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

In the Matter of	)	
	)	
K.H	)	OAH No. 22-0490-MDS
	)	

DECISION

I. Introduction

K.H is a seriously disabled minor. He is a Medicaid Home and Community-Based Waiver (Waiver) recipient who received a variety of services through both the Waiver program and the regular Medicaid program including personal care services (PCS). On April 22, 2022, the Division of Senior and Disabilities Services (Division) notified him that his PCS were being reduced from 20 hours per week to four hours per week. K's legal guardian, E.X, requested a hearing on May 24, 2022[1] to challenge the reduction.

K's hearing was held in two sessions, July 19 and 28, 2022. Ms. X represented K's interests at the hearing. Ms. X and N.N testified on K's behalf. O.J, K's Medicaid Care Coordinator, also participated in the hearing. The Division was represented by Fair Hearing Representative Terri Gagne. Melissa Meade, a Health Program Manager I with the Division, testified for the Division.

The evidence in this case shows that K's care needs have not changed. Although he has reduced the usage of his PCS that change is attributable to a difficulty in staffing his care team, and not to a decreased need or his care needs being met by other available services. However, part of his PCS hours were provided for passive range of motion exercises, which have to be renewed on a yearly basis. The evidence show that renewal was not done properly. Accordingly, the Division did meet its burden of proof to reduce K's PCS but only in the amount of time previously provided for the passive range of motion exercises. It, however, did not meet its burden of proof to reduce his other PCS.

K also asked that his PCS be increased to 40 hours per week, and that he be reassessed for PCS. The evidence, however, does not show support for either of those requests. K's request is therefore denied because he did not meet his burden of proof.

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[1] The May 24, 2022 hearing request indicates that the hearing was requested earlier on April 22, 2022. Ex. C.

In summary, K's PCS are reduced to eliminate the time provided for passive range of motion exercises. His PCS are otherwise unchanged.

II. Facts

K is a severely disabled 13-year-old. His primary care physician detailed his health conditions in a July 22, 2022 letter:

> K has a severe congenital syndrome known as Allan-Herndon-Dudley syndrome which has resulted in chronic and severe spasticity which sometimes worsens depending on his emotional state. He has epilepsy and global development delays. He has medical equipment dependence in the forms of a wheel chair and G-tube feeding dependence and takes numerous medications. He is non-verbal and non-ambulatory. He is getting increasingly challenging to transfer as he grows and absolutely requires at least two adults for his own safety as well as caregivers' during cares.[2]

K was authorized to receive PCS in the spring of 2022 as follows:

Transfers – Completely Dependent – 4x daily (28x weekly)

Locomotion – Completely Dependent – 4x daily (28x weekly)

Locomotion – Access Medical Appointment – Dependent once weekly

Dressing – Completely Dependent – 2x daily (14x weekly)

Personal Hygiene – Completely Dependent – once daily (7x weekly)

Bathing – Completely Dependent – once daily (7x week)

Passive Range of Motion exercises - daily[3]

In addition to PCS, K was receiving a number of other services paid for by the Medicaid program:

Family Habilitation Services - 365 daily units

Day Habilitation Services – 12 hours per week

Hourly Respite – 10 hours per week

Daily Respite – 14 days per year

Private Duty Nursing – 120 hours per week[4]

On April 22, 2022, the Division notified K that his authorization for PCS tasks would be reduced from 7 days per week to only two days per week, as follows:

Transfers – Completely Dependent 4x daily, 2 days per week (8x weekly)

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2 Dr. Parker's July 22, 2022 letter, filed on July 22, 2022.
3 Ex. D, pp. 3 – 6.
4 Ex. D, p. 3; Ms. Meade's testimony.

