

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

In the Matter of:)
)
 F G) OAH No. 15-0467-MDS
) Agency No.
_____)

DECISION

I. Introduction

F G receives General Relief Assisted Living Home Assistance (ALH Assistance). On April 6, 2015, the Division of Senior and Disabilities Services (Division) notified him that he was no longer eligible to receive ALH Assistance. Mr. G requested a hearing.

Mr. G's hearing was held on May 27, 2015. Mr. G appeared telephonically and testified on his own behalf. E C, the owner of the assisted living home (ALH) where Mr. G resides, testified on his behalf. Victoria Cobo represented the Division. Lynn Thurston, a health program associate employed by the Division, testified on its behalf.

The evidence demonstrates that Mr. G remains eligible for ALH Assistance. The termination of his ALH Assistance is reversed.

II. Facts

Mr. G is 33 years old. Mr. G receives Social Security Supplemental Security Income benefits.¹ This means that Social Security Administration has determined that he is disabled. He is schizophrenic and experiences a depressed mood, and has paranoid, delusional ideation. He also has a diagnosis of alcohol abuse, which is in early full remission. His symptoms are improved by medications, which are olanzapine (antipsychotic), sertraline (antidepressant), and naltrexone (alcohol abuse treatment). His physician believes he is vulnerable to alcohol abuse outside of structured supported living and recommends that he stay in an assisted living facility. His physician stated that Mr. G requires reminders to take his medication, is not a danger to himself or others, and does not require physical assistance with the activities of bathing, dressing, grooming, oral hygiene, toileting, eating, moving about, or getting in and out of bed.²

Mr. G has been living in an ALH since December 2010, following his discharge from the Facility X, where he was placed due to auditory hallucinations and a suicide attempt. He had a

¹ Ex. E, pp. 10, 12, 14.

² Ex. E, pp. 1 – 2; Ex. 2 (May 19, 2015 physician's report).

second placement in Facility X in 2011, after another suicide attempt.³ He has periods where he will self-isolate in his room. In addition, he will occasionally leave the ALH to become intoxicated, which is in violation of house rules. The last time that occurred was in March 2015.⁴ He has been fairly stable for the several months immediately preceding the hearing.⁵

The ALH staff cooks for Mr. G and reminds him to take his medications twice daily. Ms. C, the owner of the ALH, has known Mr. G since he moved in in December 2010. She does not believe that Mr. G has the ability to take his own medications, cook, or care for himself. She is concerned that he will self-isolate without ALH support.⁶

Mr. G attends group and individual therapy at the Facility Y, which is a program for mentally ill adults. ALH staff have to prompt Mr. G to get ready to go to the Facility Y. Facility Y staff believe he would not attend its programs regularly without that prompting, and that his condition would deteriorate without his participation in its programs. In addition, they state that he has a limited ability to remember to take his medications, and cannot remember his medical and psychiatric appointments.⁷

Mr. G testified that he could take his medications without being reminded. He doesn't know if he could cook for himself. He has not cooked anything since 2007, when he made soup from scratch, which he has forgotten how to make. He continues to think that people are talking, texting, and spreading rumors about him. He does not think that he could live on his own.⁸ Mr. G walks to the local grocery store by himself.⁹

The Division determined that Mr. G was no longer eligible for ALH Assistance because he was completely independent in his activities of daily living, without restriction, and he is only provided reminders to take his medications. The Division did not consider Mr. G's diagnosis of alcohol abuse disorder as supporting a need for ALH Assistance, because his doctor's May 19, 2015 report indicated that Mr. G was in early full remission. When the Division determined that Mr. G was independent in his activities of daily living, it considered his physical functionality in the areas of bathing, dressing, grooming, oral hygiene, toileting, eating, moving about, or getting in and out of bed. These are essentially the same as the activities of daily living used to

³ Ex. 1 (May 8, 2015 fax), p. 2.

⁴ Ms. C's testimony.

⁵ Ms. C's testimony.

⁶ Ms. C's testimony.

⁷ Ex. 2, pp. 2 – 4.

⁸ Mr. G's testimony.

