

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

In the Matter of)
)
 N M)
_____)

OAH No. 13-0539-MDS
Agency No.

DECISION

I. Introduction

N M applied to participate in the Home and Community-Based Waiver (Choice Waiver) program. She was assessed by the Division of Senior and Disability Services (division) on March 20, 2013. The division denied her application on March 28, 2013. Ms. M contested that decision, and requested a hearing.

A hearing was held by telephone on July 1, 2013. Nurses Jan Bragwell and Denise Kichura testified for the division. Nurse Catherine Morgan testified for Ms. M, and Ms. M also provided testimony in support of her application. Based on the evidence presented, the division's decision is upheld.

II. Facts

Ms. M is 83 years old, and is a resident of one of Alaska's Pioneer Homes.¹ She is independent in her activities of daily living. She uses a scooter for locomotion, is able to eat by herself, and manages her own toileting needs.² She does need some help turning in bed on those occasions when she does turn over, but normally she does not turn over.³ She also needs some assistance with transfers, by holding on to an object or another person, but not weight-bearing assistance.⁴

Ms. M does have chronic skin issues. She has varicose veins that can be very painful at times, and is given lidocaine to relieve the pain. Because she cannot see the back of her legs very well, a nurse or trained CNA applies that medication for her twice a day.⁵ She requires Bacitracin ointment on her fingers from time to time,⁶ and has long term rashes or

¹ Exhibit E 1.
² Exhibit E 18.
³ Testimony of Ms. Morgan
⁴ *Id.*
⁵ Testimony of Ms. M and Ms. Morgan; Exhibit H 5.
⁶ Testimony of Ms. Morgan; Exhibit H 6.

infections in the folds of her skin.⁷ She has been prescribed different topical medications to address her skin problems.

III. Discussion

A. Medicaid Home and Community-Based Waiver Program

An adult with a physical disability is eligible to receive benefits under the Medicaid Home and Community-Based Waiver program, also called the Choice Waiver program, if he or she meets the eligibility requirements, including requiring the level of care that is normally provided in a nursing facility.⁸ If eligible, the program pays for services that allow the recipient to stay in his or her home – or in an assisted living home – rather than move into a nursing facility. The level of care that is provided in a nursing 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.⁹ For adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and 515,¹⁰ and incorporates the results of the Consumer Assessment Tool (CAT).¹¹ 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).

B. Level of Care Determination

There are several different ways in which a person may qualify for the Choice Waiver program. A person may qualify based on needing nursing services, needing extensive assistance with activities of daily living, or a combination of needing at least limited assistance with activities of daily living and some nursing services.¹² Limited assistance is defined as

Person highly involved in activity, received physical help in guided maneuvering of limbs, or other nonweight-bearing physical assistance 3+

⁷ Testimony of Ms. Morgan.

⁸ 7 AAC 130.205(d)(2).

⁹ 7 AAC 130.230.

¹⁰ 7 AAC 130.230(b)(2)(A).

¹¹ 7 AAC 130.230(b).

¹² See Exhibit E 30 (CAT scoring sheet).

times – or – Limited assistance (as just described) plus weight-bearing 1 or 2 times during last 7 days.^[13]

A person needs extensive assistance if he or she needs weight-bearing assistance for a particular task at least 3 times a week.¹⁴ There is no dispute that Ms. M does not need weight-bearing assistance more than two times a week. At most she needs limited assistance with transfers and bed mobility. Thus, Ms. M can only qualify for the Choice Wavier program if she also needs certain nursing services.

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 condition stabilizes.^[15]

The evidence does not support a finding that Ms. M needs skilled nursing services since her skin problems are not unstable conditions, and she does not need an RN or an LPN to identify and evaluate the need for possible modification or initiation of treatment.

Intermediate nursing services are the observation, assessment, and treatment of a recipient with long-term illness or disability whose condition is relatively stable and where the emphasis is on maintenance rather than rehabilitation, or care for a recipient nearing recovery and discharge whose condition is relatively stable but who continues to require professional medical or nursing supervision.^[16]

Ms. M might meet the definition in this regulation since she is receiving treatment for a stable condition. It is not clear from the record, however, whether the treatment needs ongoing medical or nursing supervision. Even if her treatment does require ongoing supervision, however, the CAT, which was adopted by regulation, narrows what qualifies for level of care consideration in the category of treatment/dressings.

Section A of the CAT covers nursing services, and can count towards either skilled or intermediate level of care.¹⁷ Section A 4 covers treatments and dressings:

Treatment and/or application of dressings for one of the following conditions for which the physician has prescribed irrigation, application of medications, or sterile dressings and which requires the skill of an RN.^[18]

¹³ See Exhibit E 7.

¹⁴ *Id.*

¹⁵ 7 AAC 140.515(b). "Licensed nursing personnel" means registered nurses or licensed practical nurses. 7 AAC 140.595(1).

¹⁶ 7 AAC 140.510(b).

¹⁷ See Exhibit E 30, sections NF 1 a and NF 2 a.

¹⁸ See Exhibit E 13 (emphasis added).

Unlike other portions of Section A, this portion specifies that the nursing service must require the skill of an RN. Although Ms. M is receiving the application of medication on a daily basis, the evidence in the record does not support a finding that the application requires the skill of an RN.¹⁹

IV. Conclusion

Based on the evidence presented, Ms. M has not met her burden of proving that the division's determination was incorrect.²⁰ Accordingly, the division's March 28, 2013, denial of her application for this program is upheld.

Dated this 18th day of July, 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 1st day of August, 2013.

By: *Signed*

Name: Jeffrey A. Friedman
Title: Administrative Law Judge

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

¹⁹ Many people receive daily medications of one sort or another. If this portion of Section A were not limited, many people would qualify for the Choice Waiver program under NF 1 scoring even though they would be able to self-administer their medication and fully care for all their other needs on their own.

²⁰ The person requesting new or additional benefits has the burden of proving eligibility by a preponderance of the evidence. 7 AAC 49.135.