Locomotion – Completely Dependent 4x daily, 2 days per week (8x weekly)

Dressing – Completely Dependent – 2x daily, 2 days per week (8x weekly)

Personal Hygiene – Completely Dependent – once daily, 2 days per week (2x weekly)

Bathing – Completely Dependent once daily, 2 days per week (2x weekly)

Passive Range of Motion exercises – eliminated.[5]

PCS for Locomotion to Access Medical Appointments was not reduced or eliminated.[6]

K's last assessment was conducted on July 9, 2020.[7] The Division did not reassess K's need for assistance with his ADLs prior to his reduction. Instead, the Division's reduction in his ADLs was primarily based upon the Medicaid billing records for K's PCS which showed a pattern of only using PCS two days per week. Those records were supplied during the hearing, and they showed that after February 8, 2021, K stopped using PCS on a daily basis, and was only using PCS several days per week, with a weekly average usage of 10 hours.[8] This overall pattern continued, with some variation. through the end of June 2022:[9]

Month	Day	Units	Hours (Units ÷ 4)
January 2022	1	20	5
	7	20	5
	8	20	5
	14	20	5
	15	20	5
	21	20	5
	22	20	5
	28	20	5
	29	20	5

[5] Ex. D, pp. 3 – 6, 12; Ms. Meade's testimony. The record also contains several other reduction letters written after K's hearing request, both dated June 16, 2022. *See* Ex. G, pp. 11, Ex. H. Because those were written after K requested a hearing, only the reduction letter dated April 22, 2022 (Ex. D) will be considered. *See Allen v. State, DHSS,* 203 P.3d 1155, 1169 – 1170 (Alaska 2009) (as a general rule, the agency cannot correct errors/deficiencies in a subsequent notice issued after the recipient requests a hearing)

[6] Ex. D, p. 12.

[7] Ex. D.

[8] Ex. K; Ms. Meade's testimony.

[9] The Division's exhibits showing PCS utilization go through Jun 29, 2022. *See* Exs. J and K. *Also see* Ms. Meade's testimony.

February 2022	4	20	5
	5	20	5
	12	20	5
	25	20	5
March 2022	4	20	5
	5	20	5
	11	24	6
	12	16	4
	18	24	6
	19	16	4
	25	24	6
	26	16	4
April 2022	1	24	6
	2	16	4
	8	24	6
	9	16	4
	12	24	6
	13	24	6
	15	32	8
	29	36[10]	9
	30	16	4
May 2022	5	16	4
	6	28[11]	7
	7	16	4
	13	20	5
	14	16	4

[10] There are two entries for April 29. One is for 12 units, the other is for 24 units. Ex. J.

[11] There are two entries for May 6. One is for 20 units, the other is for 8 units. Ex. J.

	19	16	4
	20	36[12]	9
	21	16	4
	22	16	4
	23	22[13]	5.5
	24	14	3.5
	25	8	2
	27	16	4
	30	8	2
	31	8	2
June 2022	2	8	2
	3	8	2
	6	8	2
	13	8	2
	14	8	2
	21	8	2
	22	8	2
	27	8	2
	28	8	2
	29	8	2

The Division's reduction decision is directed towards two areas. Passive range of motion exercise and activities of daily living (ADLs).

Passive range of motion exercises are only provided for a specific time period, of no more than 52 weeks.[14] The elimination of the passive range of motion exercises was based upon K not having submitted what the Division considered to be a valid renewal request. Specifically,

[12] There are two entries for May 20. One is for 20 units, the other is for 16 units. Ex. J.
[13] There are two entries for May 23. One is for 8 units, the other is for 14 units. Ex. J.
[14] *See* Ex. L.

the Division found that the renewal request forms did not comport with regulatory requirements that passive range of motion exercises would only be authorized for 15 minutes per day per extremity. A required exercise plan was also not submitted.[15] The passive range of motion form instead prescribed bilateral scapulae, shoulders/elbow/wrist, neck/back, hip/knee/ankle/foot, and for amounts that greatly exceeded the maximum weekly limit of seven hours.[16]

For the ADLs (Transfers, Locomotion, Dressing, Personal Hygiene, and Bathing), the Division allowed those at the same daily frequency, *e.g.,* 4x daily for transfers, and the same level of support (completely dependent), but only allowed them for two days per week. This reduction was based upon the Division's observation that K was had been only using PCS for an average of two days per week.[17]

K had two of his caregivers testify at hearing. Ms. X is his guardian with whom he lives and who provides him with family habilitation services, which is a 24 hours per day, 7 days per week service. N.N is a family friend and neighbor, who also provides paid respite, day habilitation services, and has occasionally been a PCA.[18]

