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

In the Matter of:	)	
	)	OAH No. 13-0542-MDS
O E	)	HCS Case No.
	)	Medicaid ID No.

DECISION

I. Introduction

The issue in this case is whether Ms. O E continues to require skilled or intermediate level nursing care, or otherwise qualifies for Medicaid Home and Community-Based Waiver Services based on the level of assistance that she requires with activities of daily living. The Division of Senior and Disabilities Services (DSDS or Division) conducted an assessment on March 21, 2013 and subsequently determined that Ms. E no longer requires skilled nursing care, intermediate level nursing care, or extensive assistance with activities of daily living.[1] This decision concludes that, although Ms. E has significant physical and cognitive impairments, and although these impairments significantly limit her ability to function independently, she does not currently require either skilled or intermediate level nursing care. This decision further concludes that, although Ms. E requires physical assistance with some activities of daily living, the amount of physical assistance that she requires in order to perform her activities of daily living is not extensive enough to qualify for Waiver Services on that basis. As a result, Ms. E is not presently eligible to participate in the Medicaid Home and Community-Based Waiver Services Program ("Waiver Services program"). The Division's determination that Ms. E is not currently eligible for waiver services is therefore affirmed.

II. Facts

A. Ms. E's Current Diagnoses and Relevant Medical History

Ms. E is a 70-year-old woman who lives in an assisted living facility (ALF).[2] Her diagnoses include arthritis, asthma, back pain, bipolar disorder, cerebrovascular disease, chronic obstructive pulmonary disease (COPD), depression, dissociative identity disorder, emphysema, fibromyalgia, gastroesophageal reflux disease (GERD), hypertension, hypothyroidism, memory loss, severe osteoarthritis of the knees, post-traumatic stress disorder (PTSD), psychosis NOS, renal insufficiency, schizophrenia, sleep apnea, and history of

[1] Exs. D, E.
[2] Ex. I p. 1.

stroke.[3] She has symptoms including blurred vision, fatigue, and headaches.[4] In addition to numerous medications she uses ankle braces, a walker, an oxygen concentrator, and portable oxygen.[5]

Ms. E has had pain in both her knees for the last six years, but it has gotten significantly worse since 2011.[6] Her knees hurt more with activity, including when she uses the stairs. Her knees get very stiff if she sits for any length of time. Over time she has lost a significant range of motion in her knees, and attempts at conservative treatment using anti-inflammatory medications have not been successful. Her daily activity level is becoming severely limited due to her knee problems. Recent x-rays show advancing patellofemoral arthritis in both knees, and her orthopedic physician recommends (and she plans to have) knee replacement surgery when her medical condition is good enough to allow it.

Ms. E has previously undergone weekly outpatient physical therapy.[7] However, a memo from Ms. E's orthopedic physician dated June 26, 2013 states that her "physical therapy has temporarily been stopped due to her severe osteoarthritis in her knees."[8] Ms. E usually takes three Vicodin each day to control her knee pain.[9]

Ms. E has good strength in both her hands.[10] She can touch her hands over her head and behind her back. However, she cannot touch her toes while seated, or cross her arms over her chest and stand up.

Ms. E had no hospitalizations or falls during the year prior to her most recent assessment.[11] She did need to go to the emergency room once due to breathing trouble. She has been prescribed continuous oxygen at two to three liters per minute.

Prior to living in an ALF, Ms. E was involved in an incident in which she shot at a shadow in her apartment complex, called the police, and met them at her door holding a hammer.[12] She was admitted to the Alaska Psychiatric Institute in May 2010 due to a suicide

---

3 Ex. 1 p. 1; Ex. 2 pp. 2, 3; Ex. 5 p. 3; Ex. H pp. 4, 5; Ex. I p. 3.

4 Ex. H p. 5.

5 Ex. 2 pp. 3, 10, 19. Ms. E's current medications are aspirin, Abilify, acetaminophen, Advair, albuterol / ipatrope, amlodipine besylate, benztropine mesylate, clindBcin Hcl, Combivent, ducosate sodium, gabapentin, hydrocodone, levothyroxine sodium, Lorazepam, losartan potassium, metoprolol succinate, montelukast sodium, pantoprazole sodium, paroxetine Hcl, Simvastatin, Trazodone, and Vicodin.

