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

In the Matter of	)	
	)	
E N	)	OAH No. 19-0107-MDS
	)	Agency No.

DECISION

I. Introduction

E N is a 58-year old man who applied for Medicaid personal care services (PCS). After reviewing Mr. N's medical records and conducting an assessment of his functional abilities, the Division of Senior and Disabilities Services (Division) denied his application. Mr. N appealed. Based on the totality of the evidence, this decision concludes that Mr. N requires at least some hands-on physical assistance with routine housework, laundry, main meal preparation, dressing and locomotion to access medical appointments, as well as medical escort. The Division's decision is therefore reversed as to those activities, and Mr. N is to be provided PCS as discussed below.

II. Facts

A. The Personal Care Service Determination Process

The Medicaid program authorizes Personal Care Services for the purpose of providing assistance to a Medicaid recipient who has functional limitations resulting from his/her physical condition that "cause the recipient to be unable to perform, independently, or with an assistive device, the activities specified in 7 AAC 125.030."[1] Those activities are broken down into "activities of daily living" (ADLs) -- bed mobility, transfers, locomotion, dressing, eating, toileting, personal hygiene, and bathing[2] -- and "instrumental activities of daily living" (IADLs) -- light meal preparation, main meal preparation, housework, laundry, and shopping.[3] In addition, PCS are provided for medication assistance, maintaining respiratory equipment, dressing changes, and wound care, medical escort, and passive range-of-motion exercises.[4]

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[1] 7 AAC 125.010(b)(1)(A)(iii). PCS are furnished by a Personal Care Assistant, usually abbreviated as "PCA."

[2] 7 AAC 125.030(b).

[3] 7 AAC 125.030(c).

[4] 7 AAC 125.030(d). The regulation contains specific conditions that a recipient must satisfy to receive these specialized services.

Personal Care Services are not provided for activities that can "be performed by the recipient,"[5] nor are they allowed for "oversight and standby functions."[6]

The Division assesses recipients by using the Consumer Assessment Tool, or "CAT", as a methodology to score both eligibility for the PCS program and the amount of assistance needed for covered activities and services.[7] The list of available services, time allotted for each service (based upon the severity of need), and the allowable frequency for each service, is set out in the *Personal Care Services: Service Level Computation* instructions, which are adopted by reference into regulation.[8]

1. Calculation of ADL self-performance and support codes

The ADLs measured by the CAT are bed mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room), locomotion (between levels), locomotion (to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, personal hygiene-shampooing, and bathing.[9] The CAT numerical coding system for ADLs has two components.

The first component is the *self-performance code* which rate an individual's capacity for performing a particular ADL. The possible codes are:

0 the person is independent and requires no help or oversight or help/oversight provided only 1 or 2 times during the last 7 days;
1 the person requires supervision;
2 the person requires limited assistance;
3 the person requires extensive assistance;
4 the person is totally dependent;
5 the person requires cueing;
8 the activity did not occur during the past seven days.

The second component of the CAT scoring system is the *support code*, which refers to the degree of assistance that a person requires for a particular ADL. The possible codes are:

0 no setup or physical help required;
1 only setup help required;
2 one-person physical assist required;
3 two or more-person physical assist required;

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[5] 7 AAC 125.040(a)(4).
[6] 7 AAC 125.040(a)(10).
[7] *See* 7 AAC 125.020(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900(d)(6).
[8] 7 AAC 125.024(a); 7 AAC 160.900(d)(29). *See also, Personal Care Services: Service Level Computation*, State of Alaska Department of Health and Human Services Senior and Disabilities Services, PCS Service Computation, *available at* http://dhss.alaska.gov/dsds/Documents/regulationMaterials/PCS_SLA_Computation_Chart_6-2-2017.pdf.
[9] All ADL coding explanations and definitions are listed in Ex. D, p. 12.

5 cueing required;
8 the activity did not occur during the past seven days.

2. *Calculation of IADL self-performance and support codes*

The IADLs measured by the CAT are light meal preparation, main meal preparation, light housekeeping, laundry (in-home), laundry (out-of-home), and shopping.[10] The CAT codes IADLs slightly differently than it does ADLs. The *self-performance codes for IADLs* are:

0 independent either with or without assistive devices - no help provided;
1 independent with difficulty; the person performed the task, but did so with difficulty or took a great amount of time to do it);
2 assistance / done with help - the person was somewhat involved in the activity, but help in the form of supervision, reminders, or physical assistance was provided;
3 dependent / done by others - the person is not involved at all with the activity and the activity is fully performed by another person;
8 the activity did not occur.

