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

In the Matter of	)	
	)	
T. J.	)	OAH No. 23-0268-MDS
	)	

DECISION

I. Introduction

T. J. is a Medicaid recipient who receives Personal Care Services (PCS) through the Medicaid Community First Choice Personal Care Services option. On March 2, 2023, the Division of Senior and Disability Services (Division) notified him that his PCS hours would be reduced from 20.75 hours per week to 19.5 hours per week.

Mr. J. not only disagreed with the reduction in his PCS, but also requested that additional PCS be provided. A hearing was held on July 27, 2023 to address the Division's reduction and Mr. J.'s request for an increase. The evidence and law in this case supports Mr. J.'s request for an increase in toileting assistance, but not in the other requested areas. The evidence and law only partially support the Division's reduction. Accordingly, the reduction in benefits is affirmed in part and reversed in part as discussed below.

II. Introductory Facts and Procedural History

T. J. is a severely disabled 58-year-old man who lives in the home of his elderly mother, who helps to provide care for him. Mr. J.'s medical diagnoses include Cerebral Palsy, intellectual disability, epilepsy, Autistic Disorder, and blindness.[1] Mr. J. is bed bound and cannot be moved without it causing him severe pain. Ms. N., his mother, provides the bulk of his care when it is not provided through PCS, which, at her advanced age, is exceedingly difficult.[2]

Mr. J. was receiving 20.75 weekly hours of PCS in February 2023, when the Division assessed him on February 17, 2023 to determine his ongoing eligibility for those services. Following the assessment, the Division modified his PCS support plan. It increased his assistance with bed mobility from 42 times per week to 63 times per week, eliminated his assistance with mechanical transfers, while providing him with once weekly assistance with non-

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1 Division Ex. G, p. 3. It should be noted that Mr. J.'s mother disagrees with the Autism diagnosis.

2 Ms. N.'s testimony.

mechanical transfers, increased the amount of time available for accessing medical appointments, reduced his assistance with toileting from 28 times per week to 14 times per week, and decreased his medication assistance from 28 times per week to 7 times per week. This reduced his total amount of PCS time to 19.5 hours per week.[3]

Mr. J. requested a hearing to challenge the reduction in his PCS hours. Mr. J.'s hearing was held on July 27, 2023. Mr. J. did not participate in the hearing. His interests were represented by his mother E. N., who holds his power-of-attorney. Ms. N. testified on Mr. J.'s behalf, as did his Medicaid Care Coordinator, O. B. with Southcentral Foundation, and G. V. with Home Care Services Group A., Inc. The Division was represented by Terri Gagne, a Fair Hearing representative with the Division. Q. S., R.N., the nurse assessor with the Division who conducted the assessment, testified for the Division.

At hearing, Mr. J. not only disputed the reduction in his hours, but also requested an increase in his bed mobility PCS frequency, an increase in his dressing frequency, an increase in toileting frequency, an increase in the time allotted each time he toileted or bathed, and that he be provided PCS time for range of motion exercises, and PCS time for supervised eating.

III. Discussion

A. The Personal Care Service Determination Process

The Medicaid program authorizes Personal Care Services (PCS) for the purpose of providing assistance to a Medicaid recipient whose physical condition causes functional limitations which "cause the recipient to be unable to perform, independently, or with an assistive device, the activities specified in 7 AAC 125.030."[4] If a Medicaid recipient receives Medicaid Home and Community-Based Waiver Services, the PCS are administered through the Community First Choice option. However, the PCS requirements for assistance with activities of daily living (ADLS) for Community First Choice enrollees are the same as those set out in the PCS requirements for ADLs for non-Medicaid Waiver recipients.[5]

The ADLs are broken down into eight specific "activities of daily living" (ADLs) – bed mobility, transfers, locomotion, dressing, eating, toileting, personal hygiene, and bathing[6] -- and five specific "instrumental activities of daily living" (IADLs) – light meal preparation, main

