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

In the Matter of	)	
	)	
H.S	)	OAH No. 22-0352-MDS
	)	

DECISION[1]

I. Introduction

H.S submitted an initial application for Medicaid Personal Care Services (PCS). The Division denied his application on March 28, 2022. Mr. S appealed.

The Division's denial of PCS is modified for the reasons set out below.

II. Overview of the PCS 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."[2] Those activities are broken down into eight specific "activities of daily living" (ADLs) – bed mobility, transfers, locomotion, dressing, eating, toileting, personal hygiene, and bathing[3] -- and five specific "instrumental activities of daily living" (IADLs) – light meal preparation, main meal preparation, housework, laundry, and shopping.[4] 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,"[5] nor for "oversight and standby functions."[6]

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.[7] For both ADLs and IADLs, the CAT provides recipients with a two-part

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1 On July 1, 2022, pursuant to Executive Order 121, the Department of Health and Social Services was restructured into two separate Departments. The case caption in this matter has been modified to reflect that it is being heard on referral from the Commissioner of the Department of Health.

2 7 AAC 125.010(b)(1)(A)(iii).

3 7 AAC 125.030(b).

4 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.

5 7 AAC 125.040(a)(4).

6 7 AAC 125.040(a)(10).

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

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.[8] 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.[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.[10]

The independent activities of daily living (IADLs) measured by the CAT are light meal preparation, main meal preparation, light housekeeping, laundry, and shopping.[11] 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."

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8 Ex. E., pp. 8-12.
9 Ex. E., p. 7.
10 Ex. E. p. 8.
11 Ex. E., pp 27 – 33.

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."[12]

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."[13]

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.[14]

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.[15] 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.[16]

"The department will not authorize personal care services for a recipient if the assessment shows that the recipient only needs assistance with supervision, cueing, and setup in order to

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12 *Id.*
13 *Id.*
14 *Id.*
15 *See* Ex, D, p. 6.
16 Ex. D, pp. 6 – 7; 7 AAC 125.024(a); 7 AAC 160.900(d)(29).

independently perform an ADL or IADL."[17] This is true, no matter how difficult it may be for the applicant to perform the ADL or IADL independently or with an assistive device.

Pursuant to 7 AAC 125.040(a)(14)(A), a person is not eligible for PCS to assist with performance of IADLs if they have a parent, legal guardian, or spouse who is present and legally obligated to support the applicant.

III. Introductory Facts

A. Background and Procedural History

Mr. S is 84 years old. He lives with his wife, K.B, in a two-story residence that includes a day care facility run by Ms. B. Mr. S's medical records demonstrate that he uses a cane or walker to locomote because he is unreliable on his feet due to unsteady gait and pain caused by lumbar stenosis.[18] The record includes a February 25, 2022 Verification of Diagnosis (VOD) form completed by Dr. Q.N, which documents that Mr. S has diagnoses of Type 2 diabetes without complication, hypertension, hyperlipidemia, spinal stenosis, and osteoarthritis of the shoulder.[19] Dr. N also provided a letter dated May 26, 2022, stating Mr. S has "chronic low back pain and spinal stenosis which have made it more and more difficult over the years to perform the activities of daily living. He is not a surgical candidate. He requires a walker and a cane to be able to ambulate in his home, but he is unable to cook for himself, clean, shower without assistance, use the bathroom without assistance. He requires PCA care to be able to perform these activities of daily living. His wife runs a daycare and was unable to help him with his activities during the day. He requires assistance to go to physical therapy and other appointments."[20]

Mr. S submitted an initial application for PCS. His CAT assessment took place on March 14, 2022. That assessment found that Mr. S did not require any form of physical assistance with the ADLs. The assessment further concluded Mr. S was not eligible for PCS to assist with IADLs because he had a spouse with a duty to provide support.[21]

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[17] 7 AAC 125.020(d)[the Division will not authorize services if the recipient does not need the level of assistance described in 7 AAC 125.020(c)].

[18] Ex. F., p. 23

[19] *Id.* at 10.

[20] *See,* Medical Center A Letter submitted May 26, 2022. *See,* 7 AAC 125.040(a)(14)(A).

