex. 3 – 5.

²⁶ Z testimony. Additionally, insurance generally does not cover physical therapy sessions once a patient fails to make progress or plateaus.

²⁷ N written submission; Z testimony.

²⁸ Z testimony.

²⁹ K testimony.

IV. Discussion

This case involves the denial of an application for benefits. As a result, Ms. N has the burden of proof by a preponderance of the evidence.³⁰ Ms. N met that burden. Ms. N challenged the results of the assessment regarding dressing, toileting, bathing, personal hygiene, main meal preparation, light meal preparation, housework, and shopping.³¹ Ms. N also challenged the Division's decision to deny time for escort.³² Each of these is addressed below.

1. Dressing

The assessor determined that Ms. N was independent (self-performance code of 0) with dressing, based upon her observation of Ms. N during the assessment.³³ Ms. N independently dressed herself in pajamas on the day of the assessment. Ms. N often wears pajamas, not street clothes, because they are roomy and do not have fasteners. Ms. N reported, and Dr. K confirmed, that her range of motion limitations are increasing.

Dressing considers how a person puts on, fastens, and takes off all items of street clothing, including shoes.³⁴ Ms. N's limited range of motion and pain make it more likely than not that she needs limited assistance (score of 2/2) for dressing. Accordingly, Ms. N should receive limited assistance with dressing 14 times per week.

2. Toileting

The assessor determined that Ms. N was independent (self-performance code of 0) with toileting, based upon her observation of Ms. N's ability to transfer and her range of motion.³⁵ The CAT notes that Ms. N's arms hurt when she wipes, and that she wears pads when needed. Ms. N wrote that she has difficulty reaching to clean herself after a bowel movement, and is often unable to adequately cleanse herself. At times, she will attempt to clean herself, often several hours later, in the shower.

To qualify for toileting assistance, Ms. N would need hands-on physical assistance three or more times per week. The evidence supports a finding that Ms. N requires this level of

³⁰ 7 AAC 49.135.

³¹ Ms. N's written submission. Ms. N also provided comments on bed mobility, transfers, locomotion, and eating. Because it does not appear that Ms. N was requesting or stating that she qualifies for PCA time in these areas, this decision does not address them.

³² Ms. N's written submission. Ms. N also challenged the Division's administration of the CAT, and the qualifications of Division staff. Because Ms. N's case may be resolved on functional abilities alone, this decision will not address the CAT process or staff qualifications.

³³ Ex. E, p. 8.

³⁴ Ex. E, p. 8; Norton testimony.

³⁵ Ex. E, p. 9.

assistance after a bowel movement, but not for every trip to the toilet. Accordingly, Ms. N's score is changed to a 2/2, twice per day.

3. Bathing

The assessor determined that Ms. N required supervision and set-up help only for bathing.³⁶ The CAT states that Ms. N can get into her tub independently.³⁷ Ms. Norton, however, did not observe Ms. N get into the bathtub. It also notes that Ms. N shaved her head to make washing her hair easier, and that she prefers for her sister to help wash her back and hair if she is tired or in pain.³⁸

Ms. N, on the other hand, stated that she needs, not prefers, physical assistance to adequately bathe. Dr. K's testimony supports Ms. N's assertions regarding her limitations as to bathing. Overall, the weight of the evidence shows that Ms. N requires limited physical assistance with bathing, for a score of 2/2, seven days per week.

4. Personal Hygiene

The assessor determined that Ms. N was independent with the personal hygiene ADL.³⁹ The assessor noted that Ms. N had strong grips and adequate range of motion when not too tired or in pain.⁴⁰ Ms. N reported that she can brush her teeth and wash her face, but cannot reach her entire head to comb or wash her hair. Ms. N shaved her head to make grooming easier. Like bathing, Ms. N and Dr. K's testimony support a finding that she needs limited assistance to adequately perform personal hygiene tasks. Ms. N's bathing score is therefore adjusted to 2/2, seven days per week.

5. Instrumental Activities of Daily Living

The assessor determined that Ms. N was independent with preparing light meals and main meals, and grocery shopping.⁴¹ The assessor also determined Ms. N was independent with difficulty, requiring set-up help only with routine housework and laundry.

