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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. 10-FH-2028
	)	
Claimant.	)	Div. Case No. [redacted]
_____	)	

FAIR HEARING DECISION

STATEMENT OF THE CASE

[redacted] (Claimant) applied for Medicaid benefits[1] under the Home and Community Based Waiver (hereinafter "HCB Waiver") program. On January 21, 2010 the Division of Senior and Disabilities Services (Division) sent the Claimant notice her application was denied. (Ex. D) The Claimant requested a fair hearing contesting the denial on January 26, 2010. (Ex. C)

This Office has jurisdiction pursuant to 7 AAC 49.010.

The hearing was held on May 10, 2010 and June 1, 2010. The Claimant was represented by [redacted], Esq. with the Disability Law Center, who appeared in person. The Claimant attended the hearing in person and testified on her own behalf. [redacted], R. N., and [redacted] both appeared in person and testified on the Claimant's behalf.

The Division was represented by [redacted], Esq., Assistant Attorney General, who appeared in person. [redacted], a registered nurse employed with the Division, appeared in person and testified on the Division's behalf.

The record was left open after the hearing until June 22, 2010 for post-hearing briefing.

ISSUE

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

[1] The record does not indicate the date of Claimant's application.

FINDINGS OF FACT

The following facts were established by a preponderance of the evidence:

1. The Claimant is a 59 year old woman (date of birth [redacted]) who lives in an assisted living home. (Ex. E, p. 1) The Claimant experiences a variety of conditions: major depressive disorder, post traumatic stress disorder, hypothyroidism, hypercholesterolemia, bipolar disorder, hypertension, dementia, and severe malnutrition. (Exs. F, p. 3; G, p. 2) She is also a recovering heroin addict, who receives methadone daily. (Exs. G, p. 2; H, pp. 1, 7 - 8)

2. Claimant applied for Medicaid assistance under the HCB Waiver program. Claimant was assessed for HCB Waiver eligibility on December 23, 2009. (Ex. E, p. 1) The person who conducted the assessment was [redacted], a registered nurse. *Id.*

3. The December 23, 2009 HCB Waiver assessment (Consumer Assessment Tool) scored the claimant with a "0" and found she did not qualify for HCB Waiver services. (Ex. E, pp. 29 - 30) Specifically, the assessment found that as of December 23, 2009:

   a. The Claimant did not require any professional nursing services. (Ex. E, p. 13) However, she does have her methadone "administered by a LN (sic)" once daily, 7 days per week. *Id.*

   b. The Claimant did not receive any therapies (physical therapy, speech therapy, occupational therapy or respiratory therapy). (Ex. E, p. 14)

   c. The Claimant did not require any special treatments or therapies. (Ex. E, p. 15)

   d. The Claimant does not have difficulty with her short-term memory. (Ex. E, p. 16) However, she does have long-term memory problems. *Id.* She also is moderately impaired (score of 2) in her daily decision making skills. *Id.* She does not require "professional nursing assessment, observation and management" to manage her decision making skills. *Id.*

   e. The Claimant did not exhibit any problem behaviors. (Ex. E, p. 17)

   f. The Claimant was able to turn and reposition herself in bed (bed mobility). (Ex. E, p. 6) She received a self-performance code of 0 (independent) and a support code of 0 (none required) in this category. (Ex. E, pp. 6, 18)

   g. The Claimant had difficulty moving (transferring) herself to and from a bed, couch, chair, etc; she needed to "be monitored moving from bed to chair to a standing position." (Ex. E, p. 6) She received a self-performance code of 1 (supervision/cueing required) and a support code of 2 (one person physical assistance) in this category. (Ex. E, pp. 6, 18)

h. The Claimant used a walker to move about. (Ex. E, p. 7) "[C]lient is very frail and though she moves about with her walker she needs to be monitored throughout the day client is in danger of falling." *Id.* She received a self-performance code of 1 (supervision required) and a support code of 0 (no physical help required) in this category. (Ex. E, pp. 7, 18)

i. The Claimant was not able to dress herself without hands on physical assistance. (Ex. E, p. 8) She received a self-performance code of 2 (limited physical assistance required) and a support code of 2 (one person physical assistance) in this category. (Ex. E, pp. 8, 18)

