

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

In the Matter of)
)
N S) OAH No. 17-0774-MDS
) Agency No.

DECISION AFTER REMAND

I. Introduction

The issue in this case is whether the Division of Senior and Disabilities Services (Division) correctly terminated N S’s eligibility for Medicaid Personal Care Assistance (PCA) services, based primarily on documentation generated by a physical therapist and an occupational therapist when Ms. S was being discharged from the hospital after undergoing surgery. The Division reviewed those documents when Ms. S sought a post-surgery increase in services; the Division denied her requested increases and determined that her needs had changed such that she no longer requires PCA services at all.¹

After a hearing was held, a proposed decision was issued, finding that the Division's determination to terminate Ms. S’s PCA eligibility was incorrect. After the Division submitted a proposal for action contesting several aspects of the proposed decision, the Commissioner of Health and Social Services remanded the case to the undersigned to take additional evidence and make additional findings on six discrete issues. An additional hearing session was held, and the parties submitted additional information and arguments in response to the remand order.

Based on all of the evidence presented, including the parties’ post-hearing filings and their testimony at the post-remand hearing, the Division's decision to terminate Ms. S’s PCA eligibility is reversed, and her PCA authorization is amended, as further discussed below.

II. Background (the PCA service determination process)²

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 . . .”³ Accordingly, “[t]he department will not authorize personal care services for a recipient if the

¹ Exh. D.

² The Division’s PCA program regulations were recently amended, but the amendments went into effect in late July 2017, after the Division’s termination of Ms. S’s eligibility; therefore, the prior version of the regulations applies in this case.

³ 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.”⁴

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 in order to perform ADLs, IADLs, and other covered services.⁵ 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.

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.⁶ 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 independent⁷ and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance⁸); **3** (the person requires extensive assistance⁹); **4** (the person is totally dependent¹⁰). 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).¹¹

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

⁴ 7 AAC 125.020(e) (defining “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.”)

⁵ See 7 AAC 125.024(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900.

⁶ Exh. F, pp. 6 – 11.

⁷ 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 Exh. F, p. 6.

⁸ 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.”

⁹ 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.”

¹⁰ According to 7 AAC 125.020(a)(3), “dependent” as to an ADL, or dependent as to an IADL, “means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity.”

¹¹ Exh. F, 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).¹²

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.¹³

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).¹⁴

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).¹⁵

In order to qualify for any 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 assistance¹⁶ (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 he or she is eligible for PCA services.¹⁷

The codes assigned to a particular ADL or IADL determine how much PCA service time a person receives for each occurrence of a particular activity. For instance, if a person is coded

¹² *Id.*

¹³ Exh. F, p. 26.

¹⁴ Exh. F, p. 26.

¹⁵ Exh. F, p. 26.

¹⁶ 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 Exh. F, pg. 26.

¹⁷ Exh. F, p. 31.

as requiring extensive assistance (code of 3) with bathing, he or she would receive 22.5 minutes of PCA service time every day he or she was bathed.¹⁸

III. Facts

The hearing in this matter was held on August 30 and October 4, 2017. Ms. S attended the hearing in person, testified on her own behalf, and was represented by her husband and power-of-attorney, F S. Their daughter, N S, and Mr. S both testified for Ms. S. The Division was represented at the hearing by Victoria Cobo. Division assessor supervisor Jerry Fromm testified for the Division.

Ms. S is a 43-year-old woman living in Anchorage, Alaska.¹⁹ She lives with Mr. S and their three children.²⁰ Ms. S has multiple physical and mental health problems. She has been determined to be disabled and eligible for Social Security disability payments by the Social Security Administration.²¹

Ms. S has numerous orthopedic and neurologic problems relating to a car accident in 2011 where she suffered serious injuries, including spinal and cervical fractures.²² She has had multiple surgeries, including back and shoulder surgeries, since the car accident.²³ She has a cardiac pacemaker in place, and, following the car accident, has developed an “unspecified seizure disorder,” whereby she experiences moderate seizures and tremors at random times throughout a given week.²⁴ She also has a diagnosis of “bipolar disorder, severe, with psychotic features,”²⁵ as well as diagnoses of paranoid schizophrenia, depression, anxiety, obsessive compulsive disorder, “PTSD secondary to a major surgery,” sick sinus syndrome with pacemaker, asthma, chronic pain syndrome, obstructive sleep apnea, carpal tunnel syndrome, and hypothyroidism.²⁶

Ms. S receives PCA services from the Division. She was last assessed by the Division on August 4, 2016 to determine her eligibility for the PCA program and her PCA benefit level, if

¹⁸ See 7 AAC 125.024(a)(1) and the Division’s *Personal Care Assistance Service Level Computation* chart contained at Exh. B, pp. 16 - 18.

