

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

In the Matter of:)	
)	OAH No. 13-0059-MDS
U S)	HCS Case No.
_____)	Medicaid ID No.

DECISION

I. Introduction

The issue in this case is whether U S continues to require skilled or intermediate level nursing care. The Division of Senior and Disability Services (DSDS or Division) conducted an assessment on October 8, 2012 and subsequently determined that Mr. S no longer requires either skilled or intermediate level nursing care.¹ This decision concludes that, although Mr. S has significant cognitive impairments, and although these impairments severely limit his ability to function independently, he does not currently require either skilled or intermediate level nursing care. This decision further concludes that, although Mr. S requires prompting and coaching to perform most tasks, he does not qualify for waiver services based on the level of his need for physical assistance with activities of daily living. As a result, Mr. S is not presently eligible to participate in the Medicaid Home and Community-Based Waiver Services Program ("Waiver Services program"). The Division's determination that Mr. S is not currently eligible for the Waiver Services program is therefore affirmed.

II. Facts

A. Mr. S's Relevant Medical History and Current Diagnoses

Mr. S is a 53-year-old man who lives with his brother and power-of-attorney holder S S.² Until May 2012 Mr. S's mother was his primary resident caregiver; after her death in May 2012 S S assumed that role.³

Prior to 2001 Mr. S had a history of substance dependence.⁴ In 2001 he suffered a traumatic brain injury (TBI).⁵ Since then he has had problems with adaptive functioning, anger management, anxiety, attention deficits, behavioral problems, confusion, depression, poor executive functioning, slow information processing speed, language difficulties, memory

¹ Exs. D, E.
² Ex. E1; S S hearing testimony.
³ S S hearing testimony.
⁴ Ex. 1 p. 1.
⁵ Ex. 1 p. 1.

problems, and post-traumatic stress.⁶ He also has a seizure disorder, vision problems, and problems with dizziness, lack of coordination, and fatigue.⁷ Mr. S takes prescription medications for these problems, including amitriptyline, fluoxetine, gabapentine, and ranitidine.⁸

Mr. S and his brother reported during a March 28, 2013 neuropsychological evaluation that Mr. S requires "assistance/reminders" with feeding, grooming, bathing, shopping, cooking, transportation, medications, finances, and paperwork.⁹ For the last seven years Mr. S has lived in a home with his two brothers and one sister; his mother also previously lived there with him but she died in 2012.¹⁰

Tests administered in conjunction with the March 28, 2013 neuropsychological exam indicate that Mr. S has an extremely low IQ and severely impaired judgment as to health and safety issues, which is a level consistent with adults who require some form of ongoing supported living placement and a guardian / conservator.¹¹ The tests also indicate that Mr. S has significant memory deficits nearing the border of dementia.¹² The neuropsychologist who performed the assessment wrote that it would be appropriate to place Mr. S in an assisted living facility (ALF), and that at minimum he should receive an increased level of PCA services.¹³ The neuropsychologist also recommended "intensive monitoring" of medication administration, as well as periodic blood tests to ensure that Mr. S is actually taking his medications at therapeutic levels.¹⁴

B. Mr. S's Care Needs and Functional Abilities as Determined by the CAT

Mr. S was previously assessed and found eligible for the Waiver Services program, based primarily on the need for extensive assistance with his Activities of Daily Living (ADLs), in December 2006.¹⁵ Mr. S's current assessment was performed on October 8, 2012 by Michelle Moore, R.N. of DSDS.¹⁶ Ms. Moore used the Consumer Assessment Tool or "CAT" (a system for

⁶ Ex. 1 pp. 1 - 2.

⁷ Ex. 1 pp. 2 - 3, Ex. F27. Mr. S has averaged approximately two to three seizures per year since 2005 (Ex. 1 p. 3). For example, medical records indicate that Mr. S required treatment for seizures which occurred on April 13, 2012 and May 30, 2012.

⁸ Ex. 1 p. 3.

⁹ Ex. 1 p. 2.

¹⁰ Ex. 1 p. 5, S S hearing testimony.

¹¹ Ex. 1 pp. 7 - 9.

¹² Ex. 1 p. 9.

¹³ Ex. 1 pp. 10 - 11.

¹⁴ Ex. 1 p. 11.

¹⁵ Ex. F.

