

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

In the Matter of	)	
	)	
N. J.	)	OAH No. 22-0907-MDS
_____	)	

DECISION

I. Introduction

After N. J. made an initial application for Personal Care Services (PCS), the Division of Senior and Disabilities Services (“Division”) conducted an assessment and, on November 2, 2022, approved her for 14.5 hours per week of PCS. Through her daughter, who serves as her power of attorney (POA), Ms. J. requested a fair hearing to contend that the number of approved hours should have been higher.

After an initial delay caused by a communication breakdown among those assisting Ms. J., a hearing was held on January 4, 2023. Ms. J.’s POA appeared and testified on her mother’s behalf, as did T. T., Ms. J.’s sister and current personal care assistant (PCA). Terri Gagne represented the Division, with assessor Michaela Schaefer testifying in support of the Division’s decision.

The fair hearing process in this case can address only the amount of PCS for which Ms. J. qualified on November 2, 2022, when the decision was made. This decision concludes that the 14.5 hours awarded was correct as of that date, and affirms the Division’s decision.

It seems likely that Ms. J.’s condition deteriorated significantly after November 2, which may make her eligible for more PCS. The way to address that is through a request for amendment to the service plan. Ms. J.’s support team did submit an amendment request, but they sent it to the wrong place. They were encouraged at the hearing—and are encouraged again here—to resubmit it to the correct location.

II. Background Facts

Ms. J., who has just turned 62 while this case was pending, lives with her niece. She is beset with diabetes, stage 3 kidney disease, emphysema requiring supplemental oxygen, congestive heart failure, and other conditions, and she has begun to experience cognitive decline.¹

¹ Ex. E, p. 4; hearing testimony.

Assessor Michaela Schaefer evaluated Ms. J. for PCS October 26, 2022, using the Consumer Assessment Tool (CAT).² The Division’s CAT assessment rated Ms. J. as requiring assistance in a number of areas. Under activities of daily living (ADLs), it supported PCS time authorizations for access to medical appointments, dressing, toileting, personal hygiene, and bathing. Under instrumental activities of daily living (IADLs) it supported time for light meal preparation, main meal preparation, light housework, shopping, and laundry—in home. Under other covered activities, PCS time was justified for minor respiratory equipment maintenance, escort, and medication assistance. This led to a total PCS time award of 14.5 hours per week, finalized in a decision sent to Ms. J. on November 2, 2022.³

Ms. J. submitted a request for a fair hearing on November 16, 2022. Her care team later supplied a thoughtful and articulate “List of Disagreements” that has guided the focus of this appeal. The list stated that Ms. J. needed PCS for the ADL of supervised eating (for which no time had been awarded), and additional PCS beyond what was awarded for the IADLs of light meal preparation, light housework, and laundry—in home.

Because this is an initial request for PCS, Ms. J. bears the burden of proof of establishing that she is eligible for PCS beyond the levels the Division has already approved.⁴

III. Discussion

A. The PCS Program

The purpose of the PCS program is:

to provide a recipient physical assistance with activities of daily living (ADL), physical assistance with instrumental activities of daily living (IADL), and other services based on the physical condition of the recipient.⁵

The Division uses the CAT to help it assess the level of assistance needed.⁶ The goal of the assessment process is to determine the level of physical assistance that an applicant requires to perform their ADLs and IADLs.⁷

Some of the issues in this case involve technical scoring issues as to IADLs. The CAT’s numerical coding system with regard to IADLs has two components: a self-performance code

² Ex. E.

³ Ex. D.

⁴ 7 AAC 49.135.

⁵ See 7 AAC 125.010(a).

⁶ 7 AAC 125.020(b).

⁷ See 7 AAC 125.010(a).

and a support code. The CAT's "self-performance" codes rate how capable a person is with regard to performing a particular IADL. The CAT's "support" codes rate the degree of assistance that a person requires for a particular IADL.

B. Accuracy of Ms. J.'s Assessment

Through her care team, Ms. J. has identified four areas where she needs added PCS time. They will be reviewed one by one below.

1. Supervised Eating

Ms. J.'s care team advocates that she be awarded time for supervised eating, on the basis that she needs to be on a strict no-sugar diet and there are some indications that she is not eating healthily. There is no dispute that Ms. J. can physically feed herself.