6 Ex. H pp. 2 - 6 (source for all factual findings in this paragraph).

7 Ex. 2 p. 19; Ex. I p. 3.

8 Ex. 1 p. 1.

9 B P hearing testimony.

10 Ex. I p. 4 (source for all factual findings in this paragraph).

11 Ex. I p. 3 (source for all factual findings in this paragraph).

12 Ex. F p. 2.

attempt.[13] She was subsequently placed in a guardianship due to her mental impairments. Her guardian is the Office of Public Advocacy (OPA). OPA makes all significant financial, medical, and placement decisions on behalf of Ms. E.

Ms. E previously had continuity-of-care problems because she would see numerous doctors that those caring for her did not know about.[14] The Veterans Administration (VA) has since become her primary care provider and provides her with medical care, psychiatric care, and case management services. She now generally sees one doctor, one psychiatrist, and one clinician.[15] In addition to the care that she receives from the VA and the ALF staff, Ms. E receives care from Maxim two to three times each month for about an hour each visit.[16] Maxim monitors Ms. E's oxygen levels and manages her medications.

Ms. E generally spends her days reading, watching television, and sewing.[17] She also likes to go out window shopping.[18] She eats well, and can make good conversation, but sometimes inserts delusions and hallucinations into her conversations.[19]

B. Ms. E's Care Needs and Functional Abilities as Determined by the CAT

The Division first assessed Ms. E in November 2008.[20] She was found eligible for the Waiver Services program at that time based primarily on her need for extensive assistance with three Activities of Daily Living (ADLs).[21]

The assessment which resulted in the filing of this case was performed on November 30, 2012 by Moli Atanoa, R.N. of DSDS.[22] By agreement of the parties, a second assessment was performed by Ms. Atanoa on July 1, 2013, just prior to the hearings held in this case.[23] In both instances Ms. Atanoa 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

---

13 Exs. 5, 6, 7 (sources for all factual findings in this paragraph unless otherwise noted).
14 Ex. 6 p. 5 (source for all factual findings in this paragraph unless otherwise noted).
15 Ex. 7 p. 3.
16 Ex. 2 (source for all factual findings in this paragraph). Maxim is a home nursing services provider.
17 Ex. 2 p. 3.
18 Ex. 7. p. 6.
19 Ex. 2 p. 10.
20 Ex. F. p. 19.
21 Ex. F pp. 22 - 24.
22 Ex. E.
23 Ex. I.

results of the assessment.[24] In completing the July 2013 CAT, Ms. Atanoa reported that Ms. E has the following care needs and the following abilities and limitations:[25]

Functional Assessment:[26] Ms. Atanoa reported that Ms. E is able to touch her hands over her head and behind her back, and has a strong grip in both hands, but cannot touch her feet while sitting, and cannot place her hands across her chest and stand up.

Physical Therapy:[27] Ms. Atanoa reported that Ms. E is not currently receiving speech / language therapy, respiratory therapy, physical therapy, or occupational therapy, and that she does not currently have any prescriptions for walking, range of motion, foot care, or other care requiring hands-on assistance from a PCA. However, Ms. Atanoa did score Ms. E as receiving some form of therapy one day per week.

Bed Mobility:[28] Ms. Atanoa reported that Ms. E told her that she is not confined to a bed or chair and that she lies down, turns over, and sits up in bed by pushing and pulling on the side rails of her hospital-style bed. Ms. Atanoa reported that she observed Ms. E walk to her bedroom, sit down, and position herself on her bed, as well as get back out of bed, walk to the kitchen, and sit down in a chair, all without assistance and without any assistive device. Ms. Atanoa scored Ms. E as being independent with regard to bed mobility (scored 0/0; frequency 0/0).

