

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

In the Matter of)	
)	
N. S.)	OAH No. 22-0039-MDS
_____)	

DECISION

I. Introduction

This case involves three consolidated fair hearing requests brought on behalf of N. S. by her husband and legal guardian, F. S. Specifically, Mrs. S. has requested a fair hearing on the following determinations made by the Division of Senior and Disability Services (Division): (1) the Division’s decision to decrease her personal care services (PCS) following a November 2021 assessment; (2) the Division’s decision to further reduce the PCS that Mrs. S. was receiving for certain Activities of Daily Living (ADLs) after the Division performed another assessment of Mrs. S. in March 2022; and (3) the Division’s April 2022 determination that Mrs. S. was not currently eligible for the Alaskans Living Independently (ALI) and Community First Choice (CFC) Medicaid Waiver program. Additionally, the S.s have argued that Mrs. S.’s PCS should have been increased, not decreased, as a result of the November 2021 assessment (2021 Assessment) and the March 2022 assessment (2022 Assessment).

The hearing involving these consolidated fair hearing requests began on March 11, 2022, and was continued to June 15 and 28 and August 11 and 19, 2022.¹ Throughout these proceedings, the Division has been represented by Assistant Attorney General Paul Peterson. It presented four witnesses: Jerry Fromm, N. T., Melissa Meade, and Robin Platt. Mr. S., who is not an attorney, has appeared on behalf of his wife and ward, Mrs. S., and testified under oath. Mrs. S. also provided testimony on her own behalf and U. T., a care coordinator, was the other witness testifying on Mrs. S.’s behalf.

Based on the testimony and other evidence at this multi-day hearing, this decision affirms the Division’s determinations that Mrs. S.: (1) can no longer receive PCS for any IADLs in light of a regulatory change made in 2017; and (2) is not eligible for the ALI and CFC waiver program. This decision reverses the Division’s elimination of Mrs. S.’s PCS for the ADLs of

¹ Both sides requested a lengthy continuance to allow the Division to conduct the 2022 Assessment in order to determine Mrs. S.’s appropriate level of PCS and her eligibility for Waiver services.

transfers and toilet use based on the 2022 Assessment but otherwise affirms the 2022 Assessment.²

II. The PCS Determination Process

The Medicaid program will authorize and pay for PCS to provide physical 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 125.030.³ Those activities are broken down into activities of daily living (ADLs) and instrumental activities of daily living (IADLs). The ADLs are bed mobility, transfers, locomotion, dressing, eating, toileting, personal hygiene, and bathing.⁴ The IADLs are light meal preparation, main meal preparation, housework, laundry, and shopping.⁵ In addition, PCS are provided for medication assistance, maintaining respiratory equipment, dressing changes, wound care, medical escort, and passive range-of-motion exercise.⁶

PCS are furnished by a Personal Care Assistant, usually abbreviated as a “PCA.” PCS are not provided for activities that can “be performed by the recipient.”⁷ Nor are they allowed for supervision, other than for the ADL of eating, or for “oversight and standby functions.”⁸

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.⁹ The CAT is also used to assess whether an individual is eligible for waiver services.¹⁰ Because the CAT is adopted by reference in 7 AAC 1760.900(d)(6), it is itself a regulation.¹¹ The actual list of services, time allotted for each service based upon the severity of need, and the allowable frequencies for each service are set

² The Division, through its counsel, stated on the record at the March 11, 2022 hearing session that if Mrs. S. was successful in proving that she needed additional PCS beyond what was authorized in the 2022 Assessment, the Division would make such additional services retroactive to the date of the 2021 Assessment. However, this decision has maintained the same level of PCS that Mrs. S. has been receiving for ADLs as a result of the Revised 2021 Assessment and has concluded that Mrs. S. is not entitled to additional PCS.

³ 7 AAC 125.010(b)(1)(A)(iii); *see also* Exh. B, p. 4.

⁴ 7 AAC 125.030(b); *see also* Exh. B, pp. 4-5.

⁵ 7 AAC 125.030(c); *see also* Exh. B, pp. 5-6.

⁶ 7 AAC 125.030(d); *see also* Exh. B, p. 6. The regulation contains specific conditions that a recipient must satisfy in order to receive these specialized services.

⁷ 7 AAC 125.040(a)(4); *see also* Exh. B, p. 7.

⁸ 7 AAC 125.040(a)(9)-(10); *see also* Exh. B, p. 7.

⁹ *See* 7 AAC 125.020(a)(1); *see also* Exh. B, p. 2. The CAT is itself a regulation, adopted in 7 AAC 160.900(d)(6); *see also* Exh. B, p. 34.

¹⁰ Exh. B, p. 20.

¹¹ Exh. B, p. 11.

out in the *Personal Care Services: Service Level Computation* instructions, which are adopted by reference into regulation.¹²

As a gateway to eligibility for PCS, the CAT evaluates a subset of the ADLs and IADLs.¹³ If a person requires some degree of hands-on physical assistance with any one of these “gateway” ADLs or IADLs, or has a medically documented need for supervision while eating, then the person is eligible for PCS assistance.¹⁴ Once eligibility is established, time for additional ADLs and IADLs, as well as certain other covered services, can be added to the authorization.

The ADLs measured by the CAT are bed mobility, transfers (mechanical or non-mechanical), locomotion (in room, between levels, and access to medical appointments), dressing, eating, toilet use, personal hygiene, and bathing.¹⁵ The CAT numerical coding system for ADLs has two components. The first component is the *self-performance* code. These codes rate how capable a person is of performing a particular ADL. The possible codes are: **0** (the person is independent¹⁶ and requires no help or oversight); **1** (the person requires supervision¹⁷); **2** (the person requires limited assistance¹⁸); **3** (the person requires extensive assistance¹⁹); and **4** (the person is totally dependent²⁰). There are also codes that are not used in calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).²¹

The second component of the CAT scoring system is the *support* code. These codes rate 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); and **3** (two

¹² 7 AAC 125.024(a); 7 AAC 160.900(d)(6). The *Personal Care Services: Service Level Computation* instructions are located at Exh. D, pp. 6-7.

¹³ In this subset are the ADLs of transfers, locomotion, eating, toilet use, dressing, or bathing and the IADLs meal preparation (either light or main meals), housework, grocery shopping, or laundry. See Exh. D, p. 42.

¹⁴ 7 AAC 125.020(c)(1); see also Exh. B, p. 3.

¹⁵ Exh. D, pp. 17-21.

¹⁶ 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 Exh. D, p. 16.

¹⁷ Supervision is defined as “[o]versight, encouragement or cueing provided 3+ times during the last 7 days -- or -- Supervision plus nonweight-bearing physical assistance provided only 1 or 2 times during last 7 days.” See Exh. D, p. 16.

¹⁸ Limited assistance is defined as “[p]erson 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 assistance 1 or 2 times during the last seven days.” See Exh. D, p. 16.

¹⁹ Extensive assistance is defined as “[p]erson performed part of activity, over the last 7-day period, help of following type(s) provide 3 or more times: Weight-bearing support and/or full staff/caregiver performance during part (but not all) of last seven days.” See Exh. D, p. 16.

²⁰ Total dependence is defined as “[f]ull staff/caregiver performance of activity during ENTIRE 7 days.” See Exh. D, p. 16.

