

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

In the Matter of)
)
U L) OAH No. 17-0824-MDS
) Agency No.
_____)

DECISION

I. Introduction

The Division of Senior and Disabilities Services reduced U L’s personal care assistance (PCA) benefits from 6.25 hours per week to 6.0 hours per week. Ms. L appealed and requested a fair hearing, seeking an overall increase in her PCA hours. The hearing was held on September 6, 2017. The evidence at the hearing showed that one of the Division’s two disputed determinations was erroneous. The Division’s decision, therefore, is reversed in part and affirmed in part.

II. Facts

U L is a 32-year-old resident of No Name City, Alaska. She lives with her three children in a private home.¹ Ms. L suffers from glaucoma, has a prosthetic left eye, and her eyesight has deteriorated to the extent that she is nearly completely blind.² At the time of the Division’s last assessment, she could only see light and colors with her right eye.³ She also has other unrelated health problems, but her vision problems are the focus of her need for PCA services.⁴ Because of her vision problems, Ms. L receives assistance with personal activities from the Medicaid PCA program.

The Division conducted its most recent assessment of Ms. L’s eligibility for PCA benefits on June 30, 2017. At that time, Ms. L had just recently had cornea surgery. As part of the assessment process, Rae Norton, a health program manager and assessor with the Division, visited Ms. L in her home and evaluated her physical ability to perform her “activities of daily living” (referred to as ADLs) by having her do some of these activities, including transferring and walking within her home (referred to as “locomotion” in the assessment documents). Ms. Norton asked questions about Ms. L’s functional ability, and had her demonstrate physical functions, such as range of motion. She also evaluated Ms. L’s ability to do what are called “instrumental activities of daily living” (IADLs)—household chores, such as laundry, shopping, and preparing a meal.

¹ Division Exhibit E at 1.

² L testimony; Division Exhibit E at 21.

³ Her vision had further deteriorated by the time of the hearing, an issue that is further discussed below.

⁴ Division Exhibit E at 3.

The Division uses a standardized assessment format, called the Consumer Assessment Tool (CAT), to assess how much assistance an applicant needs.⁵ Under the CAT, the assessor will assign a numerical score for each of the ADLs and IADLs. The Division then uses the scoring on the CAT, and other information it may have, such as medical records, to determine the level of assistance the recipient needs.

Although Ms. Norton's assessment included scores for the full range of ADLs and IADLs, only Ms. L's scores for the IADLs of light meal preparation and main meal preparation are in dispute in this matter. Therefore, the other activities covered by the assessment are not discussed in this Decision.

In her previous assessment, for light meal preparation Ms. L was given a score of 1/3, meaning she was "independent with difficulty" in the activity, and "physical assistance was provided."⁶ In the current assessment, Ms. Norton gave Ms. L a score of 0/0, meaning she is "independent," and "no support provided" with regard to this IADL.⁷

For main meal preparation, in her prior assessment, Ms. L was given a score of 1/3 ("independent with difficulty" and "physical assistance was provided").⁸ In the current assessment, she was given an increased score of 2/3, meaning "assistance / done with help," and "physical assistance was provided."⁹

Ms. L testified at the hearing that she cannot operate a microwave, identify different foods from the refrigerator or cupboard, safely operate a stove or oven, distinguish stale or moldy bread from edible bread, and she cannot even butter a piece of toast without making "a huge mess." She testified, therefore, that given the near-total degradation in her vision, she should have been scored a 2/3 for light meal preparation ("assistance / done with help" and "physical assistance was provided"). As to main meal preparation, she testified that she is completely dependent on her PCA, and therefore she should have received a commensurate score, which would be a 3/4, meaning "dependent / done by others" and "total dependence – the person [is] not involved at all when the activity [is] performed."¹⁰

⁵ Division Exhibit E.

⁶ Division Exhibit D at 9; Division Exhibit E at 26.

⁷ Division Exhibit E at 26.

⁸ Division Exhibit D at 9.