Transfers:[29] Ms. Atanoa reported she was told by Ms. E that she can usually get to a standing position and transfer to and from beds and chairs without assistance, but that when her knees are hurting she needs help to stand. Ms. Atanoa reported that the ALF staff told her Ms. E needs help to get out of a rocking recliner in the living room because she sinks into the cushions. Ms. Atanoa reported that she observed Ms. E stand and transfer into and out of a bed and dining room chair independently, but that she saw the ALF staff help Ms. E get up from the rocking recliner (scored 2/2; frequency 1/7).

Locomotion:[30] Ms. Atanoa reported she was told by Ms. E that she was able to walk on her own, and go up and down the stairs on her own, but that she "sometimes" has someone with her when using the stairs in case she needs help. Ms. E told Ms. Atanoa that she had a cane and a walker but that they "disappeared." Ms. Atanoa reported that she observed Ms. E walk from the

---

[24] Exs. E, I.

[25] Ex. I pp. 1 - 31. The November 2012 and July 2013 assessments are substantially similar and reach the same result. However, at hearing, the parties focused on the most recent assessment of July 2013. Accordingly, this decision also cites to the most recent assessment.

[26] Ex. I p. 4.

[27] Ex. I p. 5.

[28] Ex. I p. 6.

[29] Ex. I p. 6.

[30] Ex. I p. 7.

kitchen table to her bedroom, into the bathroom, back into the bedroom, and then back to the kitchen, without physical assistance and without using assistive devices. Ms. Atanoa also reported that Ms. E was able to maneuver her oxygen tubing out of the way while walking (scored 0/0; frequency 0/0; with supervision when using stairs and going to medical appointments).

Dressing:[31] Ms. Atanoa reported she was told by Ms. E that she can usually dress and undress on her own, except that she needs help with her buttons, socks, and shoes. Ms. Atanoa did not actually observe Ms. E dressing, but noted that she had been observed to be able to raise her arms above her head, touch her hands behind her back, and reach down and touch her mid-shins while seated, and that she had a strong grip with both hands. Ms. Atanoa also reported that she saw Ms. E pick her purse up off the floor and flip through some paperwork (scored 2/2).

Eating:[32] Ms. Atanoa reported she was told by Ms. E that the ALF staff prepares and sets-up her meals, but that she can eat, drink, and take pills with water independently. Ms. Atanoa did not observe Ms. E eat or drink, but noted that Ms. E could raise her hands up to her face to adjust her oxygen tubing independently and had a strong grip with each hand (scored 0/1).

Toileting:[33] Ms. Atanoa reported she was told by Ms. E that she can transfer on and off the toilet by herself and clean herself, and that she sometimes wears pads due to occasional urinary incontinence. Ms. Atanoa wrote that the ALF staff told her that they sometimes assist Ms. E with post-toileting hygiene. Ms. Atanoa did not observe Ms. E toileting, but noted that Ms. E could transfer independently to and from lying, sitting, and standing positions; that she could walk independently; that she could pick something up from the floor while standing; that her arms were functional; and that she used no assistive devices (scored 1/1; frequency 0/0).

Personal Hygiene:[34] Ms. Atanoa reported she was told by Ms. E that she did not need any help to brush her dentures, wash and dry her face, or brush her hair. Ms. Atanoa did not observe Ms. E perform these personal hygiene tasks, but relied on Ms. E's functional assessment, discussed above (scored 0/0; frequency 0/0).

Bathing:[35] Ms. Atanoa reported she was told by Ms. E that she is able to get into and out of the shower using a rail for support, and that she then sits on a shower chair and washes herself independently. The ALF staff told Ms. Atanoa that they had to help Ms. E take showers, and that she showered three times per week. Ms. Atanoa did not observe Ms. E shower or bathe, but noted

---

31 Ex. I p. 8.
32 Ex. I p. 9.
33 Ex. I p. 9.
34 Ex. I p. 10.
35 Ex. I p. 11.

Ms. E's performance on the functional assessment (above), and that she had seen Ms. E perform other transfers independently. Ms. Atanoa also noted that the bathtub at issue was difficult to access and that the bath chair was hard to sit on (scored 3/2).

