

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

In the Matter of)	
)	OAH No. 12-0605-MDS
W M. H)	Former OHA Case No.
_____)	DSDS Case No.

DECISION

I. Introduction

The issue in this case is whether W H requires skilled or intermediate level nursing care. The Division of Senior and Disability Services (DSDS or Division) conducted an assessment on January 25, 2012 and subsequently determined that Ms. H does not require either skilled or intermediate level nursing care.¹ This decision concludes that Ms. H does not currently require either skilled or intermediate level nursing care. As a result, Ms. H is not presently eligible to participate in the Medicaid Home and Community-Based Waiver Services Program ("Waiver Services program"). The Division's determination that Ms. H is not eligible for the Choice Waiver program is therefore affirmed.

II. Facts

A. Ms. H's Medical Condition and Care Needs

Ms. H is a 90-year-old woman who lives in her own home.² Her personal care assistant, D N, lives in a basement apartment in that home and provides assistance to Ms. H on a daily basis.

Ms. H functions independently in many respects, but she needs daily assistance with preparing meals, getting in and out of a car, taking her medications,³ household chores, and bathing. She needs occasional assistance – up to 50% of the time – with transfers to and from her bed and chairs, walking in her home,⁴ dressing, and personal hygiene. Very little of this assistance is weight-bearing assistance. Ms. H's long-term memory is fine, but she has problems with short term memory and sometimes has memory lapses and periodic confusion.⁵ Ms. H smokes cigarettes and has left burning cigarettes in inappropriate places such as her

¹ Exhibit D.

² The factual findings in this section are based on the testimony of Ms. H and Mr. N unless otherwise noted.

³ Ms. H takes Amlodipine, Lisinopril, Plavix, Simvastatin, and Trazadone (Ex. E20).

⁴ Ms. H had surgery on both her feet shortly before her assessment and was wearing orthotic shoes at that time (Ex. E3).

⁵ Finding by Nicole Lane, R.N. (Ex. F2).

purse.⁶ She smokes in bed and occasionally her sheets and mattress have caught fire.⁷ Ms. H does not like to take her medications and will not take them unless someone is present to monitor her. Ms. H's physician, Linda J. Sloan, M.D. has stated:

W H has medical conditions of deafness, mild-dementia, recurrent urinary tract infections, hypertension, hyperlipidemia, recent bilateral stent placement for atherosclerosis, [and] recent surgery for severe toe deformities. She is unable to shop, cook or clean for herself, or administer her own medication. For safety she should either . . . be in an assisted living home, or should have a full-time caregiver at home.^[8]

B. Ms. H's Abilities and Impairments as Determined by the CAT

On January 25, 2012 Ms. H was assessed as to her eligibility for the Waiver Services program by Nicole Lane, R.N. of DSDS.⁹ Ms. Lane used the Consumer Assessment Tool or "CAT," a system for scoring disabilities that is described in detail in Part III. The scores mentioned below are CAT scores assigned by Ms. Lane. Ms. Lane found that Ms. H has the following abilities and limitations with regard to her Activities of Daily Living (ADLs):¹⁰

Bed Mobility: Ms. H can reposition herself in her bed as needed (scored 0/0; frequency 0/0).¹¹

Transfers: Ms. H can generally stand and sit as needed (scored 0/0; frequency 0/0).¹²

Locomotion: Ms. H can walk independently within her home most of the time, but has fallen several times (two-three times in the six months preceding the assessment). The assessor concluded that Ms. H requires assistance when using the stairs for safety reasons (scored 1/1; frequency 0/0).¹³

Dressing: Ms. H has arthritis in her thumbs and therefore has difficulties with buttons and zippers. Mr. N assists her in putting on her pants and shoes 3-4 times per week (scored 2/2; frequency 1/7).¹⁴

⁶ Finding by Nicole Lane, R.N. (Ex. F2).

⁷ Finding by Nicole Lane, R.N. (Ex. F2).