⁹ Division Exhibit E at 26. All of Ms. L's IADL scores in the recent assessment represented increases over her previous scores, with the exception of light meal preparation. Division Exhibit D at 9.

¹⁰ L testimony; Division Exhibit E at 26.

Ms. Norton, on the other hand, testified that she observed Ms. L retrieving food items from the refrigerator and cupboards, although she also acknowledged that Ms. L couldn't identify or distinguish items with her limited vision. Ms. Norton stated that because Ms. L has fully functional cognitive abilities, she can prepare snacks with "some organization and planning." She concluded after conducting the assessment that light meal preparation, including pouring drinks, making toast and sandwiches, and preparing snacks, are within Ms. L's capabilities to do safely and effectively without physical assistance. As to main meal preparation, Ms. Norton acknowledged that it would be difficult for Ms. L to safely and effectively cook on the stove or with an oven, and thus her score was increased for this IADL.¹¹

Ms. L disputed portions of Ms. Norton's testimony, stating that the only thing Ms. Norton actually observed her doing in the kitchen during the assessment was getting a glass of water. Ms. L reiterated that she believes she is completely dependent on her PCA for main meal preparation. She pointed out also that when it comes to reheating foods, she "prefers" oven-heated food rather than food reheated in a microwave.¹²

Based on the scores in the recent assessment and the other documents in the record, on July 13, 2017 the Division sent Ms. L a notice that her PCA benefits would be reduced from 6.25 hours per week to 6.0 hours per week.¹³ On July 31, 2017, Ms. L requested a fair hearing.¹⁴ A telephonic hearing was held on September 6, 2017.¹⁵ T X, a representative of Ms. L's PCA agency, assisted her with the request for hearing and appeared at the hearing with her. Initially, Ms. L's request for hearing disputed only the score given for the IADL of light meal preparation; however, at the beginning of the hearing, she stated that she also disputed her score for the IADL of main meal preparation.

III. Discussion

*A. The PCA program*¹⁶

The Medicaid program authorizes PCA services for "physical assistance with activities of daily living (ADLs), physical assistance with instrumental activities of daily living (IADLs), and

¹¹ Norton testimony.

¹² L testimony.

¹³ Division Exhibit D.

¹⁴ Division Exhibit C.

¹⁵ The hearing was originally scheduled for August 25, 2017, but was rescheduled so the CAT from the recent assessment could be included in the record.

¹⁶ The Division's PCA program regulations were recently amended, but the amendments went into effect in late July 2017, after the Division took action to reduce Ms. L's PCA services; therefore, the prior version of the regulations applies in this case.

other services based on the physical condition of the recipient.”¹⁷ As a general matter, PCA minutes are allowed for recipients with scores that show that the person needs actual hands-on, physical assistance to accomplish the ADL or IADL. Scores that show independence or need for only supervision, set-up help, or cueing will not qualify for assistance.

In this case, because the Division is seeking to reduce Ms. L’s PCA benefit for light meal preparation, the Division has the burden of proving by a preponderance of the evidence that she no longer qualifies for the same level of service for this IADL that she received in the past.¹⁸ Regarding main meal preparation, the Division increased Ms. L’s scoring compared to her prior assessment, but she asserts that the current scoring is still too low. Therefore, she has the burden of proving that the score for main meal preparation is incorrect.¹⁹

We start our analysis in this case with the definitions of the scoring categories for IADLs. Scoring for IADLs is based on the following Self-Performance Codes:

0. Independent: No help provided.
1. Independent with difficulty: Person performed task, but did so with difficulty or took a great amount of time to do it.
2. Assistance / done with help: Person involved in activity but help (including supervision, reminders, and/or physical “hands-on” help) was provided.
3. Dependent / done by others: Full performance of the activity was done by others. The person was not involved at all each time the activity was performed.
8. Activity did not occur.