⁹ Ms. C's testimony.

determine eligibility and benefit levels for the Medicaid Home and Community-based Waiver (Medicaid Waiver) and Personal Care Assistance (PCA) programs. The Division did not take into account Mr. G's ability to perform tasks such as cooking, cleaning, or grocery shopping etc., because those are considered instrumental activities of daily living by the Medicaid Waiver and PCA programs and are not considered activities of daily living by those same programs.¹⁰

III. Discussion

ALH Assistance is a program that assists with payment for an individual, who does not require nursing or medical care, to stay in an ALH.¹¹ To qualify, in addition to other criteria, a recipient must have:

(A) a disability that is attributable to a severe and persistent mental illness, or to an intellectual disability or development disability or another condition closely related to an intellectual disability or developmental disability, that

(i) significantly impairs intellectual functioning and adaptive behavior; and

(ii) includes a significant deficit in the daily living skills that are necessary to function without supervision or support;

(B) a hearing, speech, visual, orthopedic, or other major health impairment such as cerebral palsy, epilepsy, or autism, that significantly impedes participation in the social, economic, educational, recreation, and other activities general available to the individual's nonimpaired peers in the community; or

(C) a significant deficit in adaptive behavior in the area of self-care, communication of needs, mobility, or independent living that may be the result of the aging process, a major health impairment, an emotional health disturbance, or alcohol or drug dependence;¹²

The recipient must also be a person who "without assisted living care is subject to, or at risk of abuse, neglect, or exploitation by others."¹³

This case involves the termination of benefits. As a result, the Division has the burden of proof by a preponderance of the evidence to demonstrate that Mr. G is no longer eligible for ALH Assistance benefits.¹⁴

Of the three possible categories that provide paths to ALH Assistance eligibility, Mr. G falls best in category "A" being that he has a "severe and persistent mental illness" that

¹⁰ Ex. D; Ms. Thurston's testimony.

¹¹ 7 AAC 47.300 - .310.

¹² 7 AAC 47.330(4).

¹³ 7 AAC 47.330(5).

¹⁴ 7 AAC 49.135

“significantly impairs [his] intellectual functioning and adaptive behavior” and that “includes a significant deficit in the daily living skills that are necessary to function without supervision or support.”¹⁵

Mr. G is legally disabled, as determined by the Social Security Administration. He is schizophrenic. He continues to experience paranoia, despite medication, as evidenced by his testimony that he thinks people are talking, texting, and spreading rumors about him. He has been in a supported living environment, the ALH, since December 2010 following hospitalization at Facility X. He continues to self-isolate.

It is undisputed that Mr. G is able-bodied and his mental illness does not affect his ability to function physically. Physical functioning appears to be the only substantive criterion used by the Division in assessing Mr. G’s continued eligibility for ALH Assistance, as shown by Ms. Thurston’s testimony that the program used the activities of daily living used for the PCA and Medicaid Waiver programs as guidelines to assess Mr. G’s eligibility. Those activities of daily living, used for the PCA and Medicaid Waiver programs, are purely physical functional criteria, which are defined by regulation.¹⁶ However, the Division’s use of these same types of activities of daily living for determining eligibility for ALH Assistance is invalid. This is readily apparent from the language of the portion of the ALH Assistance eligibility regulation pertaining to mental illness; it requires only “significant deficit in the daily living *skills* that are necessary to function without supervision or support.”¹⁷ Daily living skills is a much broader category than the activities of daily living used in determining eligibility for the Medicaid Waiver and PCA programs.

It is therefore necessary to look at Mr. G’s overall “daily living skills that are necessary to function without supervision or support.” The Division has not done this.

The Division has the burden of proof to demonstrate that Mr. G can meet his “daily living skills that are necessary to function without supervision or support.” Because it has asked and

¹⁵ 7 AAC 47.330(4)(A). Mr. G is also arguably eligible under the other two categories contained in 7 AAC 47.330(4)(B) and (C) depending on whether his schizophrenia can be considered a “major health impairment.” However, it is not necessary to address this issue.

¹⁶ 7 AAC 125.030 (PCA program); 7 AAC 130.215 (Medicaid Waiver program). Both of these programs use the January 9, 2009 version of the Consumer Assessment Tool in evaluating eligibility, which is adopted by reference in 7 AAC 160.900(c)(6)). Inexplicably, the January 9, 2009 revision of the Consumer Assessment Tool, adopted by reference, is not readily available online. The version found online, by reviewing an older Division information brochure about the PCA program (<http://dhss.alaska.gov/dsds/Documents/docs/cat-pcatOnlineFlyer.pdf>), dates back to 2004: dhss.alaska.gov/dsds/Documents/docs/PCAT.doc.

¹⁷ 7 AAC 47.330(4)(A)(ii) (emphasis added).

answered the wrong question, the Division has not met this burden. Similarly, the evidence in this case shows that there are substantial grounds for concern that without ALH placement, Mr. G will be at risk for neglect. In the absence of proof that he is not eligible, Mr. G must continue to receive ALH Assistance benefits.

IV. Conclusion

The Division's termination of Mr. G's ALH Assistance benefits is reversed.

DATED this 18th day of June, 2015.

Signed

Lawrence A. Pederson
Administrative Law Judge

Adoption

The undersigned, by delegation from of 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 16th day of July, 2015.

By: *Signed*

Name: Jared C. Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS

[This document has been modified to conform to the technical standards for publication.]