j. The Claimant did not require any hands on assistance with eating. (Ex. E, p. 9) She received a self-performance code of 0 (independent) and a support code of 0 (no assistance required) in this category. (Ex. E, pp. 9, 18)

k. The Claimant required monitoring when transferring on and off the toilet because "client falls easily." (Ex. E, p. 9) She received a self-performance code of 1 (supervision required) and a support code of 0 (no physical help required) in this category. (Ex. E, pp. 9, 18)

l. The Claimant required some assistance with personal care needs. (Ex. E, p. 10) She received a self-performance code of 2 (limited assistance required) and a support code of 2 (one person physical assistance) in this category. (Ex. E, pp. 10, 18)

m. The Claimant required physical assistance with transferring in and out of the shower, bathing and drying herself. (Ex. E, p. 11) She received a self-performance code of 2 ("physical help limited to transfer only") and a support code of 2 (one person physical assistance) in this category. (Ex. E, pp. 11, 18)

n. The Claimant requires assistance with her medications twice daily, 7 days per week. (Ex. E, p. 12)

o. The Claimant does not exhibit problem behaviors (wandering, verbal/physically abusive, disruptive behavior, resisting care). (Ex. E, p. 17)

4. On January 19, 2010, [redacted], a registered nurse employed by the Division, reviewed the December 23, 2009 assessment and compared it to the factors listed in the State of Alaska *Manual for Prior Authorization of Long-term Care Services* in order to determine whether the Claimant qualified for HCB Waiver services. (Ex. F, pp. 1 -2) She checked a form box that stated the Claimant required "[a]ssistance with [activities of daily living]." (Ex. F, p. 2) She provided comments that the Claimant

required limited assistance with bathing, personal care and dressing. *Id.* Ms. [redacted] did not find any of the other factors to be present, including a need for direct nursing services, or a need to control behavioral problems. (Ex. F, p. 2)

5. The Claimant moved to Anchorage approximately 8 and one-half years before the hearing. ([redacted] testimony) She resided by herself. (Claimant testimony). The following occurred while she was living alone in 2009:

a. On two separate occasions, she had a person move in with her while uninvited. (Claimant testimony) One of those persons was someone she knew from the methadone clinic. *Id.* That person was physically abusive to her; she would take the Claimant's money, eat the Claimant's food and take the Claimant's methadone, which caused the Claimant to go through withdrawal. *Id.* At the time, the Claimant was receiving 7 days worth of methadone from the clinic at a time. *Id.* The Claimant ended up taking valium, which she said ruined 7 years worth of sobriety. *Id.* The methadone clinic then no longer allowed her to take a 7 day supply of methadone home with her. *Id.* Instead, the methadone clinic required her to come in daily to the clinic to take her daily methadone allotment at the clinic, which she takes orally. *Id.* The Claimant ended up having to call the police to remove the physically abusive person from her home. *Id.*

b. The Claimant began having falls in the summer of 2009. (Claimant testimony) She gets dizzy very easily and falls over. *Id.* She had two falls in her apartment and one outside her apartment. *Id.*

c. The Claimant did not always remember to take her medications. (Claimant testimony) On occasion, she would take multiple doses of her medications. *Id.*

d. The Claimant went into a deep depression. (Claimant testimony) She did not want to eat and would forget to eat. *Id.* She would go for as long as 4 days without eating. *Id.* She had a dramatic weight loss. Several years ago, she weighed about 140 pounds. She began to lose weight. On September 1, 2009, she weighed about 130 pounds. *Id.* Her weight went down to 82 pounds. *Id.*

e. The Claimant's sister witnessed a decline in her sister's condition in 2009. ([redacted] testimony) Her relationship with her sister broke down. *Id.* She then saw the Claimant only about once a month to give the Claimant money (the sister was the Claimant's designated payee for Social Security purposes). *Id.* The Claimant stopped making sense; she had headaches; she did not feel well; she could not go shopping. *Id.* The Claimant had historically been able to take care of her own paperwork. *Id.* Then in 2009, the Claimant could not even apply for her PFD. *Id.* She witnessed the Claimant lose weight month by month, until the Claimant was so thin that

it was obvious the Claimant was going for days at a time without eating. *Id.*

f. The Claimant goes daily to the methadone clinic for her daily methadone treatment. *Id.* She takes the methadone orally. *Id.* The nurse at the methadone clinic supervises her. *Id.*

