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

In the Matter of	)	
	)	
B G	)	OAH No. 18-0351-MDS
	)	Agency No.

DECISION

I. Introduction

B G was receiving 21 hours per week of personal care assistance services (PCS). He submitted an amendment to his personal care services plan, seeking to more than double his weekly assistance. On March 1, 2018, the Division denied the requested increases as unjustified. Based on the medical records Mr. G submitted, it also determined that several currently authorized PCS services should be removed. It notified him it was removing PCS authorization for the activities of transfers, locomotion between locations in his home, and all instrumental activities of daily living. This reduced his PCS authorization to 7.75 hours per week.

Mr. G requested a hearing, during which he clarified that he only contested the reduction of his currently authorized time. Based on the evidence in the record and after careful consideration, the Division's decision reducing Mr. G's PCS authorization is affirmed.

II. Overview of the PCS Program

The Medicaid program authorizes PCS for the purpose of providing assistance to a Medicaid recipient whose physical condition results in functional limitations that cause the recipient to be unable to perform, independently or with an assistive device, the activities covered by the program.[1] Covered activities are broken down into activities of daily living (ADLs) and instrumental activities of daily living (IADLs). Among other activities, the ADLs include transfers between surfaces, such as in and out of a chair, and locomotion between locations on the same floor of the recipient's home.[2] The IADLs include light meal preparation, main meal preparation, housework, laundry, and shopping.[3] PCS are furnished by a Personal Care Assistant, usually abbreviated as a "PCA."

The Division determines PCS eligibility and the amount of PCS time authorized for covered activities or services using a methodology set out in the Consumer Assessment Tool or

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1 7 AAC 125.010(b)(1)(A).
2 7 AAC 125.030(b); Exhibit D, p. 16.
3 7 AAC 125.030(c).

"CAT."[4] The list of available services, time allotted for each service (based on severity of need), and maximum daily frequency for each service is described in the *Personal Care Services Service Level Computation* instructions, which are adopted by reference into regulation.[5]

PCS time is not provided for activities that can "be performed by the recipient."[6] Nor is it allowed for "oversight or standby functions."[7] For this reason, a person who needs only monitoring, supervision, or cueing to perform an ADL or IADL will not receive PCS assistance for that activity.[8] In addition, PCS cannot be authorized to assist with IADLs that are the responsibility of a recipient's spouse, parent (if the recipient is a minor), or other individual with a duty to support the recipient under state law.[9]

The numerical coding system for rating an individual's assistance needs for ADLs has two components. The first component is the *self-performance code.* This code rates how capable a person is of performing a particular ADL. The possible codes are: **0** (the person is independent and requires no help or oversight) [10]; **1** (the person requires supervision); **2** (the person requires limited assistance) [11]; **3** (the person requires extensive assistance)[12]; and **4** (the person is totally dependent).[13] There are also codes which are not used in calculating a service level: **5** (the person requires cueing)[14]; and **8** (the activity did not occur during the past seven days).[15]

The second component is the *support code*. This code rates the degree of assistance required 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); and **3** (two-or-more person

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4 *See* 7 AAC 125.020(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900(d)(6).

5 7 AAC 125.024(a); 7 AAC 160.900(d)(29). The instructions are in the record at Exhibit D, pp. 6-7.

6 7 AAC 125.040(a)(4).

7 7 AAC 125.040(a)(10).

8 7 AAC 125.040(a)(9), (10). There is an exception for the ADL of eating, but only if the recipient has documented swallowing or aspiration difficulties. This exception is not relevant here.

9 7 AAC 125.040(a)(14)(A).

10 A self-performance code of 0 is classified as "Independent – No help or oversight – or – Help/oversight provided only 1 or 2 times during the last 7 days." *See* Exhibit D, p. 15.

11 Limited assistance with an ADL is defined 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 last 7 days." *See id.*

12 Extensive assistance is defined as "While person performed part of activity, over last 7-day period, help of following type(s) provided 3 or more times: Weight-bearing support [;] Full staff/caregiver performance during part (but not all) of last 7 days." *See id.*

13 Total dependence is "Full staff/caregiver performance of activity during ENTIRE 7 days." *See id.*

14 Cueing is defined as "Spoken instruction or physical guidance which serves as a signal to do an activity are required 7 days a week. Cueing is typically used when caring for individuals who are cognitively impaired." *See id.*

15 *See id*.

physical assist required). Again, there are additional codes which are not used to arrive at a service level: **5** (cueing support required 7 days a week); and **8** (the activity did not occur during the past seven days).[16]