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3 Division Exs. E, F, and G.
4 7 AAC 125.010(b)(1)(A)(iii).
5 7 AAC 127.040.
6 7 AAC 125.030(b).

meal preparation, housework, laundry, and shopping.[7] Some degree of hands-on assistance is required in order to qualify for PCS; PCS are not provided for activities that can "be performed by the recipient,"[8] nor for "oversight and standby functions."[9]

The Division assesses recipients by using the Consumer Assessment Tool ("CAT") to score both eligibility for the PCS program and the amount of assistance needed for covered activities and services.[10] For both ADLs and IADLs, the CAT provides recipients with a two-part numerical score to reflect the recipient's ability to perform the activity and need for assistance in doing so. That score consists of a self-performance code, which rates a person's ability to perform the activity, followed by a support code, which reflects the degree of assistance required to do so. These codes then dictate whether a recipient is eligible for PCS for the activity, and, if so, the amount of PCS time allocated to that activity.

The ADLs measured by the CAT are bed mobility, transfers, locomotion, dressing, eating, toilet use, personal hygiene, and bathing.[11] For ADLs, the possible self-performance codes relevant to determining a PCS level are as follows:

> **0 – "Independent."** This code is used if help or oversight was provided no more than twice in the prior seven days.
>
> **1 – "Supervision."** This code is used if the person requires only "oversight, encouragement, or cueing" while performing the activity.
>
> **2 – "Limited Assistance."** This code is used if the person is "highly involved" in the activity" and "received physical help in guided maneuvering of limbs, or other nonweight-bearing assistance" three or more times in the last seven days or received physical help in guided maneuvering of limbs plus weight bearing assistance no more than twice in the last seven days.
>
> **3 – "Extensive Assistance."** This code is used where the person performed part of the activity, but over the past seven days received weight-bearing support and/or full caregiver performance of the activity three or more times.
>
> **4 – "Total Dependence."** This code is used where there has been full staff/care giver performance of the activity during the entire prior seven days.[12]

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7 7 AAC 125.030(c). PCS are also provided for medication assistance, maintaining respiratory equipment, dressing changes, and wound care, medical escort, and passive range-of-motion exercises. 7 AAC 125.030(d). The regulation contains specific conditions that a recipient must satisfy to receive these specialized services. For Community First Choice enrollees, the recipient has the option of either electing IADLs or chores services. *See* 7 AAC 127.087(d).

8 7 AAC 125.040(a)(4).

9 7 AAC 125.040(a)(10).

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

11 Division Ex. G, pp. 9 – 14.

12 Division Ex. G, p. 9.

For ADLs, the possible support codes used to determine a service level reflect the "most support provided" over each 24-hour period during the prior seven days. The support codes are:

0 – The person required no set up or physical help.

1 – The person required only setup help.

2 – The person required a one-person physical assist.

3 – The person required a physical assist from two- or more people.[13]

The independent activities of daily living (IADLs) measured by the CAT are light meal preparation, main meal preparation, light housekeeping, laundry, and shopping.[14] 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."[15]

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 provided"

3 – "Physical assistance provided."

4 – "Total dependence - the person was not involved at all when the activity was performed."[16]

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, a person coded as requiring extensive assistance (code of 3) with bathing would receive 22.5 minutes of PCS time every day he or she is bathed.[17] The list of services, time allotted for each service based upon the severity of need, and the allowable frequencies for each service are all set out in the *Community First*

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13 Division Ex. G, p. 9.
14 Division Ex. G, pp. 29 - 30.
15 Division Ex. G, pp. 29 – 30.
16 Division Ex. G, p. 30.
17 *See* Division Ex. E, p. 6.