Ms. X was a credible witness. Her testimony established that K needs a two-person assist for his PCS tasks. The PCA program only provides one PCA for a task. She, as the family habilitation provider, is the second person. Her testimony further established that due to staffing problems occasioned by Covid-19 and the demands of the other disabled children in her household, that the lack of full PCS hours being used was not due to a decrease in K's needs, but rather was due to the unavailability of a PCA to assist him. As a further example of staffing issues, although Medicaid authorizes up to 120 hours per week of private duty nursing for K, he has been only able to obtain approximately 60 hours per week, which is generally provided on weeknights.[19]

Mr. N has a full-time job in addition to his parttime paid assistance with K. He has, due to the pandemic, been working remotely from home. The nature of his full-time job provides him with a great deal of flexibility. He has been helping, on a volunteer basis, multiple hours per

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15 Ex. D, p. 6; Ms. Meade's testimony.
16 Ex. L.
17 Ex. D; Ms. Meade's testimony.
18 Ms. X' testimony; Mr. N's testimony.
19 Ms. X' testimony.

week to fill in the gaps in service caused by the lack of a PCA. His job, however, no longer gives him the flexibility to continue volunteering with K's care.[20]

Because of the unavailability of care providers, K has for some time only been receiving PCS over the weekends.[21]

III. Discussion

This case has multiple parts. The division is seeking to reduce K's PCS. It has the burden of proof on the PCS reduction.[22] K is seeking to increase his PCS and obtain a reassessment. He has the burden of proof on those issues.[23] This decision will first discuss the general requirements for PCS, then address the reduction and increase issues in sequence.

A. Personal Care Services General Requirements

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."[24] Those activities are broken down into eight specific "activities of daily living" (ADLs) – bed mobility, transfers, locomotion, dressing, eating, toileting, personal hygiene, and bathing[25] -- and five specific "instrumental activities of daily living" (IADLs) – light meal preparation, main meal preparation, housework, laundry, and shopping.[26] 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,"[27] nor for "oversight and standby functions."[28]

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.[29] 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

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20 Mr. N's testimony.
21 Ms. X' testimony; Mr. N's testimony.
22 7 AAC 49.135.
23 7 AAC 49.135.
24 7 AAC 125.010(b)(1)(A)(iii).
25 7 AAC 125.030(b).
26 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.
27 7 AAC 125.040(a)(4).
28 7 AAC 125.040(a)(10).
29 *See* 7 AAC 125.020(a)(1). The CAT is itself a regulation, adopted in 7 AAC 160.900(d)(6).

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.[30]

The ADLs measured by the CAT are bed mobility, transfers, locomotion, dressing, eating, toilet use, personal hygiene, and bathing.[31] Time allowed for PCS is determined based upon the task and the degree of assistance required. It is not provided in blocks. For instance, if an individual is completely dependent upon another person for bathing, and bathing is allowed seven days per week, then they are allowed PCS for 30 minutes for each day they are authorized to be bathed.[32]

B. Reduction in Services

1. Duplication of Services

One of the Division's arguments supporting its position that K's PCS should be reduced was that there was a duplication of services, being that his family habilitation services overlapped with his PCS. Family habilitation services are approved for a residence, licensed by Medicaid, where the recipient lives and receives 24-hour care.[33] Notably, the regulations do not prohibit a recipient from receiving both family habilitation services and PCS.[34] The question then arises as to whether the 24-hour care provided to K duplicates services provided through the PCS program. The evidence shows that K is completely dependent upon others for assistance with his ADLs and that he requires two people to provide that assistance. The PCS program only supplies one PCA, not two, for a task. Ms. X is the second person who provides assistance. The family habilitation does not duplicate the assistance provided by the PCS for K's ADL care. The Division's argument on this point is therefore not persuasive.

