

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

In the Matter of)	
)	
N J L)	OAH No. 21-0523-MDS
_____)	Agency No.

DECISION

I. Introduction

N J L is a Medicaid recipient. On March 2, 2021, she submitted an amendment to her plan of care seeking the addition of 7 hours a week in Chore services to assist with meal preparation and laundry. The Division of Senior and Disability Services (SDS or Division) denied her request on April 7, 2021, after concluding the requested Chore Services would be duplicative of support she received through Personal Care Services. Ms. L appealed.

The telephonic hearing took place May 14, 2021. Evidence at the hearing established that although Ms. L resides in a home where two other Medicaid recipients reside, the Chore Services requested by her would not duplicate services provided by another program and are necessary to maintain a clean, sanitary, and safe environment.

Accordingly, the decision by the Division is REVERSED.

II. Facts¹

N J. L is an 88-year-old woman living in a private home. She had a stroke in her early 30s which caused partial paralysis to her left side which has worsened over time. She receives Personal Care Services (PCS).² Prior to 2019 Ms. L received PCS calculated on her individual needs while she lived independently. She received 28.00 hours of PCS per week.³

¹ These facts were established by preponderance of the evidence at the hearing.
² 7 AAC 125.010. The Department of Health and Social Services is authorized to provide eligible persons with personal care services in the recipient’s home. AS 40.07.030(b). The Division provides compensation for personal care services in the form of physical assistance, based on an assessment of the recipient’s ability to perform specified activities of daily living (ADL), instrumental activities of daily living (IADL), and certain other specific activities. *See, 7 AAC 125.010,-020,-.030.* The assessment is conducted using the Consumer Assessment Tool (CAT), a form created by the Department of Health and Social Services to evaluate an individual’s ability to care for himself or herself. 7 AAC 125.020(b); 7 AAC 160.900(d)(6). Individuals are given two scores reflecting their ability to perform these activities, one for their ability to perform the activity (self-performance), and the other for the degree of assistance they require (support). The Division issues a determination providing a specified amount of time for PCS assistance with each activity, depending on the scores provided and the frequency with which the activity occurs, in accordance with the CAT computation. 7 AAC 125.024(a)(1); 7 AAC 160.900(d)(29).
³ Ex. F, pp. 2-3.

In early 2019 Ms. L moved in with K Z and his family at their private residence. K Z and N L are not biologically related. Two other Medicaid recipients live in the home. One is K Z's mother, the other is another older Korean woman. At first, N L was an active part of the communal household. She ate communal meals and went on outings to church and the senior center.⁴

In March 2019 Ms. L was hospitalized after a fall. Her fall was followed by a series of ongoing infections that reduced her overall health. In March 2020, Ms. L was hospitalized again after she broke her ankle. This injury and loss of mobility further reduced Ms. L's physical and mental health. Once the COVID-19 pandemic occurred and she could no longer leave the house, Ms. L experienced additional loss of appetite and interest in her surroundings. According to records and testimony, Ms. L experienced a rapid decline in physical and cognitive functioning from April 2020 to August 2020.⁵

A CAT assessment on August 24, 2020, found Ms. L was no longer ambulatory. Her cognition was such that she rarely appeared to understand others and she rarely appeared able to make herself understood.⁶ After that assessment, the Division nonetheless eliminated Ms. L's PCS hours for shopping, food preparation, laundry, and housekeeping because the Division concluded such services would be duplicative since she was living with other care recipients. Thus, in 2020 Ms. L's PCS award was reduced from 28 hours a week to 16.7 hours.⁷ This is a reduction of 11.30 hours a week.⁸

Ms. L's care coordinator, Y H, evaluated the impact on Ms. L from the 2020 PCS reduction. Ms. H determined that the reduction in PCS placed Ms. L at risk. She submitted a Support Plan Amendment (SPA) effective March 2, 2021. The SPA requested modification of Ms. L's current authorized services due to a change in circumstances relevant to her health, safety, and welfare. The SPA requested addition of 7 hours a week of Chore Services through 7 AAC 127.087 because Ms. L needed more assistance with meal preparation, housework, and laundry than her current PCS could support.⁹

⁴ Exs. E., F., G.; J. Z testimony.