²¹ Exh. D, pp. 16-17.

or more-person physical assist required). Again, there are additional codes which are not used to arrive at a service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).²²

The IADLs measured by the CAT include light meal preparation, main meal preparation, housekeeping, laundry, and shopping.²³ For purposes of this decision, however, the coding of the IADLs on the CAT is irrelevant since the sole issue here vis-à-vis the IADLs is whether regulatory changes in 2017 preclude Mrs. S. from receiving PCS for any IADLs, regardless of the coding.²⁴

There are three routes to qualify for PCS. First, a person qualifies by being coded as requiring a limited or greater degree of physical assistance (self-performance code of 2, 3, or 4 and support code of 2, 3, or 4) in any *one* of the ADLs of transfers, locomotion, eating, toilet use, dressing, or bathing.²⁵ Second, a person qualifies if he or she is coded as requiring some degree of hands-on assistance²⁶ (self-performance code of 1, 2, or 3 and support code of 3 or 4) with any one of the IADLs of light or main meal preparation, light or routine housework, grocery shopping or laundry.²⁷ Finally, unlike 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 conveys eligibility.²⁸

The codes assigned to a particular ADL determine how much PCS a person receives for each occurrence of that ADL. For instance, if a person is coded as requiring extensive assistance (self-performance code of 3 and support code of 2 or 3) for the ADL of bathing, he or she would receive 2.5 minutes of PCS every day he or she is bathed.²⁹ For covered services – *i.e.*, services other than assistance with ADLs and IADLs -- specific rules apply.³⁰

//

/

III. Factual and Procedural Background

²² See Exh. D, p. 17.

²³ Exh. D, pp. 36-37.

²⁴ See *infra*, at p. 11.

²⁵ See Exh. D, p. 42.

²⁶ For purposes of this discussion, “hands-on” assistance does not include supervision, cueing or set-up assistance (support codes of 1 or 2). See Exh. D, p. 42.

²⁷ Since this decision concludes that the 2017 regulatory change precludes Mrs. S. from receiving PCS for any IADL, the second route for qualifying for PCS – *i.e.*, qualifying by virtue of coding which demonstrates the need for hands-on assistance (self-performance code of 1, 2, or 3 and support code of 3 or 4) with any one of the IADLs of light or main meal preparation, housework, shopping, or laundry – is inapplicable here. See *infra*, at pp. 11-12; Exh. B, p.38.

²⁸ 7 AAC 125.020(c)(1)(B); see also Exh. B, p. 3.

²⁹ See Exh. D, p. 6.

³⁰ See Exh. D, p. 6.

Mrs. S. is a forty-eight-year-old woman. She has a variety of health issues including bipolar disorder, depression, post-traumatic stress disorder, seizure disorder, obesity, hypothyroidism, a pacemaker, asthma, paranoid schizophrenia, diabetes, sleep apnea, cardiac arrhythmia, bradycardia, ulcers, parkinsonian tremor, back issues, incontinence, chronic pain syndrome, two traumatic brain injuries, memory problems, and history of knee surgeries.³¹ She has acute low back pain as the result of a motor vehicle accident in 2011 which has worsened over the years. She also experiences significant neck and leg pain.³² In 2016, Mrs. S. was approved for social security disability payments.³³

Mrs. S. lives with her husband and legal guardian, F. S., and two children. The S.'s live in a ground floor apartment with an exterior ramp.³⁴ Based on an assessment conducted on August 4, 2016 (2016 Assessment), Mrs. S. had been receiving 13.5 hours of PCS services for the ADLs of transfers, dressing, toilet use, personal hygiene and bathing, and the IADLs of main meal preparation, shopping and in-home laundry.³⁵ Mr. S. is employed by Care Services as a personal care assistant (PCA) to provide PCS for his wife/ward.³⁶

On October 28, 2021, Mrs. S. had a total knee replacement of her right knee and on January 27, 2022, a total knee replacement for her left knee.³⁷ On November 8, 2021, Mr. S. prepared an amendment to Mrs. S.'s service plan after her complete right knee replacement.³⁸ The stated basis for the amendment was that Mrs. S. had "experienced a material change in her medical condition or functional capacity" resulting from her right knee replacement.³⁹ The service plan amendment requested that Mrs. S. receive more frequent PCS on a daily basis for the ADLs of transfers, dressing, toilet use, and bathing. Additionally, the service plan amendment requested that Mrs. S. receive PCS for the ADLs of personal hygiene, locomotion, bed mobility, for the IADL of light meal preparation, and for her use of a continuous passive motion (CPM) unit.⁴⁰ Other than a request for two to four weeks of PCS time related to the

³¹ Exh. D, p. 13; Exh. G, pp. 3 & 8; S. Exh. 8, p.58. Mrs. S. has been incontinent since 2020. *See* S. Exh. 8, pp. 12, 17 & 20.

³² S. Exh. 8, pp. 12 & 14.

³³ S. Exh. B, p. 2 (also noting that the onset of her disability was May 31, 2014).

³⁴ *See* Exh. D, pp. 11 & 13; Exh. G, p. 2.

³⁵ Exh. D, pp. 1, 9 & 13

³⁶ S. Exh. 3, p. 4.

³⁷ Exh. D, p. 13; Exh. G, p. 3; *see also* Testimony of Mr. S.

³⁸ S. Exh. 3, pp. 2-3; *see also* S. Exh. 4, p. 2.

³⁹ S. Exh. 3, p. 2.

⁴⁰ S. Exh. 8, pp. 4 & 45

continued passive motion machine, the additional PCS identified in the service plan amendment were requested for a six-month period.⁴¹ Care Services signed off on the amendment, which was received by the Division on November 9, 2021.⁴² The Division denied the service plan amendment in a letter dated November 10, 2021, citing various reasons.⁴³ Mr. S. has claimed that he filed a timely appeal regarding this denial, but the Division disputes his assertion and there is no evidence in the record demonstrating that a timely appeal was filed.⁴⁴

A. The 2021 Assessment and Ensuing Reduction of Mrs. S.'s PCS

One week after the Division denied the service plan amendment, the Division performed a reassessment of Mrs. S. with Barbara Rodes as the Division's assessor. This assessment was conducted remotely through telehealth due to the Covid-19 pandemic.⁴⁵ Based on the results of this 2021 Assessment, the Division notified Mr. and Mrs. S. in December 2021 that her PCS was going to be reduced from 13.5 hours per week to 9.75 hours per week, effective January 9, 2022. This reduction in services was related to: (1) eliminating Mrs. S.'s PCS for the ADL of transfers; (2) decreasing her PCS for the ADL of toilet use; and (3) eliminating the PCS time Mrs. S. had been receiving for the IADLs of main meal preparation, shopping, and in-home laundry.⁴⁶ However, in its subsequent pre-hearing brief in this case, the Division stated that it was "reversing the reduction in toileting."⁴⁷ Shortly before the hearing commenced, the Division also indicated that it would no longer contest the PCS time Mrs. S. was receiving for transfers, due to medical information received between the date of the denial and the hearing that "justified

⁴¹ See S. Exh. 8, pp. 4 & 44.

⁴² S. Exh. 8, p. 5; *see also* Testimony of Melissa Meade (June 28, 2022).

⁴³ S. Exh. 8, pp. 6-7; *see also* Testimony of Mr. Fromm (March 11, 2022, and August 11, 2022); Testimony of Melissa Meade (June 28, 2022).

⁴⁴ See Testimony of Mr. S. (March 11, 2022); Testimony of Jerry Fromm (March 11, 2022). There were no documents in the record showing that Mr. S. had filed an appeal within 30 days of November 10, 2021 (the date when he was notified that the service plan amendment had been denied) and thus filed a timely appeal. However, Mr. S. did indicate in his January 14, 2022 fair hearings request that he was appealing both the reduction of PCS from 13.5 to 9.75 hours resulting from the 2021 Assessment along with the denial of the service plan amendment. With regard to the denial of the service plan amendment, this January appeal would have been untimely. See Exh. C, p. 1; *see also* Exh. D, p. 8.

⁴⁵ See Exh. D, pp. 1, 10 & 13. The Division is authorized to conduct random periodic reassessments under 7 AAC 125.020(A). See Exh. B, p. 2. Mrs. S.'s prior assessment had taken place on August 4, 2016. See Exh. D, p. 13. According to statements made by Counsel for the Division at the hearing on March 11, 2022, the 2021 Assessment conducted on November 17, 2021 was one of these random periodic assessments.

⁴⁶ See Exh. D, pp. 1-4 & 9.