6. The Claimant went to see her psychiatrist around Thanksgiving 2009, who told her that she had to go to the hospital. Subsequently, on November 29, 2009, the Claimant called her sister and asked her to take her to the hospital. ([redacted] testimony; Ex. H, p. 1) The Claimant was taken to the Providence Hospital emergency room, where she was admitted to the hospital "as it was deemed unsafe to send her home." (Ex. H, p. 1) She was "very cachectic-appearing."[2] (Ex. H, p. 2) An MRI scan of her brain showed "[s]ignificant progression of atrophy, with patchy white matter disease." (Ex. H., p. 3) A CT scan of her brain also showed "significant progression of severe white matter disease." *Id.*

7. The hospital would not allow the Claimant to return to her home. (Claimant testimony; [redacted] testimony)

8. The Claimant was released from the hospital to go to an assisted living home. ([redacted] testimony) At that time, the Claimant's apartment was in substantial disarray. *Id.* There was garbage, uneaten food, and medications around the apartment. *Id.* There were burn holes in her bedding, clothes, and on the couch. *Id.*

9. The Claimant goes daily to the methadone clinic for her methadone treatment. (Claimant testimony) She takes the methadone orally. *Id.* The nurse at the methadone clinic supervises her. *Id.*

10. The Claimant has short-term memory problems. (Claimant testimony) She forgets things easily. *Id.* She has trouble remembering things from day to day, and some days her mind is a complete blank. *Id.*

11. [redacted] is a registered nurse who owns the assisted living home where the Claimant resides. ([redacted] testimony) She has observed that the Claimant is weak and unsteady while standing. *Id.* While at the assisted living home, the Claimant has blacked out without warning. *Id.* Once when she was standing in the kitchen, with 2 staff members right there, she blacked out in the middle of a conversation and fell without warning. *Id.* The Claimant fractured her radius.[3] (Ex. H, p. 5)

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[2] Cachexia is defined as "[w]eight loss, wasting of muscle, loss of appetite, and general debility that can occur during a chronic disease." *The American Heritage Stedman's Medical Dictionary* 120 (Houghton Mifflin 2002)

[3] "[T]he shorter and thicker of the two forearm bones." *The American Heritage Stedman's Medical Dictionary* 704 (Houghton Mifflin 2002)

12. The Claimant has to be prompted to come to the table for meals at the assisted living home. ([redacted] testimony) She has to be prompted to eat. *Id.* She takes her medications when they are put in front of her. *Id.* She does not remind the staff that she needs to take her medications, and would not remember to take them on her own. *Id.*

13. Ms. [redacted] stated that the Claimant does not have skilled nursing needs. Instead, she needs assistance, which can be provided by a certified nursing assistant. However, a registered nurse is required to supervise the certified nursing assistant, and a registered nurse is required for the Claimant's quarterly review and assessment. ([redacted] testimony)

14. The Claimant does not leave home unaccompanied. ([redacted] testimony) When she goes to see a doctor, AnchorRides picks her up at the door and then makes sure that she gets to the doctor's office. *Id.* The Claimant has gotten lost while shopping at Fred Meyer with her sister. ([redacted] testimony)

15. Dr. [redacted] is the Claimant's treating psychiatrist. (Ex. H, p. 8) On February 1, 2010, he wrote:

> [The Claimant] has diagnoses of Major Depressive Disorder, recurrent, severe, Post Traumatic Stress Disorder, Polysubstance Deficiency in full sustained remission, as well as ongoing severe medical issues including unexplained weight loss and syncopal episodes which have resulted in fracturing her left wrist. Furthermore, she was diagnosed with dementia by her in-patient hospital staff. At this point she continues to be severely depressed with psychomotor retardation, remains confused and is at risk for medication errors and constitutes a fall risk. When living alone she had extraordinary weight loss, became cachectic and required hospitalization. I strongly recommend an assisted living facility due to the above.

