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

In the Matter of	)	
	)	
B. P.	)	OAH No. 23-0434-MDS
	)	

DECISION

I. Introduction

B. P. is a Medicaid Home and Community-Based Waiver (Medicaid Waiver) recipient who was receiving 47.5 hours per week in personal care services (PCS). The Division of Senior and Disabilities Services (Division) performed an assessment on February 14, 2023 to determine whether he continued to be eligible for PCS and, if so, the amount of PCS he should receive. Following that assessment, the Division notified Mr. P. that his PCS time would be reduced to 42 hours per week, with an effective date of July 15, 2023.[1] Mr. P. requested a hearing through his guardians, L. W. T. and K. P., to challenge the Division's determinations. At the hearing, the parties reached an agreement to reverse the reductions, except for toileting.

As discussed in detail below, the evidence presented at the hearing did not support the Division's requested reduction in toileting. Accordingly, the Division shall provide Mr. P. services as specified in this decision.

II. Background Facts

Mr. P. is a 39-year-old, blind, non-verbal, male with Autism. His diagnoses also include Norrie Syndrome, Encephalopathy, Cerebral Palsy, a circadian rhythm disorder, and a history of seizures.[2] A grown adult, who is over six feet tall, Mr. P. requires around the clock care that is complicated by episodes of combative and self-injurious behavior.[3] His assessment documented that he exhibited aggressive, disruptive, or self-injurious behavior almost daily.[4] During the hearing process the parties reached an agreement as laid out below:

---

1 Ex. D.
2 Ex. E., p.4.; Ex. J, p. 1.
3 Ex. E, p. 4.
4 Ex E, p. 4

Activity	Scoring	Weekly Frequency
Access to Med Appointment	4	1
Bath/Shower/Sponge	4/3	**7**
Escort		10 minutes per week
Medication Assistance	4/2	28

At the hearing the parties agreed that Mr. P. needed extensive assistance, and that his condition had not improved since his last assessment. The sole focus of the hearing was the frequency at which Mr. P. needed toileting assistance. Mr. P. had been receiving toileting assistance eight times daily. After the assessment, the Division sought to reduce his toileting assistance to six times per day, resulting in a reduction of 2.8 hours of PCS time per week.[5]

III. Discussion

A. The PCS Determination Process

The Medicaid program authorizes PCS to provide assistance to Medicaid recipients who have functional limitations, resulting from their 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."[6] 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.[7] The IADLs are Light Meal Preparation, Main Meal Preparation, Housework, Laundry, and Shopping.[8] PCS can also be authorized for a few additional services, with specific rules regarding eligibility for those services.[9] PCS are furnished by a Personal Care Assistant, usually abbreviated as "PCA."

The Division assesses PCS need using the Consumer Assessment Tool, or "CAT", as a methodology to code both eligibility for the PCS program and the amount of assistance needed for covered activities and services.[10] The actual list of services, time allotted for each service

5 Ex. D, pp. 3, 9; Ex. E, p. 9.
6 7 AAC 125.010(b)(1)(A)(iii).
7 7 AAC 125.030(b).
8 Ex. B, p. 67
9 7 AAC 125.030(d).
10 *See* 7 AAC 125.020(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900(d)(6).

based upon the severity of need, and the allowable frequencies for each service are set out in the *Personal Care Services: Service Level Computation* instructions, which are adopted by reference into regulation.[11]

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 independent and requires no help or oversight[12]); **1** (the person requires supervision); **2** (the person requires limited assistance[13]); **3** (the person requires extensive assistance[14]); **4** (the person is totally dependent[15]). There are also codes which 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).[16]

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); **3** (two 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).[17]

The codes assigned to a particular ADL determine how much PCA service time a person receives for each occurrence of a particular activity. A person who can perform an activity independently or with supervision or who needs no physical assistance to perform the ADL will not be eligible for PCS.

---

[11] 7 AAC 125.024(a); 7 AAC 160.900(d) (29). The *Personal Care Services: Service Level Computation* instructions can be found online at http://dhss.alaska.gov/dsds/Documents/regulationMaterials/PCS_SLA_Computation_Chart_6-2-2017.pdf

[12] A self-performance code of 0 is classified as "[I]independent – No help or oversight – or – Help/oversight provided only 1 or 2 times during the last 7 days." *See* Ex. E, p. 7.

[13] Limited assistance with an ADL 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) 1 or 2 times during last seven days." *See* Ex. E, p. 7.

[14] Extensive assistance is defined as "[w]hile person performed part of activity, over last 7-day period, help of following type(s) provided 3 or more times: Weight-bearing support [;] Full staff/caregiver performance during part (but not all) of last 7 days." *See* Ex. E, p. 7.