⁴⁷ See Division's Pre-Hearing Brief, p. 2.

a change in the Division's decision."⁴⁸ At the hearing, the Division reiterated that it was reversing its position regarding Mrs. S.'s PCS time for toileting and transfers.⁴⁹

As a result of these adjustments, the revised 2021 Assessment (Revised 2021 Assessment) resulted in the following:

<u>Task</u>	<u>Original Amount</u>	<u>Revised 2021 Assessment & Coding</u>
Transfers	limited assist – 28x/wk	limited assist – 28x/wk (2/2)
Dressing	limited assist – 14x/wk	limited assist – 14x/wk (2/2)
Toilet Use	limited assist – 56x/wk	limited assist – 56x/wk (2/2)
Bathing	extensive assist – 7x/wk	extensive assist – 7x wk (3/2)
Personal Hygiene	Independent	limited assist – 7x/wk (2/2)
Main Meal	assistance – 7x/wk	Eliminated
Housework	assistance – 1x/wk	Eliminated
Laundry	assistance – 1x/wk	Eliminated

Consequently, the *only* reduction in PCS stemming from the Revised 2021 Assessment is the Division's elimination of PCS time for the IADLs of main meal preparation, shopping, and laundry.⁵⁰ Mr. S. has, however, argued that Mrs. S. should be receiving more PCS than what was authorized in the Revised 2021 Assessment.

B. The 2022 Assessment and the Further Reduction of Mrs. S.'s PCS

Mrs. S. took part in another assessment on March 18, 2022, in connection with her application for waiver services. The March 2022 Assessment was conducted via Zoom by Division assessor Robin Platt. Also present were Mr. S. and U. T., a care coordinator. This assessment, which Ms. Platt estimated took about an hour and fifteen minutes, was used by the Division both to determine Mrs. S.'s eligibility for wavier services and to determine the amount of PCS she was eligible to receive.⁵¹

⁴⁸ See e-mail from the Division's counsel to the S.s and this tribunal dated March 11, 2022.

⁴⁹ See statements by the Division's counsel at the March 11, 2022 hearing (confirming that the Division had conceded, via an e-mail dated March 11, 2022, that the ADLs of transfers and toilet use would not be reduced because of the 2021 Assessment).

⁵⁰ Although the Division opted to reinstate the amount of time Mrs. S. had previously been receiving for the ADLs of transfers and toilet use vis-à-vis the 2021 Assessment, the Division did not quantify the total reduction in PCS resulting from the Revised 2021 Assessment after it added back in the time for the ADLs of transfers and toilet use. See Testimony of Mr. Fromm (March 11, 2022).

⁵¹ Testimony of Robin Platt; see also Exh. E, p. 2l; S. Exh. 5, p. 6.

Based on the results of this 2022 Assessment, the Division notified Mrs. S. on April 11, 2022, that she did not qualify for the ALI and CFC waiver program because she did not have health needs that required the level of care provided in a skilled or intermediate nursing facility.⁵² The checklist accompanying this denial letter showed that Mrs. S. met none of the skilled level of care factors.⁵³

Mrs. S. received another letter from the Division issued two days after the denial letter regarding waiver services. This second letter stated that, based on the results of the 2022 Assessment, the Division was reducing her service level hours from 9.75 hours to 5.0 hours, effective April 23, 2022. In the letter, the Division stated that it was eliminating Mrs. S.'s PCA time for toileting because the assessor had found that she now only needed set up help -- rather than limited assistance with a one-person physical assist -- regarding this ADL.⁵⁴ Additionally, the Division initially reduced the amount of PCA time received for the ADL of bathing. This reduction resulted from the assessor's determination that Mrs. S. no longer needed extensive assistance with a one-person physical assist for bathing (a 3/2 score on the CAT) but instead now only required limited assistance with a one-person physical assist (a 2/2 score on the CAT).⁵⁵ However, at the hearing held on August 11, 2022, Jerry Fromm testified that the Division was conceding that Mrs. S.'s score for bathing on the 2022 Assessment should remain a 3/2.⁵⁶

Notably, the letter notifying Mrs. S. of the changes to her PCS as a result of the 2022 Assessment is silent regarding the elimination of Mrs. S.'s PCA time for transfers.⁵⁷ Prior to the 2022 Assessment, Mrs. S. had been receiving 70 minutes of PCS for the ADL of transfers pursuant to the Revised 2021 Assessment.⁵⁸

//

/

⁵² S. Exh. 5, p. 6.

⁵³ S. Exh. 5, p. 7.

⁵⁴ Exh. E, p. 2.

⁵⁵ Exh. E, pp. 2-3.

⁵⁶ Testimony of Mr. Fromm.

⁵⁷ See Exh. E, pp. 2-3.

⁵⁸ See Exh. E, pp. 1-4.

C. The S.s' Appeal

As previously referenced, Mrs. S. was notified on December 28, 2021 that her PCS was going to be reduced from 13.5 hours per week to 9.75 because of the 2021 Assessment. On January 14, 2022, Mr. S. informed the Division that he was requesting a fair hearing concerning the proposed reduction in his wife's PCS.⁵⁹ According to Mr. S., his fair hearing request was challenging *both* the reduction of services in certain areas related to the 2021 Assessment *and* the failure of the Division to increase Mrs. S.'s services.⁶⁰

The first day of the hearing in this matter was on March 11, 2022. It was focused on the Division's decision to eliminate the PCS time that Mrs. S. was receiving for certain IADLs.⁶¹ Since Mrs. S. was requesting additional PCS beyond what she had been authorized to receive in the Revised 2021 Assessment, the hearing was continued at the parties' request regarding the level of PCS for Mrs. S.'s ADLs because another assessment was being conducted on March 18, 2022. Although the upcoming assessment related to Mrs. S.'s request for Waiver services, Mr. Fromm testified that if Mrs. S. did not qualify for Waiver services, the Division would evaluate the level of PCS she should be receiving.⁶²

The parties on the record agreed that if Mrs. S. was dissatisfied with the number of hours she was receiving for PCS after her 2022 Assessment, her new fair hearing request would be consolidated with the other matters in dispute – *i.e.*, any reduction in PCS resulting from the 2022 Assessment and Mrs. S.'s claim that her PCS hours should have been increased, not decreased, in both the 2021 and 2022 assessments.⁶³ The parties further agreed that the issue of whether Mrs. S. could receive PCS time for IADLs was purely a legal issue, not a factual one.⁶⁴

⁵⁹ Exh. C, p. 1. Mr. S.'s January 14, 2022 note can be construed as challenging not only the November 10, 2021 denial of the request for additional hours of PCS made in the previously denied service plan amendment, since the note references both the service plan amendment and the 2021 Assessment conducted by Barbara [Rhodes]. See S. Exh. 6, p. 5. Likewise, Mr. S.'s submission of additional medical information on November 17, 2021 in support of Mrs. S.'s service amendment request suggests that he erroneously thought that the service amendment request was being addressed through the November Assessment. See S. Exh. 4, p. 5. However, Mrs. S.'s service amendment request already had been denied on November 10, 2021. See S. Exh. 8, p. 6.

⁶⁰ See Testimony of F. S. (March 11, 2022); *see also* Exh. C, p. 1 (Mr. S.).

⁶¹ Prior to the 2021 Assessment, Mrs. S. had been receiving PCS for: main meal preparation, shopping, and laundry. See Exh. D, pp. 3 & 9.

⁶² See Testimony of Jerry Fromm.

⁶³ See *supra*, p. 2 n.

⁶⁴ As discussed later in this decision, the Division argued that regulatory changes in 2017 precluded Mrs. S. from receiving PCA services for any IADLs. See Testimony of Mr. Fromm; Division's Pre-Hearing Brief, p. 1. Mr. S.'s position was that the guardianship order permitted him to provide, and be paid for as his wife's PCA, the IADLs she had been receiving since the 2016 Assessment. See Testimony of Mr. S.; S. Exh. 1, p.3.