⁵ *Id.*

⁶ Ex. G; J. Z testimony.

⁷ *Id.*

⁸ Notably, the Division also sought to reduce or eliminate PCS services for other residents in the home because they would be duplicative of services provided to Ms. L. See, *In the Matter of C.K.*, OAH 21-0440-MDS (Commissioner of Health and Social Services June 2021).

⁹ *Id.*; Exs. E. and F.

The Division denied that request April 7, 2021. The denial letter stated it was “reasonable to assume that because” Ms. L was sharing her “residence with other recipients and other adults, other adults in the residence [were] responsible for chores in the residence.” In addition, because B Z (K Z’s wife) was her PCS provider, it was “reasonable to conclude that adding Chore services would be a duplication of PCS services as well as regular duties required by other individuals in the residence.”¹⁰ The Division assessor did not visit the home or speak with B Z, K Z, or Ms. H before issuing the denial.

Ms. L appealed.¹¹

The telephonic hearing took place on May 14, 2021. Terri Gagne represented the Division. She called Division employees Health Care Manager I Monica Mills and Lauren Scarmuzzi, Ms. Mills’ supervisor, as witnesses. Ms. Mills testified she reviewed the request. She saw that there were other care recipients in the household. She believed Ms. L was receiving Day Habilitation hours to visit outside the home three days a week.¹² Based on that information she concluded that Ms. L could eat congregate meals and was not entitled to chore service hours for meal preparation. Ms. Mills testified that she interpreted the request for meal preparation assistance as a request to accommodate a personal preference by Ms. L to eat separately. Ms. Mills further concluded there was no reason to believe the overall needs of the household for cleaning and laundry could not be met with the 2020 PCS assessment.¹³

However, because Ms. Mills was new at reviewing Chore Service requests, she consulted her supervisor, Lauren Scarmuzzi, who approved the decision to deny the request for 7 hours of weekly Chore Services.¹⁴ Two factors were important to Ms. Scarmuzzi’s decision. First, she believed Ms. L was “completely continent” and able to feed herself independently. Second, the number of care recipients in the household indicated to her that shopping, meal preparation, laundry, and housekeeping could reasonably be performed within the PCS time already awarded. She testified that PCS for these IADL could be “combined,” that is, the personal care provider could shop for all meals at once, prepare all meals at once, and do all the laundry together.¹⁵

¹⁰ Ex. D.

¹¹ Ex. C.

¹² Ms. Mills did not notice that Day Habilitation hours were no longer listed as services received by Ms. L in the March 2021 SPA.

¹³ Mills testimony.

¹⁴ *Id.*

¹⁵ Scarmuzzi testimony.

The Division did not provide information on how many hours of PCS were provided to other members of the K Lee household or how they were awarded. The Division did provide a portion of Ms. L's 2020 CAT. That CAT assessed her level of assistance as 3/4 (physical assistance provided/totally dependent) for light and main meal preparation, light and routine housework, and laundry in the home.¹⁶ The Division did not supply a copy of the award chart outlining how her current 16.7 hours were awarded or for what ADLs or IADLs they were authorized. It did provide a copy of her January 27, 2014, assessment and PCS award chart.¹⁷ According to the 2014 chart, Ms. L required 157.50 weekly minutes for Light Meal Preparation; 175.00 weekly minutes for Main Meal Preparation; 90 weekly minutes for Light Housework, and 22.50 weekly minutes for Laundry.¹⁸ This is a total of 435.00 weekly minutes for these services or 7.25 hours a week. Thus, the 11.30-hour reduction by the Division in 2020 eliminated a time more than equivalent to the provision of PCS for those IADLs.