⁸ Exhibit G2. The doctor's recommendation is relevant to the determination of whether Ms. H satisfies the intermediate level of care requirements. See 7 AAC 140.510(a)(2).

⁹ Ex. E1.

¹⁰ Exs. E1 - E25.

¹¹ Ex. E6.

¹² Ex. E6. Mr. N stated at the assessment that Ms. H needed a little assistance at that time due to her recent foot surgery.

¹³ Ex. E7.

¹⁴ Ex. E8.

Eating: Ms. H can generally feed herself, but needs assistance when cutting-up meat. She wears dentures and has trouble chewing. She has trouble taking her medications and sometimes gags (scored 0/1; frequency 0/0).¹⁵

Toileting: Ms. H requires limited physical assistance with post-toileting hygiene / clean-up (scored 2/2; frequency 1/7).¹⁶ She has urinary incontinence most of the time, and occasional bowel incontinence.¹⁷ She utilizes incontinence pads or briefs.¹⁸

Personal Hygiene: Ms. H can generally perform her own personal hygiene but requires occasional assistance with brushing her hair (scored 1/1; frequency 0/0).¹⁹

Bathing: Ms. H requires assistance to transfer into and out of the tub for safety reasons. She requires cueing or supervision to rinse soap from her hair and body (scored 2/2; frequency 1/1).²⁰

With regard to cognitive skills for daily decision-making, the assessor rated Ms. H as being moderately impaired (making poor decisions and requiring cueing and supervision).²¹

The assessment of January 25, 2012 scored Ms. H as follows with regard to her Instrumental Activities of Daily Living (IADLs):²² Meal Preparation (light) 3/4; Meal Preparation (main) 3/4; Telephone 0/0; Light Housework 3/4; Managing Finances 3/3; Routine Housework 3/4; Grocery Shopping 2/4; Laundry 3/4.

C. Relevant Procedural History

At some time prior to January 25, 2012, Ms. H's care coordinator submitted an application to the Division for participation in the Waiver Services Program.²³ As discussed above, a nurse employed by the Division conducted an in-person assessment using the CAT.²⁴ The nurse ultimately found that Ms. H did not require a nursing facility level of care and therefore was not eligible for participation in the Waiver Services program.²⁵

On February 3, 2012, the Division mailed a notice to Ms. H advising that it had denied her application for Waiver Services on the basis of the Division's finding that Ms. H did not

¹⁵ Ex. E9.

¹⁶ Ex. E9.

¹⁷ Ex. E9.

¹⁸ Ex. E9.

¹⁹ Ex. E10.

²⁰ Ex. E11.

²¹ Ex. E16.

²² Ex. E26; *see* 7 AAC 125.199(6).

²³ Exhibit D1. The exact date of the submittal of Ms. H's application is not at issue in this case.

²⁴ Exhibits E1 - E31.

²⁵ Exhibit E29.

require either skilled or intermediate-level nursing care.²⁶ The letter cited state Medicaid regulations 7 AAC 130.205, 7 AAC 140.505, 7 AAC 140.510, and 7 AAC 140.515 in support of its determination. Ms. H requested a hearing on February 20, 2012 to contest the Division's denial of her application.²⁷

Ms. H's hearing was held on May 22, 2012. Ms. H was represented by attorney Chelsea Hicks. Ms. H and her caregiver D N attended the hearing and testified on Ms. H's behalf. The Division was represented by attorney Kimberly Allen. Karen Mattson, a Nurse III employed by DSDS, attended the hearing and testified on behalf of the Division. The hearing was concluded on May 22, 2012 and the record closed on May 23, 2012.

III. Discussion

Because skilled care is a higher level of care than intermediate care, the minimum level of care for which Ms. H must demonstrate a need, in order to qualify for Waiver Services, is intermediate care.