[15] Total dependence is defined as "" [f]ull staff/caregiver performance of activity during ENTIRE 7 days." *See* Ex. E. p. 7.

[16] Ex. E. p. 7.

[17] Ex. E. p. 7.

If the person scores a 2/2 or higher, a fixed number of PCS minutes is assigned for each activity.[18] That number is then multiplied by the times a day the activity is performed and a weekly total of minutes is calculated.[19] For instance, if a person is coded as being totally dependent (code of 4) with toileting, they would receive 12 minutes of PCA service time every time they engage in the ADL of toileting.[20]

B. The Burden of Proof

The Division has the burden to proof, by preponderance of the evidence, on tasks that it wishes to reduce or eliminate.[21] Once a person receives PCS services, they must be regularly reassessed to maintain eligibility. [22] Before the Division can eliminate or reduce services, the assessment must find that the recipient "has experienced a change that alters the recipient's need for physical assistance with ADLs, IADLs, or other covered services."[23] Regulatory changes are also considered a material change, allowing an increase or decrease in PCS services.[24]

The Division can meet its burden of proof using any evidence on which reasonable people might rely in the conduct of serious affairs, including such sources as written reports of firsthand evaluations of the patient. [25] The relevant date for purposes of assessing the state of the facts is, in general, the date of the agency's decision under review.[26]

As the parties reached an agreement to restore the PCS time in other categories, the remaining issue for resolution is whether the Division met its burden of proof to show that the frequency for the ADL of toileting should be reduced.

---

18 Ex. D, p. 6.
19 Ex. D, p. 6.
20 7 AAC 125.024(a); 7 AAC 160.900(d) (29). Ex. B, p. 66.
21 7 AAC 49.135.
22 AS 47.07.045(b)(l); 7 AAC 125.012(b).
23 7 AAC 126.026(a).
24 7 AAC 125.026(b)(3)(C).
25 2 AAC 64.290(a)(1).
26 *See* 7 AAC 49.170; *In re T.C.,* OAH No. 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013) (http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf).

C. The 2023 CAT

Mr. P. had not received a full CAT since 2014 and was re-assessed via CAT on February 14, 2023.[27] Due to a recent seizure, followed by several days without sleep, Mr. P. was unable to participate in the 2023 CAT.[28]

The CAT found no documented changes to indicate an improvement in Mr. P.' condition.[29] Instead, it noted that Mr. P. continues to frequently have issues with the task of toileting, especially after a seizure.[30] Even when Mr. P. is not recovering from a seizure, he tends to rock when he is on the toilet, which has resulted in several broken toilets in the past. Mr. P. also regularly engages in self-injurious behaviors, with the CAT noting 149 instances of self-injurious behavior from February 1 to February 14, 2023.[31] Based on these, and other factors, the CAT assessed Mr. P. with a self-performance score at 4 and a support score at a 3 for the ADL of toileting. However, the assessor reduced the number of times Mr. P. was receiving toileting assistance from eight times daily, to six times daily. The CAT provided no explanation for the reduction other than the frequency was assessed based on an estimation of use every three hours.[32] The assessor did not testify at the hearing.

D. Details of the Division Presentation

Melissa Meade is a Health Program Manager with the Division.[33] She has worked for the Division for 17 years and has been in her current position for seven years. As part of her current role, she reviews PCS decisions. In this case she was assigned to review Mr. P.' 2023 CAT and compare it against his current services. At the time of Ms. Meade's review, in part due to some of the complications of Covid-19, she did not have access to full records for Mr. P.[34] She did not have a current full Medicaid Waiver support plan or current medical records.[35] At the time of her review, she was able to review an abbreviated renewal support plan. This is the part of the reason that the review was not completed until July.[36]

---

27 Ex. E.
28 Ex. E, p. 6.
29 Ex. E, p. 9.
30 Ex. E, p. 9
31 Ex. E, p. 5.
32 Ex. E, p. 9.
33 Ms. Meade's testimony.
34 Ms. Meade's testimony.
35 Ms. Meade's testimony.
36 Ms. Meade's testimony.

The CAT itself does not provide a reasoning for the reduction in toileting frequencies and the assessor did not testify to explain the reduction. However, Ms. Meade, who did not perform the assessment, provided an explanation. Ms. Meade was able to review some log notes and time sheets provided after the assessment in Exhibit H. She also reviewed the waiver services Mr. P.' was authorized for. In her review of those documents, she did not see documentation that Mr. P. was utilizing the toilet eight times a day, the full amount he was authorized for. Instead, the notes reflected 3-4 times per day on average through PCS.[37] In addition to PCS, Ms. Meade testified that Mr. P. is approved for 76 hours of supportive living services.