[21]

Following that assessment, the Division notified Mr. S on March 28, 2022, that his request for PCS was denied.[22] Mr. S appealed.[23]

B. Information at the Hearing

The telephonic hearing took place May 26, 2022. A Spanish interpreter was provided throughout the hearing. Terri Gagne represented the Division. She called one witness, Robin Platt, who conducted the CAT assessment. Division Exhibits A-F were admitted.

Mr. S appeared on his own behalf. He was accompanied by O.P, his client coordinator from Home Care Service A. At the hearing Mr. S identified the areas of dispute as the ADLs of dressing and bathing, and all the IADLs. The facts regarding the specific areas in dispute are addressed in detail below.

Ms. B made a statement but did not testify.

1. The Division Presentation

Division assessor Robin Platt evaluated Mr. S's need for PCS on March 14, 2022, using the Consumer Assessment Tool (CAT). The assessment took place over Zoom with the assistance of a Spanish interpreter. Mr. S's wife, K.B, was present, but she absented herself for a portion of the time to provide services at her on-site day care.

Ms. Platt testified she has seven years' experience as a Division assessor. During the pandemic, her evaluations have occurred over Zoom. Ms. Platt has adopted a number of strategies to address the limitations that Zoom imposes. For example, she demonstrates each movement she wants the applicant to perform so they can see the action they are requested to do. She evaluates gait and locomotion as the person walks in front of the screen. She also performs a detailed question and answer session.[24]

Ms. Platt's assessment scored Mr. S as independent without set up (code 0/0) with regard to the ADLs of bed mobility, transfer, toileting, and hygiene. She based her assessment on his statements to her, her observations, and the medical documentation in Exhibit F. which stated prior to January 2022 he had no specified functional limitations with the activities of daily living. She also testified that Mr. S told her that he could perform those tasks on his own.[25]

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22 Ex. D.
23 Ex. C.
24 R. Platt testimony.
25 *Id.*

Mr. S sleeps in a regular bed with his spouse indicating to her that there were no bed mobility issues. She saw that Mr. S had good range of motion in his arms and hands and appeared to have good grip strength. He could not touch his feet, but he readily stood unassisted from a chair to standing on his feet.[26]

Ms. Platt saw Mr. S move about the room using his walker. He informed her that he exercises by "walking" throughout the residence. However, he told her that he has trouble walking up and down stairs and relies on Ms. B to walk in front of him or steady him when he does so. She scored Mr. S as independent with supervision (code 1/1) for locomotion given his expressed concerns and notes regarding balance in his medical records.[27]

Ms. Platt assessed Mr. S as independent with supervision (code 1/1) for the ADL of dressing. She saw that he could not reach his feet. He told her that he can put on and take off most of his clothes, but sometimes his wife holds his pants for him to put his foot into them or picks his foot up. Ms. Platt decided it was unlikely that Mr. S needed help lifting his foot given his statements to her about walking for exercise, however.[28]

Ms. Platt scored Mr. S as independent with set-up (code 0/1) for the ADLs of bathing and eating.[29] Ms. Platt testified that Mr. S told her that he could usually dress and undress himself to bathe, but he needs his wife to assist with his shoes and socks on occasion. She concluded he could get in and out of the tub without weight bearing help from Ms. B, and his wife is only present to steady him if needed. He washes his own body except his back and hair.[30]

According to her testimony, Mr. S told Ms. Platt at the time of the assessment that Ms. B prepares and serves his meals. He stated it would be hard for him to prepare his own main meal given his spinal diagnosis. She also does the housework and laundry. He goes shopping with her. Ms. Platt saw Ms. B at the residence. Ms. B has a daycare inside the home and regularly goes up and down the stairs between the main living area and the childcare area. Based on his statements to her, her observations, and the contents of Ex. F. Ms. Platt assessed Mr. S as needing limited assistance (code 2/3) for the IADL of main meal preparation, but she gave him a

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26 R. Platt testimony. Ex. E., p. 8.
27 *Id.*
28 *Id.*
29 Ex. E.
30 R. Platt testimony. Ex. E., p. 9.

code of independent with difficulty (score 1/3) for the IADLs of light meal preparation, housework, and laundry.[31]