The *support codes* for IADLs are also slightly different than the support codes for ADLs. The support codes for IADLs are:

0 no support provided;
1 supervision/cueing provided;
2 set-up help;
3 physical assistance provided;
4 total dependence - the person was not involved at all when the activity was performed;
8 the activity did not occur.

There are several routes to qualify for PCS. Of relevance here, a person qualifies if he or she is coded as requiring some degree of hands-on assistance (self-performance code of 1, 2, or 3, and a support code of 3 or 4) with any one of the IADLs.[11] Once eligibility is established, time for additional ADLs and IADLs, as well as certain other covered services, will be added to the authorization where physical assistance is required. The codes assigned to a particular ADL or IADL determine how much PCS time a person receives for each occurrence of a particular activity. For instance, if a person is coded as requiring extensive assistance (code of 3) with

[10] All IADL coding explanations and definitions are listed in Ex. D, p. 23.

[11] 7 AAC 125.020(c)(1)(C). A person also qualifies by being coded as requiring a limited or greater degree of physical assistance (self-performance code of 2, 3, or 4, and a support code of 2, 3, or 4) in any one of the ADLs of transfers, locomotion, eating, toilet use, dressing or bathing. 7 AAC 125.020(c)(1)(A). Also, despite the general rule that mere monitoring/supervision/ cueing for an ADL or IADL will not confer eligibility for PCS, a medically documented need for supervision while eating confers eligibility. 7 AAC 125.020(c)(1)(B).

bathing, he or she would receive 22.5 minutes of PCA service time every day he or she is bathed.[12]

B. Background facts

Mr. N is a 58-year-old man who shares a third-floor walk-up apartment in City A with a roommate.[13] He receives SSDI due to neck and back injuries sustained in a car accident in 2007.[14] The accident also injured both of Mr. N's knees and his left hand.[15] Mr. N had lower spinal surgery in 2017 and has since developed bilateral numbness and pain in his back and lower extremities.[16] He has bilateral knee pain and tingling and numbness in his toes and feet, which has affected his ability to walk and navigate stairs.[17] He is having increasing difficulty gripping and twisting things, with pain centered over the dorsal aspect of his left wrist.[18]

In addition to his orthopedic concerns, Mr. N has a primary diagnosis of mild congestive heart failure, with a pacemaker placed in 2016, and has secondary diagnoses that include GERD, chronic allergies, and sleep apnea.[19] Additionally, in his 20s he had radiation of the spine for lymphoma and had a testicle removed.[20]

Division Assessor Eric Talbert assessed Mr. N for the PCS program on November 16, 2018.[21] The assessment consisted of Mr. Talbert interviewing and observing Mr. N as he performed various tasks.[22] A G, a representative from Business A Care Services (a PCA agency), was also was present.

Based on his visual observations, functional testing, and statements made by Mr. N, Mr. Talbert determined that Mr. N had no cognitive limitations or problem behaviors. He found that Mr. N had a strong grip in both hands, could touch his hands over his head and behind his back, and he could stand up without using his hands, but could not touch his feet from a sitting

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12 7 AAC 125.024(a); 7 AAC 160.900(d)(29). *Personal Care Services: Service Level Computation*, State of Alaska Department of Health and Human Services Senior and Disabilities Services, PCS Service Computation, *available at* http://dhss.alaska.gov/dsds/Documents/regulationMaterials/PCS_SLA_Computation_Chart_6-2-2017.pdf.

13 Ex. D, p. 8; N testimony.

14 Ex. D, p. 9, *see also* Ex. F, p. 9.

15 Ex. D, p. 9.

16 Ex. G, p. 1, p. 5.

17 Ex. 1, p. 26, *see also* Ex. F, pp. 5, 9.

18 Ex. F, page 9.

19 Ex. G, pp. 1-2, 5; Ex. H, p. 1.

20 Ex. 1, p. 11.

21 Ex. D.

22 Ex. D, pp. 8-39; Talbert testimony.

position. Mr. Talbert observed Mr. N walk around his apartment without using an assistive device, and he saw him stand up from a laying position on the floor without assistance.