A. *Relevant Alaska Medicaid Statutes and Regulations*

Alaska's Medicaid Waiver Services Program provides eligible Alaskans with a choice between home and community based care, and institutional care.²⁸ An applicant who otherwise satisfies the eligibility criteria is eligible for Waiver Services if he or she requires the level of care specified in 7 AAC 130.230(b).²⁹ For older adults such as Ms. H, that level of care must be either "intermediate care" as defined by 7 AAC 140.510 or "skilled care" as defined by 7 AAC 140.515.³⁰ In determining whether an applicant requires either intermediate care or skilled care, the Division must incorporate the results of the Consumer Assessment Tool (CAT) into its decision-making process.³¹

DHSS Medicaid regulation 7 AAC 140.510, titled "Intermediate Care Facility Services," provides in relevant part as follows:

- (a) The department will pay an intermediate care facility for providing the services described in (b) and (c) of this section if those services are
 - (1) needed to treat a stable condition;
 - (2) ordered by and under the direction of a physician, except as provided in (c) of this section; and

²⁶ Exhibit D.

²⁷ Exhibit C.

²⁸ 7 AAC 130.200.

²⁹ 7 AAC 130.205(d)(2).

³⁰ 7 AAC 130.230(b)(2).

³¹ 7 AAC 130.230(b)(2)(B).

(3) provided to a recipient who does not require the level of care provided by a skilled nursing facility.

(b) Intermediate nursing services are the observation, assessment, and treatment of a recipient with a 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.

Thus, in order to qualify for an intermediate level of care under 7 AAC 140.510, the applicant must, among other things, require professional medical or nursing supervision.

B. The Consumer Assessment Tool (CAT)

Under state Medicaid regulation 7 AAC 130.230(b)(2)(B), level of care determinations for Waiver Services applicants seeking services under the "adults with physical disabilities" or "older adults" categories must incorporate the results of the Department's Consumer Assessment Tool (CAT). The CAT is adopted by regulation at 7 AAC 160.900(d)(6).

The CAT numerical coding system has two components. The first component is the *self-performance code*. These codes rate how capable a person is of performing a particular activity of daily living (ADL).³² The possible codes are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance); **3** (the person requires extensive assistance); **4** (the person is totally dependent). There are also codes that are not treated as numerical scores for purposes of calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).³³

The second component of the CAT scoring system is the *support code*. These codes rate the degree of assistance that a person requires for a particular activity of daily living (ADL). The possible codes are **0** (no setup or physical help required); **1** (only setup help required); **2** (one person physical assist required); **3** (two or more person physical assist required). Again, there are additional codes that do not add to the service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).³⁴

³² According to the federal Medicaid statutes, the term "activities of daily living" includes tasks such as eating, toileting, grooming, dressing, bathing, and transferring. See 42 USC § 1396n(k)(6)(A). In Alaska, pursuant to AS § 47.33.990(1), "activities of daily living" means "walking, eating, dressing, bathing, toileting, and transfer between a bed and a chair."

³³ See, for example, Ex. E at page 6.

³⁴ See, for example, Ex. E at page 6.

The ADLs coded or scored by the CAT are body mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room), locomotion (between levels), locomotion (to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, personal hygiene-shampooing, and bathing. In addition, the CAT codes or scores five other ADL-like activities which are not technically ADLs. These are medication, vital signs/glucose levels, dressings/bandages/oxygen, sterile wound care, and documentation.

The CAT also codes or scores certain activities known as "instrumental activities of daily living" (IADLs).³⁵ These are light meal preparation, main meal preparation, light housekeeping, laundry (in-home), laundry (out-of-home), and shopping. Finally, the CAT codes or scores one other IADL-like activity which is not technically an IADL (oxygen maintenance).

C. Alaska Case Law Relevant to Determination of Level of Care

Alaska Superior Court decisions exist which emphasize that a level of care determination may not be made solely on an applicant's CAT score, and that other relevant factors, including the testimony of the applicant's treating physician, must be considered.³⁶ While these decisions are not binding here, they are persuasive because they allow the qualifying criteria expressed in the Division's regulation to be harmonized with the qualifying criteria expressed in the CAT.

