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

In the Matter of:	)	
	)	OAH No. 13-0318-MDS
E K	)	HCS Case No.
	)	Medicaid ID No.

DECISION

I. Introduction

The issue in this case is whether Mr. E K continues to require skilled or intermediate level nursing care. The Division of Senior and Disabilities Services (DSDS or Division) conducted an assessment on November 7, 2012 and subsequently determined that Mr. K no longer requires either skilled or intermediate level nursing care.[1] This decision concludes that, although Mr. K has significant physical impairments, and although these impairments significantly 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. K requires physical assistance with some activities of daily living, the level or degree of physical assistance that he requires in order to perform his activities of daily living is not extensive enough to qualify for Waiver Services on that basis.[2] As a result, Mr. K 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. K is not currently eligible for the Waiver Services program is therefore affirmed.

II. Facts

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

Mr. K is a 39-year-old man who lives alone.[3] He suffers from cerebral palsy, diplegia / hemiplegia / paraplegia, contracture of multiple joints, chronic shoulder, elbow, hip, and back pain, and major depression.[4] He has had cerebral palsy his whole life.[5] His legs are atrophied, he has chronic weakness and spasms in his legs due to his cerebral palsy, he has shoulder

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1 Exs. D, E.

2 The Division acknowledges, however, that Mr. K qualifies for Personal Care Assistant (PCA) services (see hearing testimony of Jan Bragwell, R.N. and Shelly Boyer-Wood).

3 Ex. E1.

4 Ex. 1 p. 2; Exs. E3, F39.

5 Mr. K's hearing testimony.

impingement, and he needs crutches or a walker to ambulate.[6] He has poor circulation and swelling in his feet.[7] His PCA massages and soaks his feet to help prevent muscle contractures, edema, and skin breakdown.[8] It is not uncommon for him to fall, and he has hurt himself doing so.[9] His right leg will sometimes get numb very suddenly, and because this makes it difficult or impossible to work accelerator and brake pedals, he no longer drives a car.[10] He has had eleven surgeries to date.[11]

Mr. K has received referrals to physical therapy and orthopedics multiple times in the past.[12] However, after a few visits, the therapist tells him that there is nothing more that can be done. As of May 22, 2013 Mr. K felt that his orthopedic issues were stable, and he did not want to pursue further therapy / treatment.

Mr. K's current medications are Alegra, Prilosec, Flexeril, Zanaflex, Hydrocodone-Acetaminophen, Lexapro, Lyrica, Cymbalta, Lubriderm, and aloe.[13] In addition, he uses a urinal and power lift recliner chair, and has a prescription for 30 minutes of range of motion exercises each day.[14]

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

Mr. K was originally assessed in December 2009 and found eligible for the Waiver Services program based primarily on his need for extensive assistance with his Activities of Daily Living (ADLs).[15] Mr. K's current assessment was performed on November 7, 2012 by Marianne Sullivan, R.N. of DSDS.[16] Ms. Sullivan used the Consumer Assessment Tool or "CAT" (a system for 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. Sullivan reported that Mr. K has the following care needs and the following abilities and limitations:[17]

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6 Ex. 1 pp. 1, 6; Ex. 2 p. 5; Ex. E3.
7 Ex. 1, p. 2.
8 Ex. 2 p. 2.
9 Ex. 1 p. 2.
10 Ex. 1 p. 2.
11 Ex. 2 p. 3.
12 All facts found in this paragraph are based on Ex. 2 p. 1.
13 Ex. 2 p. 3.
14 Ex. 2 p. 3.
15 Ex. F.
16 Ex. E.
17 Exs. E3 - E30.

Functional Assessment: Ms. Sullivan reported that Mr. K is able to touch his hands over his head and behind his back, can place his hands across his chest and stand up, has a strong grip in both hands, and has good fine motor control, but cannot touch his feet while sitting.[18]

Physical Therapy:[19] Ms. Sullivan reported that Mr. K is not currently receiving speech / language therapy, respiratory therapy, physical therapy, occupational therapy, or any other therapies from a qualified therapist, and that he does not currently have any prescriptions for walking, range of motion, foot care, or other care requiring hands-on assistance from a PCA.[20]

Bed Mobility:[21] Ms. Sullivan reported that Mr. K uses an older, manual style hospital bed. Her assessment does not state whether Mr. K requires assistance to move to and from a prone position, turn side to side, or otherwise reposition his body while in bed. However, the scores that she assigned imply that he is independent as to bed mobility (scored 0/0; frequency 0/0).