Mr. Talbert concluded that Mr. N could independently perform all ADLs, and he required no setup or physical help. He further concluded that Mr. N requires no support for light meal preparation and light housework, and requires only supervision or cueing and setup help with main meal preparation, routine housework, grocery shopping, and out-of-home laundry.

C. Procedural History

On January 7, 2019, the Division sent Mr. N a notice denying his application for PCS assistance. Mr. N requested a hearing. The hearing was postponed several times as the parties attempted mediation, and later because Mr. N was having difficulty receiving his mail and coordinating with Mr. G to attend the hearing. After multiple reschedules, the hearing took place telephonically on April 24, 2019.[23]

At the hearing, Mr. N represented himself with the assistance of Mr. G; both men also testified. Fair Hearing Representative Terri Gagne represented the Division. Mr. Talbert, the Division assessor, testified for the Division. The record remained open after the hearing so Mr. N could submit additional medical records from Medicaid providers concerning the extreme functional limitations he described in his testimony.

On May 7, 2019, Mr. N's Business A case manager submitted three sets of medical records:

- A September 22, 2017 cervical spine MRI report documenting multi-level cervical spondylosis and neuroforaminal narrowing that ranges in spots from mild to severe;
- A November 9, 2017 lumbar spine MRI report documenting two small disc bulges, some neuroforaminal narrowing, and mild multilevel facet arthrosis; and
- A November 20, 2017 Neurology Consultation Report from Alaska Neurology Center, diagnosing axonal neuropathy causing numbness in his toes and bilateral L5 radiculopathy causing numbness and pain in his lower extremities.[24]

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[23] At the time of the hearing, the case was assigned to Administrative Law Judge (ALJ) Cheryl Mandala. However, due to an emergency on the date of the hearing, the hearing was instead conducted by the undersigned, who had, until shortly before the hearing, been the assigned judge.

[24] The medical records submitted by Mr. N on March 28, 2019 as "N Client Exhibits" are referred to herein as Exhibit 1. The C-Spine MRI report is referred to herein as Exhibit 2, the Lumbar MRI report is referred to as Exhibit 3; and the Neurology Report is referred to as Exhibit 4.

The Division was given an opportunity to respond, and it subsequently submitted a letter objecting to the award of any PCS hours, along with the following documents regarding Mr. N's medical care:

- Two hundred twenty-four pages of 2017-2019 medical records from the Alaska Heart Institute;[25]
- Seventy-seven pages of 2015-2017 medical records from Apex Neurosurgery, LLC;[26]
- Thirty-two pages of 2018 medical records from Orthopedic Physicians of Alaska;[27]
- Thirty-two pages of 2017-2018 medical records from the Alaska Spine Institute;[28]
- Eight pages of 2018-2019 medical records from the Alaska Ear Nose and Throat;[29] and
- Forty-five pages of 2017-2018 medical records from Providence Alaska Medical Health Center.[30]

All documents submitted by either party were admitted to the record, which closed on May 15, 2019.

III. Discussion

As an applicant for new services, Mr. N bears the burden of proving that he qualifies for PCS assistance. The standard is preponderance of the evidence.[31] He can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs.[32] This may include sources such as written reports of firsthand evaluations of the patient. The relevant date for purposes of assessing the facts is the date of the agency's decision under review. Here, that time period is generally from the date of the assessment in mid-November 2018 to the date of the agency's decision on January 7, 2019. Based on Mr. N's testimony and submissions to the record, the areas in dispute are bed mobility, transfers, locomotion, dressing, toileting, bathing, personal hygiene and all IADLs.

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25 The Heart Institute records are referred to herein as Ex. I.
26 The Apex records are referred to herein as Ex. J.
27 The OPA records are referred to herein as Ex. K.
28 The Spine Institute records are referred to herein as Ex. L
29 The Alaska ENT records are referred to herein as Ex. M.
30 The PAMC records are referred to herein as Ex. N.
31 7 AAC 49.135.
32 2 AAC 64.290(a)

A. Activities of Daily Living (ADLs)

1. Bed Mobility

Bed mobility is defined as "how [a] person moves to and from lying position, turns side to side and positions body while in bed."[33] The assessor did not see Mr. N moving in bed. However, in his report he states that when asked about turning while lying in bed, Mr. N answered, "I can do that," and that he denied having any bedsores or skin breakdown. Additionally, the assessor observed Mr. N walk, answer the door, stand up from laying on the floor, and walk to and from his bedroom. The assessor coded Mr. N as a 0/0, or totally independent with this task and requiring no set up or physical assistance.