Professional Nursing Services:[36] Ms. Atanoa found that Ms. E has no current need for professional nursing services. Specifically, Ms. Atanoa found that Ms. E is currently receiving no injections, intravenous feedings, suctioning or tracheotomy care, or treatments for open lesions, ulcers, burns, or surgical sites.[37] Ms. Atanoa further found that Ms. E does not currently have any unstable medical conditions, and specifically, that she does not use a catheter or ventilator / respirator, is not comatose, and does not have an uncontrolled seizure disorder.[38] In addition, Ms. Atanoa found that Ms. E does not receive speech, respiratory, physical, or occupational therapy, and does not require professional nursing assessment, observation, and/or management at least once per month.[39] Ms. Atanoa also found that Ms. E 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, chest physical therapy by a registered nurse, or oxygen therapy performed by a nurse to treat an unstable chronic condition.[40] Finally, Ms. Atanoa found that Ms. E does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.[41] However, Ms. Atanoa found that Ms. E requires medication set-up and a routine check of her vital signs twice per month.[42]

Cognition:[43] Ms. Atanoa found that Ms. E has a short-term memory problem, but no long-term memory deficit. She also found that Ms. E is generally able to recall names and faces, where she is, the location of her room, and the current season. She rated Ms. E's cognitive deficits as creating "some difficulty in new situations only." She determined that Ms. E's memory and cognitive deficits do not require professional nursing assessment, observation, or management three days per week, or even once per month.

---

36 Ex. I pp. 13 - 14.

37 Ex. I p. 13. The CAT also includes the administration of oxygen as a professional nursing service, but only provides a score or points when the oxygen is newly prescribed (within the first 30 days of use) (Ex. I p. 13). That is not the situation in this case.

38 Ex. I p. 14.

39 Ex. I p. 14.

40 Ex. I p. 15.

41 Ex. I p. 15.

42 Ex. I p. 15.

43 Ex. I p. 16; Ex. J.

Based on her scoring of Ms. E's cognitive abilities in the CAT, Ms. Atanoa also completed the Supplemental Screening Tool (SST) for cognitive issues.[44] Ms. Atanoa found that Ms. E does not have difficulty remembering and using information, or require reminders or directions from others; that she speaks normally; that she does not wander; that her attitudes, habits and emotional states limit her living arrangements and companions; that she is sometimes physically or verbally aggressive or disruptive, or is sometimes extremely anxious or agitated, even after proper evaluation and treatment; but that she understands her own self-care needs. Ms. Atanoa did not enter scores on the SST for the sections on "memory for events," global confusion," or "spatial orientation." Ms. E received a total of two points on the SST.

Behavioral Problems:[45] Ms. Atanoa found that Ms. E does not wander, is verbally abusive one to three days per week but is not physically abusive; does not engage in socially inappropriate or disruptive behavior; and does not resist care. Ms. Atanoa also found that Ms. E does not need professional nursing assessment, observation, or management due to her behavioral problems.

Medication Management:[46] Ms. Atanoa reported that Ms. E does not prepare her own medications, but that she does self-administer her medications, and that Ms. E is "always compliant" in taking her medications.

Balance:[47] Ms. Atanoa found that Ms. E limits her activities due to a fear of falling, but had not fallen in the 180 days prior to the assessment.

Mood:[48] Ms. Atanoa found that Ms. E exhibited no indication of depression or anxiety, but had sleep issues up to five days per week.