D. Ms. H Does Not Require Intermediate Care as Defined by Alaska Medicaid Regulation 7 AAC 140.510

Ms. H is eligible for the Choice Waiver Program if she requires intermediate level nursing services. The testimony of Ms. H and Mr. N establishes that Ms. H needs full-time (or nearly full-time) supervision in order to ensure her safety and make sure that she takes her medications.

The Division did not dispute the fact that Ms. H requires a substantial amount of supervision.³⁷ Rather, the Division focused almost exclusively on the fact that the services which Mr. N provides to Ms. H do not require professional medical or nursing supervision as

³⁵ The federal Medicaid statutes state that "instrumental activities of daily living" includes (but is not limited to) meal planning and preparation, managing finances, shopping for food, clothing, and other essential items, performing essential household chores, communicating by phone or other media, and traveling around and participating in the community. See 42 USC § 1396n(k)(6)(F). In Alaska, pursuant to AS § 47.33.990(11), "instrumental activities of daily living" means "doing laundry, cleaning of living areas, food preparation, managing money and conducting business affairs, using public transportation, writing letters, obtaining appointments, using the telephone, and engaging in recreational or leisure activities."

³⁶ 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, Division of Senior and Disabilities Services*, Superior Court Case No. 3AN-06-6613 (decision dated July 11, 2007).

³⁷ See hearing testimony of Karen Mattson of DSDS and DSDS counsel's argument at hearing. The results of the CAT must be considered in making the level of care determination. See 7 AAC 130.230(b)(2)(B).

required by 7 AAC 140.510(b).³⁸ The Division is correct that, as of the date of the hearing, it was not necessary for a nurse or another medical professional to review or monitor Mr. N's provision of services to Ms. H, and this was not disputed by Ms. H.³⁹ Because Ms. H does not require professional medical or nursing supervision, she does not satisfy the intermediate level of care criteria as stated in 7 AAC 140.510. However, this does not end the inquiry because, under the CAT, it is possible to qualify for a nursing facility level of care without requiring professional medical or nursing supervision.

E. Ms. H Does not Require Intermediate Care Based on the Consumer Assessment Tool (CAT)

The Consumer Assessment Tool's scoring summary is located at page 29 of the CAT.⁴⁰ As indicated by that scoring summary, there are numerous scoring combinations through which one may demonstrate a need for a Nursing Facility Level of Care. Some of these combinations (discussed below) allow a person to meet the Nursing Facility Level of Care (NFLOC), without a need for professional nursing services, based on the level of assistance which the person requires in order to perform their ADLs. The CAT divides these possible combinations into six different areas, designated "NF1" through "NF6."

1. NF1

There are five different ways to meet NFLOC under NF1. The first way (under NF1(a)) is to require nursing services seven days per week. Ms. H did not assert that she satisfies NF1(a). The second way (under NF1(b)) is to require use of a ventilator or respirator at least three days per week. Ms. H did not assert that she satisfies NF1(b). The third way (under NF1(c)) is to require care due to uncontrolled seizures at least once per week. Ms. H did not assert that she satisfies NF1(c). The fourth way (under NF1(d)) is to receive some form of therapy at least five days per week. Ms. H did not assert that she satisfies NF1(d).

The fifth/last way to meet NFLOC under NF1, under NF1(e), is to score a three (extensive assistance required) or a four (completely dependent) in the self-performance portion of three or more of the "shaded" ADLs listed at pages 18-19 of the CAT.⁴¹ The

³⁸ See hearing testimony of Karen Mattson of DSDS and DSDS counsel's argument at hearing; see also denial notice dated February 3, 2012 at Exhibit D2 ("[y]ou do not need intermediate care which is characterized by the need for licensed nursing services ordered by and under the direction of a physician that would be provided in an intermediate care facility").

³⁹ See hearing testimony of Ms. H and Mr. N.

⁴⁰ Ex. E29.