K Z represented N L at the hearing. Both Mr. Z and Ms. H testified that Ms. L no longer received Day Habilitation hours to take her from the residence, due to the pandemic and her decreased functioning. They testified that the Division's assumptions about Ms. L's ability to share in congregate meals and locomote within and out of the household were incorrect.¹⁹ They explained that meals for N L were not provided in a congregate setting because she is bedridden. Although shopping and some preparation for her meals can be combined with IADLs for other residents, complete meal preparation and service cannot. Ms. L cannot be held to a rigid eating schedule due to her health. Her meals take place when she is awake regardless of whether that is the same time meals are fed to other residents. In addition, consistent with her religious beliefs, Ms. L is a lifelong vegetarian. It is important that her dietary needs be met.²⁰

K Z also testified that the Division's assumption providing Chore Services for Ms. L's laundry would result in duplication of other services was incorrect. He testified that Ms. L's laundry cannot be combined with wash day for other Medicaid recipients in the home. First, she has her own bedding and clothing. Second, her laundry consists of clothing and bedding soiled by human waste that should be laundered separately for sanitary reasons. Third, her laundry

¹⁶ Ex. G, pp/ 27-28.

¹⁷ Ex. F, pp. 2-3.

¹⁸ *Id.*

¹⁹ J. Z testimony; H testimony.

²⁰ *Id.*

must be performed with much greater frequency. Ms. L must be bathed, and her sheets changed each morning due to her lack of continence and bowel control. She requires similar care at least one other time a day and often twice a day. Thus, laundry for Ms. L takes a significant amount of time over and above that awarded by PCS for the household.²¹

K Z further testified Ms. L has her own living area and bed which must be separately cleaned.

K Z and Y H argued a failure to award time for Chore Services would result in an unclean, unsanitary, and unsafe environment for Ms. L.

Ms. L's August 2020 CAT assessment and 2021 SAP confirmed her physical and cognitive limitations as described by K Z and Y H.²²

III. Discussion

A. *Burden of Proof*

As an applicant for new services, Ms. L bears the burden of proof by a preponderance of the evidence.²³ On appeal, the Division's determination is reviewed in light of all the evidence in the record.²⁴

B. *The Governing Regulation*

The award of chore services is controlled by 7 AAC 127.087. That regulation provides:

(a) The department will pay for chore services that

(1) comply with the department's *Provider Conditions of Participation for Home and Community-Based Waiver Services and Community First Choice Chore Services*, adopted by reference in 7 AAC 160.900.

(2) are approved under 7 AAC 127.039 or 7 AAC 130.217 as part of the recipient's support plan;

(3) receive prior authorization; and

(4) do not exceed 10 hours for each week during the period that a support plan is in effect, up to a maximum of 520 hours for a one-year support plan, except that if more than one recipient lives in the residence where services are to be provided, the department

²¹ J. Z testimony.

²² Exs. E., F., and G.

²³ 2 AAC 64.290(e); *see also*, *Amerada Hess Pipeline v. Alaska Public Utilities Comm'n*, 711 P.2d 1170, n. 14 at 1179 (Alaska 1986)(party seeking a change in the status quo has the burden of proof by a preponderance of the evidence).

²⁴ *See In Re F.M.*, at 3, OAH No. 13-1051-MDS (Commissioner of Health and Social Services 2014).

(A) will limit the number of hours to that necessary to maintain a clean, sanitary, and safe environment for each recipient; and

(B) will base the number of hours allowed on

(i) the degree to which the tasks listed in (b) of this section are necessary for each recipient or benefit all recipients in the residence;

(ii) whether the services would duplicate services received by any recipient under this chapter, 7 AAC 125.010 - 7 AAC 125.199, or 7 AAC 130; and

(iii) the justification for the number of hours provided in each recipient's support plan.

(b) The department will consider the following tasks to be chore services:

(1) routine cleaning within the recipient's residence;

(2) performing heavy household chores, including

(A) washing floors, windows, and walls;

(B) securing loose rugs and tiles;

(C) moving heavy items of furniture;

(D) snow removal sufficient to provide safe access and egress for the recipient;

(E) hauling water for use in the recipient's residence;

(F) disposing of human excreta; and

(G) chopping or collecting firewood, if firewood is used as the primary source of energy for heating, bathing, or cooking in the recipient's residence;

(3) food preparation and shopping;

(4) other tasks that the department determines necessary to maintain a clean, sanitary, and safe environment with respect to the recipient's residence.