Transfers:[22] Ms. Sullivan reported she was told by Mr. K that he needs help to get into and out of bed. She reported that Mr. K has a standing lift available, but does not use it, and that he has a lift recliner which is currently inoperable; he is awaiting receipt of replacement parts. She reported that she observed Mr. K reposition himself on his couch independently, and transfer from the couch to his walker with assistance from his PCA (scored 2/2; frequency 4/7).

Locomotion:[23] Ms. Sullivan reported she was told by Mr. K that he uses forearm crutches and a wheeled walker with a seat for locomotion, and has a wheelchair ramp leading to his door. Ms. Sullivan reported that she observed Mr. K locomote using his wheeled walker with only supervision from his PCA (i.e. no hands-on assistance) (scored 2/2; frequency 6/7).

Dressing:[24] Ms. Sullivan reported she was told by Mr. K that he needs help to put on his lumbar support and foot brace, and that he must wear larger-than-normal size shoes because his feet swell so much. Ms. Sullivan further reported that Mr. K told her he could dress his upper body himself, but that he required assistance donning and doffing his pants, socks, and shoes. Ms. Sullivan did not actually observe Mr. K dressing or undressing, but noted that he was appropriately dressed at the assessment, that he had good range of motion in his upper body, and good fine motor control (scored 2/2; frequency 2/7).

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18 Ex. E4.
19 Ex. E5.
20 Ex. E5. This is partially incorrect, as Mr. K has a prescription for 30 minutes of range of motion exercises each day, and for daily foot care. *See* Ex. 2 p. 3 and B G's hearing testimony.
21 Ex. E6.
22 Ex. E6.
23 Ex. E7.
24 Ex. E8.

Eating:[25] Ms. Sullivan reported she was told by Mr. K that he can feed himself. She reported that she did not observe Mr. K eat, but that she saw him take pain medications and drink water independently (scored 0/0; frequency 0/0).

Toileting:[26] Ms. Sullivan reported she was told by Mr. K that he uses a urinal at night, and that his PCA empties it in the morning because he is unable to do so. Ms. Sullivan further reported Mr. K told her that he needs assistance to transfer on and off the toilet due to poor balance. Ms. Sullivan wrote that Mr. K' Care Coordinator, B G, told her that Mr. K had a prescription for a urinal and for incontinence supplies, and that he has an elevated toilet with safety bars (scored 2/2; frequency 4/7).

Personal Hygiene:[27] Ms. Sullivan reported she was told by Mr. K that he did not need any help to brush his teeth, wash his face, or shave, and that he did not have any wounds or lesions on his feet. Ms. Sullivan further reported that the PCA told her she soaked Mr. K's feet to help control edema. Finally, Ms. Sullivan noted "script for foot soaking TID 15 minutes daily as needed," and "pending documentation from [primary care provider] to support script dated [June 4, 2012]" (scored 0/0; frequency 0/0).

Bathing:[28] Ms. Sullivan reported she was told by Mr. K that environmental modifications to his bathroom were completed in 2011 which included a roll-in shower, shower bench, grab bars, and a hand-held shower head. Ms. Sullivan further reported she was told by Mr. K that he showers daily and shampoos his hair during the shower, but needs assistance to transfer on and off his shower chair, and to wash areas of his body that he is unable to reach. Ms. Sullivan noted that Mr. K had good fine motor control, and could flex forward while seated, but could not touch his feet (scored 3/2; frequency 1/7).

Medication Management: Ms. Sullivan reported that Mr. K needs assistance with his medications three times per day, seven days per week.[29] She found that he could prepare and administer his over-the-counter medications, but needed assistance with prescription medications.[30] She also reported that Mr. K was always compliant in taking his medications.[31]

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25 Ex. E9.
26 Ex. E9.
27 Ex. E10.
28 Ex. E11.
29 Ex. E12.
30 Ex. E20. This is fairly consistent with Ms. G's hearing testimony that Mr. K can take his medications himself, but that he needs his PCA to set-up or prepare them for him first.
31 Ex. E20.

