

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

In the Matter of)
)
 S E)
_____)

OAH No. 13-0406-MDS
Agency No.

DECISION

I. Introduction

S E was assessed for participation in the Home and Community-Based Waiver program. The Division of Senior and Disability Services (division) concluded he did not meet the eligibility requirements, and denied his application. Mr. E contested that decision, and requested a hearing.

A hearing was held on June 27, 2013, and July 18, 2013. Both parties were represented by counsel. Mr. E’s daughter, D J, testified on his behalf. The division’s witness was Registered Nurse Sam Cornell who had conducted the assessment.

Mr. E has not met his burden of proving that the division’s conclusion was incorrect, and therefore the denial of his application is upheld.¹

II. Facts

Mr. E is 72 years old.² He has a number of different health problems, including COPD, and he needs to receive oxygen on a nearly continuous basis 24 hours per day.³ He has difficulties and “checks out” mentally when his oxygen level is not properly maintained.⁴ This can be caused by either hypoxia (too little oxygen) or hypercarbia (too much carbon monoxide).⁵ Mr. E uses an oxygen concentrator machine in his home and portable oxygen tanks when he leaves the home.

In August of 2012, Mr. E moved out of Ms. J’s home and into his own apartment.⁶ Beginning in the fall of 2012, Ms. J noticed major changes in his condition. He stopped

¹ The person who’s application or request for service has been denied has the burden of proving by a preponderance of the evidence that the division’s decision was incorrect. 7 AAC 49.135.

² Exhibit E 1.

³ Exhibit E 22; testimony of Ms. J; Exhibit G 25. Two different exhibits were labeled as Exhibit G. At the hearing, the second document, which is 25 pages long, was renamed as Exhibit G.

⁴ Testimony of Ms. J.

⁵ Testimony of Mr. Cornell.

⁶ Testimony of Ms. J.

dressing nicely, was not eating properly, and said things that did not make sense.⁷ Late in the fall, she and her brother, S E, Jr., went to Mr. E's apartment, and Mr. E was in such bad shape they called 911. Mr. E was taken to the emergency room, and was admitted to Providence Hospital for 8 days.⁸ Adult Protective Services became involved, and insisted on a discharge plan for Mr. E. Mr. E was discharged in January of 2013, and Ms. J and her brother had a schedule set up to ensure that Mr. E was visited by each of them once a day (two daily visits between them) so that he would have his meals prepared, take his medications, and have his home kept reasonably clean.⁹ Initially, this plan seemed to be working, but five days into it, Mr. E was again in poor condition when Ms. J arrived. He was in dirty clothes, his house was a mess, and it was clear that he had been falling and hurting himself.¹⁰ Ms. J called 911, and Mr. E was admitted to Providence Hospital for nine days. Adult Protective Services insisted that Mr. E be placed in an assisted living home when he left the hospital.¹¹

Mr. E has been in an assisted living home since late January or early February of 2013. The staff checks his oxygen level twice a day, ensures that he takes his medications, and prepares all of his meals.¹² He is unsteady when walking, and someone needs to be near him to catch him if he falls. Mr. E is able to manage his activities of daily living (bed mobility, transfers, locomotion, eating, and toilet use) independently, or with limited assistance.¹³ He does have memory and cognitive difficulties.¹⁴

III. Discussion

A. Home and Community-Based Waiver Program

An adult with a physical disability is eligible to receive benefits under the Choice Waiver program if he or she requires the level of care that is normally provided in a nursing facility.¹⁵ The program pays for services that allow an eligible person to stay in his or her home rather than move into a nursing facility. The level of care that is provided in a nursing

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Testimony of Ms. J; Exhibit E 19.

¹⁴ *Id.*

¹⁵ 7 AAC 130.205(d)(2).

facility is described by regulation. Skilled nursing facility services are defined in 7 AAC 140.515. Intermediate care facility services are defined in 7 AAC 140.510.

The division determines whether an applicant requires nursing facility level of care services by conducting an assessment.¹⁶ For adults with disabilities or older adults, this assessment looks at the nursing level services defined in 7 AAC 140.510 and 515,¹⁷ and incorporates the results of the Consumer Assessment Tool (CAT).¹⁸ The CAT is an evaluation tool created by the Department of Health and Social Services, and is adopted by reference in 7 AAC 160.900(d)(6).¹⁹

B. Scoring the Consumer Assessment Tool

There are a variety of ways in which the CAT may show that a person is eligible for the Choice Waiver program. In this case, because Mr. E needs limited assistance with two activities of daily living – locomotion and toileting²⁰ – he would be eligible if he also scored one point in either section NF 3 (cognitive impairments) or NF 4 (behavioral issues), or both.²¹

C. Mr. E's Assessment

Mr. Cornell conducted an assessment of Mr. E on March 4, 2013.²² Based on that assessment, the division determined that Mr. E did not qualify for the Choice Waiver program.²³ Mr. E challenges the CAT scoring in two areas: cognitive impairments and behavioral issues.