(c) The department will either deny or limit the time authorized for chore services if

(1) an individual that lives in the recipient's home is responsible for performing the chores described in (b) of this section, and the individual is a member of the recipient's immediate family, an individual with a duty to support the recipient under state law, or a caregiver for the recipient;

(2) a community or voluntary agency is willing to perform those chores for the recipient;

- (3) a third party is responsible for paying for the performance of those chores for the recipient;
- (4) the recipient's residence is a rental property, and the department determines those services to be the responsibility of the landlord under the lease or applicable law;
- (5) a provider certified under 7 AAC 127.050 to provide chore services designates an individual to provide chore services, and that individual resides in the same residence as the recipient of chore services; or
- (6) the recipient's meals are provided in a congregate setting or delivered to the recipient's residence.

(d) If a recipient is eligible for chore services under this section and eligible for Community First Choice personal care services under this chapter, the recipient must choose to either receive the chore services described in this section or to have similar tasks performed as personal care services.

(e) The department will not pay or may reduce the time for chore services allowed under (a)(4) of this section if

- (1) a recipient's performance of a task is planned as habilitation; or
- (2) a recipient's meals are provided in a congregate setting or delivered to the recipient's residence.

C. Did Ms. L Establish That an Award of Chore Services Was Appropriate?

The Medicaid program has a number of coverage categories.²⁵ One of those coverage categories is the Home and Community Based Waiver program (Waiver).²⁶ Waiver recipients are able to receive services from one or more programs, but each specific service must be justified in the Waiver recipient's plan of care.

Chore Services are among the specific services available to Waiver recipients. Chore Services include routine cleaning within the recipient's residence, heavy household chores, food preparation and shopping, and other tasks "that the department determines necessary to maintain a clean, sanitary, and safe environment with respect to the recipient's residence."²⁷ Some Chore Services provided under the Medicaid Choice Waiver program are also covered under the separate PCS program as IADLs, specifically, light housekeeping, shopping, and meal preparation.²⁸ Chore Services will be denied if another person in the home is legally responsible

²⁵ See, 7 AAC 100.002.

²⁶ 7 AAC 100.002(d)(8).

²⁷ 7 AAC 127.087(a)(4)(A).

²⁸ See, 7 AAC 125.030(c).

for performing the chore²⁹ or the services would be duplicative of those provided under another program.³⁰ Thus, a care recipient who receives Chore Services may not also receive PCS for the same activity. Duplication of services may not occur.³¹

The Division's conclusion duplication of meal preparation would occur rested on its assumption Ms. L did not have needs for meal preparation separate from the household and she was participating in congregate meals. Participation in congregate meals is a separate basis for denial.³² The Division concluded duplication of laundry services and housework would occur because it assumed laundry and housecleaning for all three care recipients living at the K Z ALF could be combined or were chores performed by "other adults."³³ Those were not reasonable assumptions in this case.

Light meal preparation is the preparation of "breakfast and light meals;" main meal preparation is the preparation of a "main meal."³⁴ The regulations provide that meal preparation, for both light and main meals includes not only the actual preparation of the meal but also its "service, and cleanup."³⁵ Ms. L has been assessed as totally dependent for her light and meal preparation since at least 2014.³⁶ The need to serve her separately due to her bedridden condition and dietary and nutritional requirements demonstrated that duplication of services will not occur if she is provided Chore Services under 7 AAC 127.087(b)(3). The evidence did not support a conclusion that Chore Services would be duplicative of other program assistance provided to Ms. L. She does not have an award of PCS for these IADL, and she is not covered by services rendered to other household members. The evidence established that it is more likely than not that Chore Services for meal preparation are appropriate.³⁷

PCS for housework includes cleaning a recipient's living space, cleaning a recipient's bathroom, and making the recipient's bed.³⁸ Light housework consists of doing housework such

²⁹ 7 AAC 127.087(c)(1).