It was her assumption that Mr. P. would have also received assistance with toileting while receiving supportive living services, leaving an average of 13 hours a day when PCS could be provided. She also considered the time Mr. P. may be sleeping during the day. The records showed Mr. P. has a circadian rhythm disorder and has an erratic sleep schedule. Based on her review of the limited records, she concluded Mr. P. sleeps an average of four hours a night, leaving nine hours a day during which PCA could be provided.[38]

Ms. Meade conceded that there has not been a change in "actual physical decline or physical improvement in the recipient's condition…" and concluded that there was "no question" that Mr. P. is need of assistance.[39] However, after reviewing all the of the services Mr. P. was receiving, she concluded that a reduction from eight times a day to six times a day, "…seems appropriate."

She did see some indication of failed attempts at toileting in her review of the logs, but found it was infrequently documented.[40] She was also able to see incidents in the logs where clothing had to be changed. However, she did not have enough information to determine how often these unsuccessful trips occur. She did not know if the logs, that show a maximum of five trips a day, included failed attempts.[41]

---

37 Ms. Meade's testimony.
38 Ms. Meade's testimony.
39 Ms. Meade's testimony.
40 Ms. Meade's testimony.
41 Ms. Meade's testimony.

E. Details of Mr. P.' Presentation

Mr. P.' guardians disagreed with the reduction in PCS time for toileting. They gave a thorough explanation of the reasons Mr. P. continued to require authorization for eight toileting uses per day. The guardians credibly testified that due to Mr. P.' neurologic condition, voiding his bladder can often be difficult, and this results in frequent failed attempts at utilizing the toilet.[42] Due to a UTI or the impacts of a seizure, there are times that Mr. P. may have to be taken to the bathroom as many as six times in an hour, before he is able to successfully complete the task of toileting.[43] This sometimes causes significant concern, as Mr. P. is unable complete the task of toileting for an extended period, it begins to raise the concern that his bladder may be descended, or that he may require catheterization.[44]

The guardians testified that the logs do not accurately log failed attempts at toileting or situations where Mr. P.' clothing had to be changed due to incontinence or encopresis.[45] Instead, the logs the are focused on Mr. P.' safety and tracking his assaultive and self-injurious behavior. Additionally, given the chaotic nature of providing him care, Mr. P.' care providers often are unable to take accurate contemporaneous notes.[46]

Mr. P. also called K. N.-L. as a witness, who is his care coordinator. She has known Mr. P. for at least 20 years and has served as his care coordinator for the last ten years.[47] She testified his services have not changed in at least six years and that the Division's proposed reduction is not in response to an increase in some other type of benefit.[48] She further testified, that there have been no changes to his service plan, and no material improvement in his care needs. In her view, his needs have only increased as he ages. She described the log notes as a "highlight reel" and that they often did not track failed attempts at toileting.[49]

After the conclusion of the hearing, Mr. P.' guardians requested that the record be left open to provide documentation from Mr. P.' Neurologist about his medical need for the maximum frequency of toileting uses. On September 1, 2023 a letter from Alaska Neurology Center was provided. That letter confirmed that due to "..his disabling conditions, [Mr. P.] needs

---

42 Mr. W. T. and Ms. P.' testimony.
43 Mr. W. T.'s testimony.
44 Mr. W. T.'s testimony.
45 Mr. W. T. and Ms. P.' testimony.
46 Mr. W. T. and Ms. P.' testimony.
47 Ms. N.-L.l's testimony.
48 Ms. N.-L.l's testimony.
49 Ms. N.-L.l's testimony.

to be brought to the bathroom at a minimum of eight times per day for medical needs."[50] The Division was given until September 8, 2023 to file any response if the Division felt a response was needed. The Division filed no response.

F. Toileting

7 AAC 126.026(a) authorizes a reduction in services upon a showing that the care recipient "has experienced a change that alters the recipient's need for physical assistance with ADLs, IADLs, or other covered services." Prior to the current CAT, Mr. P. was last fully assessed in 2014. The 2014 CAT is not in the record, but based on the Division's exhibits, it appears he was given a score of 4/2 for toileting.[51] In-between 2014 and the 2023 CAT Mr. P.' PCS hours were established by agreement.[52] In the 2023 CAT, Mr. P. scored 4/3. This reflects, as all the parties agreed, that Mr. P. condition has not improved. Instead of improving, Mr. P. now needs requires a two person, or more, physical assist to complete the task of toileting.[53] While Mr. P.' need for an additional care provider to physically assist in the task of toileting would not entitle him to additional PCS, it does cut against the Division's argument that a reduction in this case would be appropriate.