During the hearing, Mr. N testified that he often needs help from his roommate to roll to his side when in bed, and to get his feet on the floor. He leans on his elbow and pulls on his roommate's wrist get into a standing position. Since he can spend up to five consecutive days in bed, his muscle tone deteriorates and he often doesn't have the core strength to pull himself up independently. He is categorized as obese and admitted he could benefit from a grab bar installed next to his bed.[34]

Mr. N's statements about lack of strength and mobility in his back and extremities are corroborated to a degree by various doctors' reports.[35] However, the medical report from a consultation on May 22, 2018 includes a note that, "MRI of the cervical spine revealed some pinching in nerves but the pain could be more due to arthritis," and "low back exercises were demonstrated to the patient to help strengthen the legs and release tension off the knees and joints of the legs."[36] During the same medical visit the doctor also noted, "Difficult but adequate heel, toe and tandem gait," and "Strength of the deltoids, biceps, triceps, wrist extensors, grip, hip flexors, knee extensors, ankle dorsiflexors and plantar flexors are 5/5 bilaterally."[37] In sum, nothing in the medical records show that Mr. N is compromised to the degree he described in his hearing. At the medical visit referenced above, he rated his pain as a "3" on a scale of 1 – 10, with 10 being the worst.[38] At a subsequent annual checkup at the Alaska Heart Institute on

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33 Ex. D, p. 12.

34 N testimony, *see also* Ex. 1, p. 9 ("General appearance: obese middle-aged Caucasian male").

35 Ex 1., pp. 8, 9, 10, 12, 30; Ex. 4, p. 2.

36 Ex. 1, p. 8.

37 *Id.,* p. 10.

38 Ex.1, p. 9.

January 2, 2019, he denied shortness of breath with activity, and the notes reflect no reports of debilitation to the degree described at the hearing.[39]

While the pain Mr. N describes in his back is undoubtedly real, the medical reports don't reflect the assertion that he doesn't have the strength or flexibility to pull himself out of bed. There is no mention in the medical records of bed sores or lesions, indicating protracted periods of being bedridden; Mr. N affirmed he had none when the assessor asked him about skin breakdown during the assessment.[40] Mr. N has not met his burden of proof to show that he needs physical assistance with bed mobility tasks.

2. Transfers

Transfers are defined as "how a person moves between surfaces – to/from bed, chair, wheelchair, standing position (not including to/from bath/toilet)."[41] The assessor reports that he asked Mr. N about his mobility, and he responded, "Sitting is where I have a problem," and "My muscles in my back don't work," referring to the fact that his back "locks up" when in a seated position. For this reason, he often prefers to lay in a prone position.[42] The assessor testified that he observed Mr. N stand up from a laying position on the floor and maneuver his body in a manner that avoided back stiffening.[43] He coded Mr. N as independent with this task and needing no set up or physical assistance.[44]

Mr. N testified that he regularly requires weight-bearing physical assistance to transfer out of bed and to get up off the floor, where he often lays when he is not in bed. He testified that his roommate takes his hand and pulls, and/or Mr. N often also pulls himself up while his roommate braces and helps lift him. Additionally, Mr. G, who was present for the assessment, testified that halfway through the assessment Mr. N had to lie down on cushions on the floor due to back pain. While Mr. N did eventually achieve a standing position, this was done very slowly and gingerly, and he relied on the wall for balance.

Various medical reports corroborate Mr. N's testimony that he struggles with back pain that affects his mobility and flexibility, as do the observations of Mr. G.[45] However, nothing in

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39 Ex. I, pp. 7-9, 20.
40 Ex. D, p. 12.
41 Ex. D, p. 12.
42 *Id.*
43 *Id.*
44 *Id.*
45 *See, e.g.,* Ex. 1, pp. 8, 26; Ex. G, p. 5; Ex. I, pp. 31-32.

the record suggests that it rises to the level that he cannot transfer from either the floor, the bed, or from a chair or couch. Over the last few years different medical professionals have prescribed back exercises, orthotics, knee braces, and steroid injections.[46] On August 30, 2018, his physician provided him a note for an accommodation for jury duty as opposed to an excused absence.[47] During that same consultation, Mr. N reported having "no new areas of numbness, tingling or weakness" and "no bowel or bladder incontinence."[48] And the medical record is devoid of any recommendations that N consider a wheelchair, a home health care aide or an assisted living home, all of which would be services recommended for an individual with the extreme levels of immobility described by Mr. N at the hearing.