Following the 2022 Assessment, the Division notified Mrs. S. that she was not eligible for the ALI and CFC waiver program based on the 2022 Assessment.⁶⁵ Two days later, the Division notified Mrs. S. that her PCS would be further reduced to 5.0 hours per week, effective April 23, 2022, based on the results of her CAT scores from the 2022 Assessment.⁶⁶ On April 14, 2022, Mr. S. on his wife's behalf filed a fair hearing request regarding both of these determinations – *i.e.*, the denial of waiver program eligibility and the reduction in PCS arising out of the 2022 Assessment.⁶⁷

IV. Discussion

A. Burden of Proof

The Division is seeking to reduce Mrs. S.'s PCS based on: (1) her ineligibility to receive PCS for IADLs due to a change in the PCA regulations in 2017 (2021 Assessment); and (2) a reduction in her level of service for the ADL of toilet use and the elimination of PCS for transfers (2022 Assessment).⁶⁸ Consequently, the Division bears the burden of proof that Mrs. S. no longer qualifies for the same level of services for the ADLs of bathing and toilet use and that she no longer qualifies for assistance with the ADL of transfers (2022 Assessment).⁶⁹

To the extent that Mrs. S. is arguing that she should receive increased scores for certain ADLs or increased frequencies related to various ADLs, she bears the burden of proving by a preponderance of the evidence that the Division's scoring or assigned frequencies are incorrect. Additionally, as an applicant for Waiver services, Mrs. S. bears the burden of proving that she is eligible for waiver services.⁷⁰ A "preponderance of the evidence" means the fact is shown to be more likely true than not true.

B. The 2021 Assessment

There were two issues pertaining to the 2021 Assessment by the time of the hearing: (1) whether Mrs. S. was eligible to receive PCS for any IADLs, and (2) whether the PCS time

⁶⁵ S. Exh. 5, p. 9.

⁶⁶ See Exh. E.

⁶⁷ See S. Exh. 5, p. 9.

⁶⁸ As noted, the Division conceded at the hearing that Mrs. S.'s PCS for bathing should not have been decreased in the 2022 Assessment. See *supra*, at p. 8.

⁶⁹ 7 AAC 49.135. Initially, the 2021 Assessment had eliminated Mrs. S.'s PCS for transfers and reduced her frequency need for toilet use from eight times a day to six times a day. However, the Division reversed its determination regarding these two ADLs prior to the hearing. See D, pp. 2-3; Division's Pre-Hearing Brief, p. 1; *supra*, pp. 6-7. Accordingly, the Revised 2021 Assessment, as revised, only reduced the PCS for Mrs. S.'s IADLs.

⁷⁰ 7 AAC 49.135

allotted for ADLs should have been increased above and beyond the service level specified in the Revised 2021 Assessment.

1. Can Mrs. S. Receive PCS for IADLs?

The issue here is purely a legal one. Mrs. S. had been receiving PCS for the IADLs of main meal preparation, shopping, and in-home laundry prior to the 2021 Assessment.⁷¹ The Division has argued that Mrs. S. is no longer eligible to receive PCS for *any* IADLs because she is married, and her spouse is responsible for providing assistance with the IADLs. In support of its argument, the Division points to the current PCA regulations, which became effective on July 22, 2017. These regulations, found in 7 AAC 125.040, state that:

- (a) Personal care services *do not include* . . .
 - (14) assistance with an IADL under 7 AAC 125.030(c) that
 - (A) is the responsibility of the spouse of the recipient . . .

.⁷²

In other words, a recipient whose spouse is legally obligated to provide assistance with IADLs is not eligible for PCS time for these activities.

Mr. S., however, argues that he is a court-appointed guardian for his wife and points to an Order which states, in pertinent part, that:

F. S. is authorized to be compensated as a paid care provider, personal care assistant and/or PCA for the respondent [his wife, Mrs. S.] through Medicaid and any other public benefits the respondent *is eligible to receive*.⁷³

It is Mr. S.'s position that because of this Order, he can be paid for assisting with his wife's IADLs.

The 2017 regulatory change that resulted in 7 AAC 125.040(a)(14)(a) redefined the term "personal care services" to *exclude* any IADLs that are the responsibility of the spouse if the spouse can perform those tasks. Here, Mr. S. can perform these tasks as he has been doing so as a PCA for his wife. Moreover, he did not argue that the tasks of shopping, main meal (and light

⁷¹ See Exh. D. Mrs. S. in her service amendment had also sought to receive PCS for the IADL of light meal preparation, but the denial of the service amendment was not appealed in a timely manner. Even had the appeal of the service amendment been timely, Mrs. S. would still have been ineligible to receive PCS for this IADL for the reasons set forth in this decision.

⁷² Exh. B, p. 7; *see also* Exh. B, p. 5 (7 AAC 125.030(c), which defines IADLs).

⁷³ See S., Exh. 1, p. 3 (emphasis added).

meal) preparation, and in-home laundry were not his responsibility as a spouse. Instead, he has argued that he should be paid for performing such tasks as a PCA because of the guardianship Order.

What Mr. S. has overlooked is the language of the Order, which only allows him to be compensated as a PCA for his wife through Medicaid for benefits she is “*eligible to receive*.”⁷⁴ Here, Mrs. S. is not eligible to receive IADLs because she has a spouse who can perform those tasks.⁷⁵ Accordingly, Mr. S. cannot be compensated for those services. U. T., a care coordinator whom the S.s presented as a witness, aptly summarized the situation: A married individual cannot get IADLs from a spouse even if there is a guardianship agreement allowing the spouse to be a paid Medicaid provider.⁷⁶ Thus, the Division appropriately eliminated Mrs. S.’s PCS for the IADLs in the 2021 Assessment. To the extent that the Division failed to reassess Mrs. S. between 2016 and 2021, Mr. S. benefitted by being paid for providing such services to his wife/ward long after the regulatory change occurred on July 22, 2017.

Accordingly, the Division’s determination to reduce Mrs. S.’s PCS by 132.5 minutes per week for the IADLs of main meal preparation (87.5 minutes per week), shopping (30 minutes per week), and in-home laundry (15 minutes per week) is AFFIRMED.

2. Is Mrs. S. Entitled to Additional PCS Beyond What Was Authorized In the Revised 2021 Assessment?

Mrs. S. has also argued that she needs more PCS for ADLs than she was allotted in the Revised 2021 Assessment.⁷⁷ The Revised 2021 Assessment authorized Mrs. S. to receive PCS for the ADLs of bathing, personal hygiene, transfers, dressing, and toilet use. As explained below, Mrs. S. has not met her burden of proving that she is entitled to receive more PCS than what was authorized in the Revised 2021 Assessment.

(a) Bathing, Dressing, and Personal Hygiene

Mrs. S. has not disputed the CAT scoring she received for bathing (3/2: extensive assistance with one-person physical assist), dressing (2/2: limited assistance with one-person

⁷⁴ S. Exh. 3, p. 9.

⁷⁵ See 7 AAC 125.040.

⁷⁶ Testimony of U. T. (August 11, 2022); see also OAH No. 13-1430-MDS, p. 11 (a recipient receiving PCS time for IADLs from a PCA lost that PCS time when he got married). Ms. T. testified that she has never seen a person receive IADLs if they are married.

⁷⁷ In his testimony, Mr. S. argued that his wife/ward needed the additional PCS that was reflected in the service amendment request. See Testimony of Mr. S.; see also Exh. C, p. 1; S. Exh. 2, p. 5.

physical assist), or personal hygiene (2/2: limited assistant with one-person physical assist). Instead, she has asked for greater daily frequencies for each of these tasks rather than the one-time per day frequency allotted in her Revised 2021 Assessment.⁷⁸ However, the maximum number of daily frequencies for the ADL of bathing and personal hygiene is once a day, so Mrs. S. was already receiving the regulatory maximum allocated for these respective ADLs.⁷⁹ Similarly, Mrs. S. -- as per the Revised 2021 Assessment -- was authorized to receive PCS for the ADL of dressing twice a day, which again is the regulatory maximum.⁸⁰ She provided no evidence showing that she should receive more PCS time for any of these ADLs beyond the regulatory maximum. Accordingly, she has not met her burden of proof and, therefore, the Division's determination as to the number of daily frequencies she is receiving for each of these ADLs is AFFIRMED.