¹⁶ Ex. E.

scoring the need for nursing assistance and physical assistance that is described in detail in Part III) to record the results of the assessment. In completing the CAT, Ms. Moore reported that Mr. S has the following care needs and the following abilities and limitations with regard to his Activities of Daily Living (ADLs):¹⁷

Bed Mobility: Ms. Moore reported that Mr. S told her he is independent as to bed mobility, and that her observations were consistent with this report (scored 0/0; frequency 0/0).¹⁸

Transfers: Ms. Moore reported she was told by Mr. S that he does not need any help with transfers. She reported that she observed Mr. S transfer independently from multiple surfaces at different heights (scored 0/0; frequency 0/0).¹⁹

Locomotion: Ms. Moore reported she was told by Mr. S that he does not need any assistance to walk, and that he rides a bike around his neighborhood. Ms. Moore reported that she observed Mr. S walk unassisted (scored 0/0; frequency 0/0).²⁰

Dressing: Ms. Moore reported she was told by Mr. S that he can dress himself. Ms. Moore did not actually observe Mr. S dressing or undressing but noted that he was appropriately dressed at the time of the assessment (scored 0/0; frequency 0/0).²¹

Eating: Ms. Moore reported she was told by Mr. S and by his sister that Mr. S can feed himself, but Ms. Moore did not observe Mr. S eating (scored 0/0; frequency 0/0).²²

Toileting: Ms. Moore reported she was told by Mr. S that he does not need any help to use the toilet (scored 0/0; frequency 0/0).²³

Personal Hygiene: Ms. Moore reported she was told by Mr. S that he does not need any help with personal hygiene. Ms. Moore reported that she observed Mr. S to be clean and odor-free at the time of the assessment (scored 0/0; frequency 0/0).²⁴

Bathing: Ms. Moore reported she was told by Mr. S that he does not need any assistance to bathe (scored 0/0; frequency 0/0).²⁵

Ms. Moore found that Mr. S has no current need for professional nursing services.²⁶ Ms. Moore found that Mr. S is currently receiving no injections, intravenous feedings, suctioning or

¹⁷ Exs. E1 - E26.

¹⁸ Ex. E6.

¹⁹ Ex. E6.

²⁰ Ex. E7.

²¹ Ex. E8.

²² Ex. E9.

²³ Ex. E9.

²⁴ Ex. E10.

²⁵ Ex. E11.

tracheotomy care, oxygen, or treatments for open lesions, ulcers, burns, or surgical sites.²⁷ Ms. Moore found that Mr. S does not currently have any unstable medical conditions, and specifically, that he does not use a catheter or ventilator / respirator, is not comatose, and does not have an uncontrolled seizure disorder.²⁸ Ms. Moore found that Mr. S does not receive medications via tube, does not require tracheostomy care, does not use a urinary catheter, and does not require venipuncture, injections, barrier dressings for ulcers, oxygen therapy, or chest physical therapy by a registered nurse.²⁹ Ms. Moore found that Mr. S does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.³⁰

Ms. Moore found that Mr. S has a short-term memory problem and that he has some cognitive problems, but that he was still able to make most decisions required in daily living.³¹ Ms. Moore found that Mr. S has no behavioral problems.³²

With regard to prescription medications, Ms. Moore reported that Mr. S prepared and administered all of his own medications, and that he was always compliant in taking his medications.³³ With regard to mood, Ms. Moore found that Mr. S exhibited no indication of depression, anxiety, or sleep issues.³⁴

Ms. Moore found that Mr. S has slightly impaired vision, adequate hearing, is usually able to make himself understood, and is usually able to understand others.³⁵ She also found that Mr. S is not currently receiving any therapies from a qualified therapist,³⁶ and does not currently have any prescriptions requiring hands-on assistance from a PCA.³⁷

The assessment also scored Mr. S with regard to Instrumental Activities of Daily Living (IADLs).³⁸ Ms. Moore scored Mr. S's need for assistance with IADLs as follows: Meal Preparation (light) 0/0; Meal Preparation (main) 0/0; Telephone 0/0; Light Housework 0/0; Managing Finances 3/4; Routine Housework 0/0; Grocery Shopping 0/0; and Laundry 0/0.³⁹

²⁶ Ex. E13.

²⁷ Ex. E13.

²⁸ Ex. E14.

²⁹ Ex. E15.

³⁰ Ex. E15.

³¹ Ex. E16.

³² Ex. E17.

³³ Ex. E20.

³⁴ Ex. E25.

³⁵ Ex. E22.

³⁶ Ex. E5.

³⁷ Ex. E5.

³⁸ Ex. E26; *see* 7 AAC 125.199(6).