Professional Nursing Services:[32] Ms. Sullivan found that Mr. K has no current need for professional nursing services. Ms. Sullivan also found that Mr. K is currently receiving no injections, intravenous feedings, suctioning or tracheotomy care, oxygen, or treatments for open lesions, ulcers, burns, or surgical sites.[33] Ms. Sullivan further found that Mr. K 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.[34] In addition, Ms. Sullivan found that Mr. K 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.[35] Finally, Ms. Sullivan found that Mr. K does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.[36]

Cognition:[37] Ms. Sullivan found that Mr. K has a short-term memory problem, but no long-term memory deficit. She also found that Mr. K is generally able to make most decisions required for daily living, and that Mr. K's minor memory and cognitive deficits do not require professional nursing assessment, observation, or management.

Behavioral Problems:[38] Ms. Sullivan found that Mr. K does not resist care, is not socially inappropriate, is not disruptive, is not self-abusive, is not verbally or physically abusive to others, and does not wander. She also found that he does not need professional nursing assessment, observation, or management due to any behavioral problems.

Ability to Communicate:[39] Ms. Sullivan found that Mr. K has adequate hearing, does not need or use a hearing aid, is usually able to make himself understood, and is usually able to understand others. She also found that Mr. K has adequate vision and does not use glasses or contact lenses.

Balance:[40] Ms. Sullivan found that Mr. K has an unsteady gait, has balance problems when standing, limits his activities due to a fear of falling, and had fallen in the 180 days prior to the assessment.

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32 Ex. E13.
33 Ex. E13.
34 Ex. E14.
35 Ex. E15.
36 Ex. E15.
37 Ex. E16.
38 Ex. E17.
39 Ex. E22.
40 Ex. E23.

Mood: With regard to mood, Ms. Sullivan found that Mr. K exhibited no indication of depression or anxiety, but had sleep issues up to five days per week.[41]

Miscellaneous: Ms. Sullivan found that Mr. K has no significant dental problems, no problem skin conditions or pressure ulcers, no foot problems, and no hazards in his home.[42]

The assessment also scored Mr. K with regard to Instrumental Activities of Daily Living (IADLs).[43] Ms. Sullivan scored Mr. K's need for assistance with IADLs as follows: Meal Preparation (light) 3/4; Meal Preparation (main) 3/4; Telephone 0/0; Light Housework 3/4; Managing Finances 0/0; Routine Housework 3/4; Grocery Shopping 2/3; and Laundry 2/3.[44]

Based on the foregoing CAT scores, Ms. Sullivan found that Mr. K does not currently require skilled level or intermediate level nursing care, and does not otherwise qualify for Waiver Services based on a need for extensive assistance with his activities of daily living (ADLs).[45]

C. Relevant Procedural History

Mr. K was originally assessed for Waiver Services eligibility on December 10, 2009.[46] At that time he was found eligible for Waiver Services based primarily on his need for extensive assistance with the ADLs of bed mobility, transfers, dressing, toileting, and bathing.[47] However, based on Mr. K's most recent assessment of November 7, 2012, the nurse-assessor concluded that Mr. K is no longer eligible for participation in the Waiver Services program.[48] Accordingly, on March 6, 2013 the Division mailed a notice to Mr. K advising that it was terminating payment for his waiver services due to the nurse-assessor's finding that he no longer requires either skilled or intermediate level nursing care.[49] On March 8, 2013 Mr. K requested a hearing to contest the Division's decision.

Mr. K's hearing was held on May 22, 2013. Mr. K and his Care Coordinator, B G, participated in the hearing by phone and testified on Mr. K's behalf. Shelly Boyer-Wood

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41 Ex. E25.

42 Ex. E24. The finding that Mr. K has no foot problems is incorrect (see discussion at Section II(A), above). This scoring error does not, however, mean that Mr. K necessarily qualifies for Waiver Services. It will be necessary to factor in his revised score on the final CAT scoring page (Ex. E29, discussed below) to determine whether his revised score impacts Mr. K's total CAT score sufficiently to qualify him for Waiver Services.

43 Ex. E26; *see* 7 AAC 125.199(6).

44 Ex. E26.

45 Exs. E29, E30.

46 Ex. F1.

47 Ex. F.

48 Exs E29, E30.

49 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.

participated in the hearing by phone and represented the Division. Marianne Sullivan, R.N. and Jan Bragwell, R.N., both nurses employed by the Division, participated by phone and testified on behalf of the Division. The record was held open for post-hearing filings through June 10, 2013, at which time the record closed.