Based on the foregoing CAT scores, Ms. Atanoa found that Ms. E 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 her activities of daily living (ADLs).[49]

C. Relevant Procedural History

Ms. E was originally found eligible for Waiver Services in 2008 based primarily on her need for extensive assistance with the ADLs of bed mobility, transfers, and toileting.[50] However, based on an assessment performed on November 30, 2012, the nurse-assessor (Ms. Atanoa) concluded that Ms. E is no longer eligible for participation in the Waiver Services

---

44 Ex. J p. 1.
45 Ex. I p. 17.
46 Ex. I p. 20.
47 Ex. I p. 23.
48 Ex. I p. 25.
49 Ex. I p. 29, Ex. I p. 30.
50 Ex. F pp. 22, 23.

program.[51] Accordingly, on March 21, 2013 the Division mailed a notice to Ms. E advising that Medicaid would cease paying for her waiver services after thirty days.[52] On April 11, 2013 Ms. E requested a hearing to contest the Division's decision.[53]

Ms. E's hearing was postponed to allow time for the Division to consider medical records which had not previously been provided, and to conduct an updated assessment. The assessment was conducted by Ms. Atanoa (who had also conducted the November 2012 assessment) on July 1, 2013.[54] This assessment again found that Ms. E is no longer eligible for the Waiver Services program.[55]

Ms. E's hearing was held on July 30, 2013 and September 20, 2013. Ms. E was represented by Tom Fernette of the Office of Public Advocacy. B P (manager of Ms. E's ALF) and M Q (Ms. E's primary caregiver at the ALF) participated in the hearing by phone and testified on Ms. E's behalf. Attorney Kimberly Allen and legal intern Alexis Cole represented the Division. Moli Atanoa, R.N. and Angela Hanley, R.N., both nurses employed by the Division, testified on behalf of the Division. Grace Ingrim, R.N. of Qualis Health testified by phone on behalf of the Division. The record was held open for post-hearing filings through October 4, 2013, at which time the record closed.

III. Discussion

A. Applicable Burden of Proof and Standard of Review

Pursuant to applicable state and federal regulations, the Division bears the burden of proof in this case.[56] The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.[57] The substantial evidence test is the standard of review that would be applied to factual determinations only *after* a final decision is made by the agency and an appeal is made to the Superior Court. Likewise, the reasonable basis test is the standard of

---

[51] Ex E p. 29; Ex. E p. 30.

[52] Ex. D. The Division's termination notice cited state statute AS 47.07.045; state Medicaid regulations 7 AAC 130.205, 7 AAC 130.210, 7 AAC 130.230, 7 AAC 140.505, 7 AAC 140.510, 7 AAC 140.515; federal statute 42 USC 1396r, and federal Medicaid regulations 42 CFR 435.1008, 42 CFR 435.1009, and 42 CFR 440.180 in support of its determination.

[53] Ex. C p. 1.

[54] Exs. I, J.

[55] Ex. I pp. 29, 30. The Division did not issue a new adverse action letter, relying instead on the original March 21, 2013 waiver services termination letter.

[56] 42 CFR § 435.930, 7 AAC 49.135.

[57] *See* 42 CFR 431.244; *Albert S. v. Dept. of Health and Mental Hygiene*, 891 A.2d 402 (2006); *Maryland Dept. of Health and Mental Hygiene v. Brown*, 935 A.2d 1128 (Md. App. 2007); *In re Parker*, 969 A.2d 322 (N.H. 2009); *Murphy v. Curtis*, 930 N.E.2d 1228 (Ind. App. 2010).

review for questions of law involving agency expertise only *after* a final decision is made by the agency and the case is appealed to the Superior Court.[58]

In this case, evidence was presented at hearing that was not available to the Division's reviewers. The administrative law judge may independently weigh the evidence and reach a different conclusion than did the Division's staff and/or Qualis, even if the original decision is factually supported and has a reasonable basis in law. Likewise, the Commissioner, as chief executive of the department, is not required to give deference to factual determinations or legal interpretations of his staff or his staff's contractors.

B. Relevant Medicaid Waiver Services Statutes and Regulations

Alaska's Medicaid Waiver Services Program provides eligible Alaskans with a choice between home and community based care, and institutional care.[59] 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).[60] For older adults and adults with disabilities (such as Ms. E), 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.[61] Intermediate nursing care is the lowest level of nursing care which can qualify an applicant or recipient for waiver services. Intermediate care is defined by 7 AAC 140.510 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 . . . .