¹⁹ Exh. F, p. 1.

²⁰ *Id.*

²¹ 4/25/16 letter from Social Security Admin., submitted as an exhibit by Ms. S on 10/3/17.

²² Exh. F, p. 3; 9/13/17 letter from Dr. K K, submitted as an exhibit by Ms. S on 9/15/17.

²³ Exh. F, p. 3; Ms. S testimony.

²⁴ Exh. F, p. 3; Ms. S testimony. Mr. S testified that Ms. S experiences these seizures every day. Ms. S apparently experienced one of these seizures for several minutes in the hearing room during the second day of the hearing.

²⁵ Exh. F, p. 3.

²⁶ Ex. F, p. 3; 9/13/17 letter from Dr. K K.

any. Ms. S’s daughter, N, who serves as her PCA, attended the assessment.²⁷ Ms. S eventually requested a fair hearing (OAH No. 16-1136-MDS) contesting the results of that assessment; the fair hearing decision modified the assessment results.²⁸ The Division then recorded Ms. S’s eligibility for PCA services on a Service Level Authorization Chart, taking into account the changes mandated by the fair hearing decision.²⁹

At the close of her fair hearing in 16-1136-MDS, Ms. S pointed out that she would be undergoing surgery in the spring of 2017, and she expected she would need additional PCA services after the surgery. The Division’s representative explained the process of applying for post-surgery assistance through Ms. S’s PCA agency, and encouraged her to apply.

Ms. S underwent back surgery on May 15, 2017.³⁰ In collaboration with her PCA agency, she then submitted a Personal Care Services Amendment to Service Plan request form (“amendment request”) on May 23, 2017, requesting additional post-surgery PCA services.³¹ Along with the amendment request, Ms. S submitted medical records relating to her surgery, including documents prepared by a physical therapist and an occupational therapist in connection with her discharge from the hospital where the surgery was performed.³²

Ms. S’s amendment request asked for PCA services as follows:³³

Activity	Frequency per day	Times per week	How long needed
Eating	5	7	6 months
Dressing	2-3	7	6 months
Body Mobility	10	7	6 months
Transfers	11	7	6 months
Locomotion in room	3-4	7	6 months
Toilet use	8	7	1 year
Light meal prep	2	7	1 year
Shopping		1	1 year

²⁷ Exh. F, p. 2.

²⁸ The decision in that case, OAH No. 16-1136-MDS, made certain findings as to Ms. S’s abilities to perform ADLs and IADLs, which are incorporated by reference here. *See* Final Decision in OAH No. 16-1136-MDS, submitted as an exhibit by Ms. S on 10/3/17.

²⁹ Service Level Authorization Chart, Exh. D, p. 13.

³⁰ Exh. E, p. 8.

³¹ *See* Exh. E, pp. 1-5.

³² *See* Exh. E, pp. 9-21.

³³ *See* Exh. E, pp. 2, 4.

In home laundry		1-2	1 year
Medication	6	7	1 year
Wound care	2	7	6 months

Each of these requests represents a significant increase over the services authorized under Ms. S's August 2016 assessment, as modified by the fair hearing decision in 16-1136-MDS.³⁴

On behalf of the Division, Mr. Fromm reviewed Ms. S's amendment request and the medical documents submitted along with the request. Mr. Fromm also spoke with the occupational therapist who had authored one of the documents submitted with the amendment request. The Division did not conduct a new assessment of Ms. S in connection with Mr. Fromm's review. The Division did, however, produce a new Service Level Authorization Chart, showing the revised scores for ADLs and IADLs that Mr. Fromm determined were appropriate, based on his review.³⁵

Based on Mr. Fromm's review, the Division issued a letter to Ms. S on June 27, 2017, informing her that her eligibility for PCA services was being terminated.³⁶ The termination was based on reduced scores for each of the ADLs and IADLs listed in the amendment request. Ms. S then requested a fair hearing.