To receive PCS time for an ADL, an individual must require at least limited assistance from one person to perform the activity (self-performance code 2, support code 2), or a higher degree of assistance.[17]

III. Background Facts

B G is 61 years old. He is 6'2" and weighs 260 pounds.[18] He is married to S G, who holds a power of attorney to act on his behalf.[19] Mr. and Ms. G live in City A. Mr. G's medical diagnoses include lumbar disc herniation with radiculopathy, low back pain, left hip bursitis, hypertension, and arthritis.[20] He has a history of chronic pain in his back and left hip.[21] His family reports that he experiences mild dementia. However, a March 6, 2018 neuropsychological evaluation concluded that he experiences mild cognitive impairment because of depression, chronic pain, and hearing loss, rather than dementia.[22]

Mr. G was receiving 21 hours of PCS per week based on a 2014 assessment, as modified by subsequent amendments or fair hearing/mediation outcomes.[23] The prior authorization included PCS assistance with the ADLs of transfers (non-mechanical) and locomotion between locations on the same level of Mr. G's home. It also authorized assistance for all IADLs: light and main meal preparation, light housework, shopping, and laundry (in-home).[24]

On December 13, 2017, Mr. G underwent a surgical procedure known as a "L4-L5 micro discectomy and decompression, with a repeat left L5-S1 micro discectomy and decompression."[25] The procedure was designed to relieve Mr. G's back and left leg pain.[26] A pre-operative visit anticipated a hospital stay after the procedure because of Mr. G's history of

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16 *See id.*
17 *See* Exhibit D, pp. 6-7.
18 Exhibit 1, p. 22.
19 Exhibit 1, pp. 1-5.
20 Div. 5/11/18 submission, pp. 4-7, 15 of 46. Mr. G apparently receives Social Security disability benefits for an injury he sustained while in the military. Exhibit 1, pp. 8-14.
21 Exhibit 1; Div. 5/11/18 submission.
22 Exhibit 1, pp. 8-14.
23 Exhibit D, pp. 1-10.
24 Exhibit D, p. 3.
25 *Id*. at pp. 8, 10; Fromm testimony; S G testimony.
26 Exhibit 1; Div. 5/11/18 submission, pp. 12-16, 19 of 46.

deep vein thrombosis.[27] Consistent with this plan, Mr. G spent two nights in the hospital after the surgery for pain control, observation, and therapy.[28] He was discharged on December 15, 2017.[29]

On February 13, 2018, Ms. G submitted an amendment to her husband's PCS plan.[30] The amendment requested authorization for approximately 51 hours of weekly assistance, based on asserted needs for assistance with bed mobility, transfers, locomotion, dressing, eating, toileting, bathing, personal hygiene, light meal preparation, laundry and shopping.[31] Except for the activities of dressing and bathing, all of the requests involved increases from the prior service plan.[32]

The Division reviewed the request along with medical records related to Mr. G's December surgery and follow-up medical appointments. It took particular note of a January 26, 2018, post-operative appointment, in which Mr. G's doctor wrote that Mr. G "can get up and walk around the examination room under his own power, but he is a little bit stiff and sore."[33] At that appointment, which was only two and a half weeks before the amendment request, Mr. G also reported that he was not having the severe leg pain he experienced before the surgery, his leg was no longer giving way, and he wanted to begin physical therapy.[34]

The Division determined there is no basis for increasing PCS time for any activities, and Mr. G requires less assistance than is currently authorized. It also determined that his spouse lives in the home, which affects his eligibility for IADL assistance. On March 1, 2018, it notified him it was denying all requested increases and eliminating the current PCS authorization for transfers (non-mechanical), locomotion (between location), and all IADLs.[35] This resulted in authorization of 7.75 hours of assistance per week.

Mr. G requested a hearing, which took place by telephone on May 11, 2018. It was audio-recorded. Mr. G was represented by his wife and power of attorney, S G. Ms. G testified on Mr. G's behalf. Mr. G also testified briefly. Victoria Cobo represented the Division of

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27 *See* Div. 5/11/18 submission. at pp. 16, 20; Exhibit 1, p. 25.
28 *Id.* at p. 14 of 46.
29 *Id.* at p. 32.
30 S G testimony; Div. 5/11/18 submission, p. 1 of 46.
31 Div. 5/11/18 submission to record, pp. 1-2.
32 *Id.*; Exhibit D; Div. hearing representative clarification.
33 *See* Exhibit 1, p. 20.
34 *Id.*
35 Exhibit D, pp. 1-8.