In short, Mr. N has not met his burden to show he regularly needs physical assistance with transfers. He is therefore not eligible for PCS assistance with this task.

3. Locomotion

Locomotion is defined in the CAT as "how [a] person moves between locations in his/her room and other areas of the same floor. If in a wheelchair, self-sufficiency once in chair."[49] There are two distinct categories: 1. How a person moves in a single-level house and 2. How a person moves outside to access medical appointments.[50] Assistance is not available for individuals who are self-sufficient with an assistive device.[51]

As to both categories of locomotion the assessor coded Mr. N as a 0/0 or completely independent. He observed Mr. N walking throughout his home, answering the door, and walking to and from his bedroom. He did not observe Mr. N using any assistive devices or needing any physical help. When he asked Mr. N about his ability to move around, Mr. N acknowledged that he has assistive devices but doesn't use them. He asserted that he cannot rely on a cane because his hands do not work well enough. He also stated that he struggles with vertigo and cannot navigate uneven ground or stairs, and that, after walking short distances, he needs to lie down. Mr. G testified that when he has visited Mr. N in the past, only his roommate has ever come down the stairs and answered the door, not Mr. N.

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[46] Ex. 1, pp. 8, 12, 26.
[47] Ex. 1, p. 28.
[48] Ex. 1, p. 29.
[49] Ex. D, p. 13.
[50] *Id. See also* 7 AAC 125.030(b)(3)(B)
[51] 7 AAC 125.030(b)(3)(B)(i)

As to the first component of locomotion -- how Mr. N moves in a single level home – there is conflicting evidence. Medical documents show that Mr. N has two canes and a walker and has been prescribed an ankle brace and bilateral knee reaction braces.[52] However, he doesn't use them with consistency, preferring to rely on the furniture for stability. He testified that he falls often, but does not injure himself, presumably due to the number of cushions in the house. He also testified that on "bad days" he just remains in bed.

However, no medical information substantiates Mr. N's assertion that he has long struggled with significant vertigo. Nor do the medical records support Mr. N's overall narrative in terms of the severity of his mobility problems. While arguably Mr. N might benefit from some supervision in the home when he walks around, he has not met his burden of proof by demonstrating that he needs physical assistance with locomotion in his house.

But as to the second component of locomotion -- how Mr. N moves outside to access medical appointments – the evidence supports a finding that Mr. N requires hands on assistance.

Medical documents show that Mr. N has been treated for joint and muscle issues that affect his ability to navigate stairs.[53] A medical report dated May 22, 2018 notes, "joint pain in the ankles and knees, weakness in the ankles. PT for the knees. Issues with the knees make it harder to go upstairs and give[s] out."[54]

Mr. N lives on the third floor in a building with no elevator, and he must navigate numerous steps to get in and out of his home for medical appointments. His medical records corroborate his testimony, showing that he consistently requires weight-bearing assistance to get up and down the stairs outside his home. He requires this help from another person; his assistive devices are not sufficient. Therefore, his self-performance score should be a 3, as he needs extensive weight bearing assistance.[55]

4. <u>Toilet use</u>

Toileting is defined in the CAT as, "how [a] person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, cleanses, changes pad, manages ostomy or catheter, adjusts clothes."[56] The assessor scored Mr. N as a 0/0, or totally independent and requiring no

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[52] *See* Ex. F, p. 11, 14, Ex. D, p. 13, N testimony.
[53] Ex. 1. pp. 8, 9, 12; Ex. 4, p 5.
[54] Ex. 1, p. 9.
[55] The CAT does not require calculation of a support score for this ADL. See Ex. D, p. 4.
[56] Ex. D, p. 14.

assistance from others. He noted that Mr. N displayed all the physical abilities to meet his toileting needs.[57]

Mr. N testified that on "bad days" his back muscles stiffen and lock when he is on the toilet, and he must lower himself onto the floor. When that happens, he may defecate on the floor and manually put the feces in the toilet. He also described not being able to adequately wipe himself clean after a bowel movement, though he did not request or desire assistance with this. The medical reports are silent regarding Mr. N's toileting abilities or needs for assistance. The most recent medical report of any arguable relevance is dated February 1, 2018, which prescribes Nystatin powder for a fungal infection in his groin and buttock region possibly implicating toileting issues, or just hygiene concerns.[58]