After the hearing was held on August 30 and October 4, 2017, a proposed decision was issued. The Division filed a proposal for action, arguing that certain aspects of the proposed decision were incorrect. Ms. S did not submit a proposal for action at that time.³⁷ The proposed decision and the Division's proposal for action were conveyed to the Commissioner of Health and Social Services as the final decisionmaker. The Commissioner then issued a Non-Adoption order, remanding the case for the undersigned to take additional evidence, and make additional findings, about:

The level of Ms. S's need (i.e. support scores) for the post-surgery PCA service for the IADL of laundry; the necessary duration of post-surgery PCA services for that activity and for toilet use and shopping; whether Ms. S's prior approval of PCA services for the IADL of light housework is appropriately denied; and whether Ms. S qualifies for post-surgery wound care assistance, given her previous score of 0/0 for personal hygiene.^[38]

³⁴ Compare Exh. E, pp. 2, 4, with Service Level Authorization Chart, Exh. D, p. 13.

³⁵ Service Level Authorization Chart, Exh. D, p. 12.

³⁶ Exh. D.

³⁷ On the date of the remand hearing, March 22, 2018, Ms. S submitted a document which included the statement "THIS IS A REQUEST FOR PROPOSAL FOR ACTION;" however, this filing was untimely, as the deadline to submit a proposal for action was January 11, 2018.

³⁸ Non-Adoption order, February 12, 2018.

The hearing after remand was held on March 22, 2018, after twice being rescheduled to accommodate the Ss' concerns regarding witness availability and disclosure of medical records.

Ms. S's requests for increased services for ADLs and IADLs in her amendment request, and the Division's determinations as to her eligibility for PCA services, are each discussed below, including findings as to the six issues addressed by the Commissioner's remand order.

IV. Discussion

A. Burden of proof

In this case, because the Division is seeking to terminate Ms. S's PCA eligibility based on reduced scores for ADLs and IADLs, it has the burden of proving by a preponderance of the evidence that she no longer qualifies for the same levels of service for those activities that she received in the past.³⁹ To the extent that Ms. S argues that the increased scores requested in her amendment request are appropriate, she has the burden of proving that the Division's failure to approve the increases was incorrect, also by a preponderance of the evidence.⁴⁰ "Preponderance of the evidence" means that a fact is shown to be more likely true than not true.

B. Scope of the hearing

At the beginning of the hearing on August 30, 2017, Mr. and Ms. S pointed out that they had written a letter to the Division in early April 2017, in which they argued that the Division had improperly implemented the results of the fair hearing decision in 16-1136-MDS. Mr. S argued that the issue raised in the letter should be included within the issues to be decided at this hearing. Mr. S also pointed out, however, that he and his wife raised the same issue in a lawsuit they filed against the Division in Anchorage Superior Court. The undersigned administrative law judge (ALJ) then ruled that because the issue raised in the April 2017 letter will be adjudicated in the Ss' court action, it would not be appropriate to also adjudicate that issue in this hearing. Therefore, the issues to be decided in this matter are the Division's decisions to deny Ms. S's requested PCA benefit increases in her amendment request, and to terminate her eligibility for PCA services.⁴¹

³⁹ 7 AAC 49.135.

⁴⁰ *Id.*

⁴¹ At the outset of the March 22, 2018 hearing session, Mr. S argued that the hearing should have encompassed the Division's implementation of the prior fair hearing decision, as discussed above. I noted that this issue had already been resolved on August 30, 2017 and ruled, therefore, that it would not be revisited, and that the remand hearing would be limited to the six issues described in the Commissioner's Non-Adoption order.

C. Reliance on medical records in lieu of an assessment

Under the Division's normal practices and procedures, the Division would perform an in-person assessment of a Medicaid PCA recipient before reducing their PCA eligibility to the point of terminating the person's overall eligibility. In this case, Ms. S had last been assessed by the Division in August 2016. When she submitted her amendment request on May 23, 2017, the Division chose to rely on the old assessment and the more recent medical documents, rather than conduct a new assessment. At the hearing, the Division admitted that this was an unusual procedure.⁴²

However, after review of the Division's regulations governing the PCA program and the assessment and amendment processes, it appears that the Division's approach in this case comports with those regulations. 7 AAC 125.026(a) provides that "[i]f the department confirms that a recipient has had a material change in condition, the department may increase, reduce, or terminate services or the number of hours of service authorized." 7 AAC 125.026(c) provides that "[a] change to a personal care service level authorization may be made ... without personal observation of the recipient by the department." 7 AAC 125.026(d) provides that "a material change in condition is confirmed if the department had determined in its records that ... the recipient's medical condition has changed since the last assessment." Thus, the regulations allow the Division to respond to and evaluate a recipient's amendment request without having to undertake an actual assessment of the recipient.