On April 30, 2010, Dr. [redacted] wrote that when the Claimant lived independently, "she was not able to meet her minimal activities of daily living and lost weight severely, becoming cachectic and suffering from orthostatic hypotension and syncopal episodes."[4] (Ex. 1) He stated that she was at high risk of exploitation, and that if she returned to independent living, she was at "high risk for recurrence of both physical and mental health issues." *Id.*

16. Dr. [redacted] is the Claimant's treating physician. (Ex. G, p. 2) On or about March 4, 2010,[5] he wrote that the Claimant's conditions included dementia and severe

[4] Syncope is "[a] brief loss of consciousness." *The American Heritage Stedman's Medical Dictionary* 811 (Houghton Mifflin 2002)

[5] Dr. [redacted]'s letter is undated. However, it has a facsimile transmission date on the top of the letter of March 4, 2010. (Ex. G, p. 2)

malnutrition. *Id.* He further wrote that the Claimant "suffers from episodes of syncope felt to be secondary to irreversible central nervous system changes as well as malnutrition. She is prone to fall with a recent accident resulting in a fractured wrist." *Id.* He opined that she currently required the 24 hour care provided at her assisted living home, and that her condition would deteriorate without it. *Id.*

17. [redacted], LPN, is the nursing supervisor at the methadone clinic that the Claimant attends. (Ex. H., p. 7) On February 20, 2010, she wrote the following:

> Prior to being placed in an assisted living home supportive environment [the Claimant's] physical state of health appeared to be worsening. She appeared to be emaciated, weak, frail, confused, and in a vulnerable state of being.CDP Medical interventions and coordinating efforts to promote her safe were implemented and supported. The patient's progression since receiving supportive services has been noticeably improved.

Id.

18. [redacted], R.N., is a registered nurse who works for the Division. ([redacted] testimony) She reviewed the Claimant's assessment and spoke to the nurse at the methadone clinic that the Claimant attends. *Id.* She said that the Claimant's daily dosage of methadone was a chronic medication, and not a nursing treatment. *Id.* She opined the Claimant required supervision, cueing, and monitory, i.e. not nursing needs. *Id.* She stated the Claimant would qualify for a PCA (Personal Care Assistant) based upon the CAT, but did not qualify for the Waiver program. *Id.*

PRINCIPLES OF LAW

A party who is seeking a change in the status quo has the burden of proof by a preponderance of the evidence. *State, Alcohol Beverage Control Board v. Decker*, 700 P.2d 483, 485 (Alaska 1985); *Amerada Hess Pipeline v. Alaska Public Utilities Comm'n,* 711 P.2d 1170, n. 14 at 1179 (Alaska 1986). "Where one has the burden of proving asserted facts by a preponderance of the evidence, he must induce a belief in the minds of the [triers of fact] that the asserted facts are probably true." *Robinson v. Municipality of Anchorage,* 69 P.3d 489, 495 (Alaska 2003).

An adult between the ages of 21 and 65, 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).[6] Pursuant to 7 AAC 43.1010(d)(2), the Division is required to perform a level of care assessment under 7 AAC 43.1030(b):

[6] There are other eligibility criteria, however, those are not at issue in this case. *See* 7 AAC 43.1010(a) and (b). It should be noted that there was a regulatory change effective February 1, 2010 that resulted in the Medicaid Waiver regulations being recodified at 7 AAC 130.200 – 319. (Register 193) This Decision, however, uses the regulations in effect at the time of January 21, 2010, the date the Claimant's application for Medicaid Waiver services was denied.

If the assessment is to determine if the applicant falls within the recipient category for

* * *

(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 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.
(b) Intermediate nursing services are the observation, assessment, and treatment of a recipient with long-term illness or disability whose condition is relatively stable and where the emphasis is on maintenance rather than rehabilitation, or care for a recipient nearing recovery and discharge whose condition is relatively stable but who continues to require professional medical or nursing supervision.

The acronyms "ICF" and "SNF" contained in 7 AAC 43.185 refer 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 therapy provided by a qualified therapist, for special treatments

(chemotherapy, radiation therapy, hemodialysis, peritoneal dialysis), and whether or not an applicant experiences impaired cognition, or problem behaviors. (Ex. E, pp. 13 - 14)

The CAT only assesses an applicant based on their conditions and needs for the 7 day time period immediately preceding the assessment date. (Ex. E, pp. 13 - 14) Each of the assessed items is given a numerical score. For instance, if an individual required 5 days or more of therapies (physical, speech/language, occupation, or respiratory therapy) per week, she would receive a score of 3. (Ex. E, p. 29)