As previously discussed, Mr. N may have suffered a recent and extraordinary physical set back. However, he did not mention the severe toileting issues he discussed during the hearing during the November 16, 2018 assessment, nor did he raise them to Dr. Wu at his annual checkup on January 2, 2019.[59] In fact, he told the assessor that he was able to get to and from the bathroom, on and off the toilet, and denied having any accidents or wearing adult diapers.[60] Neither the assessor nor Mr. G stated that the apartment smelled of feces, or that Mr. N's clothes were stained from urine or feces. Therefore, absent more information about his inability to independently manage toileting (and a willingness to even receive such assistance), Mr. N has not met his burden of proving he needs assistance with the ADL of toilet use.

5. Bathing

Bathing is defined in the CAT as, "[h]ow a person takes a full-body bath/shower, sponge bath, and transfer in and out of the tub/shower."[61] This does not include washing of the back or hair.[62] Mr. Talbert evaluated Mr. N as being able to ambulate, transfer, and dress himself, and determined that he was physically and mentally capable of washing himself. He deemed him fully independent regards to his bathing needs and requiring no help or set up from another person.

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57 *Id.*
58 Ex. N, pp. 14-17.
59 *See* Ex. I, pp. 7-9.
60 Ex. D, p. 14.
61 Ex. D, p. 15.
62 *Id.*

Mr. N testified that he struggles with showering due to the balance and stability issues referenced earlier, that he must keep a hand on the wall for balance, and that he can't wash his hair because closing his eyes causes him to feel dizzy. Mr. N has not met his burden of proving that he needs help with bathing. He has provided no explanation as to why he cannot put a stool in the shower to help with balance, or take breaks sitting and standing. He told the assessor, "I can take a shower by myself," and said there was a time he couldn't wash between his legs (presumably inferring that is no longer the case).[63] As previously noted, there is nothing in his medical history that documents his assertion that he has severe vertigo. Finally, neither his doctors nor the assessor mentions poor presentation or uncleanliness. Mr. N has not met his burden of proof to show he needs physical help bathing at this time.

6. Dressing

Dressing is defined in the CAT as, "h]ow a person puts on, fastens, and takes off all items of street clothing, including donning/removing prosthesis."[64] The assessor evaluated Mr. N as being totally independent with dressing himself, noting that he presented in a t-shirt and shorts for the assessment. However, he also noted that Mr. N could not touch his feet from a seated position.[65]

Mr. N testified credibly that he can put on his own shirts and shorts. However, he cannot put on socks and shoes, because he cannot bend to the floor. As a result, he does not wear anything on his feet unless his roommate physically assists him by helping put a sock and shoe on each foot. At a medical visit on May 22, 2019 he reported to his doctor that "if he is standing up for long periods of time he can't bend over."[66]

His bending issues having been corroborated by the assessor's observations, Mr. N's medical records, and his testimony, Mr. N has met his burden of establishing that he needs some physical assistance to complete this aspect of the dressing ADL. The needed assistance qualifies as limited assistance from one other person, which is a score of 2/2. The frequency of this help should be twice a day.

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63 *Id.*

64 Ex. D, p. 14.

65 *Id.*

66 Ex. 1, p. 12.

B. Instrumental Activities of Daily Living (IADLs)

A person is eligible for PCA services if he has a score of 2/2 or higher in one of the six gateway ADLs or a score of 1/3 or higher in one of the six gateway IADLs.

1. Light meal preparation

Light meal preparation includes the preparation, serving, and cleanup of a meal that is essential to meet the recipient's health needs, but is not the main meal of the day.[67]

The assessor concluded that Mr. N can perform this activity independently (score of 0/0).[68] Mr. N reported that cannot stand long enough to engage in any significant meal preparation. However, he did acknowledge that he can manage preparing very simple meals such as a bowl of oatmeal, a scoop of ice cream or a hot dog; anything that can provide calories quickly. He also often eats take-out food, like a Subway sandwich or McDonalds burgers.

Again, Mr. N's ability to prepare a light meal could certainly be affected by his level of pain, which he testified can fluctuate from day to day. Medical documents clearly show that his back pain is verified, and that it affects his ability to stand and walk for long periods of time. However, nothing in his history suggests that he cannot be on his feet long enough to prepare a light meal. No doctor noted that he appeared malnourished, or that he wasn't eating properly. Even on days when his back is causing him more distress, Mr. N could take breaks by sitting down while he makes a simple snack or gets a piece of fruit. Therefore, Mr. N has not met his burden of proof by demonstrating that he requires physical help to make a light meal.