The fact that the Division's approach is allowed under the regulations, however, does not mean that the evidence relied upon by the Division is automatically deemed to be reliable and persuasive. In this case, the Division relied primarily on the documents containing the evaluations and recommendations of the occupational therapist (OT) and physical therapist (PT) who met with Ms. S at the hospital the day after her May 15, 2017 back surgery. It is noted that Ms. S testified that she did not recall much of her interactions with the therapists, which makes sense, given that it apparently took place one day after she had undergone major surgery. It is also noted that neither therapist testified at the hearing; this meant that they could not be questioned regarding whether the Division and the ALJ were properly interpreting their conclusions. In addition, no testimony was presented that provided context for the therapists' work with Ms. S (e.g., how long they did meet with her? was she coherent, or was she still in

⁴² Fromm testimony.

recovery from the surgery or under the influence of post-surgery medications? did they actually observe her walking, transferring, etc.?).⁴³ Nor was any testimony presented to clarify how the therapists reached their conclusions (i.e., was it primarily based on their review of Ms. S's medical documents? on their interactions with Ms. S? on their observations of her while she was interacting with other medical providers? on discussions about Ms. S with her husband and children?).

Even though Mr. Fromm spoke with the OT by telephone prior to the Division issuing its termination notice, he testified that he did not know for certain whether the OT actually examined Ms. S. In addition, his description of the teleconference was very general, to the effect that the OT simply confirmed that his interpretation of her document was not off base.

Under these circumstances, and in the absence of the important foundational evidence discussed above, the therapists' documents are accorded relatively little weight compared to direct testimony from witnesses.

D. ADLs

The activities covered by the amendment request and encompassed by the Division's termination decision are discussed below, in the order in which they are presented in the amendment request.

1. Eating

Ms. S was not previously authorized to receive PCA benefits for eating assistance; under the previous assessment and fair hearing decision, she had a 0/0 score for this ADL. Her amendment request asked for PCA assistance five times per day, seven days per week, without specifying particular scores for self-performance or support level. In evaluating this ADL, the Division considered the PT and OT documentation, along with the prior assessment and Ms. S's medical diagnoses.⁴⁴ The Division also considered a letter from Ms. S's daughter that was submitted with the amendment request, which stated that Ms. S was unable to stay awake during meals due to being heavily medicated post-surgery.⁴⁵ The Division noted that helping to keep Ms. S awake while eating constitutes "cueing," which as mentioned above is a type of assistance

⁴³ Because the therapists were not available to testify, I can only assume that the purpose of their interactions with Ms. S was to evaluate her readiness to be discharged from the hospital, a fact which in and of itself reduces the relevance of their conclusions in this proceeding.

⁴⁴ Exh. D, p. 4.

⁴⁵ Exh. E, p. 6.

not covered by the PCA program.⁴⁶ Based on all of these factors, the Division determined that Ms. S was not eligible for PCA assistance with the ADL of eating and gave her a score of 0/0.

Because Ms. S previously had a 0/0 score, she has the burden of proof as to this ADL, as she is seeking an increase. Ms. S did not present any cognizable evidence at the hearing that directly pertained to this ADL, other than her daughter's letter. The Division's conclusion that the type of assistance described in the letter is cueing, for which PCA assistance is not available, is correct. Ms. S did not meet her burden of establishing, by a preponderance of the evidence, that the Division's denial of an increase of PCA services for the ADL of eating was incorrect.

2. Dressing

Ms. S was previously authorized to receive PCA benefits for assistance with dressing; under the previous assessment and fair hearing decision, she had a 2/2 score for this ADL, twice per day, seven days per week.⁴⁷ Her amendment request asked for PCA assistance "2-3" times per day, seven days per week, without specifying scores for self-performance or support level. In evaluating this ADL, the Division relied primarily on the PT and OT documentation, which contained references to Ms. S allegedly having "lower body assistive equipment" and concluded that she is "modified independent" with dressing.⁴⁸ The Division concluded that Ms. S "can reasonably perform the activity independently" and gave her a score of 1/1 ("person requires supervision," "only setup help required"), which is a score that results in no PCA assistance.