(b) Transfers (Non-Mechanical)

Transfers are defined as "how a person moves between surfaces -- to/from bed, chair wheelchair, standing position (excluding to/from bath/toilet)."⁸¹ Mrs. S. received a CAT score of 2/2 (*i.e.*, limited assistance; one person physical assist) in the 2016 Assessment and was receiving PCS assistance 28 times a week (4 times a day for seven days a week).⁸² The Revised 2021 Assessment maintained her CAT score and frequency of transfers at the same levels.⁸³

Mr. S. has maintained that his wife/ward needs more frequencies for the ADL of transfers after her knee surgery.⁸⁴ However, there are no medical records or physical therapy records that would support an increase in PCS time for transfers or call into question the accuracy of the 2/2 CAT score contained in the Revised 2021 Assessment.⁸⁵ Accordingly, Mrs. S. has not met her burden of proving that she needs more than limited assistance and a one-person assist with the

⁷⁸ Compare S. Exh. 1, p. 2 with Testimony of Mr. S. and Testimony of Mrs. S.

⁷⁹ Exh. D, p. 6; *see also* Testimony of Ms. Meade. It should be noted that the 2021 Assessment marked the first time that Mrs. S. had been deemed eligible for PCS for the ADL of personal hygiene.

⁸⁰ Exh. D, p. 6.

⁸¹ Exh. D, p. 17.

⁸² The regulatory maximum is six transfers per day, so that 42 transfers per week is the maximum amount allowed.

⁸³ Compare Exh. D, p. 9 with *supra*, at p. 7.

⁸⁴ See Testimony of Mr. S. When Mr. S. filed the service plan amendment on November 9, 2021, he requested that his wife/ward receive PCS time for 26 transfers a day. See S. Exh. 8, p. 4. However, the regulatory maximum for transfers is six per day. See Exh. D, p. 6.

⁸⁵ See Testimony of Mr. S. *see also* Testimony of N.T (noting that the Division gives emphasis to medical records when conducting an assessment). Although Mrs. S. apparently attended physical therapy after both knee surgeries, there were no physical therapy notes included in the records which Mrs. S. provided to this tribunal.

ADLs of transfers or that she needs a greater frequency of transfers. Consequently, the Division's determination is AFFIRMED.

(c) Toilet Use

The CAT defines toilet use as to how a “person uses the toilet room, transfers on/off the toilet, cleanses . . . [and] adjusts clothes.”⁸⁶ In the 2016 Assessment, Mrs. S. was scored a 2/2 (limited assistance; one person physical assist) for the ADL of toilet use with eight frequencies a day (56 per week) approved.⁸⁷ Eight frequencies a day is the maximum daily amount of PCS time allowed for toilet use.⁸⁸ The Revised 2021 Assessment maintained this same level of PCS for toilet use.⁸⁹ The S.s, however, have requested that the daily frequencies be increased, without explaining why an increase is needed.⁹⁰ The only additional evidence of a change in Mrs. S.'s toilet use was in a PCA weekly case note dated October 28, 2021, which suggested that Mrs. S. was having bowel control issues immediately after her knee surgery.⁹¹ However, there are no medical records that indicate that Mrs. S.'s loss of bowel control was an ongoing problem. Similarly, there was nothing in the 2021 Assessment suggesting that Mrs. S. needed more frequent toilet use.⁹²

Melissa Meade, a witness for the Division, testified that requested time beyond the regulatory maximum of eight times per day for toilet use was typically only authorized for significant bowel or bladder disease as shown by medical records. Although Mrs. S. has suffered from incontinence since 2020, Ms. Meade said that incontinence alone would not support additional PCS time beyond the regulatory maximum.⁹³ Accordingly, Mrs. S. has not met her burden of proof in showing that she should be approved for PCS time for the ADL of toilet use beyond the regulatory maximum of eight times per day. The Division's determination, based on the Revised 2021 Assessment, to continue Mrs. S.'s level of service for the ADL of toilet use at the same level that she had been receiving since the 2016 Assessment is, therefore, AFFIRMED.

(d) Bed Mobility

⁸⁶ Exh. D, p. 18.

⁸⁷ Exh. D, p. 9.

⁸⁸ Exh. D, p. 6.

⁸⁹ Exh. D, pp. & 19

⁹⁰ See S. Exh 6, p. 2; Testimony of Mr. S.

⁹¹ S., Exh. 6, p.3.

⁹² See Exh. D, p. 18.

⁹³ S. Exh. 8, pp. 12 & 31. Testimony of Ms. Meade (June 28, 2022). While regulatory caps can be exceeded, Ms. Meade testified that this only occurs with high need recipients and significant supporting medical documentation.

Bed mobility concerns “[h]ow a person moves to and from [a] lying position, turns side to side, and positions body while in bed.”⁹⁴ However, to qualify for PCS for the ADL of bed mobility, the recipient must be non-ambulatory.⁹⁵ On both the 2016 Assessment and the 2021 Assessment, Mrs. S. was assessed with a score of 1/1 (supervision, setup help only).⁹⁶ Consequently, she was not receiving PCS for this ADL.

At the hearing, Mrs. S. testified that she needed assistance in turning over in bed and that she has blisters near the incision site of her knee replacement surgery so she can’t use her legs to turn over.⁹⁷ However, to be eligible for bed mobility, Mrs. S. first must show that she is non-ambulatory, and she has not made this showing. Here, the 2021 Assessment noted that Mrs. S. uses a walker, power scooter, and crutches to ambulate.⁹⁸ Mrs. S.’s medical records similarly confirmed that she was ambulatory using an assistive device.⁹⁹ Accordingly, Mrs. S. has not met her burden of proving that she is eligible to receive PCS for the ADL of bed mobility. Accordingly, the Division’s determination that she was not eligible to receive PCS for the ADL of bed mobility is AFFIRMED.

(e) Locomotion

The ADL of Locomotion involves “[h]ow a person moves between locations in his/her room and other areas on the same floor.” On the 2016 Assessment and the 2021 Assessment, Mrs. S. was scored 1/1 (supervision, setup help only) on the CAT regarding locomotion. The 2021 Assessment notes that she walked from her bed to the bathroom and back using her two-wheeled walker independently.¹⁰⁰ Mrs. S., however, painted a different picture. She testified that she uses a gait belt and that she tips over if she uses the walker because she has tremors and no grip in her hands. She also testified that her scooter can’t fit through the hallway, the bathroom, or her bedroom, so she is pushed in a rolling chair to get through the hallway.¹⁰¹

Mrs. S.’s medical records from the summer of 2021 noted that she had been using crutches to walk during the past year. Her pre-surgical medical records further noted that her

⁹⁴ Exh. D, p. 17.

⁹⁵ Exh. B, p. 4; *see also* Testimony of Ms. Meade (stating that the ADL of bed mobility was only applicable to individuals who were bedridden).

⁹⁶ Exh. D, p. 9.

⁹⁷ Testimony of Mrs. S. (August 11, 2022).

⁹⁸ Exh. D, pp. 17-18.

⁹⁹ S. Exh. 8, p. 12.

¹⁰⁰ Exh. D, p. 17.

¹⁰¹ Testimony of Mrs. S.; *cf.* Exh. D, 15 (noting that Mrs. S.’s grip with both hands was strong).

gait was “extremely unsteady” and that she “can barely get around with crutches at this point.”¹⁰² However, after her knee surgery in October, she was described on November 19, 2021 as “ambulating well with walker assist.”¹⁰³ By December 3, 2021, medical notes show she was about to begin physical therapy and described her gait as “well-balanced with walker assist”¹⁰⁴ Thus, based on the medical records, Mrs. S. was ambulating well with a walker after her first knee surgery, which would be consistent with what assessor observed at the 2021 Assessment.¹⁰⁵ There was nothing in the medical records suggesting that Mrs. S. had any problems with using a walker. Consequently, Mrs. S. has not met her burden of proof in showing that she requires hands-on physical assistance for locomotion. Accordingly, the Division’s determination that Mrs. S. was not eligible to receive PCS for the ADL of locomotion is AFFIRMED.