Ms. Platt further concluded that Mr. S was not eligible for PCS for any IADL pursuant to 7 AAC 125.040(a)(14)(A) because he lives with his spouse who is obligated by law to assist with those activities.[32]

2. Mr. S's Presentation

Mr. S is an 84-year-old man. He is diagnosed with controlled Type 2 diabetes, hypertension, spinal stenosis of the lumbar canal, high blood pressure, and osteoarthritis in his shoulder.[33] His medical records state his lumbar stenosis is severe "with multilevel neuroforaminal stenosis. He is less steady on his feet due to the pain."[34] He has had knee replacement.[35] In September 2021 his gait and stance were described as abnormal,[36] but appeared improved in October 2021.[37] Otherwise Mr. S's medical records indicate he is mostly functional for his age with regard to the activities of daily living, while a letter his doctor addresses where his specific needs for PCS assistance exist due to his age and health.[38] He cannot work "any longer due to his age and physical disabilities."[39]

Mr. S did not dispute that he could independently perform many of the ADL and IADL. Mr. S testified that he needs PCS assistance with the ADLs of dressing and bathing. He also needs PCS assistance with all of the IADL.[40]

Mr. S explained that he needs PCS for dressing and bathing due to shaking in his hands and limited range of motion in his shoulders. Due to the shaking he cannot pull on or button a shirt without effort and sometimes not at all. The tremors also cause him to drop his pants and when he does so, he cannot bend over to pick them up. His balance is impaired by his severe lumbar stenosis and prior knee replacement. He does walk for exercise, but it is more of a shuffle, he does not pick his foot up with each step. Thus, he argued, Ms. Platt erred when she

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31 R. Platt testimony; Ex. E., pp. 26-27.
32 *Id.*
33 Ex. F., p. 10
34 *Id.* at 23.
35 *Id.* at 30.
36 *Id.* at 26.
37 *Id.* at 33.
38 *Id.* at 24, 31.
39 *Id*. at 36.
40 G. Rendon testimony.

concluded his wife did not assist him with dressing by lifting his foot to slide it into or out of his pants or put on his socks and shoes.[41]

As for bathing, Ms. B escorts him to the bathroom. She helps steady him while he takes off his clothes and sometimes helps him do so. She is there to help him in and out of the tub. He can wash himself except for his back. He needs Ms. B to wash his back due to limited range of motion and pain in his shoulder joints caused by arthritis. When he is finished bathing, Ms. B supervises his dressing and helps when needed.[42]

Mr. S acknowledged that Ms. B runs an on-site day care and has been available to assist with the IADL. However, he and Ms. B did not tell Ms. Platt on March 14, 2022, that Ms. B had been feeling ill herself. At the time of the assessment, neither of them felt there was anything seriously wrong, but soon after the CAT was conducted, Ms. B was told she had breast cancer. Since March 14, 2022, Ms. B has received surgery. At the time of the hearing, she was scheduled for approximately six more months of radiation, according to Mr. S's testimony.[43]

Mr. S stated that Ms. B has not been able to run her day care center or perform her normal daily activities around the house, including taking care of housework, shopping, meal preparation, laundry, or helping Mr. S with his personal care needs since her diagnosis. To the contrary, she has needed assistance herself.[44]

Ms. B made a brief statement. She stated that Mr. S "forgets everything and I have to tell him everything." He "does not do anything" on his own. "He cannot." It is very difficult because her husband needs help, but she also has to run her day care center and the "children are the most important thing to her." Things are even harder now because she needs to recover from surgery and feels sick from the cancer treatment. She cannot take care of Mr. S's personal needs or take care of the house without help for the foreseeable future. [45]

The parties discussed how Ms. B could apply for PCS and other services, how to expedite that process, and what documentation would be helpful before the close of the hearing.

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41 Ex. E.
42 G. S. testimony. *Id.*
43 *Id.*
44 J. B. statement.
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IV. Discussion

A. Applicable Burden of Proof and Standard of Proof

Because this case involves an initial application for services, Mr. S bears the burden of proof to demonstrate that the Division erred and he is eligible for services.[46] He can meet the burden of proof using any evidence on which reasonable people might rely in the conduct of serious affairs,[47] including such sources as written reports of firsthand evaluations of the patient. The relevant date for purposes of assessing the state of the facts is, in general, the date of the agency's decision under review.[48]

B. Discussion

The disputed areas are addressed below.