Ms. S and her daughter both testified regarding her difficulties with dressing herself. Ms. S denied that she owns any "lower body assistive equipment," denied telling the OT or PT that at the hospital, and could not imagine how they drew that conclusion. She cannot reach her feet and has difficulty moving and maneuvering her left arm (facts documented in the 2016 assessment and the fair hearing in 16-1136-MDS). Weighing the Ss' testimony and the undisputed facts regarding her physical condition, and the OT and PT documentation that carries little weight in this proceeding, I conclude that the Division did not meet its burden of proving that the reduction of her score to a 1/1 was correct.

However, Ms. S did not provide evidence to support an increase in frequency from twice per day to two-three times per day, so she did not meet her burden of proving that an increased

⁴⁶ Exh. D, p. 4.

⁴⁷ Exh. D, p. 13.

⁴⁸ *Id.*

frequency should have been approved. Her score for the ADL of dressing should be 2/2, twice per day, seven days per week.

3. Body mobility

Ms. S was not previously authorized to receive PCA benefits for the ADL of body mobility (often referred to as “bed mobility”). In her amendment request she asked for PCA assistance ten times per day, seven days per week.

Despite Ms. S’s difficulties repositioning herself in bed, as described in her testimony and her daughter’s, the Division’s regulations do not allow PCA assistance for this ADL for recipients who are ambulatory. Because it is undisputed that Ms. S can walk, the Division was correct in giving her a score of 0/0 for this ADL.

4. Transfers

Ms. S was previously authorized to receive PCA benefits for assistance with transfers; under the previous assessment and fair hearing decision, she had a 2/2 score for this ADL, four times a day, seven days per week. Her amendment request asked for PCA assistance 11 times per day, seven days per week, without specifying particular scores for self-performance or support level. In evaluating this ADL, the Division again relied primarily on the PT and OT documentation, noting that they recorded that she required “stand-by assist, with assistive device,” which was described as a front wheel walker. The Division gave her a score of 1/1 for transfers.

On this ADL, Ms. S and her daughter testified that she requires at minimum a “contact guard” type of assistance with transfers, meaning there is physical contact that sometimes involves weight-bearing assistance. I find their testimony more credible and persuasive than the OT and PT documentation. Accordingly, the Division did not meet its burden of proving that the reduction of her score to a 1/1 was correct.

However, Ms. S did not provide any evidence to support an increase in frequency from four times per day to 11 times per day, so she did not meet her burden of proving that an increase should have been approved. Her score for the ADL of transfers should be 2/2, four times per day, seven days per week.

5. Locomotion

Ms. S was not previously authorized to receive PCA benefits for assistance with locomotion; under the previous assessment and fair hearing decision, she had a 0/0 score for this ADL. Her amendment request asked for PCA assistance “3-4” times per day, seven days per

week, without specifying scores for self-performance or support level. In evaluating this ADL, the Division again relied primarily on the PT and OT documentation, stating that it showed she “can ambulate (locomotion) with stand-by assistance and a front wheel walker for a distance of 150 feet... .”⁴⁹ The Division actually increased her score to a 1/1 (“person requires supervision,” “only setup help required”), but this score does not qualify for PCA assistance.

In this instance, the PT and OT documentation was corroborated by my observations of Ms. S entering and exiting the hearing room on both hearing days. She was clearly observed being able to walk using a cane, without physical assistance from her daughter and Mr. S, who accompanied her to the hearing. Considering all the evidence pertinent to this ADL, the Division met its burden of proving by a preponderance of the evidence that her score of 1/1 was correct.

6. Toilet use

Ms. S was not previously authorized to receive PCA benefits for assistance with toilet use; under the previous assessment and fair hearing decision, she had a 1/1 score for this ADL. Her amendment request asked for PCA assistance eight times per day, seven days per week, without specifying scores for self-performance or support level. In evaluating this ADL, the Division again relied primarily on the PT and OT documentation, stating that it showed she required only supervision with toileting. Based on this information, the Division maintained her score at a 1/1.

Ms. S testified that she needs “peri care” in toileting, and that she sometimes needs physical help getting on and off the toilet; her daughter testified similarly. Their testimony is somewhat corroborated by her need for assistance with transfers, which correlates with a person needing help on and off the toilet. I find their testimony more credible and persuasive than the conclusory, unsupported OT and PT documentation. Accordingly, the Division did not establish that maintaining her score at 1/1 was correct.⁵⁰ Ms. S met her burden of establishing that her score for toilet use should have been increased to a 2/2 (“limited assistance,” “one-person physical assist required”).