C. The 2022 Assessment and the Reduction of PCS

The 2022 Assessment initially eliminated Mrs. S.’s PCS for the ADLs of toilet use and transfers and reduced her PCS for the ADL of bathing as compared to the Revised 2021 Assessment.¹⁰⁶ During the hearing held on August 11, 2022, the Division conceded that Mrs. S. still be scored as a 3/2 (extensive assistance, one-person physical assist) for bathing. Thus, based on this concession, there were only two ADLs – transfer and toilet use -- reduced by the 2022 Assessment. As noted, since a reduction in services is involved, the Division bears the burden of proof concerning whether a reduction is warranted by the 2022 Assessment. There are several issues that arise when making this determination here, including whether Mrs. S. received adequate notice that her PCS time was being reduced based on the 2022 Assessment and whether additional PCS may be warranted based on the 2022 Assessment.

1. Did Mrs. S. Receive Adequate Notice That Her PCS Time for Transfers was Being Eliminated in the 2022 Assessment?

The notice letter dated April 13, 2022 relating to the reduction in services following the 2022 Assessment failed to advise Mrs. S. that her 70 minutes per week in PCS for transfers – which she had still been receiving as a result of the Revised 2021 Assessment -- were also being

¹⁰² S. Exh. 8, pp. 12 & 26.

¹⁰³ S. Exh. 8, p. 34.

¹⁰⁴ S. Exh. 8 p. 36.

¹⁰⁵ Compare Exh. D, p. 17 with S. Exh 8, pp. 34 & 36.

¹⁰⁶ Compare *supra*, at p. 7 with Exh. F.

eliminated.¹⁰⁷ Consequently, the sole ADL that was identified in that letter as being reduced (other than the reduction in PCS time for bathing, which was restored at the hearing) was for the ADL of toilet use.

Due to this defective notice letter, a threshold question is whether Mrs. S. received “timely and adequate notice detailing the reasons for the proposed termination, and an effective opportunity to defend” vis-à-vis the elimination of PCS for the ADL of transfers in the 2022 Assessment.¹⁰⁸ The Alaska Supreme Court in Baker v. State of Alaska, Department of Health and Social Services, has stated that in providing notice of an agency’s determination to reduce PCA services, an agency’s effort should err “on the side of providing too much detail respecting the basis for the agency’s decision rather than too little.” The Baker court also stated that due process demands that recipients facing a reduction of their public assistance benefits be provided a meaningful opportunity to understand, review, and, where appropriate challenge the department’s action.¹⁰⁹

The Revised 2021 Assessment allotted 70 minutes of PCS time per week for the ADL of transfers.¹¹⁰ That was the last position of the Division prior to its April 13, 2022 letter reducing Mrs. S.’s PCS to 5.0 hours a week as a result of the 2022 Assessment – a letter which did not mention the elimination of PCS time for transfers.¹¹¹

As the Baker court observed, the agency “should be required to show how and why it determined that a reduction in PCA services was in order.”¹¹² The Division “cannot presume that recipients already have a basis for understanding why services are being reduced; whatever information the department is required to provide must be part of the written notice itself.”¹¹³ Here, the notice letter listed the wrong aggregate amount of PCS time that Mrs. S. had been

¹⁰⁷ See Exh. E, pp. 2-3. The original 2021 Assessment had given Mrs. S. a score of 1/1 (supervision, set-up help only) for the ADL of transfers. See Exh. D, pp. 2-3. However, the Division prior to the start of the hearing reversed its decision and reinstated the PCS that Mrs. S. had been receiving for transfers prior to the 2021 Assessment. See Statements of Counsel for Division at the hearing on March 11, 2022; see also *supra*, at pp. 6-7.

¹⁰⁸ Baker v. State of Alaska, Dept’ of Health and Social Services, 191 P.3d 1005, 1009.

¹⁰⁹ Baker, 191 P.3d at 1011.

¹¹⁰ See *supra*, at pp. 6-7; see also e-mail from the Division’s counsel dated March 11, 2022 to the S.s and this tribunal; Exh. D, p. 2 (indicating that Mrs. S. had been receiving 70 minutes for transfers).

¹¹¹ While the chart accompanying the letter showed no PCS time for transfers, it erroneously listed that Mrs. S. currently was not receiving PCS time for transfers. The chart was also erroneous as to the amount of PCS time for toilet use that Mrs. S. was receiving for toilet use under the Revised 2021 Assessment, since the Division had reversed its prior decision to reduce her toileting frequencies. Compare Exh. F with *supra*, at pp. 6-7.

¹¹² Baker, 191 P. 3d at 1011.

¹¹³ Baker, 191 P. 3d at 1010.

receiving after the Revised 2022 Assessment (it was more than 9.75 hours), it did not specify that the ADL of transfers had been eliminated by the 2022 Assessment, nor did it identify the basis for that elimination. Finally, the chart contained in the letter erroneously depicted Mrs. S. as having a 1/1 scoring for transfers since the chart did not reflect the scoring Mrs. S. received based on the Revised 2021 Assessment.¹¹⁴

Because the Division failed to provide Mrs. S. with adequate notice that it was eliminating the PCS time for the ADL of transfers based on the 2022 Assessment, the Division's elimination of PCS time for the ADL of transfers is REVERSED.

2. Did the Division Adequately Justify the Reduction of PCS Time for the ADL of Toilet Use?

The Revised 2021 Assessment scored as a 2/2 (limited assistance, one-person physical assist) on the CAT for the ADL of toileting which involves how a person "uses the toilet room, transfers on/off toilet, cleanses . . . adjusts clothes" and kept in place the 56 frequencies per week that Mrs. S. had been receiving.¹¹⁵ In contrast, the 2022 Assessment scored Mrs. S. as a 1/1 (supervision, set-up help only) for the ADL of toileting which meant that she would receive no PCS time for toilet use.¹¹⁶

During the hearing, the Division's assessor for the 2022 Assessment, admitted that because the assessment was conducted via Zoom, she did not see the configuration of the bathroom. She also confirmed that she did not see Mrs. S. getting into the bathroom and did not recall if the hallway was too narrow to accommodate Mrs. S.'s scooter. Accordingly, the assessor was only able to "imagine" that Mrs. S. probably scoots herself in the bathroom on her scooter and then transfers to the toilet.¹¹⁷ The assessor testified that Mrs. S. did not report having difficulty with adjusting her clothing after using the toilet. However, the assessor overlooked Mrs. S.'s statements regarding the ADL of dressing, when Mrs. S. reported that someone helps her to pull her pants up.¹¹⁸

¹¹⁴ See Exh. E, pp. 1-3; Exh. F.

¹¹⁵ Exh. D, p. 18; Exh. G, p. 8. The notice letter and accompanying chart erroneously stated that Mrs. S. was receiving PCS for toileting six times a day. See Exh. E, p. 2; Exh. F. However, the notice letter provided Mrs. S. with written notice that her PCS time for toileting was being eliminated and why, thus meeting the standards outlined in Baker.

¹¹⁶ Exh. G, p. 8.

¹¹⁷ Testimony of Ms. Platt.

¹¹⁸ Compare Testimony of Ms. Platt with Exh. G, p. 8 (stating that, for the ADL of dressing, Mrs. S. needed hands on assistance with pulling up her pants and putting on her jacket).