³⁹ Ex. E26.

Based on the foregoing CAT scores, Ms. Moore found that Mr. S does not currently require skilled level or intermediate level nursing care.⁴⁰

C. Relevant Procedural History

Mr. S was originally assessed for waiver services eligibility on December 6, 2006.⁴¹ At that time he was found eligible for waiver services based primarily on his need for assistance with his ADLs.⁴² However, based on Mr. S's most recent assessment of October 8, 2012, the nurse-assessor concluded that Mr. S is no longer eligible for participation in the Waiver Services program.⁴³ On December 24, 2012 the Division mailed a notice to Mr. S advising that it was terminating payment for Waiver Services on the basis of the nurse-assessor's finding that Mr. S no longer required either skilled or intermediate level nursing care.⁴⁴ Mr. S requested a hearing, which was held on May 6, 2013. Mr. S, his brother and legal representative S S, and his Care Coordinator N H-Q, participated in the hearing by phone and testified on Mr. S's behalf. Gerry Johnson participated by phone and represented the Division. Michelle Moore, R.N., (a nurse employed by the Division), participated by phone and testified on behalf of the Division. The record closed at the end of the hearing.

III. Discussion

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.⁴⁵ 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).⁴⁶ For older adults and adults with disabilities (such as Mr. S), that level of care must be either "intermediate care" as defined by 7 AAC 140.510, or "skilled care" as defined by 7 AAC 140.515.⁴⁷ 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.⁴⁸

⁴⁰ Exs. E29, E30.

⁴¹ Exs. F1 - F15.

⁴² Exs. F1 - F15, F32. Mr. S was also assessed in 2009, 2010, and 2011 (Gerry Johnson hearing testimony), but those assessments are not in the record.

⁴³ Exs E29, E30.

⁴⁴ Ex. D. The Division's termination notice cited A.S.47.07.045 and state Medicaid regulations 7 AAC 130.205, 7 AAC 130.210, 7 AAC 130.230, 7 AAC 140.505, 7 AAC 140.510, and 7 AAC 140.515, in support of its determination.

⁴⁵ 7 AAC 130.200.

⁴⁶ 7 AAC 130.205(d)(2).

⁴⁷ 7 AAC 130.230(b)(2).

⁴⁸ 7 AAC 130.230(b)(2)(B).

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 (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 generally 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).⁴⁹ 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).⁵⁰

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

⁴⁹ 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."

⁵⁰ See, for example, Ex. E at page 6.

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).⁵¹

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).⁵² 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 based solely on an applicant's CAT score, and that other relevant factors, including any testimony by the applicant or recipient's physician, must be considered.⁵³ While these decisions are not binding here, and were decided prior to the amendment of Alaska's Waiver Services regulations, they are still relevant because they allow the qualifying criteria expressed in the Division's regulation to be harmonized with the qualifying criteria expressed in the CAT.

D. Does Mr. S Require Intermediate or Skilled Nursing Care?

Based on the regulations and the CAT, there are three ways in which a Waiver Services applicant or recipient can qualify for (or remain qualified for) Waiver Services. The first way, under both the regulations and the CAT, is to demonstrate a need for either skilled nursing care or intermediate level nursing care.⁵⁴ Because skilled care is a higher level of care than

⁵¹ See, for example, Ex. E at page 6.

⁵² The federal Medicaid statutes state that "instrumental activities of daily living" include, but are 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."

⁵³ See *Bogie v. State, Division of Senior and Disabilities Services*, Superior Court Case No. 3AN-05-10936 (August 22, 2006); *Casey v. State, Division of Senior and Disabilities Services*, Superior Court Case No. 3AN-06-6613 (July 11, 2007).

⁵⁴ 7 AAC 140.510, 7 AAC 140.515.

intermediate care, the minimum level of care for which Mr. S must demonstrate a need, in order to remain eligible for Waiver Services, is intermediate care.