2. Main Meal Preparation

Main meal preparation includes the tasks of preparing, serving, and cleaning up one main meal a day that is essential to meet the health needs of the recipient.[69] The assessor concluded that Mr. N can perform this activity slowly or with difficulty, with nothing more than set-up help from others (score of 1/2).[70] However, Mr. N testified that his muscle and joint pain and overall instability prevent him from preparing any main meals. He indicated that he is entirely dependent on others for this task, and his roommate often brings him take-out food as a main meal.

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[67] 7 AAC 125.030(c)(1).
[68] Ex. D, p. 33.
[69] 7 AAC 125.030(c)(2).
[70] Ex. D, p. 33.

Mr. N has met his burden of proving that the assessment was erroneous as to this IADL. It is well documented that Mr. N's medical issues can impact his ability to stand for protracted periods of time, as well as bend over or move about with good balance. While snacks can often be prepared quickly and easily, a nutritious main meal often requires a more significant amount of time chopping food, mixing ingredients, putting items in the oven. Items may need to be taken down from the shelves, pans pulled out of the cupboards, or at the conclusion of the meal, the dishwasher must be loaded. The record reflects that on many days Mr. N may be able to contribute to the preparation of a meal, but his limitations implicate the need for consistent physical assistance from another person. Therefore, his score should be 2/3, seven times a week.

3. Laundry

Laundry includes the tasks of changing a recipient's bed linens or laundering his or her linens and clothing.[71] The assessor concluded that Mr. N can perform this activity slowly or with difficulty, with nothing more than set-up help from others (score of 1/2).[72]

In Mr. N's household, the laundry is on the main floor of the apartment building. Because of his need for physical assistance simply to descend or ascend the stairs, Mr. N cannot get to or from the laundry area while carrying a laundry bag or basket and detergent unless he has hands-on assistance. As a result, this task generally falls to his roommate, who also has significant health problems. Unfortunately, the net effect is that laundry often simply does not get done for extended periods of time. As of the date of the hearing in this case, Mr. N estimated that his laundry had not been done in the last eight weeks.

Mr. N has met his burden of proof, demonstrating that he needs some physical assistance with this task. While he can't go up and down the stairs with a basket and detergent unless he receives hands-on physical help, he is able to fold or sort laundry if it is placed near him. This evidence supports that his self-performance score should be 2, with a support score of 3, and a frequency of once per week.

4. Light and Routine Housekeeping

Light housekeeping involves things like dusting, doing dishes and making the bed.[73] Routine housekeeping encompasses activities such as vacuuming, cleaning the bathroom and

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71 7 AAC 125.030(c)(4).
72 Ex. D, p. 33.
73 Ex. D, p. 33.

trash removal.[74] The assessor concluded that Mr. N can perform both of these activities independently, with no assistance at all.[75]

Mr. N consistently struggles with standing for protracted periods of time, as well as bending. These issues are definite impediments to completing simple chores around the home with efficiency, and there will surely be days when he is less capable of cleaning than others. However, slowly and with intermittent breaks, there is no medical reason why Mr. N cannot dust surfaces or make his bed. He can hold on to countertops for balance or lean against the wall when in his bedroom. Therefore, he has not met his burden of demonstrating that he needs physical assistance with light housekeeping.

As to routine housekeeping, however, Mr. N did meet his burden of proof. Mr. N testified that he relies on his roommate to clean the apartment. His roommate is not amenable to bearing this responsibility, however, and oftentimes is unable to do so due to his own health complications. As a result, Mr. N testified that his home is generally unkempt and dirty, and he described a growing problem with bugs in his roommate's area. Mr. N has a visiting friend that sometimes helps with simple cleanup or food preparation, but she, too, only comes sporadically and is not inclined to continue to offer help. Mr. N asserted that, were he physically capable, he would take a more active role in cleaning the home.