Neither side presented testimony at the hearing as to the frequency of assistance that Ms. S requires for toilet use. The only evidence available to me is Ms. S’s signed and certified

⁴⁹ Exh. D, p. 3.

⁵⁰ The December 29, 2017 proposed decision erroneously stated that the Division had the burden of proof on the issue of Ms. S’s scoring for toilet use.

amendment request, which asked for assistance eight times per day.⁵¹ Eight instances of toilet use per day is not an unreasonable frequency. In the absence of any contrary testimony, Ms. S met her burden of proof on this issue.

On remand, the issue of the duration of Ms. S's need for assistance with toilet use was addressed. The Division argued that she should be fully recovered from her May 15, 2017 back surgery, the event on which her amendment request was based, and therefore she should no longer need assistance with toilet use. Ms. S testified that she continues to need assistance with toilet use, because she sometimes needs assistance with transferring off of the toilet and with "peri care." Ms. S's daughter testified at the remand hearing that her mother still needs assistance with cleaning herself after toilet use, explaining that her mother wouldn't accept assistance with toileting if it were not necessary, because she is reluctant and embarrassed about needing help.

Ms. S's May 15, 2017 surgery prompted her filing of the amendment request at issue in this hearing, and she appears to be fully recovered from the effects of the surgery itself. However, an assessment of her present need for assistance must be based on her overall, current physical condition, even if she has recovered from the specific effects of the surgery. Ms. S's testimony and that of her daughter was credible and persuasive as to her continuing need for assistance with toilet use. Ms. S met her burden of establishing that her 2/2 score for toilet use should remain in place until the Division's next assessment of her for the PCA program.

7. Bathing

Ms. S was previously authorized to receive PCA benefits for assistance with bathing; under the previous assessment and fair hearing decision, she had a 3/2 score for this ADL ("extensive assistance," "one-person physical assist required"), once per day, seven days per week. Her amendment request did not ask for an increase for this ADL. Nonetheless, the Division took the opportunity presented by her amendment request and evaluated this ADL, again relying primarily on the PT and OT documentation. The Division noted the reference in the PT and OT documents to Ms. S supposedly having lower body assistive equipment for use in

⁵¹ It is noted that the Division's new PCA regulations, which went into effect July 22, 2017 (after the Division's termination of Ms. S's eligibility), set a maximum frequency of eight times per day for PCA assistance with toilet use. See 7 AAC 125.024(a); 7 AAC 160.900(d)(29) (adopting by reference the *Personal Care Services: Service Level Computation* instructions).

dressing, and concluded that the same assistive equipment could be used in bathing to reach her lower extremities,⁵² resulting in a score of 1/1.⁵³

As already discussed, Ms. S denied having lower body assistive equipment and denied telling the hospital OT and PT that she has such equipment. It is undisputed that she cannot reach her lower extremities and that she requires her daughter's assistance in washing there and in getting in and out of the shower. Her physical condition and bathing environment have not improved since the prior hearing in 16-1136-MDS, where it was found that she needed assistance stepping into and out of the shower, as well as with washing her lower body. Considering all the evidence pertinent to this ADL, the Division did not meet its burden of proving by a preponderance of the evidence that a reduction of her score for bathing to a 1/1 was correct. Therefore, the prior score of 3/2, at once per day, seven times per week, shall remain in effect.

E. IADLs

1. Light meal preparation

Ms. S was not previously authorized to receive PCA benefits for assistance with the IADL of light meal preparation; under the previous assessment and fair hearing decision, she had a 0/0 score for this IADL. Her amendment request asked for PCA assistance two times per day, seven days per week, without specifying scores for self-performance or support level. In evaluating this IADL, the Division again relied primarily on the PT and OT documentation, stating that it supported a finding that she “can reasonably perform the activity independently.”⁵⁴

The evidence presented by Ms. S at the hearing did not focus on this IADL. Light meal preparation involves tasks such as putting cereal and milk into a bowl, making a simple sandwich, or pulling a snack from a cupboard or refrigerator and placing it out to be consumed. Ms. S did not present evidence that she is incapable of performing such tasks. Therefore, she did not meet her burden of proving that her score should have been increased to provide PCA benefits for light meal preparation.