Choice Personal Care Services: Service Level Computation instructions, which are adopted by reference into regulation.[18]

B. Disputed Areas

The PCS activities that are in dispute are: bed mobility, transfers, dressing, eating, toileting, bathing, passive range of motion exercises, and medication assistance. On tasks that the Division wishes to decrease the level of assistance, the Division has the burden of proof. On tasks that Mr. J. wishes to increase the level of assistance, he has the burden of proof.[19]

1. Bed Mobility

Bed Mobility is defined as "[h]ow [a] person moves to and from lying position, turns side to side, and positions body while in bed."[20] Mr. J. was receiving extensive assistance (coded 3/2) with bed mobility 42 times weekly.[21] During the February 17, 2023 assessment process, the assessor observed Mr. J. moving in bed and determined that he required extensive assistance (coded 3/2) with bed mobility 10 times daily (70 times per week) to "relieve the pressure."[22] Mr. J. currently has two small pressure sores on his back, which have apparently developed recently.[23]

The Division, however, increased the frequency of Mr. J.'s assistance with bed mobility to 63 rather than the 70 provided in the assessment.[24] Mr. J. therefore maintains that he should receive bed mobility PCS 70 times per week rather than the 63 allotted by the Division.

The Medicaid program only allows a maximum of 12 daily frequencies for bed mobility, which would be 84 times per week. However, that amount is "reduced by frequencies for the ADLs of transferring, locomotion, toileting, and bathing."[25] The Division's PCS plan allows twice daily toileting assistance, and once daily bathing assistance.[26] This would reduce the maximum allowable frequencies for bed mobility by 3 per day, to a maximum of 9 frequencies per day. This results in a total allowable bed mobility assistance frequency of 63 frequencies per week,[27] the amount allotted by the Division.

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18 Division Ex. B, pp. 66 - 69; 7 AAC 127.090(a)(1); 7 AAC 160.900(d)(57).
19 7 AAC 49.135.
20 Division Ex. G, p. 9.
21 Division Ex. F, p. 1.
22 Division Ex. G, p. 9.
23 Ms. N.'s testimony.
24 Division Exs. E, F.
25 Division Ex. E, p. 6.
26 Division Ex. F, p. 1.
27 9 bed mobility assists per day 7 days per week.

2. Transfers

Transfers are defined as "[h]ow [a] person moves between surfaces – to/from bed, chair, wheelchair, standing position (Exclude to/from bath/toilet)."[28] Mr. J. was previously provided mechanical transfer assistance, using a Hoyer lift, twice weekly. The assessor found that Mr. J. was no longer being transferred, either using his Hoyer lift or otherwise, due to his extreme pain, and changed the transfers to once per week, to allow for emergencies, at a complete dependence level, which was a reduction in the weekly time allotted for transfers.[29] It is undisputed that Mr. J. is completely bedbound and is not currently being transferred due to his extreme pain. As a result, the evidence supports this change.

3. Dressing

Dressing is defined as "[h]ow [a] person puts on, fastens, and takes off all items of street clothing, including donning/removing prosthesis."[30] Mr. J. was previously provided extensive assistance (coded 3/2) with this task twice daily.[31] The assessor found that Mr. J. required a higher level of assistance with the task of total dependence (coded 4/2) twice daily.[32] Mr. J. maintains that he requires clothing changes more than twice daily. However, by regulation, dressing assistance is limited to twice daily.[33] Accordingly, PCS for this task remains at twice daily.

4. Eating

Eating is defined as "[h]ow [a] person eats and drinks regardless of skill."[34] The Division had previously found that Mr. J. did not require any PCS assistance with this activity. The Division's February 17, 2023 assessment similarly found that Mr. J. did not qualify for PCS assistance with this task.[35] Mr. J. requested that he receive eating supervision, which is an allowable PCS task for eating. However, to qualify for PCS for eating supervision, he would need a swallow study showing a need for supervision due to "swallowing or aspiration difficulties" that was conducted within the past year.[36]

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28 Division Ex. G, p. 9.
29 Division Ex. E, p. 6; Division Ex. G, pp. 9 – 10.
30 Division Ex. G, p. 10.
31 Division Ex. F.
32 Division Ex. F; Division Ex. G, pp. 10, 13.
33 Division Ex. B, p. 66.
34 Division Ex. G, p. 10.
35 Division Ex. F; Division Ex. G, p. 10.
36 7 AAC 125.030(b)(5)(C).