The regulatory authorization for supervised eating in the PCS program does not extend to the kind of supervision Ms. J.'s team feels she needs. Under 7 AAC 125.030(b)(5)(C), this kind of personal care assistance is only available for a person with swallowing or aspiration difficulties, as documented by a recent swallow study. Since Ms. J. does not have that kind of eating issue, PCS time for supervised eating had to be denied, and the denial must be affirmed.

2. Light Meal Preparation

The IADL of light meal preparation is the physical assistance needed for the preparation, serving, and cleanup in the recipient's home of any meal that is essential to meet the health needs of the recipient, and that is not the main meal of the day.⁸ The Division found Ms. J. "independent with difficulty" but needing "physical assistance" for the task (CAT score 1/3).⁹ This resulted in a time award of 105 minutes per week.

Ms. J.'s team advocates changing the scoring to 2/3, on the basis that the self-performance score should reflect that, while Ms. J. is involved in light meal preparation, hands-on help is required. Changing to a score of 2/3 would increase the minutes per week to 157.5.¹⁰

The assessor explained the score as reflecting that Ms. J. can prepare many light meals by herself, albeit with difficulty, but when cutting is required she requires physical assistance. That is consistent with a score of 1/3, and type of score expressly envisioned in the scoring chart.¹¹ Ms. J.'s team has not carried its burden of proof to show that this score is in error. They

⁸ 7 AAC 125.030(c)(1).

⁹ Ex. E, p. 29.

¹⁰ See Ex. D, p. 4.

¹¹ *Id.*

essentially concede that the physical assistance Ms. J. needs is for cutting food, an activity that is not required for every kind of light meal. Their main concern, as with supervised eating, seems to be that more attendant supervision would “help her stay on a healthy diet.”¹² However, diet supervision is not within the scope of this IADL, and the assessor’s determination cannot be changed on this basis.

3. Light Housework

Ms. J. was given a score of 2/3 for light housework assistance (self-performance code of 2, support code of 3), resulting in an award of 67.5 minutes of PCS per week for this item.¹³ Light housework involves keeping the recipient’s living space orderly, including such activities as dusting, vacuuming, and dishwashing.¹⁴ The score reflected the fact that, when she was assessed, Ms. J. was able to get around using assistive devices and could participate to a degree with these activities, although she needed physical help.

Ms. J.’s team advocates a score reflecting total dependency, but they made no demonstration that Ms. J.’s condition as of November 2 was such that she could was not physically able to participate *at all* in the maintenance of an orderly living space. The score must be left as it is.

4. Laundry—In Home

Ms. J. was likewise scored 2/3 for in-home laundry. This reflects that at the time of the decision at issue she could participate in the home laundry process to some degree, such as folding laundry. Nothing at the hearing indicated that, as of November 2, Ms. J. should have been determined to be totally reliant on others in this area. Therefore, the score cannot be changed.

C. Changes After November 2

Ms. J.’s PCA testified at the hearing that while Ms. J. was “doing a great job” in late October, her physical health and cognition “now”—as of the time of the hearing in January—was much worse.¹⁵ And, indeed, Ms. J. seems to have had a significant decline, beginning with

¹² List of Disagreements, p. 1.

¹³ Ex. D, p. 6.

¹⁴ 7 AAC 125.030(c)(3).

¹⁵ T. testimony.

a series of alarming events in late November. None of this can be addressed in the present decision, which relates to Ms. J.'s eligibility at the time of the decision being appealed.¹⁶

To get these changes addressed, Ms. J.'s team needs to submit a proposal for a service plan amendment to the Department of Health via the Harmony system. If the resolution of that proposal is not satisfactory to Ms. J., she can submit a new request for a fair hearing.

IV. Conclusion

Ms. J. has not met her burden of proof of showing that, *as of November 2, 2022*, she needed additional PCS beyond what the Division determined. The Division's award of 14.5 hours of PCS is therefore affirmed.

Ms. J. condition is apparently deteriorating, and this may mean that she has additional eligibility as of a later date. As was explained during the hearing, Ms. J. should submit her amendment request to the proper location for evaluation.

DATED this 28th day of February, 2023

SIGNED
Christopher Kennedy
Administrative Law Judge

¹⁶ *E.g., In re T.C.*, OAH Case No. 13-0204-MDS (DHSS 2013), at 7 (published at <https://aws.state.ak.us/OAH/Decision/Display?rec=2856>) (correctness of decision under review judged as of time of decision; later evidence is relevant but only insofar as it bears on the condition at the time of the decision).

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 14th day of March, 2023.

By: SIGNED
Signature
Christopher Kennedy
Name
Administrative Law Judge
Title

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