IADL scoring also includes the following Support Codes:

0. No support provided.
1. Supervision / cueing provided.
2. Set-up help only.
3. Physical assistance was provided.
4. Total dependence - the person was not involved at all when the activity was performed.
8. Activity did not occur.²⁰

As a preliminary matter, it must be noted that Ms. L testified that since the June 30, 2017 assessment and the Division’s July 13, 2017 notice reducing her PCA benefits, her vision has greatly deteriorated to the point that she is now effectively, completely blind.²¹ The Division did

¹⁷ 7 AAC 125.010(a).

¹⁸ 7 AAC 49.135.

¹⁹ *Id.*

²⁰ Division Exhibit E at 26.

²¹ At the time of the assessment, Ms. L could still distinguish light and dark and could see some shapes and motion. L testimony; Division Exhibit E at 3, 6, 7.

not dispute this testimony. However, it is Ms. L's condition as of the date of the Division's notice (July 13, 2017) that we must use when determining the amount of services she is eligible to receive.²² There is no authority under which this Decision can take into account the more recent decline in her vision.

B. Light meal preparation

As previously mentioned, in the current assessment Ms. L was given a score of 0/0 for light meal preparation (independent, no support provided), after previously being given a score of 1/3 (independent with difficulty, physical assistance was provided).²³ The Division contended at the hearing that despite the undisputed fact that Ms. L's vision had deteriorated significantly as of the assessment, it was appropriate to score her as independent in preparing light meals. The Division's argument is primarily based on the availability of training and assistance for blind persons from community organizations such as the Alaska Center for the Blind and Vision Impaired (ACBVI). The Division pointed out that ACBVI can provide training to Ms. L in her home that will enable her to achieve a higher level of independence with her IADLs, and it argued that she can therefore be independent in light meal preparation. Ms. Norton explained at the hearing that the Division's viewpoint is that blindness need not be a functional limitation, because with proper training and planning, a blind person can be "totally independent" in their ADLs and IADLs.²⁴

Ms. L, on the other hand, responded to this argument by explaining that she received training from ACBVI ten years ago when her vision was impaired to a much lesser degree, but she argued that prior training has no applicability to her current situation. She testified that she cannot afford to undertake ACBVI training now, and that public funding for the training is not available for a "homemaker" such as herself.²⁵

The Division's arguments in this matter present a conundrum. On the one hand, it cannot be disputed that enabling greater independence is a worthy goal for any vision-impaired person. It also appears to be undisputed that some blind persons can achieve a relatively high level of independence in ADLs and IADLs. The Division is to be commended for encouraging Ms. L to

²² See *In re T C*, OAH Case No. 13-0204-MDS (Commissioner of Health and Social Services 2013), page 7 (finding that the notice sent to recipient is the decision under review). OAH cases are available online at <http://aws.state.ak.us/officeofadminhearings/categoryList.aspx>.

²³ *Id.*; Division Exhibit D at 9.

²⁴ Norton testimony.

²⁵ Apparently, the Alaska Division of Vocational Rehabilitation can provide funding for ACBVI training, but only in connection with vocational training; Ms. L testified that she has no desire to enter the workforce.

try to achieve a greater level of independence, and she would be well-advised to maximize her efforts toward that goal.

On the other hand, however, eligibility for PCA services must be based on a Medicaid recipient's present level of ability. The Division has presented no authority for the proposition that a person's current eligibility can or should be based on future training that is or may be available in the community if the person can pay for it. Even if the training were free, there is no support in the Division's regulations for requiring a person to undergo training as a condition of receiving Medicaid PCA benefits.

In this context, the Division cited a previous agency decision, OAH No. 15-1471-MDS, in support of its argument that a blind person does not automatically qualify for PCA benefits.²⁶ That case involved a Medicaid recipient with very significant vision impairment (but not complete blindness), who had recently undergone ACBVI assessment and training. The decision, however, is very distinguishable from Ms. L's case. The recipient in 15-1471-MDS had a lesser degree of vision impairment than Ms. L; and, importantly, he had recently "demonstrated his ability" to perform meal preparation IADLs in connection with his ACBVI training. Because of these distinctions between that case and Ms. L's case, the Commissioner's decision in 15-1471-MDS does not provide legal precedent in support of the Division's arguments here.