2. Reduction Due to Lack of Use

The evidence clearly shows that K has not been utilizing the full amount, with limited exceptions, of his PCS services for quite some time. He is allotted 20 hours per week and has only been using, on the average 10 hours per week, primarily on weekend nights. The PCS

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30 *See* Ex. D, p. 9.
31 Ex. D, pp. 9, 12.
32 Ex. D, p. 9.
33 7 AAC 130.265(b).
34 7 AAC 130.265(c)(3).

regulations allow a termination, but not a reduction, of benefits "if the recipient (1) fails to use the personal care services within 90 consecutive days after approval by the department or during any 90-day period . . ."[35] Because the Division is not seeking termination, it cannot usen the partial use of benefits as a reason for reduction. Please note, this decision does not decide whether a decrease in use justifies a reduction in services. In addition, the credible evidence shows that the reduction in use is attributable to an inability to obtain full staffing for K.

The applicable regulation is 7 AAC 125.026(f). It allows the Division to reduce PCS if the reduction will not "create a risk of institutionalization for a recipient eligible to receive home and community-based waiver services." Because K is a Waiver recipient, this provision applies. That same regulation requires, as a part of the risk of institutionalization analysis, that the Division conduct a new assessment and consider "the finding on the recipient's *Consumer Assessment Tool* . . . that are the result of a new assessment."[36] No new assessment has been performed. Without a new assessment, the Division cannot conduct the regulatorily required risk of institutionalization analysis, and therefore cannot reduce K's PCS for his ADLs.

3. Passive Range of Motion Exercises

The passive range of motion exercises are a specialized form of PCS. Passive range of motion exercises are allowed for "a documented physical condition associated with contractures that results in a need for passive range-of-motion for the extremities affected by that condition."[37] Unlike the other PCS categories, passive range of motion exercises are only for a limited duration, up to 52 weeks at a time, and have to be renewed when they expire.[38] As part of that renewal, there must be a "written plan for passive range-of-motion for those extremities for those extremities . . . (ii) provides detailed guidance for the movements of the recipient's extremities that is to be followed by the recipient's personal care assistant . . ."[39] The "*PCA Service Level Reduction"* form states "*PROM – Allow only if recipient has a written plan developed in accordance with 7 AAC 125.030(d)(5), for the PCA assistant to follow."*[40]

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35 7 AAC 125.026(d)
36 7 AAC 125.026(f)(1) and (2).
37 7 AAC 125.030(d)(5)(A).
38 *See* Ex. L.
39 7 AAC 125.030(d)(5)(B).
40 Ex. D, p. 9 (emphasis in original). *Also see Personal Care Services.Service Level Computation*, located online at https://health.alaska.gov/dsds/Documents/regulationMaterials/PCS_SLA_Computation_Chart_6-2-2017.pdf - adopted in regulation at 7 AAC 160.900(d)(29).

The requested renewal of K's PCS for passive range of motion exercises included a request for both extremities and other body parts, for times well in excess of the daily limit for each affected extremity and did not include a written exercise plan. Consequently, it did not comply with regulatory requirements. As such, the Division's reduction in K's PCS removing authorization for passive range of motion exercise is fully supported by both the facts and the applicable regulations.

C. Increase in PCS and a New Assessment

K requested that his PCS be increased to 40 hours per week and that the Division conduct a new assessment. There was a dearth of evidentiary support showing the need for an increase other than Ms. X pointing out the fact that there has been no assessment done for several years and that K is now older and heavier than at the time of the previous assessment. However, it is undisputed that K was previously found to be completely dependent in his ADLs, and no evidence was presented that he now requires a greater frequency of assistance with PCS tasks. Under 7 AAC 125.012(d), the Division is not required to perform a new assessment for someone who "has a chronic or permanent physical condition that is stable and predictable" and there have been "no changes that would affect the recipient's current service level authorization." The only change that has occurred is the difficulty in obtaining service providers, and no evidence was presented that K's condition has worsened. The evidence therefore does not support K's request for either an increase in service or for a new assessment.

IV. Conclusion

The Division's reduction in PCS services is reversed in part and affirmed in part. The elimination of PCS for passive range of motion exercises is AFFIRMED. The reduction for the other ADLs is REVERSED.

Dated: August 25, 2022

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 9th day of September, 2022.

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

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