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.[50] 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).[51] For older adults and adults with disabilities (such as Mr. K), 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.[52] 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.[53]

Alaska Department of Health and Social Services' 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.
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> (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 . . . .

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

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50 7 AAC 130.200.
51 7 AAC 130.205(d)(2).
52 7 AAC 130.230(b)(2).
53 7 AAC 130.230(b)(2)(B).

Assessment Tool (CAT). The CAT is adopted by regulation at 7 AAC 160.900(d)(6). The activity of daily living (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.

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 ADL.[54] 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).[55]

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 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). 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). [56]

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.[57] While these decisions are not binding here, and were decided prior to the most recent amendment of Alaska's Waiver Services regulations, they are still relevant because they allow the qualifying criteria expressed in the Division's regulations to be harmonized with the qualifying criteria expressed in the CAT.

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[54] 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."

[55] *See*, for example, Ex. E at page 6.

[56] *See*, for example, Ex. E at page 6.

[57] *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).

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

Based on the regulations and the CAT, there are several 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.[58] Because skilled care is a higher level of care than intermediate care, the minimum level of nursing care for which Mr. K must demonstrate a need, in order to remain eligible for Waiver Services, is intermediate care. Intermediate level nursing care is defined by 7 AAC 140.510 (quoted in Section IIIA, above).

The evidence in the record demonstrates that Mr. K does not currently receive the types of services which would indicate a need for intermediate level care under 7 AAC 140.510. He does not receive any therapy provided by a qualified therapist.[59] He has two prescriptions requiring hands-on PCA assistance.[60] 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.[61] He is not comatose, he is not on a respirator or ventilator, and he does not use catheters.[62] He does not require venipuncture by a registered nurse and is not receiving chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.[63] He has minor cognitive / memory problems, no behavioral problems, and minor problems with depression.[64] In summary, Mr. K does not currently require intermediate level nursing care as defined by 7 AAC 140.510 and the CAT.

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

The Consumer Assessment Tool's scoring summary is located at page 29 of the CAT.[65] As indicated by that summary, there are several scoring combinations through which one may

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58 7 AAC 140.510, 7 AAC 140.515.

59 Exs. E5, E14, E15.

60 Mr. K has prescriptions for 30 minutes of range of motion exercises each day, and for daily foot care (*see* Ex. 2 p. 3 and B G's hearing testimony). However, as discussed below, this is not sufficient to qualify him for Waiver Services.

61 Exs. E13 - E15.

62 Ex. E15.

63 Ex. E15.

64 Exs. E16, E17, E25. An assessment by Mr. K's treating physician, Mary Loeb, M.D. dated May 22, 2013 (Ex. 2 p. 9) indicates that Mr. K's depression is more serious than indicated by the Division's assessment. However, Dr. Loeb's assessment was performed over six months after the Division's assessment. Further, even if Mr. K's level of depression at the time of the Division's assessment was as severe as that later described by Dr. Loeb, this would not be sufficient to qualify him for Waiver Services (see discussion at pp. 11 - 15, below).

65 Ex. E29.

demonstrate a need for a Nursing Facility Level of Care (NFLOC) or otherwise qualify for Waiver Services. The first way, discussed immediately above, is to require skilled or intermediate level nursing care. However, under the CAT, an individual may also qualify for Waiver Services, even 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.[66] Alternatively, 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.[67] The CAT divides these scoring 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. K 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. K 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 section, Mr. K does not have uncontrolled seizures. The fourth way (under NF1(d)) is to receive some form of therapy from a qualified therapist at least five days per week. As discussed in the preceding section, Mr. K 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.[68] The CAT scores which the Division assigned to Mr. K with regard to the five "shaded" ADLs are: bed mobility: 0/0; transfers: 2/2; locomotion: 2/2; eating: 0/0; and toilet use: 2/2.[69]

Marianne Sullivan, the nurse who performed the assessment, testified at hearing, and her testimony regarding Mr. K's ability to perform his ADLs was generally credible. Mr. K disagreed, however, with some of the ADL scores assigned by Ms. Sullivan, asserting that he