The evidence presented in this case demonstrated that, based on her ability as of the time of the June 30, 2017 assessment, Ms. L requires some physical assistance with light meal preparation. Therefore, the Division did not meet its burden at the hearing of establishing by a preponderance of the evidence that the score of 0/0 was correct. Ms. L should have received the same score that she previously received, a 1/3.

Ms. L argued she should have received a score of 2/3 for light meal preparation. However, the types of difficulties that she testified about with respect to this IADL are more appropriately categorized under the self-performance score of 1: "Independent with difficulty: Person performed task, but did so with difficulty or took a great amount of time to do it." It would not be appropriate to increase Ms. L's scoring to a higher level of need based on her preference for a particular style of cooking or on her discomfort with messes she may make as she

²⁶ *In re NW*, OAH Case No. 15-1471-MDS (Commissioner of Health and Social Services 2016). A copy of the decision was provided to Ms. L after the hearing, and she submitted a written response to the Division's arguments based on the decision.

engages in light meal preparation. Ms. L did not meet her burden of establishing by a preponderance of the evidence that an increased score to 2/3 was appropriate.

C. Main meal preparation

For main meal preparation, in her prior assessment, Ms. L was given a score of 1/3 (independent with difficulty, physical assistance was provided),²⁷ while in the current assessment she was given an increased score of 2/3 (assistance / done with help, physical assistance was provided).²⁸ Ms. L testified that because her eyesight has deteriorated to such a great extent, she is completely dependent on her PCA for main meal preparation, and therefore she argued she should have been given a score of 3/3 (dependent / done by others, physical assistance was provided). It is noted that Ms. L may have misspoken at this point in her testimony, because a person who is completely dependent on PCA services for an IADL would typically receive a score of 3/4: “Dependent / done by others: Full performance of the activity was done by others. The person was not involved at all each time the activity was performed. Total dependence - the person was not involved at all when the activity was performed.”²⁹

Ms. L, however, may misunderstand the nature of total dependence with regard to PCA services for IADLs. Recipients who should be classified as “totally dependent” as to an IADL are persons who literally cannot participate at all in the activity. People who are completely bedridden, paralyzed, or so profoundly cognitively disabled that they simply cannot participate, are considered totally dependent as to an IADL. Ms. L’s disability is not so profound that she cannot participate at all in the activity of main meal preparation. It is not disputed that she cannot be in charge of preparing main meals and that she requires a great deal of assistance. However, Ms. L did not testify, for example, that her blindness would prevent her from standing next to her PCA and assisting in the activity if directed by her PCA. Thus, she is able to participate in main meal preparation to some degree. Ms. L did not meet her burden of establishing by a preponderance of the evidence that she is totally dependent as to this IADL.

IV. Conclusion

The Division’s reduction of Ms. L’s score for the IADL of light meal preparation is reversed; the CAT should be amended to restore her score to a 1/3. The Division’s increase of Ms. L’s score for the IADL of main meal preparation to a 2/3 is affirmed.

²⁷ Division Exhibit D at 9.

²⁸ Division Exhibit E at 26. It is noted that all of Ms. L’s IADL scores in the recent assessment represented increases over her previous scores, with the exception of light meal preparation. Division Exhibit D at 9.

²⁹ Division Exhibit E at 26.

Ms. L should receive PCA services consistent with these findings.

DATED this 28th day of December, 2017.

By: Signed
Andrew M. Lebo
Administrative Law Judge.

Adoption

Under a delegation from the Commissioner of Health and Social Services and under the authority of AS 44.64.060(e)(1), I adopt this decision 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 12th day of January, 2018.

By: Signed
Signature
Kathryn A. Swiderski
Name
Administrative Law Judge
Title

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