2. Main meal preparation

Ms. S was previously authorized to receive PCA benefits for assistance with main meal preparation; under the previous assessment and fair hearing decision, she had a 1/3 score for this IADL (“independent with difficulty,” “physical assistance provided”), once per day, seven days

⁵² Exh. D, pp. 4-5.

⁵³ Exh. D, p. 12.

⁵⁴ Exh. D, p. 5.

per week. Her amendment request did not ask for an increase for this ADL. Again, the Division took the opportunity presented by her amendment request to reconsider and evaluate this IADL, relying primarily on the PT and OT documentation and Mr. Fromm’s teleconference with the OT. Without providing any detail, the Division stated that based on those sources, it concluded that Ms. S could “reasonably perform the activity independently,”⁵⁵ and she was given a score of 1/2 (“independent with difficulty,” “set-up help provided”), which does not qualify for PCA services.⁵⁶

Ms. S and her daughter both testified to her difficulties with main meal preparation. Although she is ambulatory, it is difficult for her to stand for long enough periods to prepare food. In addition, because of her unpredictable seizure disorder, it is unsafe for her to cook on a stove or with a hot oven. Their testimony carries more weight and is far more probative than the conclusory documents prepared by the PT and OT in the process of discharging Ms. S from the hospital.

Considering all the evidence pertinent to this IADL, the Division did not meet its burden of proving by a preponderance of the evidence that a reduction of Ms. S’s score for main meal prep to a 1/2 was correct. Therefore, the prior score of 1/3, at once per day, seven times per week, shall remain in effect.

3. Shopping

Ms. S was not previously authorized to receive PCA benefits for assistance with the IADL of shopping; under the previous assessment and fair hearing decision, she had a 0/0 score for this IADL. Her amendment request asked for PCA assistance once per week, without specifying scores for self-performance or support level. In evaluating the request, the Division again relied on the PT and OT documentation and Mr. Fromm’s teleconference with the OT, concluding that Ms. S can “reasonably perform the activity independently.”⁵⁷ This resulted in a score of 1/2 (“independent with difficulty,” “set-up help provided”), which does not qualify for PCA services.⁵⁸

Countering the Division’s argument, Ms. S testified that she cannot shop unless a motorized “scooter chair” is available, and even if a scooter is available she still needs physical assistance because she cannot reach the upper shelves in the store.

⁵⁵ Exh. D, p. 5.

⁵⁶ Exh. D, p. 12.

⁵⁷ Exh. D, p. 5.

⁵⁸ Exh. D, p. 12.

Considering all the evidence pertinent to this IADL, Ms. S met her burden of proving by a preponderance of the evidence that she needs physical assistance with shopping from a PCA. However, her amendment request did not specify the appropriate score. Based on the type of assistance Ms. S and her daughter described in their testimony, I conclude that a score of 1/3 (“independent with difficulty,” “physical assistance provided”) is appropriate, with a frequency of once a week.

On remand, the issue of the duration of Ms. S’s need for assistance with the IADL of shopping was addressed. The Division conceded that that her 1/3 score for shopping assistance should remain in place until the Division’s next assessment of Ms. S for the PCA program, and Ms. S had no objection to this result. Her eligibility for shopping assistance, therefore, shall be based on a 1/3 score until the Division’s next assessment takes effect.

4. Laundry in-home

Ms. S was not previously authorized to receive PCA benefits for assistance with the IADL of laundry in-home; under the previous assessment and fair hearing decision, she had a 0/0 score for this IADL. Her amendment request asked for PCA assistance “1-2” times per week, without specifying scores for self-performance or support level. In evaluating the request, the Division again relied on the PT and OT documentation and Mr. Fromm’s teleconference with the OT, concluding that Ms. S can “reasonably perform the activity independently.”⁵⁹ This resulted in a score of 1/2 (“independent with difficulty,” “set-up help provided”), which does not qualify for PCA services.⁶⁰

Ms. S’s testimony on this IADL was straightforward – physically, she simply cannot do it. Her daughter corroborated her need for assistance.

It is difficult to reconcile Ms. S’s testimony with the conclusions drawn by the Division from the PT and OT documents. It is just this type of situation that calls out the challenges of significantly reducing or eliminating a recipient’s PCA services without performing a face-to-face assessment of the recipient. Weighing the relevant evidence, I find that Ms. S met her burden of establishing by a preponderance of the evidence that she requires PCA assistance with laundry in-home. Her PCA authorization should be amended accordingly.