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66 Ex. E29. This is the primary basis upon which Mr. K asserts that he still qualifies for Waiver Services.
67 Ex. E29.
68 Ex. E18. This is the primary basis upon which Mr. K asserts that he still qualifies for Waiver Services.
69 Ex. E18.

requires extensive assistance with at least three of the shaded ADLs.[70] Mr. K's areas of disagreement are summarized and addressed as follows:

a. Body / Bed Mobility

For purposes of Waiver Services eligibility, body / bed mobility is defined as how a person moves to and from a lying position, turns side to side, and positions his or her body while in bed.[71] In order to receive a self-performance score of three (extensive assistance) with regard to bed / body mobility, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.[72] Ms. Sullivan's assessment does not state whether Mr. K requires assistance to move to and from a prone position, turn side to side, or otherwise reposition his body while in bed; the scores that she assigned merely *imply* that he is independent as to bed mobility (scored 0/0). On the other hand, Ms. G testified that, because Mr. K's hospital bed is an older, manual model, his PCA must perform all the adjustments,[73] and that when Mr. K is having a bad day he can't move while in bed, and his PCA must come by every two hours to reposition him. Ms. G was present at the assessment, and her testimony was more specific on this point than were Ms. Sullivan's assessment notes, which were somewhat vague as to bed mobility. Accordingly, the preponderance of the evidence indicates that Mr. K still requires *some* assistance with bed mobility. However, Ms. G's and Mr. K's testimony did not indicate that Mr. K requires *weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.* The evidence therefore supports a finding that Mr. K requires *limited* assistance with bed / body mobility, but does not show that he requires *extensive* assistance.

b. Transfers

For purposes of Waiver Services eligibility, a transfer is defined as how a person moves between surfaces (with the exception of the toilet and bathtub or shower, which are handled as separate ADLs).[74] In order to receive a self-performance score of three (extensive assistance) with regard to transfers, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.[75] Ms. Sullivan reported that she observed Mr. K reposition himself on his couch independently, and transfer from the couch to

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70 B G hearing testimony.
71 Ex. E6.
72 Ex. E6.
73 Ms. G was present at the time of the assessment (Ex. E2).
74 Ex. E6.
75 Ex. E6.

his walker with assistance from his PCA (scored 2/2). On the other hand, Ms. G testified that Mr. K's PCA must physically assist him in moving from a sitting position to a standing position, and vice-versa. She also stated that the PCA generally uses the "bear hug" technique, which indicates that the PCA is providing weight bearing assistance.

Both Ms. Sullivan and Ms. G reported that Mr. K needs PCA assistance with transfers - the only issue is the *extent* of the assistance provided. Ms. Sullivan assigned her "limited assistance" score based on her observation of a single transfer during a single assessment.[76] Ms. G's testimony that Mr. K's PCA usually uses a weight-bearing "bear hug" technique for transfers is based on longer familiarity with Mr. K and his PCA, and is therefore likely to be more accurate than an estimate by an assessor based on a short period of observation. Accordingly, the preponderance of the evidence indicates that Mr. K requires weight bearing assistance with transfers at least three times per week, and that this ADL should have been scored as requiring extensive one-person assistance (a CAT score of 3/2).

c. Locomotion

For purposes of Waiver Services eligibility, locomotion is defined as how a person moves between locations in his or her room and other areas on the same floor / level.[77] In order to receive a self-performance score of three (extensive assistance) with regard to locomotion, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.[78] Ms. Sullivan reported that she observed Mr. K locomote using his wheeled walker with only supervision from his PCA (i.e. no hands-on assistance), and she assigned him a self-performance score of two (limited assistance). Ms. G testified that, at the assessment, Mr. K could only walk five to seven feet before he had to sit down; that if he is having a bad day he can't walk at all; that his PCA must "set-up" his walker so that he can get into it; that he generally requires physical assistance to walk; that he requires extensive physical assistance to walk outside his home; and that he uses a scooter when he goes to the store.

It initially appears difficult to reconcile Ms. G's account with Ms. Sullivan's account. However, careful review of Ms. G's testimony indicates that she was including those activities necessary to get Mr. K *into and out of his walker* as part of locomotion, when those activities

[76] This is not meant to criticize Ms. Sullivan in any way. Rather, it is simply a limitation inherent in the Waiver Services (and Personal Care Assistant services) assessment process.