⁴¹ Exs. E18, E19.

"shaded" ADLs are bed mobility, transfers, locomotion, eating, toilet use, and bathing. Ms. H asserts that she meets NFLOC under NF1(e).

The CAT scores which the Division gave Ms. H with regard to the "shaded" ADLs are bed mobility: 0/0; transfers: 0/0; locomotion: 1/1; eating: 0/1; toileting: 2/2; and bathing: 2/2.⁴² Ms. H asserts, however, that she requires extensive assistance by one person as to these ADLs (*i.e.*, a score of 3/2).

It is difficult to assess the credibility of the Division's CAT scores because the person who performed the assessment was not available to testify at the hearing. However, Ms. H pointed out at least two errors in the assessment. The assessment indicates that Ms. H is renting her home and that she does not have dentures. The sworn hearing testimony of Ms. H and Mr. N was that these statements are incorrect. While these errors are minor, the fact that they exist suggests that the assessment may not be entirely accurate in other areas as well. Accordingly, more weight has been given to Ms. H's and Mr. N's testimony as to her need for assistance with ADLs than has been given to the information reported in the CAT.

Based on the hearing testimony, a preponderance of the evidence indicates that Ms. H requires somewhat more help than indicated in her assessment. The undersigned finds that Mr. N's testimony shows that Ms. H needs supervision and minimal assistance from one person for transfers, locomotion, and eating, and limited assistance from one person for toileting and bathing. However, Mr. N's testimony likewise shows that Ms. H *does not require extensive assistance* as to any of the "shaded" ADLs. Accordingly, Ms. H's "shaded" ADLs should be rescored as follows: bed mobility: 0/0; transfers: 1/2; locomotion: 1/2; eating: 1/2; toileting: 2/2; and bathing: 2/2.

In summary, while Ms. H requires more supervision and assistance with some of her ADLs than is indicated by her CAT scores, she does not require extensive assistance with regard to any of the "shaded" ADLs. Accordingly, she does not meet NFLOC under NF1(e).

2. NF2

An applicant cannot meet NFLOC under NF2 alone. However, under NF2 an applicant can obtain points towards qualifying for NFLOC which, when added to points obtained under *other* subsections of NF1 - NF6, can qualify the applicant for NFLOC. The first way (under NF2(a)) is to obtain a score of two or three with regard to injections and/or IV hookups, feeding tubes, tracheotomy care or nasopharyngeal suctioning, applying treatments or

⁴² Exs. E18, E19.

dressings, administering oxygen, observing, assessing, and managing unstable conditions, catheter management, and/or care required due to a comatose condition. The record does not show that Ms. H requires any of these services, so she gets no points under NF2(a).

The second way to obtain points (under NF2(b)) is to require speech therapy, respiratory therapy, physical therapy, and/or occupational therapy at least three days per week. However, the record does not show that Ms. H requires any of these therapies, so she gets no points under NF2(b).

The third way to obtain points (under NF2(c)) is to require medications via tube, tracheotomy care, urinary catheter changes or irrigation, veni-puncture, or barrier dressings for ulcers, at least three days per week. Again, however, the record does not show that Ms. H requires any of these procedures, so she gets no points under NF2(c).

The fourth/last way to obtain points (under NF2(d)) is to require chemotherapy, radiation therapy, hemodialysis, and/or peritoneal dialysis, at least three days per week. Again, however, the record does not show that Ms. H requires any of these treatments, so she gets no points under NF2(d).

3. NF3

An applicant cannot meet NFLOC under NF3 alone. However, under NF3 an applicant can obtain points towards qualifying for NFLOC which, when added to points obtained under *other* subsections of NF1 - NF6, can qualify the applicant for NFLOC. The first way (under NF3(a)) is to have short-term memory problems. The parties agree that Ms. H has short-term memory problems, and Ms. H received the maximum score (one) in this category.