Senior and Disabilities Services. Jerry Fromm, a registered nurse and health program manager for the Division, testified for the Division. Rae Norton, a Division assessor who performed a new assessment of Mr. G's condition in May 2018, also testified. The record remained open after the hearing, so both parties could submit additional documentation. All submitted documents were admitted to the record, which closed on May 18, 2018.

IV. Discussion

When a recipient seeks to increase PCS time or add services that were not previously provided, the recipient bears the burden of proof to show a change that justifies the additional time.[36] When the Division reduces a recipient's PCS time, it must show that the recipient has experienced a change that alters his or her need for physical assistance with relevant ADLs, IADLs or other covered services.[37] The Division also may reduce or terminate PCS authorization if it determines that the recipient, the recipient's representative, the representative's designee, or the recipient's PCS agency have misrepresented the recipient's physical condition or needs for assistance, for the purpose of obtaining services for which the recipient does not qualify.[38] The standard is preponderance of the evidence.[39] In general, the relevant timeframe for assessing the state of the facts is the date of the agency's decision under review.[40]

A. Mr. G does not contest the denial of any requested increases in PCS time.

During the hearing, the Division expressed dismay at the significant increases Mr. G had requested to his personal care services plan, which it concluded were clearly not justified by his medical records or other information.[41] It expressed concern that the request was made in an effort to obtain assistance for which Mr. G does not qualify.

Ms. G responded that she did not know the amendment sought significant increases. She blamed the PCS agency for requesting them, though her signature appears on the amendment form as her husband's legal representative, and it acknowledges the accuracy of the information

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36 7 AAC 125.026(b).

37 7 AAC 125.026(a), (c). However, for recipients eligible to receive Medicaid Home and Community-based Waiver services, the Division may not reduce PCS authorization if the reduction would create a risk of institutionalization. 7 AAC 125.026(f). Mr. G is not eligible for Waiver services, so this provision does not apply. Regardless, there has been no showing that he is at any risk of institutionalization.

38 7 AAC 125.026(e).

39 7 AAC 49.135. Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

40 *See* 7 AAC 49.170; *In re T.C.,* OAH No. 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013), available online at http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf.

41 Exhibit pp. 1-8; Fromm testimony.

provided.[42] Ms. G did not defend the requested increases, but instead clarified that her husband does not challenge their denial. His appeal focuses only on the reductions to his previously authorized PCS time.

B. The Division correctly eliminated Mr. G's PCS authorization for all IADLs.

In 2014, the Division authorized six months of PCS assistance with Mr. G's IADLs because S G had undergone recent surgery and could not perform them while she recuperated. With Ms. G's consent, it removed the authorization in April 2015.[43] In January 2016, the Division granted a new request to authorize PCS time for all IADLs, because Ms. G was leaving the state to care for an ill family member.[44] The authorization should have terminated upon her return home. That never happened, because Ms. G failed to notify the Division when she came back.[45] It is not clear from the record precisely when Ms. G returned home, but it is highly likely that Mr. G has received PCS assistance to which he was not entitled for more than one year, and potentially more than two years.

Alaska law is clear that PCS is not permitted for any IADLs when a Medicaid recipient lives with his or her spouse, since the spouse is deemed responsible for managing those tasks.[46] Ms. G testified that she in fact has been performing all of her husband's IADLs for some time, since he is incapable of providing much help with them. This strongly supports the conclusion that she can manage main and light meal preparation, light housework, shopping, and laundry on her husband's behalf.

Ms. G asserted that she has her own medical problems that make it difficult for her to perform IADL tasks. She argued that her declining health justifies retaining Mr. G's authorization for each IADL. However, she did not specify which tasks were a problem, nor did she provide medical documentation showing her own limitations. She submitted a letter from Dr. Steven Johnson, M.D., dated four days before the fair hearing in this case. Dr. Johnson wrote:

> I saw S G in the office today, she has been a chronic pain patient of mine since at least 2010. Due to her lengthy list of diagnoses which cause limitation of daily activities, my patient is unable to care properly for her

[42] Division submission 5/11/18, pp. 1-2 of 46.
[43] Fromm testimony.
[44] *Id.*
[45] *Id.*
[46] 7 AAC 125.040(a)(14)(A).

