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

In the Matter of	)	
	)	
K.Z	)	OAH No. 22-0299-MDS
	)	

DECISION

I. Introduction

The issue in this case is whether K.Z's Medicaid Personal Care Services (PCS) should be reduced. Ms. Z was receiving 19.25 hours per week of PCS. On March 15, 2022, the Division of Senior and Disability Services (Division) notified Ms. Z that her PCS hours were being reduced to 9.0 hours per week. Ms. Z appealed.

This decision concludes that the Division's assessment was correct as to the elimination of PCS for light meal preparation and shopping. However, the evidence provided at the hearing demonstrated that it is more likely true than not true that Ms. Z continues to be eligible for PCS for main meal preparation and light housework. Accordingly, the termination of her PCS for those IADLs is reversed, and she is to receive services as specified in detail below.

II. Overview of the PCS 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."[1] Those activities are broken down into eight specific "activities of daily living" (ADLs) – bed mobility, transfers, locomotion, dressing, eating, toileting, personal hygiene, and bathing[2] -- and five specific "instrumental activities of daily living" (IADLs) – light meal preparation, main meal preparation, housework, laundry, and shopping.[3] Some degree of hands-on assistance is required in order to qualify for

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1 7 AAC 125.010(b)(1)(A)(iii).

2 7 AAC 125.030(b).

3 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.

PCS; PCS are not provided for activities that can "be performed by the recipient,"[4] nor for "oversight and standby functions."[5]

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.[6] 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.[7] 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.[8]

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.

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4 7 AAC 125.040(a)(4).
5 7 AAC 125.040(a)(10).
6 *See* 7 AAC 125.020(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900(d)(6).
7 Ex. E., pp. 8-12.
8 Ex. E., p. 7.

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

3 – The person required a physical assist from two- or more people.[9]

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

0 – "Independent either with or without assistive devices - no help provided."

1 – "Independent with difficulty; the person performed the task but did so with difficulty or took a great amount of time to do it."

2 – "Assistance / done with help - the person was somewhat involved in the activity, but help in the form of supervision, reminders, or physical assistance was provided."

3 – "Dependent / done by others - the person is not involved at all with the activity and the activity is fully performed by another person."[11]

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."[12]

If an applicant/recipient has a self-performance code of 2 (limited assistance) in any of the ADLs of transfer, locomotion, eating, toilet use, dressing or bathing or a self-performance code of 1, 2, or 3 and a support code of 3 or 4 in any of the IADLs of light or main meal preparation, light housework, routine housework, grocery shopping or laundry, they are eligible for PCS.[13]

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

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9 Ex. E. p. 8.
10 Ex. E., pp 27 – 33.
11 *Id.*
12 *Id.*
13 *Id.*

he or she is bathed.[14] 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 *Personal Care Services: Service Level Computation* instructions, which are adopted by reference into regulation.[15]

III. Facts

1. Background

Ms. Z is ninety-one years old. She lives with L.M, who holds her power of attorney, and his family in a multilevel private residence. Another Medicaid recipient also lives at the residence. Mr. M's wife provides PCS to both recipients.[16]

Ms. Z has a number of significant medical problems. She has a primary diagnosis of Parkinson's disease. Her secondary diagnoses include high blood pressure, high cholesterol, Type 2 Diabetes, and osteoarthritis in both knees. Over the last two years Ms. Z has become increasingly withdrawn, and her health has deteriorated. During that time, Ms. Z has lost 31 pounds: according to her medical records she weighed 121 pounds on June 4, 2019, but only 90 pounds on March 21, 2021.[17] There is no indication her weight increased prior to the December 3, 2021 CAT evaluation.

According to Mr. M's testimony, Ms. Z now spends most of her time in her room. She sleeps a great deal. Due to her frailty and sleep habits, she does not eat communal meals. Her light meal is typically a can of Supplements A and some fruit. Her care attendant must either separately prepare or re-cook Ms. Z's main meal as it is provided to her when she wakes in the late afternoon or evening. Her meals require separate set up, service, and clean-up.[18]

Ms. Z has received PCS for several years. In 2021 she was receiving 19.5 hours of weekly PCS time. Division assessor Barbara Rodes conducted the evaluation regarding her continued eligibility for PCS on December 3, 2021.[19] The Division's decision- dated March 15, 2022- reached conclusions regarding Ms. Z's functional capabilities similar to those of her prior CAT with one exception for locomotion.[20] The March 15, 2022 decision would have authorized

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14 *See* Ex, D, p. 6.
15 Ex. D, pp. 6 – 7; 7 AAC 125.024(a); 7 AAC 160.900(d)(29).
16 Ex. E; J. L. testimony.
17 Ex. E., p. 9.
18 *Id.*
19 Ex. E.
20 The final assessment changed Ms. Z's scores for locomotion from limited assistance from one person (self-performance score 2/ support score 2) to supervision and set up (self-performance score 1/ support score 1). Ex. E.,

PCS hours for light meal preparation, main meal preparation, shopping, light housework, and laundry.[21] However, Ms. Z's living circumstances had changed.