1. Cognitive Impairments

Mr. E would qualify for the Choice Waiver program if he receives a score of 1 in section NF 3. To receive an overall score of 1 in this section, he must have a score of 1 in each of the four subparts. Mr. Cornell scored him with a 1 in all but subpart d.²⁴ To receive a score of 1 in this last subpart – and therefore qualify for the Choice Waiver program – Mr. E must receive at least 13 points in section C4B of the Supplemental Screening Tool.²⁵ This

¹⁶ 7 AAC 130.230.

¹⁷ 7 AAC 130.230(b)(2)(A).

¹⁸ 7 AAC 130.230(b).

¹⁹ Adopting January 29, 2009 version of the CAT.

²⁰ Exhibit E 18.

²¹ See Exhibit E 30 (CAT scoring page).

²² Exhibit E.

²³ Exhibit D.

²⁴ Exhibit E 30.

²⁵ *Id.*

tool asks five questions about memory, use of information, confusion, orientation, and communication. Mr. Cornell gave Mr. E a score of 4.

Mr. E cannot accurately draw a clock showing a specified time.²⁶ He cannot monitor and adjust his oxygen concentrator on his own.²⁷ He cannot recall the current season or the names or faces of those who should be familiar to him.²⁸ In the area of Cognitive Skills for Daily Decision-Making, Mr. Cornell concluded that Mr. E was “Moderately impaired – decisions poor, cues/supervision required.”²⁹

Ms. J testified that her father’s memory was poor and provided an example of an outing to a restaurant when, shortly after ordering appetizers, Mr. E questioned when someone would come to take their order. Ms. J testified that Mr. E has moments of confusion. He knows he is in assisted living home, but is not aware that he is near the Birchwood Airport.³⁰

Given this evidence, and especially in light of the fact that Mr. E needs cues and supervision for his daily decision-making,³¹ it is more likely true than not true that Mr. E should have received a higher score on the Supplemental Screening Tool. In the Memory For Events section, Mr. Cornell gave Mr. E a score of 0, indicating no difficulty in this area. He should have received a score of 1, indicating difficulty in recalling details or sequences of recent events, or in remembering names of meaningful acquaintances. However, Mr. E did not prove by a preponderance of the evidence that he cannot recall entire events or names of close friends or relatives without prompting – score of 2 – or that he could not recall entire events even with prompting – score of 3.

In the Memory And Use Of Information section, Mr. Cornell found that Mr. E has minimal difficulty remembering and using information, requiring direction and reminding up to 3 times per day. Mr. E did not prove that his memory difficulties were greater than this.

For Global Confusion, Mr. E was scored with a 1, indicating nocturnal confusion on awakening. It is more likely than not that he also has periodic confusion during the day,

²⁶ Exhibit E 4; Testimony of Mr. Cornell.

²⁷ Testimony of Mr. Cornell; Testimony of Ms. J.

²⁸ Exhibit E 16; Testimony of Mr. Cornell.

²⁹ Exhibit E 16.

³⁰ Testimony of Ms. J.

³¹ Exhibit E 16.

which would be a score of 2. There is insufficient evidence to show that he is nearly always confused, which would be a score of 3.

For Spatial Orientation, Mr. Cornell found that Mr. E had confusion when driving or riding in the community. It is likely that Mr. E would also get lost when walking in the neighborhood.³² The evidence did not establish that he got lost in his current assisted living home. Thus, he should have received a score of 2 in this area.

Finally, in the area of Verbal Communication, Mr. Cornell gave Mr. E a score of 1, indicating minor difficulties. The evidence does not establish that Mr. E should receive a score of 3, for being unable to speak coherently or make needs known. At most he should receive a score of 2 in this area.

In his written closing argument, Mr. E asserted,

If a person's cognitive skills for daily decision-making are "moderately impaired," and he cannot successfully draw a clock or remember what season it is or otherwise carry on a coherent conversation about how things are going, it is incorrect systematically to assign to him a set of "1"s for memory and task-completion issues. Mr. E's total scores should have been at least 14.^[33]

As discussed above, Mr. Cornell should have assigned higher scores, but Mr. E has not proven that he should have received a total of at least 13 points on the Supplemental Screening Tool. Thus, he does not receive a score of 1 in section NF 3 of the CAT scoring sheet.