Mr. N has verified physical limitations, and clearly struggles with balance and mobility issues. Neither the assessor nor Mr. G described the house as being exceptionally filthy, and nothing in Mr. N's medical history references bug bites or rashes from an unclean living situation. However, routine housework often requires the scrubbing of bathroom surfaces, vacuuming, mopping, and reaching overhead to clean. These are tasks that require kneeling, bending, and at times, vigorous activity. Trash removal also requires Mr. N to descend and ascend three flights of stairs, which he cannot do without regular physical assistance. Mr. N should be able to participate in some degree in these tasks, so he is not completely dependent, but he does require hands-on physical assistance. Therefore, his coding should be 2/3, with a frequency of once per week.

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[74] *Id*.

[75] *Id*.

5. Grocery Shopping

Grocery shopping is evaluated as an activity that does not include transportation.[76] The assessor concluded that Mr. N can perform this activity slowly or with difficulty if he receives set-up help from others (score of 1/2).[77] Mr. N did not meet his burden of proving that this score was in error. Mr. N did not testify directly about grocery shopping. Rather, he explained that he relies on others, namely his friend and his roommate, to ensure there is food in the house. Mr. N and his roommate seemingly eat a lot of takeout food.

Mr. N's most significant challenge with regard to shopping is his difficulty with the stairs in and out of his apartment. Once at a grocery store, however, the evidence supports the finding that he more likely than not can navigate the store, using a grocery cart or motorized cart for stability. He also can reach items on the shelves and put them in the basket and on the check-out conveyer. He is cognitively quite capable of making a list, selecting needed items, and managing the check-out transaction. While he no doubt has bad days when shopping may be too taxing or painful for him, he also experiences better days where this kind of relatively light physical activity should be manageable. Mr. N has not met his burden to show he regularly needs hands-on physical help with this task.

C. Escort to Medical Appointments

Lastly, because Mr. N requires extensive assistance for locomotion, access to medical appointments (self-performance score of 3), he qualifies for medical escort services as well.[78] The "Medical Providers" section of the CAT lists approximately fifteen medical visits per year.[79] Given that the majority of Mr. N's providers are in close proximity to his home, he should be awarded twenty minutes of time per visit, for a total of 300 minutes per year, or 6 minutes per week.[80]

IV. Conclusion

Mr. N demonstrated that he requires PCS assistance with certain activities. His testimony, corroborated by medical documents and the observations of Mr. G and the assessor,

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76 Ex. D, p. 33.

77 *Id.*

78 *Personal Care Services: Service Level Computation*, State of Alaska Department of Health and Human Services Senior and Disabilities Services, PCS Service Computation, *available at* http://dhss.alaska.gov/dsds/Documents/regulationMaterials/PCS_SLA_Computation_Chart_6-2-2017.pdf.

79 Ex. D, p. 11.

80 *See* Ex. D, p. 4.

establish that Mr. N is often compromised by balance and pain issues, and he cannot bend to touch his feet. He also has significant difficulty managing stairs. For these reasons, Mr. N regularly needs physical assistance with the ADLs of locomotion (access to medical appointments) and dressing, as well as the IADLs of main meal preparation, routine housecleaning, and laundry. He additionally qualifies for medical escort assistance.

Accordingly, the Division's decision is partially affirmed and partially reversed. Mr. N's CAT scores and PCS eligibility should be revised as follows:

ADLs:

- Locomotion (access to/from medical appointments) (self-performance score of 3)
- Dressing (2/2, frequency 14 per week)

IADLs:

- Laundry (2/3, frequency once per week)
- Main meal preparation (2/3, frequency 7 per week)
- Routine Housekeeping (2/3, frequency 1 per week)

Other:

- Medical escort (2/3) (frequency 15 times per year, 20 minutes each time)

Dated: June 25, 2019

Signed
Kathryn Swiderski
Administrative Law Judge

Non-Adoption Options

C. The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(4), rejects, modifies or amends one or more factual findings as follows, based on the specific evidence in the record described below:

After having reviewed the record in this case, including the testimony, the medical records and testimony, when considered together show that Mr. N has some degree of impairment in his physical functionality. However, they do not demonstrate that Mr. N requires hands-on physical assistance in some of the areas identified in the proposed decision: dressing, main meal preparation, and routine housekeeping. The factual finding, and ultimate conclusion that he should receive PCS for those activities is reversed. However, based on the testimony from Mr. G's observations of Mr. N's locomotion ability during 2 visits, the remainder of the decision is unchanged.

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

DATED this 12th day of July 2019.

By: *Signed*
Name: Jillian Gellings
Title: Project Analyst
Agency: Office of the Commissioner, DHSS

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