Ms. N disputed all the IADL scoring, stating that she needed physical help to complete each task. Ms. N stated that she does not participate in cleaning, grocery shopping, and laundry because she is physically unable to, not because she does not want to do these things.

³⁶ Ex. E, p. 11.

³⁷ Ex. E, p. 11.

³⁸ Ex. E, p. 11.

³⁹ Ex. E, p. 10; Ex. E, p.18.

⁴⁰ Ex. E, p. 10.

⁴¹ Ex. E, p. 26.

The testimony and medical records indicate that Ms. N is capable of assisting in these activities, but is unable to perform them without physical assistance. Ms. N, for example, may be able to fold clothes that are placed next to her or wipe down a countertop.

Dr. K testified credibly that she does not believe that Ms. N could safely use a knife, and that carrying milk would be difficult for her. Dr. K also testified that Ms. N could not reach down into a washing machine or remove wet clothes. Therefore, Ms. N's limitations prevent her from safely performing IADLs (other than light meal preparation) without physical assistance.

Accordingly, she should be coded as 2/3 for main meal preparation, 7 times per week, and housework, shopping, and laundry once per week. Ms. N should be coded independent with difficulty, set-up help only (1/2) for light meals.

6. Escort

Escort services include traveling with a recipient to and from a routine medical or dental appointment outside the recipient's home and conferring with medical or dental staff during that appointment.⁴² The Division determined that Ms. N needed transportation, but not escort services, to medical appointments.⁴³

Ms. N can locomote independently within her small apartment. Outside of her apartment, she uses a walker for assistance – she also sits on her walker to rest as she easily fatigues. Ms. Z testified that Ms. N cannot independently ride public transportation because she cannot step up onto the local bus. A web search revealed that the Kodiak area transit system (KATS) is equipped with wheelchair lifts that enable a person who cannot navigate steps to ride the bus. KATS will also make reasonable accommodation for passengers with disabilities if needed to access service.⁴⁴ The record does not indicate that Ms. N requested modification or attempted use of the wheelchair lift with her walker.

Ms. N also testified that she needs someone to carry a pillow and other items she needs when she is going to a doctor's appointment. It seems reasonable that Ms. N or a family member

⁴² Former 7 AAC 125.030(d)(9). New PCA regulations went into effect on July 22, 2017. Under the new regulations, a person may receive escort services only if the recipient is authorized to receive assistance with the ADL of locomotion. 7 AAC 125.030(d)(9). Because Ms. N's denial letter is dated before the adoption of the new regulations, the prior version controls Ms. N's case. Exhibit B contains the pre-July 22, 2017, PCA regulations. The new regulations will govern any future assessments and scoring changes.

Ms. N makes her own medical decisions. It may be more appropriate to analyze Ms. N's need of locomotion to medical appointments, rather than escort services. However, the outcome is the same under either – Ms. N has not shown that she qualifies for the service.

⁴³ Ex. E, p. 26.

⁴⁴ <http://katsbus.org/about/index.html>

could devise a way to attach a pillow or other necessary personal item to Ms. N's walker. Therefore, the Division's decision to deny escort time is upheld.

V. Conclusion

Admittedly, assessments via telehealth are difficult. Here, the credible testimony of Ms. N and her witnesses outweigh the Division's limited observation and record review. Therefore, the Division's denial of Ms. N's PCA application is reversed. Ms. N's scores and frequencies should be changed as follows:

- Dressing: limited assistance (2/ 2) 14 times weekly
- Toileting: limited assistance (2/2) 14 times weekly
- Bathing: limited assistance (2/2) 7 times weekly
- Main meals: physical assistance provided (2/3) 7 times weekly
- Light meals: independent with difficulty, set-up help only (1/2) 14 times weekly
- Housework: physical assistance provided (2/3) once weekly
- Shopping: physical assistance provided (coded 2/3) once weekly
- Laundry: physical assistance provided (coded 2/3) once weekly

DATED: September 19, 2017.

Signed _____
Bride Seifert
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 10th day of October, 2017.

By: *Signed* _____
Signature
Bride Seifert _____
Name
Administrative Law Judge
Title

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