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. In determining

---

58 *See Simpson v. State, Commercial Fisheries Entry Commission*, 101 P.3d 605, 609 (Alaska 2004).

59 7 AAC 130.200.

60 *See* 7 AAC 130.205(d)(2). Regulation 7 AAC 130.230 was repealed on July 1, 2013 (Register 206). However, it was the regulation in effect at the time the Division's November 30, 2012 assessment was conducted, and at the time the Division's termination notice dated March 21, 2013 was issued. Accordingly, 7 AAC 130.230, rather than its successors (7 AAC 130.211, 7 AAC 130.213, 7 AAC 130.215, 7 AAC 130.217, and 7 AAC 130.219, all effective July 1, 2013), applies.

61 7 AAC 130.230(b)(2).

whether an applicant requires intermediate care or skilled care, the Division must incorporate the results of the Consumer Assessment Tool (CAT) into its decision-making process.[62]

Before a recipient's waiver services may be terminated, the Division must conduct an annual assessment to "determine whether the recipient continues to meet the [applicable] standards . . . ".[63] To remove a recipient from the program, the assessment must find:

> that the recipient's condition has materially improved since the previous assessment; for purposes of this paragraph, "materially improved" means that a recipient who has previously qualified for . . .
>
> . . . .
>
> (C) an older Alaskan or adult with a physical disability [waiver], no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for wavier services.[64]

Based on AS 47.07.045's statutory definition of "materially improved" (above), the Division must show that the recipient no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement. The statute does not require the Division to compare the recipient's most recent assessment to any prior assessment. However, if comparing the current assessment to a prior assessment helps the Division determine whether the recipient still has a functional limitation or cognitive impairment, the Division may make that comparison. In addition, prior assessments may contain admissible evidence that could be used to support or controvert the Division's current assessment.

An assessment finding that a recipient's condition has materially improved must, pursuant to AS 47.07.045(b)(2), be reviewed by "an independent qualified health care professional under contract with the department." "Independent qualified health care professional" is defined, for purposes of those waiver categories which are *not* based on mental retardation or developmental disability, as "a registered nurse licensed under AS 08.68 who is qualified to assess" recipients of the waiver category at issue.[65]

---

62 7 AAC 130.230(b)(2)(B).

63 AS 47.07.045(b)(1).

64 As 47.07.045(b)(3).

65 In this case Ms. E asserts in passing, at page 3 of her post-hearing brief, that the Qualis review does not comply with AS 47.07.045 because Qualis' review "relied almost entirely on material submitted by SDS and [limited] the review to rewording [that] material." Ms. E's observations regarding the limitations of the Qualis review are well taken. However, the statute requires only a review of the Division's assessment, not an entirely new assessment. In other words, the statute does not impose any specific requirements as to the scope or nature of Qualis' review. Accordingly, the statute does not require anything more than a "paper review." Further, the hearing process provides ample opportunity for recipients to present additional information beyond that previously provided and to challenge the reliability of the information provided to Qualis.

C. 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), which is adopted by regulation at 7 AAC 160.900(d)(6). The activities 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.[66] 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).[67]

The second component of the CAT scoring system for ADLs is the *support code*. These codes rate the degree of assistance that a person requires in order to perform a particular ADL. The relevant 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).

D. Does Ms. E Require Intermediate or Skilled Nursing Care?

Based on the regulations (which incorporate 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 is to demonstrate a need for either skilled nursing care or intermediate level nursing care.[68] Because skilled care is a higher level of care than intermediate care, the minimum level of nursing care for which Ms. E 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 III(A), above).

---

[66] 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."

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

[68] 7 AAC 140.510, 7 AAC 140.515.