The Division's assessor reported that Mrs. S. "cleans herself with wet wipes."¹¹⁹ Mrs. S., however, testified that while she was able to cleanse herself after urinating, she could not cleanse herself after a bowel movement because she has had surgeries on her shoulders and has trouble using her arms.¹²⁰ Mrs. S.'s testimony was credible, since the assessor had recorded in the 2022 Assessment that Mrs. S. was unable to touch her hands behind her back and there was a June 3, 2022 letter from her physician stating that "an aide must assist in wiping peri-areas after bathroom use."¹²¹ Mrs. S. also testified that her scooter and wheelchair, which is wider than the scooter, do not fit in the hallway and that the scooter does not fit in the bathroom. She said her husband pushes her to the bathroom in a gaming chair and helps her get to the toilet and she further described difficulties she has holding onto the walker.¹²²

Based on statements in the CAT and Mrs. S.'s testimony, the Division has not met its burden of proof in establishing the Mrs. S. does not need any hands-on assistance for the ADL of toileting or that her frequency for toilet use should be reduced from eight times a day to six times a day.¹²³ Accordingly, the Division's determination to eliminate Mrs. S.'s PCS for toilet use is REVERSED. Mrs. S. should continue to have a score of 2/2 for this ADL and receive PCS assistance 56 times per week (8 times a day x 7 days a week) consistent with the scoring and PCS time allotted to her in the Revised 2021 Assessment.

3. Mrs. S.'s Request for Additional ADLs

To the extent that Mrs. S.'s appeal of the 2022 Assessment can be broadly read as requesting additional PCS time, the same analysis pertaining to her request to receive additional PCS beyond what was allotted in the Revised 2021 Assessment is applicable here.¹²⁴ Mrs. S. bears the burden of proving that the CAT scores she received on the 2022 Assessment were incorrect and that she should be receiving PCS for the ADLs of bed mobility, locomotion, and eating.¹²⁵

(a) *Bed Mobility*

¹¹⁹ Exh. G p. 8

¹²⁰ Testimony of Mrs. S.

¹²¹ See Exh. G, p. 5; S. Exh. 6, p. 7.

¹²² Testimony of Mrs. S.

¹²³ There was no testimony or evidence provided, either with regard to the original 2021 Assessment or the 2022 Assessment, in support of the Division's determination that Mrs. S. required less frequent toilet use.

¹²⁴ See Testimony of Mr. S.

¹²⁵ As noted earlier in this decision, Mrs. S. is receiving the maximum number of frequencies for the ADLs of bathing, dressing, personal hygiene, and toilet use. See *supra*, at pp. 13-15.

Mrs. S. is not eligible for PCS for the ADL of bed mobility because she can ambulate. Only non-ambulatory individuals can receive PCS for the ADL of bed mobility.¹²⁶ Accordingly, Mrs. S. has not met her burden of proving that she needs PCS time for the ADL of bed mobility.

(b) *Locomotion*

Regarding the ADL of locomotion, which is how a person moves between his/her room and other areas on the same floor, Mrs. S. testified that she uses a gait belt with the walker but has trouble holding onto the walker. She reported that the walker “would probably fit through the hallway” but said she is pushed through the hallway while seated on a gaming chair since her scooter and wheelchair don’t fit through the hallways, bathroom, or her room.¹²⁷ The Division’s assessor only viewed Mrs. S. on her scooter in the teleassessment area. She did not ask Mrs. S. to demonstrate getting from one place to the other without the scooter or verify whether the scooter would fit through the hallway or observe whether she could use her walker.¹²⁸

//

/

Mrs. S.’s medical records, however, stated that as of November and December of 2021, Mrs. S. could ambulate independently with a walker.¹²⁹ A letter from one of her doctors dated June 3, 2022 further confirmed that Mrs. S. uses a cane and walker “with standby assist.”¹³⁰ Consequently, without further evidence that Mrs. S. needs hands-on physical assistance rather than supervision for locomotion, she has not met her burden of proof regarding her need for hands-on assistance for the ADL of locomotion.

(c) *Eating*

On the 2022 Assessment, Mrs. S. was scored a 0/1 (independent, set-up help only) on the CAT for the ADL of eating, which is how a person eats or drinks *regardless of skill*.¹³¹ According to the CAT, Mrs. S. feeds herself and uses a straw in a cup when she drinks since she has tremors. Mrs. S. testified that she has difficulty eating because food falls off the utensils due to her tremors and her clothes get stained, so her husband feeds her. He also cuts up some of her

¹²⁶ Exh. B, p. 4.

¹²⁷ Testimony of Mrs. S.

¹²⁸ Testimony of Ms. Platt. The Division does not authorize PCS time for locomotion if an individual is self-sufficient with an assistive device such as a walker. *See* Exh. B, p. 5.

¹²⁹ S. Exh. 8, pp. 18, 34 & 36. The record in this case had limited medical records or notes for Mrs. S. after December 3, 2021.

¹³⁰ S. Exh. 6, p. 7.

¹³¹ Exh. G, p. 8.

food so she doesn't choke. Although Mrs. S. alluded to a swallow study having been done in the past during her testimony, there was no information in the record about that study or its outcome.¹³²

Since the CAT assesses the ADL of eating regardless of skill, the fact that Mrs. S. drops food and stained her clothes does not alter the fact that she *can* eat independently but prefers to be fed by her husband to avoid dropping food or staining her clothes. Accordingly, Mrs. S. has not met her burden of proof in showing that she should receive PCS for the ADL of eating.

D. The 2022 Assessment as Revised

As a result of these adjustments to the 2022 Assessment as set forth in this decision, Mrs. S.'s PCS time is as follows:

////

///

//

/

<u>Task</u>	<u>Original 2022 Assessment</u>	<u>2022 Assessment as Revised & Coding</u>	
Transfers	eliminated	limited assist – 28x/wk	(2/2)
Dressing	limited assist – 14x/wk	limited assist – 14x/wk	(2/2)
Toilet Use	eliminated	limited assist – 56x/wk	(2/2)
Bathing	limited assist – 7x/wk	extensive assist – 7x wk	(3/2)
Personal Hygiene	limited assist – 7x/wk	limited assist – 7x/wk	(2/2)

Consequently, the PCS for ADLs from the 2022 Assessment, as revised by this decision, remain the same as the PCS allotted to Mrs. S. in the Revised 2021 Assessment.¹³³

E. The 2022 Assessment and the Denial of Waiver Services

Mrs. S. applied for Waiver Services and, as a result, the Division conducted the 2022 Assessment to determine her eligibility. As an applicant, she bears the burden of proof. Since the Division's decision is being reviewed, the relevant date for assessing whether she is eligible for waiver services is the date of the agency's decision under review – *i.e.*, April 11, 2022.

1. Method of Assessing Waiver Eligibility

¹³² Exh. G, p. 8; Testimony of Mrs. S.

¹³³ *Cf. supra*, at p. 7.

An adult with a physical disability is eligible to receive benefits under the Alaska Medicaid Waiver program if he or she requires “a level of care provided in a nursing facility.”¹³⁴ The program pays for services that allow an eligible person to stay in his or her home (which may be an assisted living home) rather than move into a nursing facility. The level of care that is provided in a nursing facility is described by regulation. Skilled nursing facility services are defined in 7 AAC 140.515; intermediate care facility services are defined in 7 AAC 140.510.

The Division determines whether an applicant requires a nursing level of care services by assessing the applicant’s physical, emotional, and cognitive functioning using the CAT.¹³⁵ The results of the assessment portion of the CAT are then scored. If the applicant’s score is 3 or higher, the applicant is medically eligible for Waiver services.¹³⁶ There are a number of ways to score a sufficient number of points on the CAT to qualify Waiver services. Two are germane to this case.¹³⁷ A person can qualify for Waiver services if he or she has a self-performance code of 3 (extensive assistance) or 4 (total dependence) and a support code of 2 (one-person physical assist) or 3 (two-person physical assist) for *three or more* of five specified ADLs – *i.e.*, bed mobility, transfers, locomotion within the home, eating, and toileting.¹³⁸ This qualification route is evaluated in Subpart (a).

A person can also qualify for Waiver services if he or she has self-performance code of 2 (limited assistance), 3 (extensive assistance), or 4 (total dependence) and a support code of 2 (one-person physical assist) or 3 (two-person physical assist) for *two* of the five specified ADLs *and* the person is receiving therapy by a qualified therapist or special treatments such as barrier dressing for stage 1 or 2 ulcers three or more days a week.¹³⁹ This qualification route will be evaluated in Subpart (b).