Mr. J. does not have the requisite swallow study, although there are plans to have one done. Because he does not have the required swallow study, he is not eligible for PCS for the task of eating. Further, Mr. J. would first have to submit an amendment request to add supervised eating to his PCS support plan to the Division for its consideration and have it denied or modified prior to requesting a hearing on this issue, which has not occurred.[37] Accordingly, this is not an issue that can be dealt with at this hearing.

5. Toileting

Toileting is defined as "[h]ow [a] person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, cleanses, changes pad, manages ostomy or catheter, adjusts clothes."[38] In addition, toileting also includes "assisting the recipient with the use of a bedpan or urinal."[39] Mr. J. was receiving extensive assistance (coded 3/2) with toileting 28 times per week.[40] The assessor was informed during the assessment process that Mr. J. had bowel movements once or twice daily, and that he was able to independently use a urinal while in bed. The assessment then reduced PCS assistance for toileting to twice daily, for a total of 14 frequencies per week.[41]

While the Division seeks to reduce Mr. J.'s toileting assistance, Mr. J. seeks to have it increased. The Division bears the burden of proof on a decrease, while Mr. J. bears the burden of proof on a decrease.

Mr. J. must be supervised when using the urinal to avoid spillage. In addition, his urinal must be emptied and washed each time, which he is unable to do. This occurs approximately three times daily.[42] The Division did not include the urinal assistance as part of toileting because it considers empty and cleaning a urinal to fall under housekeeping, an instrumental activity of daily living.[43]

The question of whether emptying and cleaning a urinal should be included under the task of toileting has been addressed in prior OAH decisions. In OAH Case No. 13-1305-MDS,

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37 A party only has a right to a hearing if a request for assistance is denied, totally or in part, or if existing benefits are suspended, reduced, or terminated. 7 AAC 49.020.
38 Division Ex. G, p. 11.
39 7 AAC 125.030((b)(6)(B).
40 Division Ex. F, p. 1.
41 Division Ex. F, p. 1; Division Ex. G, p. 11; Ms. S.'s testimony.
42 Ms. N.'s testimony; J. Ex. D, p. 1.
43 Ms. S.'s testimony.

the Commissioner's decision allowed toileting assistance for emptying a bedside urinal.[44] In OAH consolidated Case No. 13-1683/14-0212-MDS, toileting assistance was provided for emptying and cleaning a bedside commode.[45] In OAH Case No. 14-0798-MDS, toileting assistance was provided for bedside urinal emptying.[46] In OAH Case No. 15-0549-MDS, the Division's assessor allowed time under toileting for the emptying of a bedside commode.[47] The regulatory definition of toileting contained in the CAT has not changed since these decisions were issued. Consequently, the Division has not shown that Mr. J.'s toileting assistance should be decreased from 4 times daily to 2, while Mr. J. has shown that he should receive toileting PCS for the cleaning and emptying of his urinal, which occurs 3 times daily, in addition to the 2 times daily for his bowel movements, which then totals 35 times per week for toileting assistance. This 3 times daily, however, will not reduce the amount of assistance he receives for bed mobility, because this type of toileting assistance does not involve body positioning.