Alternatively, under the CAT an individual may qualify for Waiver Services, without demonstrating a need for skilled or intermediate level nursing care, if the individual's requirements for physical assistance with his or her activities of daily living (ADLs) are sufficiently high.⁵⁵ Finally, under the CAT an individual may qualify for Waiver Services by having a certain minimum level of nursing needs, *combined with* a certain minimum level of need for physical assistance with his or her ADLs.⁵⁶

Under 7 AAC 140.510 (discussed in Section IIIA, above), Mr. S is eligible for the Choice Waiver Program if he requires intermediate level nursing care. The evidence in the record indicates, however, that Mr. S does not currently receive the types of services which would demonstrate a need for intermediate level care under 7 AAC 140.510. He does not receive any therapy provided by a qualified therapist.⁵⁷ He does not have any prescriptions requiring hands-on PCA assistance.⁵⁸ He does not require injections, intravenous feeding, any type of feeding tube, nasopharyngeal suctioning, tracheotomy care, treatment or dressing of wounds, or the administration of oxygen.⁵⁹ He is not comatose, he is not on a respirator or ventilator, and he does not use catheters.⁶⁰ He does not require venipuncture by a registered nurse and is not receiving chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.⁶¹ He has no mood or behavioral problems.⁶²

There are three findings in the assessment, pertaining to indicators of nursing-level care, which are incorrect. The first is the finding that Mr. S does not have an uncontrolled seizure disorder.⁶³ A neuropsychological exam conducted on March 28, 2013 indicates that Mr. S has suffered from an uncontrolled seizure disorder since approximately 2001.⁶⁴ The second is that Mr. S has only mild cognitive problems and is still able to make most decisions required for daily living.⁶⁵ Tests administered in conjunction with the March 28, 2013

⁵⁵ Ex. E29.

⁵⁶ Ex. E29.

⁵⁷ Exs. E5, E14, E15.

⁵⁸ Ex. E5.

⁵⁹ Exs. E13 - E15.

⁶⁰ Ex. E15.

⁶¹ Ex. E15.

⁶² Exs. E17, E25.

⁶³ Ex. E14.

⁶⁴ Ex. 1 pp. 1 - 3.

⁶⁵ Ex. E16.

neuropsychological exam indicate that Mr. S has an extremely low IQ and severely impaired judgment as to health and safety issues,⁶⁶ and significant memory deficits nearing the border of dementia.⁶⁷ The third is that Mr. S prepares and administers all of his own medications and that he is always compliant in taking his medications.⁶⁸ The neuropsychologist who conducted the exam on March 28, 2013 found that Mr. S has an "ongoing pattern of missing medications due to memory problems" and that Mr. S took his medications only intermittently.⁶⁹ He stated that Mr. S would require "intensive monitoring of medication administration," as well as periodic blood tests, to ensure that Mr. S is actually taking his medications, due to Mr. S's severely impaired judgment and memory deficits.⁷⁰

These three factual errors affect Mr. S's CAT scores. First, under Section A, Professional Nursing Services, Subsection 10, Uncontrolled Seizure Disorder, he should have received a score of one instead of zero.⁷¹ Second, under Section C, Cognition, Subsection 3, Cognitive Skills for Daily Decision-Making, he should have received a score of three (severely impaired) instead of one (modified independence).⁷² Third, under Section G, Medication, Subsection 1a, Preparation and Administration, Mr. S should have received a score of at least one instead of zero.⁷³ Finally, under Section G, Medication, Subsection 1b, Compliance, Mr. S should have received a score of at least one instead of zero.⁷⁴ These scoring errors do not, however, mean that Mr. S necessarily qualifies for waiver services. It will be necessary to factor in these revised scores on the final CAT scoring page (Ex. E29, discussed below) to determine whether these revised scores impact Mr. S's *total* CAT score sufficiently to qualify him for waiver services.

E. Does Mr. S Qualify for Waiver Services Based on his Need for Assistance with his Activities of Daily Living?

It is possible to qualify for Waiver Services under the CAT, based on an elevated need for assistance with multiple ADLs, without requiring professional medical or nursing supervision. The Consumer Assessment Tool's scoring summary is located at page 29 of the

⁶⁶ Ex. 1 pp. 7 - 9.

⁶⁷ Ex. 1 p. 9.

⁶⁸ Ex. E20.

⁶⁹ Ex. 1 p. 11.

⁷⁰ Ex. 1 p. 11.

⁷¹ Ex. E14.

⁷² Ex. E16.

⁷³ Ex. E20.

⁷⁴ Ex. E20.

CAT.⁷⁵ 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 (NFLOC) or otherwise qualify for waiver services. Some of these combinations (discussed below) allow a person to meet NFLOC, without showing 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. As discussed in the preceding section, Mr. S does not require these services. The second way (under NF1(b)) is to require use of a ventilator or respirator at least three days per week. As discussed in the preceding section, Mr. S does not use a ventilator or respirator.

