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STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
OFFICE OF HEARINGS AND APPEALS

In the Matter of	)	
	)	
[redacted],	)	OHA Case No. 08-FH-693
	)	
Claimant.	)	Div. Case No. [redacted]
	)	

FAIR HEARING DECISION

STATEMENT OF THE CASE

[redacted] (Claimant) applied for Medicaid benefits on June 24, 2008 under the Medicaid Home and Community Based Waiver (HCB Waiver) Program. On September 19, 2008, the Division of Senior and Disabilities Services (Division) sent him notice his application was denied because he did not require a nursing facility level of care. (Ex. D) The Claimant requested a fair hearing contesting the denial on September 22, 2008. (Ex. C) This office has jurisdiction pursuant to 7 AAC 49.010.

The hearing was originally scheduled for November 6, 2008. However, the Claimant had not received the agency hearing packet, and requested a continuance. This request was granted and the hearing was held on November 13, 2008. [redacted], the Claimant's son, attended the hearing telephonically and represented the Claimant. The Claimant did not attend the hearing.

[redacted], a Health Program Manager III, attended in person to represent the Division. [redacted], Health Program Manager II employed by the Division, attended telephonically and testified on behalf of the Division. [redacted], Health

Program Manager II, employed by the Division, attended telephonically and testified on behalf of the Division.

ISSUE

Was the Division correct to deny the Claimant's June 24, 2008 application for Medicaid HCB Waiver benefits because he did not require a nursing facility level of care?

FINDINGS OF FACT

1. Claimant is a [redacted] year old man (date of birth [redacted]) who lives in his own apartment on his son's property. (Ex. F, p. 1) (Ex. G)

2. Claimant applied for Medicaid assistance under the HCB Waiver program. Claimant was assessed for eligibility on June 24, 2008. (Ex. F, p. 1) The person who conducted the assessment was [redacted], a registered nurse. *Id.* The Claimant, his son, and his care coordinator [redacted], were present for the assessment. *Id.*

3. The June 24, 2008 assessment, the Consumer Assessment Tool (CAT), scored the claimant with a "0" and found he did not qualify for HCB Waiver services. (Ex. E, p. 13) Specifically, the assessor, Ms. [redacted], found that as of June 24, 2008:

a. The Claimant did not require any professional nursing services. He received physical therapy two days a week. In every other criteria, he did not need any treatment, as there was no condition that warranted such treatment within the last seven days. Therefore he scored a 0 on all components of section A of the CAT, except for physical therapy, which was a 2. (Ex. F, p. 7)

b. The Claimant did not require any special treatments or therapies. Therefore he scored a 0 on all components of section B of the CAT. (Ex. F, p. 7)

c. The Claimant had both long and short-term memory problems and his daily decision making cognitive skills were severely impaired. He scored a 1, as having memory problems in section C1 of the CAT. He was able to recall common knowledge items, therefore his memory/recall ability was checked as having an ability to recall in section C2. His cognitive skills were severely impaired, and therefore, he was scored with a 2 in section C3. Claimant did not need professional nursing assessment, observation and management required at least 3 days/week to manage all the cognitive patterns. Therefore, he scored a 0 in section C4A. (Ex. F, p. 8) He had problems with cognition in memory of events, memory and use of information, global confusion, spatial orientation, and verbal communication, and therefore scored a 6 in section C4B. (Ex. F, p. 10).

d. The Claimant did exhibit problem behaviors, with verbal abuse and resisting care. He scored a 2 and 3 in these behaviors respectively in section D. (Ex. F, p. 8). He did not need professional nursing assessment, observation and management required at least 3 days/week to manage the behavior problems, and therefore scored a 0 in section D2a. (Ex. F, p. 8). Because of his behavior, he scored a 6 in section D.2B. (Ex. F, p. 10).

e. He needed limited assistance in three of his activities of daily living, transferring, locomotion, and toileting. He scored a 2 in self-performance for those three activities in section E. He needed one-person physical assist in those same activities of daily living, and therefore scored a 2 in support in those three activities in section E. (Ex. F, p. 9).

4. At the November 13, 2008 hearing, the Claimant's representative did not dispute the facts in the assessment.

5. Once the assessment is complete, the Division performs an eligibility determination based on the scores of the assessment. In this determination, questions are answered based on the assessment scores. The answers are then factored into a final determination. The Claimant scored a 0 in the final determination. The CAT required a final score of 3 to meet the qualifying level of care requirements. (Ex. F, p. 17).