(a) *Eligibility Based Upon Extensive Assistance with Three ADLs*

¹³⁴ Exh. B, pp. 18-19.

¹³⁵ Exh. B, p. 20. The CAT also records the applicant’s need for professional nursing services, therapies, and special treatments. See Exh. G, pp. 11-13.

¹³⁶ See Exh. G, 31.

¹³⁷ A person can also receive points for combinations of required professional nursing services, significantly impaired cognition (memory/reasoning difficulties) or difficult behaviors (wandering, abusive behaviors etc.). See Exh. G, pp. 31-32. However, Mrs. S. is not receiving professional nursing services and her behavior was not an issue. See Exh. G, pp. 11-13 & 15-16. Since her cognition is only mildly impaired, it does not provide her with sufficient points in the cognition category to allow that category to be combined with any points she receives in one or more ADLs where she scored a 2/2 or higher. See Exh. G, p. 31.

¹³⁸ See Exh. G, p. 31.

¹³⁹ See Exh. G, p. 32.

Under the 2022 Assessment, as revised by this decision, Mrs. S. had the following scores on the ADLs used to determine eligibility for Waiver services: bed mobility (0/0), transfers (2/2), locomotion within the home (0/1), eating (0/0), and toilet use (2/2).¹⁴⁰ Thus, she does not meet the threshold of having CAT score of 3/2 or higher on three of those five ADLs. Accordingly, Mrs. S. cannot qualify for the Waiver program on the basis of ADLs alone.

C. Eligibility Based Upon Assistance with Two ADLs and Certain Therapies

Based on the 2022 Assessment, as revised by this decision, Mrs. S. has demonstrated that she needs limited assistance (self-performance code 2) with a one-person physical assist (support code 2) with the ADLs of transfers and toilet use. Consequently, Mrs. S. has the requisite level (2/2 or higher) on two of the five specified ADLs examined for Waiver services which, if combined with certain therapies and treatments, could result in sufficient points under the CAT scoring system for her to be eligible for waiver services.¹⁴¹ Treatments which would qualify include the treatment and/or application of dressing for ulcers, surgical wounds, or open lesions for which the physician had “prescribed irrigation, application of medications or sterile dressings which requires the skill of an RN.”¹⁴²

1. Treatments

Under this route for eligibility, Mrs. S. must be receiving *professional nursing care* and monitoring for the administration of treatments, procedures, or dressing changes which involve prescription medications for chronic conditions, as prescribed by a physician.¹⁴³ Moreover, she must be receiving such treatments *three or four* days a week.¹⁴⁴ Here, there were no documents in the record and no testimony to suggest that Mrs. S. was receiving professional nursing care.¹⁴⁵ Although she has a prescription barrier cream applied after bowel movements, this is done by her PCA, not a nurse.¹⁴⁶ Similarly, although she developed ulcers after her surgery due to an allergy to tape used, there was no infection and the medical records provided do not indicate that she needed professional nursing care for those ulcers or that it was a chronic condition.¹⁴⁷ Likewise,

¹⁴⁰ See *supra*, pp. 21-22; see also Exh. F.

¹⁴¹ See Exh. G, p. 32.

¹⁴² Exh. G, p. 12.

¹⁴³ See Exh. G, pp. 12 & 31.

¹⁴⁴ See Exh. G, p. 31.

¹⁴⁵ See S. Exh. 8, pp. 12-98.

¹⁴⁶ Testimony of Mrs. S.; S. Exh. 8, pp. 24,

¹⁴⁷ The December 3, 2021 note concerning Mrs. S.’s visit to her physician contains no mention of the ulcers from the surgical tape as opposed to the notations from Mrs. S.’s earlier medical exams in November of 2021. Compare S. Exh. 8, pp. 244 & 34 with S. Exh. 8, p. 36.

the CAT for the 2022 Assessment corroborates that she does not have stage 3 or 4 decubitus ulcers, an open surgical site, stasis ulcers, or open lesions which would require the skill of an RN and thus result in scoring for Waiver services.¹⁴⁸

2. Therapies

The record mentions that Mrs. S. was to receive physical therapy two to three times week following her first knee surgery and her second knee surgery.¹⁴⁹ In order for physical therapy to be considered in conjunction with Mrs. S.'s functional limitations for the purpose of determining her eligibility for Waiver services, such therapy must occur three to four times a week.¹⁵⁰ There was no testimony presented suggesting that Mrs. S. was receiving physical therapy three or four times a week following either of her knee surgeries. Accordingly, this therapy did not meet the requisite threshold for it to be considered in conjunction with Mrs. S.'s functional limitations for the purpose of determining her eligibility for waiver services.

V. **Conclusion**

Due to the 2017 changes in the PCA regulations, Mrs. S. is no longer eligible to receive PCS for any IADLs and the Division's determination regarding the elimination of PCS time for her IADLs in the Revised 2021 Assessment is AFFIRMED. Regarding Mrs. S.'s request for additional PCS beyond what was authorized in the Revised 2021 Assessment, Mrs. S. has not met her burden of showing that she is eligible for additional PCS. Accordingly, the Division's determination, as set forth in the Revised 2021 Assessment, regarding Mrs. S.'s eligibility to receive PCS for the ADLs of transfers, dressing, toilet use, bathing, and personal hygiene and her level of service is AFFIRMED.

Regarding the 2022 Assessment, the Division's determination to reduce Mrs. S.'s PCS by eliminating time for transfers and toilet use is REVERSED.¹⁵¹ However, Mrs. S. has not met her

¹⁴⁸ Exh. G, pp. 12 & 31. It should be noted that Mr. S. provided photos of Mrs. S.'s wounds shortly after her surgery. See S. Exh. 4, p. 5. The photos could not be opened in the format he provided, so the Office of Administrative Hearings contacted Mr. S. to resend those photos in a different format; however, he did not do so. There is no mention of wounds or ulcers in either the December 3, 2021 medical notes or in the June 3, 2022 letter from Mrs. S.'s physician. See S. Exh. 6, p. 7; S. Exh. 8, p. 36.

¹⁴⁹ S. Exh. 8, pp. 34, 36 & 39. Mrs. S. had a second knee surgery on January 27, 2022. She also needed physical therapy 2-3 times a week afterwards. See Exh. 8, p. 8; *see also* Exh. G, p. 3.

¹⁵⁰ Exh. G, p. 31.

¹⁵¹ As noted, the Division conceded at the August 11, 2022 hearing that Mrs. S. should continue to be scored a 3/2 (extensive assistance/ one-person physical assist) on the ADL of bathing and thus not receive a reduction in PCS time. See Testimony of Mr. Fromm.

burden of showing she is eligible for additional PCS in connection with this 2022 Assessment. Finally, the Division's denial of Mrs. S.'s application for Waiver services is AFFIRMED.

Dated: December 29, 2022

Signed

Kathleen A. Frederick
Administrative Law Judge

The undersigned, by delegation from the Commissioner of Health and in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

Beginning on page seventeen, the proposed decision jumps to a constitutional analysis of adequate notice without even mentioning the regulation that defines adequate notice in these cases. That regulation, 7 AAC 49.070 must be analyzed before reaching the Constitution. Standard principles of statutory interpretation, particularly the doctrine of constitutional avoidance, command that a valid regulation directly on point must be discussed and rejected before basing an opinion on Constitutional principles. All relevant regulations and statutes must be analyzed before reaching constitutional issues, in particular the notice regulation at 7 AAC 49.070. Therefore, I REJECT that interpretation and application of the constitution in the proposed decision without appropriate discussion of 7 AAC 49.070.

The proposed decision frames the issue upon which the Division bore the burden of proof as "Did the Division Adequately Justify the Reduction of PCS Time for the ADL of Toilet Use." This is an incorrect application of the De Novo standard. Therefore, I REJECT this interpretation of the De Novo standard and the subsequent discussion in the proposed decision.

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 February, 2023.

By: Signed

Daniel Phelps
Project Coordinator

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