[77] Ex. E7.

[78] Ex. E7.

are technically defined as transfers. It was determined above that Mr. K requires extensive assistance with transfers. However, the evidence in the record does not sufficiently explain how Mr. K's PCA provides weight bearing assistance or full performance of locomotion in the context of Mr. K's use of a wheeled walker and forearm crutches. Accordingly, the preponderance of the evidence indicates that Mr. K requires only limited assistance with locomotion as that ADL is defined by the CAT.

d. Eating

For purposes of Waiver Services eligibility, eating is defined as how a "person eats or drinks regardless of skill."[79] In order to receive a self-performance score of three (extensive assistance) with regard to eating, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.[80] Ms. Sullivan reported she was told by Mr. K that he can feed himself, and Ms. G and Mr. K did not indicate disagreement with this report or the score assigned for this ADL. Accordingly, the preponderance of the evidence indicates that Mr. K can eat independently.

e. Toilet Use

For purposes of Waiver Services eligibility, toilet use is defined as how a "person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, cleanses, changes pads, manages ostomy or catheter, adjusts clothes."[81] In order to receive a self-performance score of three (extensive assistance) with regard to toilet use, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.[82] Ms. Sullivan reported Mr. K told her that he needs assistance to transfer on and off the toilet due to poor balance, and this assertion is well supported by Mr. K's medical diagnoses.[83] Ms. G likewise testified that Mr. K requires PCA assistance to transfer to the toilet. She stated that there are grab bars in the bathroom, but they are by the shower, not the toilet. Neither witness discussed the specific proportion of time that Mr. K requires weight-bearing assistance with toileting transfers. However, the evidence in the record shows that Mr. K usually requires weight bearing assistance with transfers *in general* three or more times per week (see discussion of transfers, above), and there is nothing in the record to suggest that he needs less

79 Ex. E9.
80 Ex. E9.
81 Ex. E9.
82 Ex. E9.
83 *See* Section II(A), above.

assistance with toileting transfers. Accordingly, the preponderance of the evidence indicates that Mr. K requires extensive one-person assistance with toileting (a CAT score of 3/2).

f. Summary - Degree of Assistance Required With Shaded ADLs

Independent review indicates that Mr. K requires a greater degree of assistance than was found by the Division with regard to the "shaded" ADLs of bed / body mobility, transfers, and toilet use. However, this review indicates that Mr. K requires *extensive* assistance as to only *two shaded ADLs* (transfers and toilet use). In order to qualify for Waiver Services under NF1(e), a person must demonstrate either full dependence, or a need for extensive assistance, *as to at least three* of the shaded ADLs. Because Mr. K does not require extensive assistance with regard to three or more 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 or two or three with regard to needing injections and/or IV hookups, feeding tubes, tracheotomy care or nasopharyngeal suctioning, treatments or dressings, oxygen, requiring observation, assessment, and management of unstable conditions, catheter management, and/or care required due to a comatose condition. The record does not show that Mr. K 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. K 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. K 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. K 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. K has a short-term memory problem, so Mr. K 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. K has short term memory problems, he is generally able to recall these particular items.[84] Accordingly, Mr. K 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. Mr. K has not asserted that his cognitive skills are moderately or severely impaired, and the evidence does not suggest that degree of cognitive impairment. Accordingly, Mr. K gets no points 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. K has a short term memory problem, there is no evidence in the record indicating that he requires professional nursing care for his memory problem. Further, although Mr. K scored at least a 2/2 as to several "shaded" ADLs, he did not receive a score on the SST. Accordingly, Mr. K 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. K received one point under NF3(a), but he received no points under any of the other three subsections. Accordingly, Mr. K 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

[84] Ex. E16.

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. K exhibits any of these problem behaviors. Accordingly, Mr. K 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 more on a designated portion of the Division's Supplemental Screening Tool (SST). Here, Mr. K does not require professional nursing care due to any behavioral problems. Further, although he received scores of 2/2 or better with regard to several "shaded" ADLs, he did not receive a score on the SST. Accordingly, Mr. K 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. However, Mr. K'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.

IV. Conclusion

In summary, Mr. K 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. Accordingly, the Division's decision that Mr. K is no longer eligible for the Waiver Services program is affirmed.

Dated this 5th day of September, 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 19th day of September, 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.]