The evidence in the record demonstrates that Ms. E does not currently receive enough of the types of services which indicate a need for intermediate level care under 7 AAC 140.510. First, Ms. E does not currently receive any therapy provided by a qualified therapist. She was previously seeing a physical therapist at the VA once per week, but had to discontinue the therapy because of her knee pain (see Section II(A), above).

Second, Ms. E has no prescriptions requiring nursing assistance. A VA home health care nurse does visit Ms. E twice per month to set-up her med sets and to check her vital signs,[69] and this *is* an intermediate nursing need. However, in order to receive a score on the CAT, the frequency of these visits would have to be at least three times per week.[70]

Third, Ms. E does not require injections, intravenous feeding, any type of feeding tube, nasopharyngeal suctioning, tracheotomy care, or the treatment or dressing of wounds.[71] She *does* require the administration of oxygen.[72] However, the CAT awards points for the administration of oxygen only when the "recipient's condition warrants professional observation for a new/recent (within 30 days) condition."[73] In this case, Ms. E has been on oxygen since she was diagnosed with COPD and emphysema in 2010.[74] Accordingly, she does not receive a score for oxygen use.

Fourth, Ms. E is not comatose, is not on a respirator or ventilator, and does not use catheters.[75] She does not require venipuncture by a registered nurse and is not receiving chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.[76]

Finally, it is clear that Ms. E has cognitive issues. Ms. P testified credibly that Ms. E won't remember what happened at a doctor appointment one to two hours before; that although she can carry on a conversation, she cannot retain and process information; that although she has a guardian, she forgets and tries to schedule medical appointments herself; that she will tell stories about aliens from her days in military service; that she thinks people are conspiring against her; that she sometimes resists care and/or tries to get extra attention and medications; that she is paranoid and manipulative; and that she can be demanding and verbally abusive ("combative" is the word Ms. P used). Ms. P testified that Ms. E exhibits paranoia and

---

69 Ex. I, p. 15; Moli Atanoa hearing testimony.
70 Ex. I pp. 15, 29; Moli Atanoa hearing testimony.
71 Ex. I p. 13.
72 Ex. I p. 3; B P and M Q hearing testimony.
73 Ex. I p. 13.
74 Ex. E p. 3; Ex. I p. 3.
75 Ex. I p. 14.
76 Ex. I p. 15.

argumentative behavior at least three times per week. However, there is no evidence to indicate, and Ms. E does not even assert, that she requires professional nursing care to manage her cognitive issues.[77] Ms. E thus does not require intermediate level nursing care for her cognitive issues alone.[78]

In summary, the Division correctly determined that Ms. E does not qualify for waiver services based on a need for intermediate nursing care. The next issue is whether Ms. E qualifies for waiver services based on the extent of her need for assistance with ADLs.

E. Does Ms. E Qualify for Waiver Services Based on her Need for Assistance with her Activities of Daily Living?

The Consumer Assessment Tool's scoring summary is located at page 29 of the CAT.[79] As indicated by that summary, there are several scoring combinations through which one may 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, as measured by the CAT. 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.[80] 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.[81] 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, Ms. E does not receive or require nursing services at that frequency. 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, Ms. E 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

---

77 See Ms. E's post-hearing brief dated October 4, 2013 at p. 10.

78 It is possible, however, for Ms. E to attain a CAT score sufficient to retain her waiver services eligibility based on a combination of her cognitive / behavioral scores, and her scores regarding her need for assistance with activities of daily living. This is discussed in Section III(E), below.

79 Ex. I p. 29.

80 Ex. I p. 29. This is the primary basis on which Ms. E asserts that she qualifies for waiver services.

81 Ex. I p. 29.

the preceding section, Ms. E 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, Ms. E does not receive such therapy. Although Ms. Atanoa scored Ms. E as receiving some form of therapy one day per week, that frequency is not sufficient to score points under NF1(d).