6. The Division also made a level-of care evaluation in accordance with the guidelines established in the Criteria of Placement section of the *Manual for Prior Authorization of Long Term Care Services*, prepared by the division of medical assistance, as revised October 1993. That evaluation indicates the Claimant did not meet any of the skilled level of care factors. The evaluation also indicates the Claimant only met one intermediate level of care factor in that he needed limited assistance with transfers, locomotion and toileting. (Ex. E, p. 26 – 27).

7. Ms. [redacted], with the Division, further testified there was no evidence the Claimant needed skilled or intermediate level of care.

PRINCIPLES OF LAW

This case involves the denial of an application for benefits. When an application is denied, the applicant has the burden of proof[1] by a preponderance of the evidence.[2]

[1] "Ordinarily the party seeking a change in the status quo has the burden of proof." *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985)

[2] Preponderance of the evidence is defined as follows:

An adult, with physical disabilities, who requires "a level of care provided in a nursing facility" is entitled to receive Medicaid Home and Community Based Waiver services. 7 AAC 43.1010(d)(1)(B) and (d)(2).[3] The Agency is required to perform a level of care assessment to determine eligibility:

> [T]he department will base a determination of eligibility under the paragraph on the level-of-care assessment under 7 AAC 43.1030(b), and will determine eligibility under
>
> (A) 7 AAC 43.180 – 7 AAC 43.190 if the applicant falls within the recipient category of
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> * * *
>
> (iii) older adults;

7 AAC 43.1010(d)(2).

> If the assessment is to determine if the applicant falls within the recipient category for
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> * * *
>
> (2) adults with physical disabilities or older adults, the
>
> (A) Department will make a determination to determine whether the applicant requires skilled care under 7 AAC 43.180 or intermediate care under 7 AAC 43.185; and
>
> (B) level of care determination under (A) of this paragraph must incorporate the results of the department's *Consumer Assessment Tool (CAT)*, revised as of 2003 and adopted by reference.

7 AAC 43.1030(b).

State Medicaid regulation 7 AAC 43.180 defines skilled level of care as follows:

> (a) Skilled care is characterized by the need for skilled nursing or structured rehabilitation ordered by and under the direction of a physician; these services must be provided either directly by or under supervision of qualified technical or professional personnel, who must be on the premises at the time service is rendered; e.g., registered nurse, licensed practical nurse, physical therapist, licensed physical

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> Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

Black's Law Dictionary 1064 (5th Ed. 1979)

[3] There are other eligibility criteria, however, those are not at issue in this case. *See* 7 AAC 43.1010(a) and (b).

therapy assistant, occupational therapist, certified occupational therapy assistant, speech pathologist, and audiologist.

7 AAC 43.185 defines intermediate level of care as follows:

> (a) Intermediate care is characterized by the need for licensed nursing services ordered by and under the direction of a physician, provided in a certified ICF and not requiring care in a hospital or SNF.
> (d) Intermediate care may include therapy provided by an aide or orderly under the supervision of licensed nursing personnel or a therapist.

The acronyms "ICF" and "SNF" contained in 7 AAC 43.185 respectively refers to intermediate care facility and skilled nursing facility.

The Consumer Assessment Tool (CAT), referenced in 7 AAC 43.1030(b)(2)(B), is used to determine whether an applicant requires either skilled care or intermediate care. The CAT performs this determination by assessing an applicant's needs for professional nursing services, for special treatments and therapies, and whether or not an applicant experiences impaired cognition, or problem behaviors.

The CAT also assesses the degree of assistance an applicant requires for her activities of daily living, which specifically include bed mobility (moving within a bed), transfers (i.e. moving from the bed to a chair, or a couch, etc.), locomotion (walking), eating, and toilet use, which includes transferring on and off the toilet. (Ex. E, pp. 5 – 7) For instance, if an applicant receives a score of "3" in three or more of the scored activities of daily living, bed mobility, transfers, locomotion, eating, and toilet use, the applicant qualifies for the HCB Waiver program. Otherwise, the results of the assessment portion of the CAT are then scored. If an applicant's score is a 3 or higher, the applicant is medically eligible for Waiver services. (Ex. E, p. 14)

In addition to use of the CAT in its determination of an applicant's level of care, the Agency is also required to consider the factors contained in the *Manual for Prior Authorization of Long Term Care Services*:

> The division or the division's designee will make a level-of-care evaluation in accordance with the guidelines established in the Criteria for Placement section of the *Manual for Prior Authorization of Long Term Care Services*, prepared by the division of medical assistance, as revised October 1993, and adopted by reference. The division will make the final level-of-care decision based upon that evaluation.