2. Behavioral Issues

Mr. E also asserted he should have received a score of 1 for behavioral issues. His closing argument states:

Before his deterioration in an isolated setting forced Mr. E's children to find a place for him in an assisted living facility, Mr. E was unable to care for himself and engaged in socially inappropriate behavior and verbal abuse. The verbal abuse is what led to his leaving his daughter's home. The socially inappropriate behavior included spilling things on himself, putting lettuce in the cat's bowl, and otherwise being unable to keep his place clean and orderly. He was significantly at risk of having his medications stolen or taken by people around him who wanted to sell them. Even after he had gone to the more secure setting of an assisted living facility, Mr. E continued to get calls from people trying to take advantage of him.

³² The CAT assesses a person's cognitive abilities so it is appropriate to determine whether Mr. E would get lost while walking even if he is not physically able to walk that distance.

³³ Closing Statement at 7.

After the assessment, while living at the ALH, Mr. E egged on a fellow resident and argued with him; the resident then attacked Mr. E and was removed from the ALH.^[34]

Mr. E would be entitled to a score of one in section NF 4 if one or more of four specified behaviors are scored with a 2 or a 3.³⁵ The specified behaviors are wandering, verbally abusive, physically abusive, socially inappropriate/disruptive behavior³⁶ To receive a score of 2, the behavior must occur on at least four days during the seven days preceding the CAT assessment.³⁷ There is evidence that Mr. E was verbally abusive at times, and he clearly exhibited socially inappropriate behavior while living in his own apartment. The question for purposes of this decision, however, is how often Mr. E was verbally abusive or socially inappropriate after moving into the assisted living home. Mr. E did not meet his burden of proving he exhibited either of these behaviors at least four times per week.

Mr. E could also qualify under the behavioral section if he meets the behavioral impairment threshold and received sufficient points in section D.2B of the Supplemental Screening Tool. Mr. Cornell did not score him under section D.2B of the Supplemental Screening Tool because Mr. Cornell determined that Mr. E did not meet the impairment threshold.³⁸ Mr. E did not prove that this determination was incorrect.

D. Need for Institutional Care

Mr. E argues that even if he is not found eligible based on the CAT assessment alone, he is still eligible based on the eligibility standards for the Choice Waiver program. Older adults such as Mr. E are eligible if they require skilled nursing care or intermediate nursing care.³⁹ In deciding whether a person needs that level of care, the division must “incorporate” the results of the CAT.⁴⁰ Mr. E argues that the results of the CAT do not preclude him from eligibility if he can otherwise show that he needs intermediate or skilled nursing care.⁴¹

³⁴ Closing Statement at 8.

³⁵ Exhibit E 30.

³⁶ *Id.*

³⁷ Exhibit E 18. To receive a score of 3, the behavior must occur daily.

³⁸ Exhibit E 18.

³⁹ 7 AAC 130.230(b)(2)(A).

⁴⁰ 7 AAC 130.230(b)(2)(B).

⁴¹ Closing Statement at 10.

The evidence presented in this case demonstrates that Mr. E cannot live independently. He needs the level of care he is currently receiving in his assisted living home, but Mr. E has not proven that he needs at least intermediate level nursing care.

Skilled nursing services are

the observation, assessment, and treatment of a recipient's unstable condition requiring the care of licensed nursing personnel to identify and evaluate the recipient's need for possible modification of treatment, the initiation of ordered medical procedures, or both, until the recipient's condition stabilizes.^[42]

Intermediate care services are

the observation, assessment, and treatment of a recipient with long-term illness or disability whose condition is relatively stable and where the emphasis is on maintenance rather than rehabilitation, or care for a recipient nearing recovery and discharge whose condition is relatively stable but who continues to require professional medical or nursing supervision.^[43]

Mr. E's conditions are currently stable, and he does not need licensed nursing personnel to identify and evaluate the need for possible changes in his treatment. Thus, he would not qualify as needing skilled nursing services.

Mr. E does need someone to observe, assess, and treat his stable conditions. That is what the assisted living home staff are doing for him now by monitoring his oxygen level, administering his medications, and providing supervision and cuing for his daily decision-making. While he needs a higher level of care than he can provide for himself, and likely a higher level of care than his daughter or son can provide for him, he has not shown by a preponderance of the evidence that he needs professional medical or nursing supervision, and therefore has not shown that he needs intermediate nursing care services as defined in 7 AAC 140.510. Even if a person may establish Choice Waiver eligibility despite not being eligible based solely on the CAT assessment, Mr. E has not shown that he needs at least intermediate nursing level care.

IV. Conclusion

Mr. E has not met his burden of proving that the division's determination was

⁴² 7 AAC 140.515(b).

⁴³ 7 AAC 140.510(b) (emphasis added).

incorrect. Accordingly, the denial of his application for the Choice Waiver program is upheld.

Dated this 1st day of August, 2013.

Signed _____
Jeffrey A. Friedman
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 11th day of September, 2013.

By: *Signed* _____
Name: Jared C. Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS