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

In the Matter of)
)
P J) OAH No. 17-1083-MDS
) Agency No.

DECISION AFTER REMAND

I. Introduction

P J was receiving 41.50 hours per week of personal care services (PCS). After an assessment on April 21, 2017, the Department of Health and Social Services (Department), Division of Senior and Disabilities Services (Division) reduced Mr. J's PCS to 23.75 hours per week. Mr. J's guardian requested a hearing.

A hearing was held on December 7, 2017. Following the hearing, a proposed decision was issued which found that Mr. J is physically capable of doing many activities, such as standing, walking, transferring, and removing his clothing. However, his profound mental and cognitive disabilities prevent him from performing any of those activities independently or with any purpose. The proposed decision concluded that the Division's assessment of Mr. J's PCS needs was incorrect and issued a proposed decision affirming in part and reversing in part the Division's allocation of PCS time.

The Division filed a proposal for action objecting to the proposed decision. In short, the Division argued that new PCS regulations precluded consideration of Mr. J's cognitive and mental disabilities when determining his functional limitations for PCS eligibility. The Division also argued that because Mr. J receives Medicaid Home and Community-Based Waiver program ("waiver") services, the reduction in PCS hours was warranted to prevent a duplication of services.

After considering the Division's proposal for action and reviewing the record in the case, the Commissioner of Health and Social Services' delegee declined to adopt the proposed decision and returned the case to the Office of Administrative Hearings (OAH) to conduct an evidentiary hearing for additional evidence and findings. A remand hearing was held on March 12, 2018.

Given the evidence presented at the remand hearing and the original December 7, 2017 hearing, this decision concludes that the 2017 changes to the PCS regulations do not preclude consideration of Mr. J's cognitive disabilities when determining his functional limitations for PCS eligibility. However, because Mr. J receives 25 hours per week of Supported Living Services (SLS) and 15 hours per week of Day Habilitation through the waiver program, there is some duplication of services, and some reduction of the PCS hours is warranted.

II. Procedural and Factual Background

A. Procedural Background

Mr. J's original hearing was held on December 7, 2017. He was represented by his court-appointed guardian, Jane Doe. Ms. Doe and Mr. J's caregiver, Mary Smith, testified for Mr. J. In addition, Ms. Doe submitted videos demonstrating Mr. J's physical abilities. Terri Gagne represented the Division. Health Program Managers Ernest Shipman and Melissa Meade testified on behalf of the Division. All evidence submitted by the parties, including the video clips of Mr. J's physical functioning, were admitted into the record. The hearing was recorded.

The proposed decision found that Mr. J is physically capable of doing many activities, such as standing, walking, transferring, and removing his clothing. However, due to his profound mental and cognitive disabilities, he lacks comprehension or purpose and is unable to perform any of those activities independently. The proposed decision concluded that the Division's assessment of Mr. J's PCS needs was incorrect, and it affirmed in part and reversed in part the Division's allocation of PCS time.

The Division filed a proposal for action objecting to the proposed decision. In short, the Division argued that the PCS regulations changed since Mr. J's last assessment and that his cognitive and mental disabilities should not have been considered when determining his functional limitations for PCS eligibility. The Division also argued that because Mr. J receives Medicaid Home and Community-Based Waiver program ("waiver") services, the reduction in PCS hours was warranted.

After considering the Division's proposal for action and reviewing the entire record in the case, the Commissioner's delegee declined to adopt the proposed decision and, in accordance with AS 44.64.060(e)(2), returned this case to the administrative law judge (ALJ) to conduct an evidentiary hearing for additional evidence and findings about: what, besides regulations, changed between March 18, 2014 and April 21, 2017; what changes in regulations between March 18, 2014 and April 21, 2017 impacted Mr. J's eligibility; whether there is a duplication of services due to services provided under the Waiver program; and whether PCS reductions, considered with other Division services, would put Mr. J at risk of needing an institutional level of care. A remand hearing was held on March 12, 2018. Mr. J was represented by Ms. Doe. Ms. Doe and Ms. Smith testified for Mr. J. Ms. Gagne represented the Division. Mr. Shipman and Ms. Meade testified for the Division. All evidence submitted by the parties was admitted into the record. The hearing was recorded.

B. Factual Background

The following facts were established by a preponderance of the evidence.

Mr. J is 23 years old.[1] He was born with a blood alcohol content of .283, and he has been profoundly disabled since birth.[2] He has been diagnosed with mental retardation, fetal alcohol syndrome, cerebral palsy, autistic disorder, epilepsy, visual loss, and hearing loss.[3] Mr. J's diagnoses have remained consistent.[4] His functional level is that of an infant or toddler.[5] He requires 24/7 care, and due to the severe mental retardation caused by both cerebral palsy and fetal alcohol syndrome, he will never be able to care for himself.[6]

Mr. J lives with his caregiver, Mary Smith. Ms. Smith was a foster placement when Mr. J was 15 years old.[7] Ms. Smith loves Mr. J and considers him part of her family.[8] When Mr. J aged out of the foster care system, Ms. Smith volunteered to keep him in her home.[9] While his living conditions have been consistent, Mr. J's physical conditions and functional abilities have not improved over the last 8 years since he was placed with Ms. Smith—if anything, his health problems have gotten more complicated as he has gotten older.[10] He gets more frustrated and his behavior has become more aggressive.[11] When Mr. J gets frustrated he hits and bites himself, and he grabs, pinches, hits, and bites his caregivers.[12] He also gulps air when he is frustrated or

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[1] Ex. E at 1.

[2] Ex. F at 8. The documentation in the record states that Mr. J's blood alcohol level at birth was 2.83. Because such a BAC would be fatal, I believe this was a typographical error.

[3] Ex. E at 3; Ex. 1 at 17-31.

[4] Ex. F at 6, 12-14; Testimony of Jane Doe; Testimony of Mary Smith.

[5] Doe Testimony; Smith Testimony.

[6] Ex. 1 at 19; *see also* Doe Testimony; Smith Testimony.

[7] Smith Testimony.

[8] Smith Testimony.

[9] Smith Testimony.

[10] Smith Testimony; Doe Testimony.

[11] Smith Testimony.

[12] Smith Testimony; Ex. F at 13, 14.

nervous, causing bloating and stomach discomfort.[13] Ms. Smith is able to continue providing care for Mr. J only with the help of his guardian and his care agency.[14]

Mr. J is non-verbal.[15] He is learning how to use signs to communicate with his caregivers and knows approximately three signs—for simple words, such as "more" and "thank you."[16] But he does not know which sign to use for a specific request, and so, when he wants something, he uses all the signs he knows.[17]

Mr. J can walk, but he has limited vision, and he has no cognitive understanding of where he is going or what he is doing.[18] He cannot recognize safety obstacles in his path.[19] He walks on his ankles and has difficulty with uneven ground and steps.[20] He does not use a walker or a cane because he would not know what to do with them.[21] Mr. J's caregivers provide hands-on, guided maneuvering to get him from one location to another.[22] Mr. J has a wheelchair for when he cannot walk.[23]

Mr. J is incontinent and requires assistance with feeding, bathing, grooming, dressing, hygiene, and other activities.[24] Mr. J has a severe swallowing impairment, and is only able to eat soft foods.[25] He does not hold a spoon, and does not know how to feed himself.[26] He is "food-aggressive" and can shove food continuously in his mouth, but he often needs to be reminded to swallow.[27] He does not know when his body has had enough or when to stop eating.[28] He receives formula through a G-Tube to supplement his diet.[29] He has pulled his G-Tube out.[30] Mr. J's caregivers provide all of his personal hygiene care.[31] Ms. Smith must move Mr. J's

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[13] Ex. F at 14.

[14] Smith Testimony.

[15] Ex. F at 9; Smith Testimony.

[16] Smith Testimony; Ex. F at 9.

[17] Smith Testimony; Ex. F at 9.

[18] Ex. F at 9; Smith Testimony.

[19] Ex. F at 13; Smith Testimony.

[20] Ex. F at 9; Smith Testimony.

[21] Smith Testimony.

[22] Smith Testimony.

[23] Doe Testimony.

[24] Ex. F at 9; Testimony of Mary Smith.

[25] Ex. F at 9.

[26] Smith Testimony.

[27] Ex. F at 12.

[28] Ex. F at 5.

[29] Ex. F at 9.

[30] Ex. F at 12.

[31] Smith Testimony.

limbs and physically support him to bathe him in the shower.[32] Similarly, Mr. J's caregivers assist him with and direct him to the bathroom for toileting.[33] He does not recognize when he needs to use the toilet.[34] He requires assistance with wiping.[35] Mr. J can remove his own clothing, but he does not know how to put his clothes back on.[36] Similarly, although Mr. J's caregivers attempt to include him in daily activities, he is dependent on others for housekeeping, laundry, and grocery shopping.[37] Ms. Smith does all of Mr. J's laundry, shopping, and other housework.[38] Mr. J does not even know to move his feet when someone is vacuuming around him.[39]

Mr. J receives both PCS and waiver services.[40] In 2014, Mr. J received 57.26 hours per week or 8.18 hours per day of combined PCS and waiver services.[41] The breakdown of those hours was 15.76 hours per week of Day Habilitation and 41.5 hours per week of PCS to supplement his needs.[42] In addition, before May 2016, Mr. J attended high school, Monday through Friday, 6:30 a.m. to approximately 2:45 p.m.—about 40 hours per week.[43] Because Ms. Smith needed more assistance when Mr. J stopped going to school in May 2016, Mr. J's care team requested additional waiver services.[44] Since the most recent assessment, Mr. J receives 15 hours per week of Day Habilitation, 25 hours per week of Supported Living Services (SLS), and 23.75 hours per week of PCS, for a total of 63.75 hours per week or 9.10 hours per day of combined PCS and waiver services.[45] Mr. J is now receiving almost one more hour of combined services per day than he was in 2014, but he no longer goes to school for approximately 8 hours each day, Monday through Friday.[46]

Mr. J's April 21, 2017 Waiver Plan of Care included the following habilitative goals for SLS: place his laundry in the hamper; take the trash out daily; place his dirty dishes in the sink;

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[32] Smith Testimony.
[33] Smith Testimony; Ex. F at 12.
[34] Ex. F at 12.
[35] Ex. F at 12.
[36] Ex. F at 9; Smith Testimony.
[37] Smith Testimony.
[38] Smith Testimony.
[39] Smith Testimony.
[40] Ex. F at 2.
[41] Ex. P; Ex. Q.
[42] Ex. P; Ex. Q.
[43] Doe Testimony.
[44] Doe Testimony.
[45] Doe Testimony; Ex. F at 2; Ex. P; Ex. Q.
[46] Ex. P; Ex. Q.

brush his teeth with hand over hand support after meals; wipe his mouth; wash his hands as needed; remain dressed in his home when appropriate; shop for his personal care items with support from staff; and run errands in the community to get items required in his home with the support from staff.[47] While the SLS providers helped Mr. J carry his laundry to the hamper, put his dishes in the sink, and take the garbage outside, they did not do Mr. J's laundry, wash the dishes, or perform any light or routine housework.[48]

After receiving notice that Mr. J's PCS hours were being reduced because Mr. J's SLS goals included items that the Division deemed duplicative, Mr. J's care team amended his goals and objectives.[49] In the amended plan of care, the team removed the following goals: place his laundry in the hamper; take the trash outside daily; carry his dirty dishes to the sink; place the toothbrush in his mouth and attempt to brush his teeth; be tolerant of staff assistance with tooth brushing; participate in shopping for his own personal care items; refrain from laying on the conveyor belt while checking out at the store; and hand money to the cashier when checking out.[50] They added the following goals: increase his sign language by working on 1-2 new words weekly; sign an activity that he wants to participate in weekly; and explore ways to communicate his wants and needs.[51] Because the team was only changing goals and objectives—as opposed to changing services—Division Health Program Manager Lauren Scarmuzzi advised the team that the changes did not require a Plan of Care Amendment.[52] But because duplication of services was an issue in these proceedings, Ms. Scarmuzzi advised the team to submit the amendment with the updated goals and objectives as an exhibit.[53] Since the team updated the plan of care, Mr. J's SLS providers no longer help Mr. J put his clothes in the hamper, put his dishes in the sink, or take the trash outside.[54] Nor do they assist with shopping.[55] Although some of Mr. J's personal hygiene goals were revised, Mr. J's SLS providers do still help Mr. J with personal hygiene.[56]

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[47] Ex. F At 11.
[48] Smith Testimony.
[49] Ex. 1-8 at 32-40.
[50] Ex. 1-8 at 33-34.
[51] Ex. 1-8 at 35-36.
[52] Ex. 7 at 2; Doe Testimony.
[53] Ex. 7 at 2; Doe Testimony.
[54] Smith Testimony.
[55] Smith Testimony.
[56] Smith Testimony.

Mr. J was receiving 41.50 PCS hours of weekly services in 2017 based on a March 2014 assessment. Since that assessment, Mr. J stopped going to school (in May 2016) and started receiving 25 hours of SLS time. Mr. Shipman reassessed Mr. J's PCS needs on April 21, 2017. Mr. Shipman's findings resulted in a reduction of Mr. J's PCS hours to 23.75 hours per week.[57] In general, Mr. Shipman found that Mr. J's physical functionality had increased, which resulted in a decrease in both the degree of assistance required and the number of times weekly that assistance was required.[58] Other than amendments to the PCS regulations, the primary changes between Mr. J's March 18, 2014 assessment and his April 21, 2017 assessment are: the person who conducted the assessment (i.e. Sherry Bartlett, RN, in 2014 and Mr. Shipman in 2017) and Mr. J is no longer attending high school 40 hours per week.[59]

III. Discussion

When the Division is seeking to reduce or eliminate a benefit a recipient is already receiving, the Division has the overall burden to prove, by a preponderance of the evidence,[60] facts that show the recipient's level of eligibility has changed.[61] In the context of PCS, the Division must show that the "recipient has experienced a change that alters the recipient's *need for physical assistance* with ADLs, IADLs, or other covered services."[62] The Division can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs,[63] including such sources as written reports of firsthand evaluations of the patient. The relevant date for purposes of assessing the basis of the Division's determination is generally the date of the agency's decision under review.[64]

A. 2017 Changes to PCS Regulations and Consideration of Mental and Cognitive Impairments for PCS

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[57] Ex. D at 1.

[58] Ex. D at 3-4.

[59] Ex. E; Ex. 1 at 42. Mr. Shipman did not conduct any assessments before the new regulations became effective in July 2017. Testimony of Ernest Shipman.

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

[61] 7 AAC 49.135.

[62] 7 AAC 125.026(a) (emphasis added). This is a term of art that encompasses not only changes in the patient's situation, but also changes in regulations affecting the authorized level of services. *See* 7 AAC 125.026(d).

[63] 2 AAC 64.290(a)(1).

[64] *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).

In 2017, the Department made broad changes to its PCS regulations.[65] Those changes became effective on July 22, 2017.[66] Among the substantive changes are: exclusion of some services, such as foot care, non-passive range of motion, and walking exercise; and caps on the time or frequency of PCS service allotments for various Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs).[67] The Division argues that the changes to the PCS regulations preclude consideration of Mr. J's cognitive disabilities when determining his functional limitations for PCS eligibility.

Under the old regulation, the stated purpose of PCS was to provide "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, as determined through a *functional* assessment of self-performance and *physical* supports."[68] Similarly, the regulation, as amended, states the Department will authorize and pay for PCS "provided to a Medicaid recipient that . . . experiences *functional limitations* that . . . are the result of the recipient's *physical condition*; . . . are evident during assessment of the recipient using the Consumer Assessment Tool (CAT) adopted by reference in 7 AAC 160.900; and . . . cause the recipient to be unable to perform the activities specified in 7 AAC 125.030 [i.e. ADLs and IADLs] . . .."[69] Although the structure of the regulation was changed, there is no significant change to the relevant language or goals of the program. Both the old regulation and the new regulation focus on the recipient's physical condition and functional abilities. They both incorporate by reference the CAT. The CAT, its definitions, and its scoring remain unchanged. And like the old regulation, the new regulation precludes PCS for a recipient if the recipient needs assistance only with cuing or supervision.[70]

The new regulations did not change or clarify the definition of "physical condition." Neither the original regulation, the amended regulation, nor the CAT defines "physical condition" or "functional limitations."[71] At hearing, the Division argued that it interprets

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[65] Redlined copy of PCS regulations, Department of Health and Social Services regulations re: Medicaid coverage and payment for personal care services (7 AAC 125.010 – 7AAc 125.199; 7 AAC 160.900(d)), available at http://dhss.alaska.gov/dsds/Documents/regulationMaterials/Filing_Notification_PCS_regs_JU2016200250.pdf.

[66] *Id.*

[67] *Id.*

[68] *Id*. at 2 (emphasis added).

[69] Terri Gagne Argument.

[70] Redlined copy of PCS regulations at 9.

[71] 7 AAC 125.199; *see also* 7 AAC 125.010.

physical condition to mean a condition relating to an individual's body and the body's ability to functionally perform as opposed to the mind—that the PCS program focuses on a person's physical abilities while the waiver program focuses on a person's cognitive and mental abilities.[72] The Division explained that it considers a person's mental or cognitive abilities only to the extent that there is a disconnect between the person's brain and the person's limbs—where damage to the brain restricts or precludes the functioning of the person's limbs.[73] However, the Division conceded that the new regulations did not change the definition of "physical condition;" instead, the Division has changed its interpretation: rather than "over-assessing" or "over-scoring" PCS recipients, the Division asserts that it is simply following its regulations and CAT definitions more accurately.[74] The Division argues that it is "correcting bad assessments."[75]

The Division's definition of "physical condition" (i.e. a condition relating to an individual's body as opposed to the mind) is reasonable.[76] However, the Division's overly narrow application (i.e. considering a person's mental or cognitive abilities only when the condition restricts or precludes movement of the person's limbs) is not. A functional limitation is an impairment or limit on a person's ability to perform an action or activity.[77] As a gateway to eligibility for PCS, the CAT evaluates the recipient's ability to perform specific activities.[78] Although the PCS regulations require a recipient to experience functional limitations that result from a physical condition, to the extent a physical condition causes cognitive or mental disabilities that limit a recipient's functional abilities, the regulations do not preclude consideration of those cognitive or mental disabilities when determining PCS eligibility. Instead, if a person requires some degree of hands-on, physical assistance with any one of these ADLs or IADLs (as defined by the CAT), then the person is eligible for PCS. Once eligibility is established, time for additional ADLs and IADLs, as well as certain other covered services, can be added to the PCS authorization.

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[72] Gagne Argument.

[73] Gagne Argument.

[74] Gagne Argument.

[75] Gagne Argument.

[76] Gagne Argument; Ex. K. Merriam-Webster defines "physical" as "of or relating to the body" or "concerned or preoccupied with the body and its needs." *See* https://www.merriam-webster.com/dictionary/physical.

[77] Gagne Argument; Ex. K. Merriam-Webster defines "functional" as "of, connected with, or being a function" or "affecting physiological or psychological functions but not organic structure." *See* https://www.merriam-webster.com/dictionary/functional.

[78] *See* 7 AAC 125.024(a)(1); 7 AAC 125.020(c)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900.

Here, Mr. J has been diagnosed with a number of conditions, including fetal alcohol syndrome, cerebral palsy, epilepsy, vision loss, and hearing loss.[79] It would be preposterous to conclude that cerebral palsy, epilepsy, vision loss, hearing loss, or brain damage resulting from alcohol exposure as a fetus or newborn are not *physical conditions.* And these physical conditions result in functional limitations. There is no dispute that Mr. J needs hands-on help with some of the gateway ADLs and IADLs. In fact, because of the effects of his physical conditions, Mr. J experiences *functional limitations* that make him unable to perform many ADLs and IADLs without physical assistance. Mr. J's functional level is that of an infant or toddler.[80] And because of his physical conditions (namely, cerebral palsy and fetal alcohol syndrome), he requires 24/7 care and will never be able to care for himself.[81]

B. CAT Scores

1. Transferring (Non-Mechanical)

Transfers are defined in the CAT as "how a person moves between surfaces – to/from bed, chair, wheelchair, standing position (excluding to/from bath/toilet)."[82] Mr. J was previously assessed with a score of 2/2 (i.e. needing limited assistance with one-person physical assist), with a frequency of 46 times per week for non-mechanical transfers.[83] After reassessing Mr. J, the Division found that Mr. J is physically capable of standing on his own without an assistive device and gave him a score of 0/5 (i.e. independent with cueing).[84] The Division removed time for transfers.[85] At the hearing, the Division's assessor, Mr. Shipman, testified that his assessment was based on a finding that with cueing, Mr. J was physically capable of rising into a standing position.[86]

The CAT defines "cueing" as "spoken instruction or physical guidance which *serves as a signal* to do an activity."[87] Whereas, the CAT defines "limited assistance" as "person highly involved in activity; received physical help in *guided maneuvering of limbs, or other nonweight-bearing assistance 3+ times – or* Limited Assistance (as just described) *plus weight-bearing 1 or*

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[79] Ex. E at 3; Ex. 1 at 17-31.
[80] Doe Testimony; Smith Testimony.
[81] Ex. 1 at 19; *see also* Doe Testimony; Smith Testimony.
[82] *See* Ex. E at 6.
[83] Ex. D at 3, 11.
[84] Ex. D at 3, 11; Testimony of Ernest Shipman.
[85] Ex. D at 3, 11; Shipman Testimony.
[86] Shipman Testimony.
[87] Ex. E at 6.

2 times during the last 7 days."[88] Ms. Smith testified, and video confirmed, that Mr. J's profound cognitive disabilities prevent him from moving between surfaces with any direction or purpose.[89] Ms. Smith must bend over and physically assist Mr. J to stand—she physically pulls him.[90] And even after Ms. Smith manages to get Mr. J in a standing position, he will frequently flop back down.[91] Indeed, in his assessment, Mr. Shipman acknowledged that Mr. J appeared too cognitively impaired to comprehend commands. Ms. Smith's physical assistance to Mr. J is far more than a signal for him to stand up.[92] The preponderance of the evidence shows that Mr. J's transfers require more than signaling, cueing, or prompting.[93]

In short, the Division failed to show by a preponderance of the evidence that Mr. J has experienced a change that alters his need for physical assistance with transfers.[94] As a result, the Division has failed to meet its burden of proving that it is more likely true than not true that Mr. J's transfer time should be removed. However, due to changes in the PCS regulations, the maximum frequency allowed for transfers is 42 times per week.[95] Accordingly, Mr. J's transfer time is reduced from 46 times per week to 42 times per week, for a total of 105 minutes per week.

2. Locomotion

Locomotion is defined in the CAT as "how a person moves between locations in his/her room and other areas on the same floor. . . . ."[96] Mr. J was previously assessed with a score of 2/2 (i.e. needing limited assistance with one-person physical assist), with a frequency of 46 times per week for locomotion.[97] After reassessing Mr. J, the Division gave him a score of 0/5 (i.e. independent with cueing) and removed time for this activity, based on a finding that Mr. J is physically capable of ambulating with his caregiver nearby to redirect.[98] As with transfers, Mr.

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[88] Ex. E at 6 (emphasis added). *See* 7 AAC 125.024(a)(1); 7 AAC 125.020(c)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900.

[89] Smith Testimony; Ex. 2.

[90] Smith Testimony. Ex. 2.

[91] Smith Testimony; *See also* Ex. 2.

[92] Ex. E at 6.

[93] Smith Testimony; Ex. 2; Doe Testimony.

[94] 7 AAC 125.026(a).

[95] Ex. B at 24 (allowing a maximum of 6 transfers per day).

[96] *See* Ex. E at 7.

[97] Ex. D at 3, 11.

[98] Ex. D at 3, 11; Ex. E at 7; Shipman Testimony.

Shipman testified that his assessment was based on a finding that with cueing, Mr. J was physically capable of walking without assistance.[99]

Just like transfers, the CAT defines "cueing" for Locomotion as "spoken instruction or physical guidance which *serves as a signal* to do an activity."[100] The CAT defines "limited assistance" as "person highly involved in activity; received physical help in *guided maneuvering of limbs, or other nonweight-bearing assistance 3+ times – or* Limited Assistance (as just described) *plus weight-bearing 1 or 2 times during the last 7 days*."[101] Again, Ms. Smith testified, and video confirmed, that although Mr. J may be able to put one foot in front of the other to take steps, Mr. J's cognitive disabilities prevent him from ambulating with any awareness or purpose.[102] Instead, he wanders without any direction or cognition.[103] He cannot recognize safety obstacles in his path.[104] He walks on his ankles and has difficulty with uneven ground and steps.[105] He has fallen or thrown himself on the ground several times.[106] He does not use a walker or a cane because he would not know what to do with them.[107] Mr. J is unsteady on his feet, and his caregivers provide hands-on, guided maneuvering to get him from one location to another.[108] Moving Mr. J between locations requires more than signaling, cueing, or prompting.[109] And he is not going to go anywhere without physical assistance from a caregiver.[110]

In short, the Division failed to show that Mr. J has experienced a change that alters his need for physical assistance with locomotion.[111] As a result, the Division has failed to meet its burden of proving that it is more likely true than not true that Mr. J's locomotion time should be removed. However, due to changes in the PCA regulations, the maximum frequency allowed

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[99] Shipman Testimony.

[100] Ex. E at 7 (emphasis added).

[101] Ex. E at 7 (emphasis added). *See* 7 AAC 125.024(a)(1); 7 AAC 125.020(c)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900.

[102] Smith Testimony; Ex. 2; Doe Testimony.

[103] Smith Testimony; Ex. 2; Ex. E at 7; Doe Testimony.

[104] Ex. F at 13; Smith Testimony.

[105] Ex. F at 9; Smith Testimony.

[106] Smith Testimony; *See also* Ex. 2.

[107] Smith Testimony.

[108] Smith Testimony; *See also* Ex. 2.

[109] Smith Testimony; Ex. 2.

[110] Smith Testimony; Ex. 2; Doe Testimony. *See also, ITMO B N.*, OAH No. 17-1286-MDS at 5-6.

[111] 7 AAC 125.026(a).

for locomotion is 42 times per week.[112] Accordingly, Mr. J's locomotion time is reduced from 46 times per week to 42 times per week, for a total of 210 minutes per week.

3. Locomotion (Access to Medical Appointments)

On both Mr. J's previous assessment and the new assessment, he was assessed as needing extensive assistance to access medical appointments.[113] In the prior assessment, he was assessed with a frequency of needing assistance twice a week.[114] After reassessing Mr. J, the Division reduced the frequency to 1 per week, based on Ms. Smith's report that Mr. J generally had one medical appointment per week.[115] Neither Ms. Doe nor Ms. Smith disputed that Mr. J has one medical appointment per week.[116] Accordingly, the Division demonstrated that it is more likely true than not true that Mr. J's medical access assistance time should be reduced from 2 times per week to 1 time per week, for a total of 7.5 minutes per week.

4. Dressing

Dressing is defined in the CAT as "how a person puts on, fastens, and takes off all items of street clothing, including donning/removing prosthesis."[117] Mr. J was previously scored 3/2 (i.e. needing extensive assistance with one-person physical assist), with a frequency of 21 times per week for dressing.[118] After reassessing Mr. J, the Division gave him a score of 2/2 (i.e. needing limited assistance with one-person physical assist) and reduced the frequency to 14 times per week, based on the assessor's finding that with cueing, prompting, and assistance, Mr. J donned his coat by threading his right arm through.[119]

As discussed above, the CAT defines "limited assistance" as "person highly involved in activity; received physical help in guided maneuvering of limbs, *or other nonweight-bearing assistance 3+ times* – or Limited Assistance (as just described) plus weight-bearing 1 or 2 times during the last 7 days."[120] Whereas, the definition of "extensive assistance" is "while person performed part of activity, over last 7-day period, help of the following type(s) provided 3 or

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[112] Ex. B at 24 (allowing a maximum of 6 single-level locomotion per day).
[113] Ex. D at 3, 11; Ex. E at 7; Shipman Testimony.
[114] Ex. D at 3, 11; Ex. E at 7; Shipman Testimony.
[115] Shipman Testimony.
[116] Shipman Testimony.
[117] *See* Ex. E at 8.
[118] Ex. D at 3, 11.
[119] Ex. D at 3, 11; Ex. E at 8; Shipman Testimony.
[120] Ex. E at 8 (emphasis added).

more times: weightbearing support [and/or] full staff/caregiver performance during part (but not all) of last 7 days."[121]

Ms. Smith's testimony established that although Mr. J can take his clothes off when he is uncomfortable, he does not know how to put his clothes back on.[122] Her description of dressing Mr. J was consistent with extensive assistance (code of 3)—full caregiver performance.[123] The Division failed to show that Mr. J has experienced a change that alters his need for physical assistance with dressing.[124] It is therefore more likely true than not true that Mr. J continues to require extensive assistance (code of 3) with dressing. However, the maximum frequency allowed for dressing is 14 times per week.[125] Accordingly, Mr. J's dressing time is reduced from 21 times per week to 14 times per week, for a total of 157.5 minutes per week.

5. Eating

Mr. J was previously scored 4/2 (i.e. total dependence with one-person physical assist), with a frequency of 32 times per week for feeding.[126] In the reassessment, the Division gave him a score of 3/2 (i.e. needing extensive assistance with one-person physical assist) and reduced the frequency to 21 times per week.[127] The assessment does not indicate, and Mr. Shipman did not explain, why Mr. J's self-performance code changed from total dependence to needing extensive assistance.[128] The only explanation Mr. Shipman gave for the reduction was about the reduced frequency--that 3 times a day for breakfast, lunch, and dinner is standard.[129] He did not take into account the fact that Ms. Smith gives Mr. J formula through the G-Tube.

The CAT defines "extensive assistance" as "while person performed part of activity, over last 7-day period, help of the following type(s) provided 3 or more times: weightbearing support [and/or] full staff/caregiver performance during part (but not all) of last 7 days."[130] The CAT defines "total dependence" as "[f]ull staff/caregiver performance of activity during ENTIRE 7 days."[131]

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[121] Ex. E at 8.

[122] Smith Testimony.

[123] Smith Testimony. *See* Ex. E at 8.

[124] 7 AAC 125.026(a).

[125] Ex. B at 24 (allowing a maximum of 2 dressings per day).

[126] Ex. D at 3, 11.

[127] Ex. D at 3, 11.

[128] Ex. E at 9; Shipman Testimony.

[129] Ex. E at 9; Shipman Testimony.

[130] Ex. E at 9.

[131] Ex. E at 9 (capitalized emphasis in original).

The weight of the evidence demonstrates that Mr. J has a severe swallowing impairment, and is only able to eat soft foods.[132] He does not hold a spoon, and does not know how to feed himself.[133] Ms. Smith testified that she feeds Mr. J soft foods three times per day, plus snacks.[134] When left to feed himself, Mr. J shoves food continuously in his mouth and often needs to be reminded to swallow.[135] He does not know when his body has had enough or when to stop eating.[136] Ms. Smith also gives Mr. J formula through the G-Tube three times per day.[137] In the absence of any evidence or argument at the hearing or any support in the CAT, the Division cannot be said to have met its burden of establishing by a preponderance of the evidence that Mr. J has experienced a change that alters his need for physical assistance with feeding.[138] It is therefore more likely true than not true that Mr. J continues to be totally dependent on his caregivers (code of 4) for eating.

However, the maximum frequency allowed for oral intake feeding is 21 times per week.[139] Mr. J may not receive PCS time for both oral intake and tube feeding.[140] Because Ms. Smith gives Mr. J formula through the G-Tube three times per day to supplement his diet, the Division authorized PCS time at the higher level. Accordingly, the Division's decision is affirmed. Based on Ms. Smith's report that she gives Mr. J formula through the G-Tube three times per day, Mr. J's feeding time is reduced from 32 times per week to 21 times per week, for a total of 420 minutes per week.

6. Toilet Use

Mr. Shipman scored Mr. J as needing extensive assistance (code of 3) in toilet use.[141] This score is unchanged from the previous assessment.[142] But Mr. Shipman scored the frequency of toileting assistance as four times per day or 28 times per week, reduced from 46 times per week in the previous assessment.[143] He testified that he based this score not on evidence of Mr.

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[132] Ex. F at 9.
[133] Smith Testimony.
[134] Smith Testimony.
[135] Ex. F at 12.
[136] Ex. F at 5.
[137] Smith Testimony.
[138] 7 AAC 125.026(a).
[139] Ex. B at 24; 7 AAC 125.030(b)(5).
[140] 7 AAC 125.030(b)(5) & (c).
[141] Ex. D at 4, 11; Ex. E at 9.
[142] Ex. D at 4, 11; Ex. E at 9.
[143] Ex. D at 4, 11; Ex. E at 9.

J's actual toileting frequency, but on "standard guidelines and regulations."[144] Ms. Smith reported during the assessment that she assisted Mr. J with toileting every two hours, and she testified that there has been no change in Mr. J's toileting since the last assessment.[145] At the original hearing, the Division did not offer any estimate of toileting frequency other than four times per day. And the regulations allow a maximum of 56 times per week.[146]

In its Proposal for Action, the Division explained:

> Mr. J receives services through the waiver program. When considering the amount of frequencies to give an individual with dual services, the agency has to take into consideration the other services and the time remaining that would fall under the PCS service. In Mr. J's situation, he receives forty hours per week of combined Supportive Living and Individual Day Habilitation services. If we break the forty (40) hours down by dividing the time between seven (7) days, he receives 5.71 hours per day of one-on-one assistance between these two services, this leaves 18.29 hours remaining in a twenty-four (24) hour day. We then need to take the 18.29 and reduce it by six (6) hours of sleep time, per regulation, and then look at the amount of time that remains in the day, for Mr. J this would be 12.29 hours.

As discussed, Mr. J does receive forty hours per week of combined Supportive Living and Individual Day Habilitation services.[147] Accordingly, PCS time for toileting should be calculated to account for the services he receives through the waiver program. Ms. Smith testified that she assists Mr. J with toileting every two hours. If the 12.29 hours not covered by SLS or Day Habilitation in the day is divided by two (for every two hours), and then multiplied by seven days per week, the result is a frequency of 43 times per week.[148] Accordingly, the frequency of toileting is established at 43 times per week, for a total of 387 minutes per week.

7. Personal Hygiene

Personal hygiene includes the tasks of combing hair, brushing teeth, shaving, washing/drying face, hands, and perineum, when done separately from bathing.[149] Mr. J was previously assessed as being totally dependent on one person ("4/2") for personal hygiene.[150] In

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[144] Shipman Testimony.
[145] Ex. E at 9; Smith Testimony.
[146] Ex. B at 24.
[147] Doe Testimony; Ex. F at 2; Ex. P; Ex. Q.
[148] 12.29 / 2 = 6.145. 6.145 * 7 = 43.015.
[149] Ex. E at 10.
[150] Ex. D at 4, 11; Ex. E at 10.

Mr. Shipman's reassessment, he assessed Mr. J as needing extensive (one person) assistance for personal hygiene ("3/2").[151]

The CAT defines "extensive assistance" as "while person performed part of activity, over last 7-day period, help of the following type(s) provided 3 or more times: weightbearing support [and/or] full staff/caregiver performance during part (but not all) of last 7 days."[152] Whereas, the CAT defines "total dependence" as "[f]ull staff/caregiver performance of activity during ENTIRE 7 days."[153]

When asked for an explanation of his score, Mr. Shipman explained it in terms of Mr. J's range of motion—that Mr. J was able to raise his hands and touch his head.[154] This explanation does not meet the Division's burden of proof, however. The personal hygiene score should be determined based on Mr. J's functional limitations and need for assistance in performing personal hygiene tasks. Here, this record demonstrates that Mr. J is totally dependent on his caregivers to provide personal hygiene care. Even on simple tasks like washing his face and hands, the evidence shows that Mr. J does not have the physical skill to accomplish the task correctly.[155] He requires hand over hand support to brush his teeth and wash his hands.[156] As noted, Mr. Shipman acknowledged that Mr. J appeared too cognitively impaired to comprehend commands.[157] Mr. J's cognitive limitations preclude him from being able to shave himself, brush and comb his hair, take care of his teeth, or apply skin care products—he is unable to help his caregivers with any of those activities.[158] The Division failed to show that Mr. J has experienced a change that alters his need for physical assistance with personal hygiene.[159] Accordingly, Mr. J should be scored as a "4/2" for personal hygiene.

However, there does appear to be a duplication of service for personal hygiene assistance. As discussed, Mr. J receives 40 hours of Individual Day Habilitation and SLS per week. Although some of Mr. J's personal hygiene goals were revised, Mr. J's SLS providers do

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[151] Ex. D at 4, 11; Ex. E at 10.
[152] Ex. E at 10.
[153] Ex. E at 10 (capitalized emphasis in original).
[154] Shipman Testimony.
[155] Smith Testimony.
[156] Ex. F At 11.
[157] Ex. E at 6.
[158] Smith Testimony.
[159] 7 AAC 125.026(a).

still help Mr. J with personal hygiene.[160] Accordingly, PCS time for personal hygiene assistance should be removed.

8. Instrumental Activities of Daily Living

Mr. J was previously provided assistance with his IADLs of light housework, shopping, and laundry based upon a previous determination that he was fully dependent in regard to them.[161] Mr. J's assistance with all three of those IADLs was eliminated based upon the Division's determination that the assistance would be duplicative.[162]

A review of the evidence demonstrates that Mr. J cannot "reasonably" perform his IADLs of light housework, shopping, and laundry without physical assistance. Given Mr. J's functional limitations, as described by Ms. Smith, Mr. J continues to be dependent. However, because Mr. J receives 40 hours of Individual Day Habilitation and SLS per week, and his plan of care for those services contained habilitative goals for him to walk with a shopping cart, put his dirty clothes in a hamper, carry trash to an outside dumpster, and put his dirty dishes in a sink, the question remains whether the waiver services will duplicate PCS services. The evidence shows that Mr. J's SLS do not—and did not prior to amendment—duplicate services for light housework or laundry. But at the time of Mr. J's April 21, 2017 assessment, Mr. J's SLS did duplicate services for shopping. Accordingly, the Division erred in removing PCS time for light housework and laundry, but PCS time for shopping was correctly removed.

a. Light Housework and Laundry

The Division removed time for light housework because Mr. J's Plan of Care has a habilitative goal for him to take trash out and put his dirty dishes in the sink.[163] Similarly, the Division removed time for laundry because Mr. J's Plan of Care has a goal for him to place his laundry in the hamper.[164] From those goals, the Division concluded that Mr. J receives services from SLS providers for light housework and laundry and removed time for those activities.[165] Although the SLS providers helped Mr. J carry his laundry to the hamper, put his dishes in the sink, and take the garbage outside, they did not do Mr. J's laundry, wash the dishes, or perform

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[160] Smith Testimony; Ex. S; Ex. T.

[161] Ex. D at 4-5, 11.

[162] Ex. D at 4.

[163] Ex. D at 5.

[164] Ex. D at 5.

[165] Ex. D at 5.

any light or routine housework.[166] Ms. Smith does all of Mr. J's laundry, shopping, and other housework.[167]

The record demonstrates that Mr. J is totally dependent on his caregivers to perform light housework, shopping, and laundry. Even on simple tasks, the preponderance of the evidence shows that Mr. J does not have the physical skill to accomplish these tasks.[168] Mr. J is simply too cognitively impaired to comprehend commands.[169] And setting goals for him—or even assisting him—to put his dirty clothes in a hamper, carry trash to an outside dumpster, or put his dirty dishes in a sink will not duplicate PCS or provide the assistance that Mr. J needs.

b. Shopping

The Division removed time for shopping because Mr. J's Plan of Care has a habilitative goal for him to "participate in shopping for his own personal care items."[170] Given that goal, Mr. J's SLS providers spent one-on-one time with Mr. J, taking him to the store to shop for his own personal care items.[171] Even though Mr. J simply walked with the shopping cart, his providers shopped for the items he needed. And through that assistance, Mr. J's shopping was completed.

After receiving notice that many of Mr. J's PCS hours were being reduced because his SLS goals included items that the Division deemed duplicative, Mr. J's care team amended his goals and objectives.[172] In the amended plan of care, the team removed some goals, including goals about shopping, and added other goals.[173] Since the team updated the plan of care, Mr. J's SLS providers no longer help Mr. J with shopping.[174] Although the changes to Mr. J's plan of care appear to have created a gap in services, the relevant date for purposes of assessing the basis of the Division's determination was April 21, 2017.[175] And on that date, Mr. J's SLS providers assisted him with his shopping. Moreover, Mr. J has natural supports who can and do perform this task on his behalf—Ms. Smith shops for Mr. J's groceries and personal care items when she

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[166] Smith Testimony.

[167] Smith Testimony.

[168] Smith Testimony.

[169] Ex. E at 6.

[170] Ex. D at 4.

[171] Ex. D at 4.

[172] Ex. 1-8 at 32-40.

[173] Ex. 1-8 at 32-40.

[174] Smith Testimony.

[175] *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).

shops for the rest of the household.[176] Accordingly, at the time of Mr. J's assessment, the Division correctly removed PCS time for shopping.

9. Other Covered Services: Dressing Changes and Wound Care and Medication Assistance

The Personal Hygiene Scores are used to determine if a recipient is eligible for dressing changes, wound care, and medication assistance. As discussed above, Mr. J should be scored as a "4/2" for personal hygiene. The Division failed to show that Mr. J has experienced a change that alters his need for physical assistance with dressing changes, wound care, and medication assistance.[177] Accordingly, Mr. J should continue to receive assistance with dressing changes and wound care 1 time per day, 7 days per week, for a total of 35 weekly minutes. And he should continue to receive assistance with his medication, computed at the 4/2 (i.e. totally dependent on one person) score.

C. Risk of Institutionalization

The total reduction affirmed is about 419.5 hours, or 7 hours, per week. For a patient like Mr. J who is eligible to receive Home and Community-Based Waiver Services and whose conditions remain consistent, the department will not reduce PCS time if the reduction would make it "likely that . . . the recipient would require relocation from the recipient's current residence to a hospital or nursing facility in 30 days."[178] In addition to the CAT and additional documentation submitted by the recipient, the following factors are considered in evaluating that risk:

1. *Impact over a 24-hour period, taking into consideration total time from any source.*[179] As discussed, Mr. J began receiving 25 hours of SLS in April 2017, for a total of 40 hours per week of waiver services. Although Mr. J no longer attends high school and the increased hours were reportedly intended to account for that loss of time in school, he has not attended high school since May 2016.[180] Mr. J was not institutionalized and his condition did not worsen between May 2016 and April 2017. Moreover, after the proposed reduction, Mr. J will continue to receive about 34.5 hours of PCS per week, for a combined total of 74.5 hours of PCS

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[176] Smith Testimony.

[177] 7 AAC 125.026(a).

[178] 7 AAC 125.026(f) & (g).

[179] 7 AAC 125.026(f)(3).

[180] Doe Testimony.

and waiver per week, or more than 10.5 hours per day. This amounts to a net increase of more than two hours per day of combined services since his last assessment.

2. *Whether the recipient's representative, family members, or other natural supports provide assistance.*[181] Mr. J is fortunate to live with a caregiver who loves and considers him part of her family.[182] Although she needs assistance with his care, Ms. Smith is committed to ensuring that Mr. J's needs are met.[183]

3. *Whether other individuals living in the same residence receive services that benefit the recipient*.[184] There is no evidence that Mr. J lives with other disabled individuals, so this factor does not appear to apply to this case.

4. *The recipient's history of use of the time authorized.* The evidence demonstrates that Mr. J needs all time that has been authorized. Indeed, Mr. J requires 24/7 care and will never be able to care for himself.[185] His needs far exceed the approximately 10.5 hours per day of combined PCS and waiver services proposed. Ms. Smith appears to fill in the gaps for the times when services are not provided.

In short, the evidence does not support a finding that reducing Mr. J's PCS services by about one hour per day will put him at risk of institutionalization in the next 30 days. On the contrary, given his recent increase in waiver services, combined with his strong natural supports, it is likely that he will remain home in spite of this reduction.

IV. Conclusion

The 2017 changes to the PCS regulations do not preclude consideration of Mr. J's cognitive disabilities when determining his functional limitations for PCS eligibility. However, because of changes in Mr. J's needs, changes in regulations, and some duplication of services through the waiver program, reduction of PCS hours and frequencies are warranted as follows:

- Mr. J's transfer time is reduced from 46 times per week to 42 times per week, for a total of 105 minutes per week.
- Mr. J's locomotion time is reduced from 46 times per week to 42 times per week, for a total of 210 minutes per week.

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[181] 7 AAC 125.026(f)(4).

[182] Smith Testimony.

[183] Smith Testimony.

[184] 7 AAC 125.026(f)(5).

[185] Ex. 1 at 19; *see also* Doe Testimony; Smith Testimony.

- Mr. J’s medical access assistance time should be reduced from 2 times per week to 1 time per week, for a total of 7.5 minutes per week.
- Mr. J’s dressing time is reduced from 21 times per week to 14 times per week, for a total of 157.5 minutes per week.
- Mr. J’s feeding time is reduced from 32 times per week to 21 times per week, for a total of 420 minutes per week.
- The frequency of Mr. J’s toileting is established at 43 times per week, for a total of 387 minutes per week.
- PCS time for personal hygiene assistance is removed.
- PCS time for shopping is removed.

Mr. J’s other ADLs, IADLs, and other services remain unchanged. The Division shall recalculate his PCS benefit time consistent with this decision.

Dated: May 30, 2018

Signed
Erin Shine
Special Assistant to the Commissioner
Department of Health and Social Services

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