7 AAC 43.190. *See Bogie v. State, Division of Senior and Disabilities Services*, Superior Court Case No. 3AN-05-10936 (Decision dated August 22, 2006); *Casey v. State, Dept. of Health & Social Services, Division of Senior and Disabilities Services*, Superior Court Case No. 3AN-06-6613 (Decision dated July 11, 2007).

ANALYSIS

The issue in this case is whether Claimant requires a nursing facility level of care; i.e., either an intermediate level of care or a skilled level of care. Because this is an application, the Claimant has the burden of proof by a preponderance of the evidence.

State regulations set forth the criteria for determining a nursing facility level of care. 7 AAC 190 and 7 AAC 43.1030(b). The Claimant may qualify for the Medicaid HCB Waiver program if he meets the scoring requirements set out in the CAT or the guidelines established by the *Manual for Prior Authorization of Long Term Care Services*.

The Consumer Assessment Tool (CAT), referenced in 7 AAC 43.1030(b)(2)(B), is used to determine whether an applicant requires either skilled care or intermediate care. The CAT performs this determination by assessing an applicant's needs for professional nursing services, for special treatments and therapies, and whether or not an applicant experiences impaired cognition, or problem behaviors.

The CAT also assesses the degree of assistance an applicant requires for his activities of daily living, which specifically include bed mobility (moving within a bed), transfers (i.e. moving from the bed to a chair, or a couch, etc.), locomotion (walking), eating, and toilet use, which includes transferring on and off the toilet. (Ex. E, pp. 5 – 7).

The Claimant did not dispute the factual assessment, in the CAT or the assessment of factors in the *Manual for Prior Authorization of Long Term Care Services.* Therefore, the factual findings in both assessments are accepted. Once those factual factors are accepted, there is little debate regarding the eligibility determination.

Once the factual assessment is determined, the CAT's eligibility determination does not leave any room for judgment or discretion. The answers are based on the numerical coding of the factual factors, and a final score is objective. The final scores for the Claimant is 0, when the required total score of 3 is necessary to qualify for the Medicaid HCB Waiver program. As a result, the Division was correct to deny the Claimant's application for the Medicaid HCB Waiver program because he did not score high enough on the CAT.

The Claimant may also qualify for Medicaid HCB Waiver services if he satisfies the factors listed in the *Manual for Prior Authorization of Long Term Care Services.* A review of the *Manual for Prior Authorization of Long Term Care Services* demonstrates the only factors that could have potentially qualified the Claimant were his need for assistance with his activities of daily living. (Ex. E, p. 26) However, the *Manual* specifically states "[a]dmission to intermediate care will not be authorized solely to provide supervision, protective custody, routine medication management, or assistance with personal services." These all fall under "supervision . . . routine medication management, or assistance with personal services." There is insufficient evidence in this case to support a conclusion the Claimant, as of his June 24, 2008 assessment, required

the degree of care that would have qualified him for HCB Waiver services under the factors contained in the *Manual for Prior Authorization of Long Term Care Services.*

The Claimant had the burden of proof in this case by a preponderance of the evidence. He did not establish either that he qualified for the Medicaid HCB Waiver program based upon either the Consumer Assessment Tool or the factors contained in the *Manual for Prior Authorization of Long Term Care Services.* Specifically, he did not require either a skilled nursing facility or intermediate care facility level of care. Consequently, he did not satisfy his burden of proof as to his qualification for HCB Waiver services at the time of the June 24, 2008 assessment.

The Division was correct when it denied the Claimant's application for HCB Waiver services, based upon the June 24, 2008 assessment.

CONCLUSIONS OF LAW

1. The Claimant, as of his June 24, 2008 assessment, did not require either a skilled nursing facility or intermediate care facility level of care.

2. The Claimant therefore did not qualify for Medicaid Home and Community Based Waiver services.

DECISION

Based upon a preponderance of the evidence, the Agency was correct to deny the claimant's application for Medicaid Home and Community Based Waiver services on September 19, 2008.

APPEAL RIGHTS

If for any reason the Claimant is not satisfied with this decision, the Claimant has the right to appeal by requesting a review by the Director. To do this, send a written request directly to:

Director of the Division of Senior and Disabilities Services
Department of Health and Social Services
PO Box 110680
Juneau, AK 99811-0680

If the Claimant appeals, the request must be sent within 15 days from the date of receipt of this Decision. Filing an appeal with the Director could result in the reversal of this Decision.

DATED this 22nd day of December, 2008.

Patricia Huna-Jines
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 22nd day of December, 2008, true and correct copies of the foregoing were sent to:

Claimant Certified Mail, Return Receipt Requested.
[redacted], Division Hearing Representative
[redacted], Director
[redacted], Policy & Program Development
[redacted], Staff Development & Training

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Al Levitre, Law Office Assistant I