The third way (under NF1(c)) is to require care due to uncontrolled seizures *at least once per week*. As discussed in the preceding sections, Mr. S *does* have uncontrolled seizures. However, the evidence in the record indicates that he has these seizures no more than once per month.⁷⁶ Accordingly, while Mr. S's seizures are clearly serious, they do not occur frequently enough to score points on the CAT at section NF1.

The fourth way (under NF1(d)) is to receive some form of therapy at least five days per week. As discussed in the preceding section, Mr. S does not receive such therapy. 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 five "shaded" ADLs listed at page 18 of the CAT.⁷⁷ The "shaded" ADLs are bed mobility, transfers, locomotion, eating, and toilet use.

The CAT codes which the Division assigned to Mr. S with regard to the "shaded" ADLs are: bed mobility: 0/0; transfers: 0/0; locomotion: 0/0; eating: 0/0; and toilet use: 0/0.⁷⁸ Michelle Moore, the nurse who performed the assessment, testified at hearing in support of these scores, and her testimony regarding Mr. S's ability to perform his ADLs was generally credible. S S did not directly challenge the scores that Ms. Moore assigned regarding his brother's ability to perform his ADLs. Rather, S S's testimony focused primarily on his

⁷⁵ Ex. E29.

⁷⁶ Ex. 1 pp. 2 - 3, Exs. F16 - F21.

⁷⁷ Exs. E18, E19.

⁷⁸ Ex. E18.

brother's cognitive problems, previously discussed above. Accordingly, a preponderance of the evidence indicates that Mr. S *does not require extensive assistance* as to any of the "shaded" ADLs. Because Mr. S does not require extensive assistance with regard to any of the "shaded" ADLs, he 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 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 Mr. S requires any of these services, so he scores 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 Mr. S requires any of these therapies, so he receives 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, venipuncture, or barrier dressings for ulcers, at least three days per week. Again, the record does not show that Mr. S requires any of these procedures, so no points are awarded 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, the record does not show that Mr. S requires any of these treatments, so he 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. Mr. S has a short-term memory problem, so Mr. S receives one point under NF3(a).

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. The evidence shows that, while Mr. S has memory problems, he is generally able to recall these particular items.⁷⁹ Accordingly, Mr. S 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. As discussed at page 9, above, under Section C, Cognition, Subsection 3, Cognitive Skills for Daily Decision-Making, Mr. S should have received a score of three (severely impaired) instead of one (modified independence). Accordingly, Mr. S gets one point under NF3(c).

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). Although Mr. S clearly has significant cognitive problems, there is no evidence in the record indicating that he requires professional nursing care for his cognitive problems. Further, Mr. S scored zeros (independent) as to the five shaded ADLs, and he did not receive a score on the SST. Accordingly, Mr. S receives 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, Mr. S received one point under NF3(c), but he received no points under any of the other three subsections. Accordingly, Mr. S receives an overall score of zero on NF3.

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. There is no evidence that Mr. S exhibits any of these problem behaviors. Accordingly, Mr. S 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 at least 2/2 as to any shaded ADL, *and* (2) score 14 or

⁷⁹ Ex. E16.

more on a designated portion of the Division's Supplemental Screening Tool (SST). Here, Mr. S does not require professional nursing care due to any behavioral problems. Further, he received scores of 0/0 with regard to the shaded ADLs, and did not receive a score on the SST. Accordingly, Mr. S gets no points under NF4(b).

5. NF5

At NF5, the total scores from NF2, NF3, and NF4 are added together. If an applicant receives a score of one or more, then the analysis proceeds to NF6, below. However, Mr. S's overall score as to NF2, NF3, and NF4 is zero. Accordingly, in this case, the analysis ends here and does not proceed to NF6 or NF7.

In summary, Mr. S does not require an intermediate level of care as defined under the relevant regulations and/or under the Consumer Assessment Tool. Further, his scores on the five "shaded" ADLs are too high to qualify for waiver services on that basis.

IV. Conclusion

The Division correctly determined that Mr. S does not require intermediate level nursing services as defined by 7 AAC 140.510 or by the Consumer Assessment Tool (CAT). The Division also correctly concluded that Mr. S does not qualify for waiver services, under the CAT, based on the level of his need for assistance with ADLs. Accordingly, the Division's decision that Mr. S is no longer eligible for the Waiver Services program is affirmed.

Dated this 6th day of June, 2013.

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 17th day of June, 2013.

By: Signed _____
Name: Jay D. Durych
Title: Administrative Law Judge, DOA/OAH

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