1. *ADL of Dressing.*

Dressing is how a person puts on, fastens, and take off all items of street clothing.[49] Mr. S's medical records indicate that he has medical issues involving his spine and legs. His testimony made it clear there are regular occasions where his balance is not reliable enough to stand on one leg to put on his pants. On those times, he relies on Ms. B to physically guide or maneuver his limbs or provide a steadying hand or shoulder. Mr. S is highly involved in the activity and Ms. B is not typically required to provide daily or regular weight bearing assistance. This is the equivalent of "limited assistance" (score 2/2). A letter from his physician corroborated Mr. S's need for assistance. Mr. S met his burden to establish eligibility for PCS for this ADL.

2. *ADL of Bathing*

Bathing includes transfers in and out of the tub/shower and the bathing of the body, excluding washing the hair and the back.[50] The Division concluded Mr. S could independently bathe. The assessor concluded Mr. S did not require assistance with bathing because he had sufficient range of motion to wash all of his body except the middle of his back and his hair which are excluded from the assessment. Mr. S did not meaningfully challenge that conclusion.

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46 7 AAC 49.135.
47 2 AAC 64.290(a)(1).
48 *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).
49 Ex. E., p. 17.
50 Ex. D, p. 16.

However, the assessor also concluded that because Mr. S could locomote unassisted or with the walker to the bathroom and stand unassisted, Mr. S could also transfer into the tub or shower. Mr. S contested that conclusion. His testimony that he has balance problems when taking big steps was credible. The assessor found that Mr. S needed supervision walking up and down the staircase in the home. There is no reason to conclude he does not need similar supervision and limited assistance stepping up and into a bathtub. This is particularly true given the letter from Dr. N and the description of how Ms. B regularly maneuvers his feet and lower limbs to help Mr. S put on his pants. The fact that Mr. S shuffles back and forth across a flat floor for exercise does not establish that he can transfer into the tub. It is more likely than not that Mr. S needs limited assistance from one person (score 2/2) to get in and out of the tub or shower.

3. *IADL*

The undisputed evidence at the hearing established that prior to March 14, 2022, Ms. B and Mr. S lived together. Ms. B ran an on-site day care center but was available during the day and at other times to prepare light and main meals, perform light and routine housework, shop, and do laundry. Pursuant to 7 AAC 125.040(a)(14)(A) at the time of his CAT assessment, Mr. S was not eligible for PCS for IADL because Ms. B was present, able, and with a duty to provide support.

Unfortunately, the fact that Ms. B may have subsequently become unable or unavailable to perform those tasks due to her own health problems does not mean that Mr. S becomes automatically entitled to PCS. Instead, a new application complete with full corroborating documentation needs to be filed, or Ms. B needs to submit her own application for PCS or other services.[51] Given the evidence submitted at the time of the application, and in the absence of clearer evidence, Mr. S has not met his burden of proof. He is not eligible to receive PCS for the IADL.

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[51] Mr. S did not submit documentation of Ms. B's medical status to the Division for consideration until May 24, 2022, two days day before the hearing. When he did so, however, the records contained only Ms. B's name, so it was not until immediately prior to the hearing on May 26, 2022, that the Division of the Administrative Law Judge were made aware that they existed. The records contain information regarding Ms. B's treatment between March 18, 2022, when a biopsy of her breast was taken, until April 21, 2022, when she had a consult with Dr. T.K on whether surgery or chemotherapy treatment was in her best interest. The records indicate that Ms. B was in favor of surgery, but do not include records of when or if surgery occurred or her follow-up plan of care. *See,* Faxed records received May 24, 2022.

V. Conclusion

Mr. S's physical condition is such that he requires hands-on limited physical assistance with the ADLs of Dressing and Bathing. As discussed above, he is to receive the following PCS:

Task	Assistance Level	Weekly Frequency
Bathing	Limited (2/2)	7 times
Dressing	Limited (2/2)	14

Dated: June 28, 2022

Signed
Carmen E. Clark
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 13th day of July, 2022.

By: *Signed*
Name: Cheryl Mandala
Title: Chief Administrative Law Judge

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