> disabled husband. It is in the best interest of all parties involved that Mrs. G receive assistance in caring for her husband.[47]

These general statements are insufficient. Ms. G acknowledged that she has been performing all the IADLs, even recently. If Ms. G believes her physical condition is such that she cannot manage these tasks without assistance, she can work with the Division and submit medical records documenting her limitations. She and the Division then can discuss whether the appropriate response is to amend Mr. G's PCS authorization or to perform an assessment of Ms. G's condition, so the Division can determine whether she qualifies for PCS on her own behalf. The Division has met its burden on this issue.

C. The Division correctly eliminated Mr. G's PCS authorization for the ADLs of transfers and locomotion (between locations).

The Division bears the burden to show it correctly eliminated Mr. G's PCS authorization for transfers and locomotion. It can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs.[48] This includes sources such as written reports of firsthand medical evaluations of a patient's condition.

Transfers are defined as how a "person moves between surfaces," such as from a sitting to a standing position.[49] Mr. G was previously provided extensive assistance from one person (self-performance code 3, support code 2) for transfers 56 times weekly.[50]

Locomotion is the act of moving between locations on the same floor of the recipient's home.[51] It may involve the use of an assistive device such as a cane, walker, or a wheelchair. In 2014, Mr. G was found to require limited assistance from one person (self-performance code 2, support code 2) for locomotion 28 times weekly.[52] Even during Mr. G's 2014 assessment, however, the assessor observed him walking within his home using his cane but without any other assistance.[53] Medical records from February, June, and November 2015 also document that he walked independently, though he reported leg weakness and ongoing left leg pain.[54]

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47 Exhibit 1, p. 5.
48 2 AAC 64.290(a)(1).
49 *See* Exhibit D, p. 15.
50 Exhibit D, p. 2.
51 *See* Exhibit D, p. 16.
52 Exhibit D, pp. 9, 16.
53 *Id.* at p. 16.
54 Exhibit 1, p. 30 ("He occasionally has to ambulate with the assistance of a cane."); Exhibit 1, p. 34 ("Arrives ambulating with a cane."); Exhibit 1, p. 39 (ambulating with a cane).

Mr. G's medical records from November 2017 through April 2018 document his condition before and after his micro discectomy and decompression surgery. In November 2017, before the surgery, he demonstrated some ability to walk without assistance, though he complained of significant pain. His records note an antalgic gait; however, he was able to walk on his heels and toes for a short distance.[55]

After the surgery, on January 26, 2018, he saw his doctor for a post-operative appointment. The records from that visit state, in part:

> Patient notes that he is doing okay at this point. Still having a little bit of soreness and stiffness, but he is not having the severe left leg pain that he has had before. His leg is no longer giving away. . . . He would like to try some physical therapy.
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> * * * *
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> . . . . This is a well-developed, well-nourished 61-year-old gentleman, in no acute distress. He can get up and walk around the examination room under his own power, but he is a little bit stiff and sore. Manual strength testing in lower extremities is 5/5. . . .[56]

At his February 28, 2018 post-op appointment, Mr. G sat comfortably in a chair.[57] His provider noted that he "has been using a cane to help with ambulation."[58] Mr. G indicated he was working hard and doing well at physical therapy, though he also reported ongoing left hip pain and some weakness.[59]

On March 23, 2018, Mr. G indicated he may have done too much during a recent physical therapy session, since he was sore and in pain afterwards. His doctor noted "some return of his left leg pain" and "some weakness" in his left leg, though less than Mr. G had experienced before the surgery.[60] As with the other post-op appointments, it appears that Mr. G ambulated to and from the appointment on his own, and he transferred in and out of chairs independently. There is no suggestion that he required any physical assistance to do so.

Ms. G testified that her husband has good days and bad days. On good days, including when he is managing his pain with oxycodone, she agreed he can transfer and move from place to place without any assistance. On bad days, which she said happen three or more times per week, he has trouble getting up from his bed and low chairs. When that happens, her grandson

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55 Exhibit 1, p. 25-26.
56 Exhibit 1, p. 20.
57 Exhibit 1, p. 18.
58 *Id.*
59 Exhibit 1, p. 15, 17.
60 Exhibit 1, p. 15.

helps pull him from a sitting to a standing position. Ms. G cannot help because she has been experiencing problems with her left arm. On bad days, she asserted he also requires physical assistance to walk within his home, particularly when he is going upstairs to shower or downstairs afterwards, because he is unsteady and at risk of falling. Ms. G noted two falls in the last two weeks.[61]

The ADL of locomotion (between locations) does not include use of stairs, so any need for assistance going up or down stairs does not control the scoring for the activity at issue. The evidence in the record does show that Mr. G walks with an unsteady gait and he has some history of falling. Because of this, he may at times require supervision as he ambulates, and he may require occasional hands-on assistance when he is going up or down stairs. Thus, despite ongoing episodes of chronic pain, the weight of the evidence is that Mr. G can ambulate using his cane either independently or with supervision only when he moves from place to place on the same floor of his home.