The CAT also assesses the degree of assistance an applicant requires for activities of daily living (ADL), 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, p.18) These are broken down into self-performance codes and support codes as explained below:

The self-performance codes rate how capable a person is of performing a particular ADL:

0 Independent, no help/oversight, or help/oversight provided two times or less during the last seven days.
1 Supervision, which consists of encouragement/oversight/cueing provided three or more times during the last seven days or supervision plus non-weight bearing physical assistance provided one or two times during the last seven days.
2 Limited Assistance, which consists of non-weight bearing physical assistance three or more times during the last seven days, or limited assistance plus weight bearing assistance one or two times during the last seven days.
3 Extensive Assistance, which consists of weight bearing support three or more times during the past seven days, or the caregiver provides complete performance of the activity during a portion of the past seven days.
4 Total Dependence, which consists of the caregiver performing the activity for the applicant during the entire previous seven day period.
5 Cueing, which is spoken instruction or physical guidance for a particular activity required seven days per week.
8 Activity did not occur during the previous seven days.

The support codes rate the amount of assistance a person receives for each ADL:

0 None.
1 Setup assistance only.
2 One person physical assistance.
3 Physical assistance from two or more people.
5 Cueing required seven days per week.
8 Activity did not occur during the previous seven days.

(Ex. E, p. 18)

If an individual receives a self-performance code of 2 (limited assistance), 3 (extensive assistance required) or 4 (total dependence) in 3 or more of 5 specified activities of daily living (bed mobility, transfer, locomotion, eating, and toileting), the Claimant receives a score of 3 on the CAT. (Ex. E, p. 29) Alternatively, a person can receive points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive, etc), and required assistance with the 5 specified activities of daily living. (Ex. E, p. 29)

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. 29)

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*: [7]

> 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] The *Manual* contains two sets of factors. The Skilled Level of Care factors are: 1) whether a patient requires 24 hour observation and assessment by a registered nurse or licensed practical nurse; 2) whether a patient requires intensive rehabilitative services, which is defined as 5 days or more per week of physician ordered physical, occupational, respiratory or speech therapy; 3) whether a patient requires 24 hour performance of direct services that must be furnished by a registered nurse, licensed practical nurse or someone acting under their supervision; 4) does the patient require medications that are administered either intravenously or by naso-gastric tube; 5) does the patient have a colostomy-ileostomy; 6) does the patient have a gastrostomy; 7) is the patient on oxygen; 8) does the patient have a tracheostomy; 9) is the patient undergoing either radiation therapy or cancer chemotherapy; 10) does the patient have sterile dressings that require prescription medication; 11) does the patient have decubitus ulcers; or 12) does the patient have unstabilized medical conditions requiring skilled nursing, such as a new stroke, new fractured hip, new amputation, being in a coma, terminal cancer, new heart attack, uncompensated congestive heart failure, new paraplegia or quadriplegia. (Ex. F, pp. 1 - 2)

The Intermediate Level of Care factors are: 1) whether a patient requires 24 hour observation and assessment by a registered nurse or licensed practical nurse; 2) whether a patient requires restorative services, which include encouraging, assisting or supervising the patient in self-care, transfers, ambulation, positioning and alignment, range or motion, handrail use; 3) does the patient require a registered nurse to perform services; 4) does the patient require nursing assistance with medications; 5) does the patient require assistance with activities of daily living, including maintaining Foley catheters, ostomies, special diet supervision, or skin care with incontinent patients; 6) does the patient have a colostomy-ileostomy; 7) does the patient require oxygen therapy; 8) does the patient require either radiation or chemotherapy treatment; 9) does the patient have skin conditions such as decubitus ulcers, minor skin tears, abrasions, or chronic skin conditions; 10) is the patient a diabetic who needs daily supervision of diet or medications; or 11) does the patient have behavioral problems such as wandering, verbal disruptions, combativeness, verbal or physical abusiveness, or inappropriate behavior. (Ex. F, p. 2)

7 AAC 43.190. *See also 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

Because this is an application, the Claimant has the burden of proof by a preponderance of the evidence.