She was now living in the same home as another Medicaid recipient. Therefore, pursuant to 7 AAC 125.040(1)(d)(14)(B), the assessor eliminated her prior PCS for light meal preparation, main meal preparation, shopping, light housework, and laundry as duplicative.[22] The Division reconsidered and reversed elimination of PCS for laundry prior to the hearing, and that time was reinstated. The hearing addressed only elimination of PCS assistance for the IADLs of light and main meal preparation, shopping, and light housework.

2. The Hearing

The hearing took place May 16, 2022. Ms. Z did not participate. She was represented by her power-of-attorney, L.M, who testified on her behalf. Victoria Cobo George represented the Division. She called one witness, David Chadwick, the assessment section supervisor. Prior to Mr. Chadwick's testimony, Ms. Cobo-George informed the Tribunal that after the reduction notice, Mr. M provided additional information regarding the laundry needs of both Medicaid recipients in the household. That information demonstrated that it would not be duplicative of services to provide Ms. Z a personal award of PCS for laundry based on her individual needs. Therefore, the Division reversed the initial denial and reinstated Ms. Z's PCS for laundry.

Mr. Chadwick did not conduct the December 3, 2021 CAT assessment, but he provided an explanation of the Division's March 15, 2022 decision based on his nine-years' employment experience, including personal conduct of more than 500 CAT assessments. According to his testimony, with the exception of time for locomotion, the elimination of Ms. Z's services was due to application of 7 AAC 125.040(d)(1)(14)(B). The regulation prohibits the Division from providing duplicate services when one or more Medicaid recipients live in the same household. When one or more Medicaid recipients live in a household, the Division presumes that PCS for IADL can be performed in the congregate.[23] When Ms. Z's living circumstances changed so that she was living with another Medicaid recipient, the Division applied the regulation and reduced her services.

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p. 8. Mr. M did not meaningfully challenge this change at the hearing. It is treated as uncontested. The record appears to demonstrate that Ms. Z requires limited assistance to transfer, but once in position, can locomote with guidance. Ex. E., p. 8.

21 *Id.*

22 Ex D.

23 D. Chadwick testimony.

Mr. Chadwick testified that the number of care recipients (2) in the L. household demonstrated to the Division that light and main meal preparation, shopping, and light housekeeping could reasonably be performed in the congregate in this case. Those PCS hours could readily be combined without negative impact on Ms. Z. That is, the personal care provider could shop for all meals at once, prepare all meals at once, and do light housework for all Medicaid recipients at the same time. It is Division policy to presume that communal meals occur and are medically appropriate in the absence of a prescription for a special diet or other persuasive evidence. [24]

Mr. M testified on Ms. Z's behalf. He testified that the removal of PCS for light housework would unduly burden Ms. Z's PCA: the residence is very large, and it is difficult for her to clean thoroughly in the time awarded to both Medicaid recipients. Mr. M recognized that PCS time for light housekeeping is set by regulation and does not vary with the size of the recipient's home. Mr. M acknowledged that shopping for both recipients could be done contemporaneously. Mr. M also acknowledged that preparation and clean-up of Ms. Z's fruit for her light meal could be done at the same time as preparation and clean-up for the light meal for the other recipient.[25]

As for the main meal, Mr. M argued the PCS services were not duplicative or in the alternative, if they were duplicative, the services remained necessary for Ms. Z's health, safety, and welfare. According to his testimony, Ms. Z spends a great deal of her time asleep. Given her frailty and medical condition, she is not woken to eat communally. Instead, food is prepared for her individually or re-cooked and delivered to her room. Her dishes and cookware must be separately washed. She has her own room which is separately cleaned.[26]

IV. Discussion

A. Applicable Burden of Proof and Standard of Proof

The Division has the burden of proof by preponderance of the evidence on those items that it wishes to reduce or eliminate, which are assistance with light meal preparation, main meal preparation, shopping and light housework.[27] In cases where (as here) the Division seeks to reduce or terminate a recipient's PCS award, the Division must demonstrate that there has been a

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24 *Id.*

25 J. L. testimony. Per the Division, opening and delivering a can of Supplement A would not constitute light meal preparation.