The weight of the evidence also shows that he can transfer in and out of chairs on his own, though he may require supervision on bad days. Despite his chronic pain, Mr. G's medical records show he is a strong man with good upper and lower body strength. He uses this strength to push himself up when standing, pull himself up when a grab bar is available, and to ease himself from a standing to a sitting position.[62]

These conclusions are consistent with Ms. G's statements regarding many of her husband's abilities, including the fact that Mr. G still drives a car and takes short trips on his own. Ms. G emphasized that he only drives limited distances to a nearby business because of her concerns about his memory. This kind of independence strongly suggests an ability to get in and out of the driver's seat without assistance and to walk at least short distances independently.

While discussing her husband's abilities, Ms. G stated that his physical condition has deteriorated rather than improved. However, even accepting this as true, it does not show that Mr. G required regular hands-on assistance to transfer or move within his home in February or March 2018. Rae Norton conducted a new assessment of Mr. G's condition and functional

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[61] S G testimony. Mr. G sleeps on the main floor of the house, where the kitchen, living room, and a half-bath are located. He goes upstairs to shower.

[62] *See* Exhibit 1, p. 6 (he is "a big strong guy"); p. 18 ("good quad tone, able to do a straight leg raise"); p. 26 ("He has 5/5 strength throughout the bilateral upper and lower extremities" with two exceptions relating to his lower left leg). *See also* Div. submission 5/18/18 (May 2018 CAT, p. 6 – noting good bilateral hand grip and strength).

abilities on May 3, 2018. At that time, she noted Mr. G's strong bilateral grip, ability to move, bend, use his arms and hands, and to stand up from a seated position with his hands crossed on his chest.[63] She concluded that he can stand up independently by pushing on his cane or other support, such as a grab bar or similar device. In addition to watching Mr. G stand up on his own, Ms. Norton observed him walk from his living room to the bathroom, where he sat on a closed toilet seat and stood back up using a nearby support and his cane.[64] She watched him walk up half a staircase to a landing, alone, then come back down using his cane and the railing for support.[65] Thus, even accepting Ms. G's testimony that her husband's overall condition has deteriorated, the May 2018 information supports the conclusion that he could both transfer and ambulate in his home without physical assistance as of February and March 2018.

In general, Ms. G was not a reliable witness. Her testimony was sometimes exaggerated and sometimes contradicted by other evidence.[66] She often failed to provide detailed descriptions of the assistance Mr. G requires (if any) for each ADL or IADL at issue, instead focusing on the outcome she desired, Mr. G's medical history, or Ms. G's own health needs. Her claim that Mr. G regularly requires physical assistance to transfer or to move within his home is therefore given less weight than other evidence in the record.

The Division has met its burden to show a change in Mr. G's ability to transfer and to ambulate on the same level of his home since it last authorized PCS assistance for these activities. More likely than not, Mr. G no longer requires regular hands-on physical assistance for either ADL. Accordingly, the Division correctly eliminated PCS authorization for each activity.

V. Conclusion

The Division has met its burden of proof on all issues presented. For the reasons discussed above, it correctly terminated Mr. G's PCS authorization for all IADLs and for the

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63 Division submission 5/18/18 (May 2018 CAT, p. 6).

64 Division submission 5/18/18 (May 2018 CAT); Norton testimony.

65 Division submission 5/18/18 (May 2018 CAT, pp. 7, 10); Norton testimony.

66 For instance, she asserted that Mr. G was in the hospital for five days after his December surgery; the medical records show he stayed two nights. Div. 5/18/18 submission, p. 32 of 46. She first asserted that her husband doesn't drive, then conceded he does, but only for short distances. She also claimed no knowledge or understanding of the PCS amendment that bore her signature. Her responsibility for PCS time for IADLs between 2016-2018 was not explored in detail during the hearing, but it too raises credibility questions.

ADLs of transfers and locomotion (between locations). Its decision is affirmed.

DATED: May 24, 2018.

Signed
Kathryn Swiderski
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision under the authority of AS 44.64.060(e)(1) as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 14th day of June, 2018.

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

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