Mr. J. also objected to the amount of time allowed each time toileting assistance is provided, arguing that it was insufficient. The Division allowed 9 minutes for this task each time it was performed.[48] 9 minutes of assistance for each time Mr. J. is toileted is the amount set by regulation for extensive assistance with toileting. It cannot be adjusted even if it is insufficient.[49]

6. Bathing

Mr. J. was provided bathing assistance once daily at the extensive assistance (coded 3/2) level. The Division assessment did not modify this.[50] The Division allowed 22.5 minutes for this task each time it was performed.[51] Mr. J. did not object to the frequency or degree of assistance, but instead argued that the amount of time allotted for assistance each time Mr. J. is

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[44] *In the Matter of K D*, OAH Case No 13-1305-MDS (Commissioner DHSS, adopted April 14, 2014). This decision is located online at https://aws.state.ak.us/OAH/Decision/Display?rec=3111 (date accessed August 2, 2023).

[45] *In the Matter of M H,* OAH Consolidated Cases 13-1683/14-0212-MDS (adopted June 10, 2014). This decision is located online at https://aws.state.ak.us/OAH/Decision/Display?rec=3130 (dated accessed August 2, 2023).

[46] *In the Matter of T-Q,* OAH Case No. 14-0798 (July 30, 2014). This decision is located online at https://aws.state.ak.us/OAH/Decision/Display?rec=3169 (date accessed August 2, 2023).

[47] *In the Matter of N R,* OAH Case No. 15-0549-MDS (September 11, 2015). This decision is located online at https://aws.state.ak.us/OAH/Decision/Display?rec=3275 (date accessed August 2, 2023).

[48] Division Ex. F.

[49] Division Ex. B, p. 66.

[50] Division Ex. F; Division Ex G, p. 12.

[51] Division Ex. F.

bathed was inadequate. This is the amount of time established by regulation for each time Mr. J. is bathed.[52] Accordingly, this amount is unchanged.

7. Passive Range of Motion Exercises

Passive Range of Motion (PROM) exercises are an available PCS task. Mr. J. was not receiving PCS for PROM previously. However, PROM exercises are only allowed for an individual with "a documented physical condition associated with contractures that results in a need for passive range-of-motion for the extremities affected by that condition" and where there is a detailed written plan for those exercises "provided by a licensed physician, physician assistant, advanced practice registered nurse, physical therapist or occupational therapist . . ."[53] It is undisputed that there is no detailed written plan for PROM exercises for Mr. J. as required by regulation. Further, Mr. J. would first have to submit an amendment request to add PROM exercises to his PCS support plan to the Division for its consideration and have it denied or modified prior to requesting a hearing on this issue, which has not occurred. As a result, this is not an issue that can be dealt with at this hearing.[54]

8. Medication Assistance

Medication Assistance is provided to recipients who either need reminding to take their medications or who need assistance in taking them.[55] Mr. J. was receiving assistance (code 3/2) with this task 4 times daily, for 28 times per week. Following the assessment, the Division reduced the allowance to this task to once daily, for 7 times per week. [56] Ms. N.'s testimony established that he requires assistance with this task 3 times daily, for 21 times per week.[57] Following her testimony, the Division agreed that medication assistance 3 times daily was appropriate.[58] Accordingly, medication assistance is reduced to 3 times daily, for a total of 21 times per week.

V. Conclusion

As discussed above, Mr. J.'s PCS support plan is revised as follows:

Task	Assistance Level	Weekly Frequency

[52] Division Ex. B, p. 66.
[53] 7 AAC 125.030(d)(5)
[54] A party only has a right to a hearing if a request for assistance is denied, totally or in part, or if existing benefits are suspended, reduced, or terminated. 7 AAC 49.020.
[55] 7 AAC 125.030(d)(1).
[56] Division Ex. F.
[57] Ms. N.'s testimony.
[58] Ms. S.'s testimony.

Toileting	Extensive (3/2)	35 times
Medication Assistance	Extensive (3/2)	21 times

The remainder of Mr. J.'s support plan is unchanged.

Dated: August 7, 2023

Signed

Lawrence A. Pederson
Administrative Law Judge

Adoption

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

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

DATED this 22nd day of August, 2023.

By: *Signed*
Name: Lawrence A. Pederson
Title: Administrative Law Judge

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