³⁰ 7 AAC 127.087(d).

³¹ 7 AAC 127.087(a)(4)(B)(ii).

³² 7 AAC 127.087(c)(6).

³³ Mills testimony; Scarmuzzi testimony.

³⁴ Ex. D, p. 37.

³⁵ 7 AAC 125.030(c)(1) and (2).

³⁶ Ex. F.

³⁷ Shopping can be combined. Chore Services are not appropriate for shopping. Some overlap in prep cooking can also occur, but primary meal preparation for Ms. L occurs separately from the other ALF residents.

³⁸ 7 AAC 125.030(c)(3).

as “dishes, dusting ...[and] making own bed.”³⁹ Routine housework consists of tasks such as “vacuuming, cleaning floor, trash removal, cleaning bathroom.”⁴⁰ In her 2020 CAT Ms. L was found to be completely dependent on others for these tasks. Regardless, the Division eliminated PCS for these tasks in their entirety because another household member was purportedly receiving IADL assistance with them.⁴¹ The 2020 CAT assessment confirmed that Ms. L remained completely dependent on others to perform these tasks and that she had her own living space and bed which required attendance to remain clean, sanitary and safe. Based on these facts, the Division erred when it concluded Chore services for housework would be duplicative.

By regulation PCS for laundry is allowed for “(A) changing a recipient’s bed linens; or (B) laundering a recipient’s linens and clothing.”⁴² Two loads of laundry are allowed in the event of bladder or bowel incontinence.⁴³ Ms. L does not currently receive PCS for this IADL. A recipient’s clothing and linens easily comprise at least one load of laundry and providing laundry services to Ms. L would not be a duplication of services. She has her own unshared linens. She also, obviously, has her own clothing. Ms. L has been assessed as totally dependent on others to perform her laundry since at least 2014.⁴⁴ The fact that she is bedridden and incontinent significantly increases the demands on her caregivers. Mr. Z credibly testified that it would be unsanitary to combine washing Ms. L’s clothing and bedding with other care recipients’ laundry and it would be unsanitary to refrain from washing Ms. L’s laundry until it could pile up into larger loads. The evidence established that it is more likely than not that Chore Services for laundry are appropriate to maintain a clean, sanitary, and safe environment and would not be duplicative.

IV. Conclusion

Evidence from the 2020 CAT and testimony of witnesses demonstrated Ms. L’s medical condition and functioning had decreased since 2014. Nonetheless, the Division eliminated N L’s PCS for the IADLs of meal preparation, housework, and laundry. Ms. L thereafter requested Chore Services to insure she lived in a clean, sanitary, and safe environment. The Division denied that request because it assumed other household members were receiving IADL

³⁹ Ex. D, p. 37.

⁴⁰ Ex. D, p. 37.

⁴¹ Ex. D, pp. 1-3; Mills testimony; Scarmuzzi testimony. . 3.

⁴² 7 AAC 125.030(c)(4).

⁴³ Ex. D, p. 7.

⁴⁴ *Id.*

assistance with those tasks and her needs would be covered through those services. Under the circumstances presented,⁴⁵ the fact that another person in the home receives PCS for meal preparation, housework, or laundry does not establish duplication of services needed by N L.

Ms. L met her burden of proof by a preponderance of evidence that the Division erred when it denied her request for Chore services.

Accordingly, the April 7, 2021 decision denying 7 hours a week of Chore services is reversed.

Dated: July 29, 2021

Signed
Carmen E. Clark
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 13th day of August, 2021.

By: Signed
Name: Carmen Clark
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.]

⁴⁵ Care recipients in the K Z ALF included two ambulatory residents and one bedridden one. There were two non-vegetarian residents and one vegetarian resident. There were two continent residents and one incontinent resident. These circumstances create a very different workload than assumed by the Division in its denial.