While the CAT provided support for determining Mr. P.' support and self-assessment scores in the ADL of toileting, frequency had significantly less supporting documentation. The CAT claimed his frequency was assessed based on an estimation of use every three hours.[54] That calculation, however, would leave six hours of the day unaccounted for. No explanation was given in the CAT for how the assessor reached that conclusion that Mr. P. toileting needs changed, nor did the CAT provide an explanation as to why he only needed to access the toilet once every three hours, or how that resulted in a frequency of six times per day. Instead in the section for toileting the assessor notes, "no medical documentation has been provided to indicate [a]n improvement or decline in ability."[55]

In its argument at the hearing, the Division also pointed to a 2017 regulatory change that reduced the maximum toileting visits to eight per day, as Mr. P.' last assessment was made prior to the 2017 change. However, a reduction in the maximum number of trips, equal to the number

---

50 Letter from T. M. H. ARNP
51 Ex. D, p. 9.
52 Ms. N.-L.'s testimony.
53 Ex. E, p. 9.
54 Ex. E, p. 9.
55 Ex. E, p. 9.

Mr. P. was already receiving, would not have required a change in his PCS award. Additionally, the Division appears to have repeatedly affirmed Mr. P.' toileting frequency since 2017.

Ms. Meade credibly testified that the logs provided to the Division only included a maximum of five toileting trips per day, however, she was uncertain if the logs included failed toileting attempts. The guardians credibly testified that the logs are focused on safety, and given the chaotic nature of caring for Mr. P., the notes often do not capture all the toileting attempts or situations where his clothing or incontinence products need to be changed. The fact the logs are focused on safety incidents is also apparent in the CAT, with the assessor noting 149 instances of self-injurious behavior from February 1 to February 14, 2023.[56] Finally, the guardians testified there are times when Mr. P. may need to attempt to use the bathroom every ten minutes, but due to a UTI or the impacts of a seizure, he is still not able to void.[57] While it is not Mr. P.' burden to prove he needs the maximum frequency for toileting, he produced a letter from his neurologist stating that due to his disabling conditions needs to be brought to the bathroom a minimum of eight times a day.[58]

At the hearing, there was some debate on if failed attempts should be counted in the ADL of toileting. 7 AAC 125.030(b)(6)(a) defines the ADL of toileting, as including, "moving a recipient to and from a location in the recipient's home and the location of the toilet…including all transfers and locomotion necessary to complete the ADL of toileting." Additionally, prior decisions of the Commissioner have held that toileting, "… does include any instances of locomotion that are to and from the bathroom."[59] Therefore, time spent locomoting and transferring to the bathroom, even if that trip to the bathroom is ultimately unsuccessful, is still counted within the ADL of toileting.

While the Division had an incomplete record to base its assessment on, the previous assessment, performed by qualified Division assessors, and subsequent agreements over the years, set Mr. P.' need for assistance with toileting eight times a day. While the regulations changed in 2017, that regulatory change did not necessitate a reduction in the frequency of visits to the bathroom Mr. P. received funding for. This is especially clear, as eight visits a day was affirmed by Division, repeatedly, until the 2023 CAT.

---

56 Ex. E, p. 5.
57 Mr. W. T.'s testimony.
58 Letter from T. M. H., ARNP
59 In Re F.V. OAH 13-1306-MDS

Instead, the Division's argument is that looking at the services provided as a whole, the reduction, "looks appropriate" and that the reduction is not a "gross reduction".[60] That, however, is not the standard the Division must meet. The Division bears the burden of proving, that there has been a change that alters the need for physical assistance with the ADL of toileting or a regulatory change that requires reduction. There is no indication in the record, however, that Mr. P. experienced a significant change in his functional capabilities in from 2014 to 2023 that would justify such departures from the 2014 assessment of his toileting needs. The Division failed to meet its burden to demonstrate it was more likely than not true that Mr. P. experienced a change in his functioning or needs sufficient to justify a reduction in the frequency of his toileting use.

IV. Conclusion

The Division has not met its burden to show that Mr. P. PCS time should be reduced. The agreement of the parties is accepted, and the Division's reduction in the ADL of toileting is reversed, with the 2023 PCS authorization adjusted as follows:

Activity	Scoring	Weekly Frequency
Access to Med Appointment	4/	1
Bath/Shower/Sponge	4/3	**7**
Escort		10 minutes per week
Medication Assistance	4/2	28
Toileting	4/3	56

Accordingly, the Division shall provide Mr. P. services as specified in this decision.

DATED: September 29, 2023.

Signed
Eric Salinger
Administrative Law Judge

[60] Ms. Meade's testimony.

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 17th day of October, 2023.

By: *Signed*
Name: Eric M. Salinger
Title: Administrative Law Judge

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