A HCB Waiver services eligibility determination is based upon an assessment performed by the Division or its designee. 7 AAC 43.1010(d)(2). The CAT is the assessment tool used in determining whether an applicant satisfies the regulatory requirement that an applicant requires either skilled care or intermediate care. 7 AAC 43.1030(b)(2)(B). The Division is also supposed to determine whether an applicant requires skilled care or intermediate care using the Manual factors. 7 AAC 43.190. Eligibility for HCB Waiver services is therefore based on the CAT and Manual factors. [8]

The evidence shows the Claimant is frail, substantially underweight, experiences a number of mental health diagnoses, forgets to eat or take her medications, is subject to falls without warning, and when living on her own has been exploited by other persons. Living in her assisted living home has rectified some of these problems. For instance, she is reminded to eat and to take her medications, and is watched for falling. Her treating physician and her treating psychiatrist both agree that she will be at risk if she lives on her own again.

Regardless, this Decision requires a review of the December 23, 2009 CAT, and the hearing evidence to determine whether there is sufficient evidence showing the Claimant met the necessary medical level of care, as of the date of the December 23, 2009 assessment, to qualify for Waiver services. Neither the discussion portion of the CAT nor the scored areas of the CAT show any requirement for professional nursing care or special treatments or therapies as of the date of the assessment.

The CAT shows that the Claimant experienced some impaired cognition (long-term memory and moderately impaired decision making), but no short-term memory problems. The Claimant presented both testimony and evidence demonstrating that she has short-term memory problems, and the Division, in post-hearing briefing, conceded that the Claimant does have short-term memory problems.

[8] The Claimant, in her Initial Post-Hearing Brief at p. 6, requests that this Decision take a more global approach to determining the Claimant's eligibility for Waiver services, rather than adhering to the CAT's scoring requirements. However, the CAT is adopted into regulation. An administrative agency is "bound by [its] regulations unless and until it repeals or amends the regulation using the proper procedure. Administrative agencies are bound by their regulations just as the public is bound by them." *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 868 – 869 (Alaska 2010). This Decision therefore will follow the terms of the applicable regulations and not expand upon them.

The Claimant argues that "if the Consumer Assessment Tool had adequately taken into account [the Claimant's] need for 24-hour attention from trained staff, plus the limitations on her daily activities, the scoring sheet on page 29 would have given her scores on sections 3 and 6 sufficient to make her eligible." (Claimant's Initial Post-Hearing Brief, p. 11) However, the evidence does not support the Claimant's argument. Section 3 of the CAT deals with cognitive impairments. (Ex. E, p. 29) In order to score a point of 1 in this section, the Claimant would need to have all of the following conditions:

1. Short-term memory difficulties;

2. Memory Recall (not able to recall one or two of "[c]urrent season," "[l]ocation of own room," "[n]ames/faces," or "[w]here he/she is.";

3. Moderately or severely impaired decision making skills; and

4. Professional nursing skills required 3 days/week or more to manage the above cognitive skills, or a requirement for limited assistance, or extensive assistance, or total dependence in one or more of the categories of bed mobility, transfers, locomotion, eating, and toilet use, plus a score of 13 or more in section C4B.[9]

The Division conceded that the Claimant has short-term memory difficulties. The CAT scored her with long-term memory difficulties. The Cat also scored her with moderately impaired decision making skills. However, the Claimant did not show that she required professional nursing skills to manage these conditions. Nor did the Claimant show that she required limited assistance in bed mobility, transfers, locomotion, eating or toilet use. Instead, the Claimant showed, as scored by the CAT, that requirement is only for supervision/monitoring on transfers, due to her unsteadiness and being at risk for falling. This is not sufficient to reach a score of 1 on section 3 of the CAT.

In order to qualify for Waiver Assistance under section 6 of the CAT, the Claimant would have to require either limited assistance (self-performance code of 2), extensive assistance (self-performance code of 3) or be totally dependent (self-performance code of 4) for three or more of five specified activities of daily living (bed mobility, transfers, locomotion, eating, and toilet use). (Ex. E, pp. 18, 29) The December 23, 2009 assessor found the Claimant required supervision (score of 1) in 2 of these specified activities of daily living, transferring and toilet use. (Ex. E, p. 18)

The evidence presented by the Claimant did not establish that the Claimant needed limited or extensive assistance (physical hands on weight bearing assistance) or was

[9] There is no section C4B contained in the Claimant's CAT. *See* Ex. E, pp. 1 – 29. However, because the Claimant does not have a score of 2 or higher for her relevant activities of daily living, the lack of any information on section C4B does not affect this Decision.

totally dependent in any of the other 3 specified activities of daily living (bed mobility, locomotion, and eating.