26 *Id.*

27 7 AAC 49.135.

material change in circumstances or the recipient's condition that "alters the recipient's need for physical assistance with ADLs, IADLs, or other covered services" since the recipient's last assessment.[28] A change in regulation establishes material change of circumstance.

If the Division meets its burden, the burden shifts to Ms. Z to prove her services should not be reduced or eliminated.[29]

B. Application

The Division eliminated Ms. Z's PCS for locomotion based on its conclusion she no longer required limited physical assistance move about within the home, although she still required limited assistance to transfer and supervision once she was in position to walk with her walker or unaided. Mr. M did not challenge that determination at the hearing. The Division met its burden of proof on that issue.

Per 7 AAC 125.040(d)(14)(B), PCS are not available for IADL where they would duplicate "services that other recipients living in the same residence receive as assistance with IADLs under this section or similar services under 7 AAC 127.087, and those services are sufficient to maintain a clean, sanitary, and safe environment for all recipients in that residence; however, the department may authorize assistance with an IADL that duplicates services if it is justified as necessary for the health, safety, and welfare of a recipient." To demonstrate reduction of Ms. Z's PCS was appropriate under this regulation, the Division had to show the eliminated services were in fact duplicative and the remaining services provided were sufficient to maintain a clean, sanitary, and safe environment for Ms. Z.

The Division met its burden to prove it was more likely than not PCS for light meal and shopping were duplicative of services already provided. Mr. M's testimony demonstrated those IADLs could be addressed in the congregate without harm to Ms. Z's health, safety, or welfare. Under the circumstances presented, Ms. Z's receipt of those services would be duplicative of services provided to another Medicaid recipient in the home. The Division decision to eliminate those PCS awards is affirmed.

PCS for Ms. Z's main meal and light housework present a different matter. The Division denied PCS services for the main meal IADL based on the presumption that when other household members receive IADL assistance with the same activity, the recipient's needs will be

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[28] 7 AAC 125.026(a).
[29] 7 AAC 49.135.

covered through those services and an award would be duplicative. Division policy also presumes communal meals occur except where separate meals are necessary to address medical dietary requirements.[30]

The evidence did not support those presumptions in this case. Mr. M credibly testified that Ms. Z's overall medical condition has deteriorated since her last CAT assessment. Deterioration over time is also consistent with the progression of Parkinson's disease. According to the current CAT, Ms. Z has lost almost a quarter of her body weight in under two years, going from 121 pounds in June of 2019 to ___ March of 2021,[31] despite the fact that most of her meals have been separately served to her in accommodation of her age and medical condition. She would need to be awakened to attend communal meals. Her sleep patterns would be disrupted, and she would be required to locomote. It is reasonable to conclude that this disruption, particularly requiring her to eat at times she might not naturally do so, would have a negative impact on Ms. Z. Due to age, underlying medical diagnosis, and established history of weight loss, it is necessary for Ms. Z's health, safety, and welfare for her to receive her main meal nutrition in her room at a time consistent with her personal needs. Therefore, providing PCS for main meal to Ms. Z is not duplicative of IADL service to another Medicaid recipient and is necessary to her health, safety, and welfare. Mr. M's knowledgeable testimony demonstrated that Ms. Z's assistance level remained the same (self-performance score 3, support level 4).[32]

Thus, the Division failed to meet its burden of proof by a preponderance of evidence that an award of PCS for main meal preparation was duplicative and the remaining services provided would be sufficient to maintain a clean, sanitary, and safe environment for Ms. Z. The Division decision to eliminate those PCS is reversed.

In addition, the testimony clearly established that Ms. Z has her own room. That room requires separate cleaning. An award of light housekeeping is not duplicative. The Division decision to eliminate those PCS is reversed.

In addition to the laundry provision, as acknowledged by the Division at the hearing, Ms. Z's allocation of PCS is modified to include the following

Ms. Z's continues to be eligible to receive the following PCS

Task	Assistance Level	Weekly Award

30 D. Chadwick testimony.
31 Ex. E., p. 9.
32 Ex. E., p. 35.

Main Meal	**3/4**	**7 times a week**
Light Housekeeping	**1/3**	**45 minutes**[33]

V. Conclusion

The Division's reduction of PCS is partially upheld and partially reversed. The Division should recalculate Ms. Z's PCS time consistent with the discussion above.

Dated: June 14, 2022

Signed

Carmen E. Clark
Administrative Law Judge

[33] Ex. D., p. 7.

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, 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 7th day of July, 2022.

By: *Signed*
Name: Laura O. Russell
Title: Policy Advisor, Department of Health

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