The second way to obtain points (under NF3(b)) is to be generally unable to recall names and faces, the season of the year, where you are, and the location of your room. Although Ms. H has recall problems, there is no evidence in the record that she is generally unable to recall any of these specific items. Accordingly, Ms. H gets no points under NF3(b).

The third way to obtain points (under NF3(c)) is to be moderately or severely impaired in one's cognitive skills for daily decision-making. The Division agreed that Ms. H is moderately impaired in this regard, and she received the maximum points available (one) under this subsection.

The fourth/last way to obtain points (under NF3(d)) is to require *either* professional nursing care due to cognitive problems, *or both* (1) score at least a 2/2 as to any shaded ADL, *and* (2) score 13 or more on a designated portion of the Division's Supplemental Screening

Tool (SST). However, although Ms. H has cognitive problems, she does not require professional nursing care due to her cognitive problems. Further, although Ms. H received scores of 2/2 with regard to two shaded ADLs, her cognitive deficits were not severe enough to require that the Division score her on its SST. Accordingly, Ms. H gets no points under NF3(d).

Under NF3, an applicant must receive a score of one *on all four subsections* in order to receive a single "overall" point at the conclusion of NF3. Here, Ms. H received points under NF3(a) and NF3(c). However, because of the way the Division has structured the CAT, Ms. H receives an overall score of zero on NF3 because she did not obtain points on two of the four subsections.

4. NF4

An applicant cannot meet NFLOC under NF4 alone. However, under NF4 an applicant can obtain one point towards qualifying for NFLOC which, when added to points obtained under other subsections of NF1 - NF6, can qualify the applicant for NFLOC.

There are two subsections to NF4, and an applicant must qualify under both of these subsections in order to receive the one point available under NF4. Under NF4(a), an applicant must either wander, engage in socially inappropriate or disruptive behavior, be verbally abusive, or be physically abusive, at least four days per week. While there is some evidence in the record that Ms. H occasionally wanders, and may sometimes unintentionally be socially inappropriate, there is no evidence that these behaviors occur with the required frequency. Accordingly, Ms. H gets no points under NF4(a).

Under NF4(b), an applicant must *either* require professional nursing care as a result of problem behaviors, *or both* (1) score of at least 2/2 as to any shaded ADL, and (2) score 14 or more on a designated portion of the Division's Supplemental Screening Tool (SST). Here, although Ms. H has minor behavioral problems, she does not require professional nursing care due to her behavioral problems. Further, although Ms. H received scores of 2/2 with regard to two shaded ADLs, her behavioral problems were not severe enough to require that the Division score her on its SST. Accordingly, Ms. H gets no points under NF4(b).

5. NF5

At NF5, the scores from NF2, NF3, and NF4 are added together. If an applicant receives a score of one or more, they meet NFLOC. However, Ms. H's overall score as to NF2, NF3, and NF4, is zero. Accordingly, Ms. H does not meet NFLOC at NF5.

6. NF6

At NF6, the CAT totals the number of "shaded" ADLs which received self-performance scores of two, three, or four, and support codes of two or three. Looking back at Section NF1, above, Ms. H had two "shaded" ADLs (toileting and bathing) scored with 2/2. Accordingly, Ms. H receives an "overall" score of two under NF6.

7. NF7

At NF7, the scores from NF5 and NF6, above, are totaled. If the applicant's total score is three or more, the applicant is considered to meet NFLOC. Ms. H's overall score (from NF6) is two. Because Ms. H scored only two of the minimum of three points required to meet NFLOC under the CAT, she does not require an intermediate level of care under the CAT.

IV. Conclusion

The Division correctly determined that Ms. H does not require intermediate level nursing services as defined by 7 AAC 140.510 or by the Consumer Assessment Tool (CAT). Accordingly, the Division's decision that Ms. H is not eligible for the Waiver Services program is affirmed.

Dated this 8th day of November, 2012.

Signed _____
Jay Durych
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 19th day of November, 2012.

By: *Signed* _____
Name: Jay D. Durych
Title: Administrative Law Judge

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