On remand, the issues of the appropriate score and duration of Ms. S’s need for assistance with the IADL of laundry was addressed. The Division conceded that that a 1/3 score

⁵⁹ Exh. D, p. 5.

⁶⁰ Exh. D, p. 12.

for this IADL would be appropriate. Ms. S, however, contended that she should be scored as fully dependent for laundry assistance. Under questioning from the ALJ, Ms. S testified that she can participate in some aspects of the IADL, such as folding of towels, but that she cannot do it well and the results would be “messy.”

The evidence established that a score of 1/3 (“independent with difficulty,” “physical assistance provided”) for Ms. S’s need for assistance with the IADL of laundry is appropriate. As for duration of this score, the Division stipulated that the 1/3 score should remain in place until the Division’s next assessment of Ms. S for the PCA program, and Ms. S had no objection. Her eligibility for assistance with laundry, therefore, shall be based on a 1/3 score until the Division’s next assessment takes effect.

G. Other covered activities

1. Medication

Ms. S was not previously authorized to receive PCA benefits for assistance with medication; under the previous assessment and fair hearing decision, she had a 0 score for this activity. Her amendment request asked for PCA assistance six times per day, seven days per week. The Division denied this request because in order for a recipient to receive assistance for medication, they have to have an “eligible Personal Hygiene score.”⁶¹ Ms. S contended at the hearing that that she does need assistance with her medication, but she did not contest the Division’s point that her eligibility here is dependent on her personal hygiene score, nor did she argue that her personal hygiene score (0/0) is erroneous.

The linkage between the two activities of personal hygiene and medication assistance is required by the Division’s PCA Service Level Computation chart, which has been adopted by reference in the Division’s regulations and carries the same force and effect as a regulation.⁶² In the absence of evidence relating to her personal hygiene score, Ms. S did not meet her burden on this issue.

2. Wound care

After undergoing significant back surgery, Ms. S submitted her amendment request and asked for PCA assistance with wound care two times per day, seven days per week. The Division denied the request, stating that “dressings in place usually remain for 3-4 days after

⁶¹ Exh. D, p. 6.

⁶² See Exh. B, p. 17; 7 AAC 160.900(d)(29). (This is a correction to an incorrect regulation citation in the proposed decision.)

surgery until they fall off and no wound care is needed or implied in the discharge instructions.”⁶³ Apparently the Division relied on the boilerplate discharge instruction form given to Ms. S on her release from the hospital. Ms. S’s daughter, on the other hand, testified that prior to discharge, the hospital staff noted that Ms. S’s incision was “still draining,” and therefore she was instructed to periodically change the dressing, particularly after Ms. S showered.

A boilerplate form that is not specifically addressed to a recipient’s physical condition carries very little weight as evidence in this proceeding. The testimony of Ms. S’s daughter on this activity was credible and persuasive. However, on remand the parties addressed whether Ms. S qualifies for post-surgery wound care, given her score of 0/0 for the activity of personal hygiene.⁶⁴ The linkage between the two activities of personal hygiene and wound care is required by the Division’s PCA Service Level Computation chart, which has been adopted by reference in the Division’s regulations and carries the same force and effect as a regulation.⁶⁵ There is no legal authority for a person to receive wound care assistance if they do not have a qualifying score for the activity of personal hygiene. Therefore, Ms. S did not meet her burden of establishing that the Division’s denial of PCA services for wound care was incorrect.

V. Conclusion

The Division’s decision to terminate Ms. S’s eligibility for PCA benefits is reversed. Ms. S’s PCA authorization should be adjusted to reflect the above discussion of the activities of dressing, transfers, toilet use, bathing, main meal preparation, shopping, and laundry in-home.

DATED this 12th day of April, 2018.

By: Signed _____
Andrew M. Lebo
Administrative Law Judge

⁶³ *Id.*

⁶⁴ The Division did not raise this issue prior to or during the hearing, raising it for the first time in its post-hearing proposal for action.

⁶⁵ See Exh. B, p. 17; 7 AAC 160.900(d)(29).

Adoption

The undersigned 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 17 day of April, 2018.

By: Signed _____
Name: Erin Shine
Title: Special Assistant, DHSS

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]