The Claimant did not establish that the CAT incorrectly scored her on her five specified activities of daily living (bed mobility, transfers, locomotion, eating, and toilet use). Her highest score on these activities was that she required supervision assistance (self-performance code of 1) for transfers and toilet use. This score of 1(supervision) in 2 activities of daily living is not sufficient to reach the required threshold of a score of 2 (limited assistance) in 3 activities of daily living to qualify for Waiver Services under section 6 of the CAT.

A review of the *Manual for Prior Authorization of Long-term Care Services* demonstrates the only factor[10] that could have potentially qualified the Claimant for HCB Waiver services, as of her December 23, 2009 assessment, was her need for physical assistance with activities of daily living. However, as is discussed above, her needs for physical assistance with her activities of daily living are not sufficient to qualify her for HCB Waiver services.

The Claimant additionally argued that she was eligible for Waiver Services because she receives nursing services at the methadone clinic. However, a review of the CAT shows that professional nursing services are specifically detailed: injections, IV feeding, feeding tube, suctioning/trach care, treatment of dressings, oxygen administration, assessment and management of unstable conditions, catheter care, comatose care, ventilator or respirator management, uncontrolled seizure disorders, or therapies. (Ex. E, pp. 14, 29) The Manual factors are similar.[11]

The Claimant does not satisfy the Manual factors. She receives methadone daily, which is supervised by an LPN. She is subject to frequent falls. She forgets to eat and take her medications. However, none of these fall within the specifically defined set of what constitutes nursing care needs in the CAT or the Manual factors. The closest item is the fact that the Claimant used to be allowed to take a 7 day supply of methadone home with her, but is no longer allowed to and has to take it daily at the clinic. However, per the Claimant's testimony, the change in her methadone regimen was due, not to her health changes and the need to monitor/modify her dosage but rather because she had an incident where she took valium. In other words, the methadone administration is not a professional nursing need, but a change in how the clinic decided to administer the Claimant's daily methadone treatment.

The Claimant additionally argued that the Claimant's undisputed risk of falling qualified her for Waiver services. This is because if she falls in her assisted living home, the 24 hour care will result in her being immediately attended to. In contrast, if she falls in her home, she might be undiscovered for some period of time. This is not a nursing need or a factor allowed for in the CAT or the Manual factors. It should also be noted that Ms.

[10] *See* fn. 7 above for a list of the factors.

[11] *Id.*

[redacted], the registered nurse who owns the assisted living home where the Claimant currently resides, acknowledged in her testimony that the Claimant does not have skilled nursing needs.

The Claimant had the burden of proof in this case. She did not establish either that the December 23, 2009 CAT was not correct or that she qualified for HCB Waiver services based upon the factors contained in the *Manual for Prior Authorization of Long-term Care Services.* Consequently, she did not satisfy her burden of proof as to her qualification for HCB Waiver services at the time of the December 23, 2009 assessment.

In summary, the Claimant did not qualify for HCB Waiver services when she was assessed. The Division was correct when it denied the Claimant's application for HCB Waiver services on January 21, 2010, based upon the December 23, 2009 assessment.

CONCLUSIONS OF LAW

1. The Claimant failed to meet her burden of proof by a preponderance of the evidence and failed to demonstrate she required either a skilled nursing facility or intermediate care facility level of care as of December 23, 2009, the date she was assessed to determine her eligibility for Medicaid Home and Community Based Waiver services.

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 January 21, 2010.

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:

Kimberli Poppe-Smart, Acting Director
Division of Senior and Disability Services
4501 Business Park Blvd., Suite 24
Anchorage, AK 99503-7167

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 16th day of August, 2010.

__/Signed/_____
Larry Pederson
Hearing Authority

CERTIFICATE OF SERVICE

I certify that on this 16th day of August, 2010,
true and correct copies of the foregoing were sent to:

[redacted], Esq., DLC USPS First Class Certified Mail, Return Receipt Requested.
And to the following by email:
[redacted], Esq., Assistant Attorney General
[redacted], Director
[redacted], Policy & Program Development
[redacted], Policy & Program Development
[redacted], Staff Development & Training

_____
J. Albert Levitre, Jr. Law Office Assistant I