The fifth/last way to meet NFLOC under NF1, under NF1(e), is to score a three (extensive assistance required) or a four (completely dependent) in the self-performance portion of three or more of the five "shaded" ADLs listed at page 18 of the CAT.[82] The CAT scores which the Division assigned to Ms. E with regard to the five "shaded" ADLs are: bed mobility: 0/0; transfers: 2/2; locomotion: 0/0; eating: 0/1; and toilet use: 1/1.[83]

Moli Atanoa, the nurse who performed Ms. E's 2012 and 2013 assessments, testified at hearing, and her testimony regarding Ms. E's ability to perform her ADLs was generally credible. Ms. E disagrees, however, with some of the ADL scores assigned by Ms. Atanoa, asserting that she requires extensive assistance with at least three of the shaded ADLs.[84] Ms. E's areas of disagreement are addressed below.

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.[85] 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.[86]

Ms. Atanoa reported that she was told that Ms. E is independent as to bed mobility. More importantly, Ms. Atanoa's assessment states that she actually *observed* Ms. E lie on her bed, reposition her body while in bed, sit up in bed, and get out of bed, independently (scored 0/0).

On the other hand, Ms. Q testified that Ms. E can sometimes get up by herself, but that most (80%) of the time she requires some level of assistance with bed mobility. Ms. Q testified that she generally provides bed mobility assistance to Ms. E two times per day, and that she provides extensive bed mobility assistance three or more times each week. Ms. Q's testimony, if accepted, would support a bed mobility score of 3/2.

---

82 Ex. I p. 18. This is the primary basis on which Ms. E asserts that she qualifies for waiver services.
83 Ex. I p. 18.
84 See Ms. E's post-hearing brief dated October 4, 2013 at pages 5 through 11.
85 Ex. I p. 6.
86 Ex. I p. 6.

Ms. Atanoa's testimony as to the degree of assistance that Ms. E requires with her ADLs was generally more credible than Ms. Q's, for several reasons. First, unlike many other nurse-reviewers, Ms. Atanoa (who testified in person at the first hearing) testified smoothly, in detail, and without looking at any notes or exhibits. Second, Ms. Q was "lead" to a significant degree by Ms. E's representative during her direct examination. Finally, Ms. Q admitted on cross-examination that she is not at all familiar with the standards for scoring the CAT, so her characterizations of assistance as "limited" or "extensive" may not coincide with the CAT's definition of those terms. Accordingly, the preponderance of the evidence indicates that Ms. E is independent with bed mobility.

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).[87] 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.[88] Ms. Atanoa reported that she was told by Ms. E that she can usually get to a standing position and transfer to and from beds and chairs without assistance, but that when her knees are hurting she needs help to stand. Ms. Atanoa reported that the ALF staff told her Ms. E needs help to get out of a rocking recliner in the living room because she sinks into the cushions. Ms. Atanoa reported that she observed Ms. E stand and transfer into and out of a bed and dining room chair independently, but that she saw the ALF staff help Ms. E get up from the rocking recliner (scored 2/2).

On the other hand, Ms. Q testified that Ms. E requires weight bearing transfers about four times per day, and she uses her legs, back, and arms to assist Ms. E with transfers. She stated that Ms. E will try to get up by herself sometimes, mostly from the dinner table, but that she still generally needs assistance.

Both Ms. Atanoa and Ms. Q reported that Ms. E needs assistance with transfers - the only issue is the *extent* of the assistance provided. Ms. Atanoa assigned her "limited assistance" score based on two fairly brief assessments.[89] Ms. Q's testimony that Ms. E's requires weight bearing assistance with transfers several times per day is based on longer

---

87 Ex. I p. 6.

88 Ex. I p. 6.

89 This is not meant to criticize Ms. Atanoa in any way. Rather, it is simply a limitation inherent in the waiver services (and Personal Care Assistant services) assessment process.

familiarity with Ms. E, and is therefore likely to be more accurate than an estimate by an assessor based on a short period of observation. Further, a finding that Ms. E requires extensive assistance with transfers is consistent with her recent x-rays showing advanced patellofemoral arthritis in both knees, and her orthopedic physician's recommendation that she undergo knee replacement surgery. Accordingly, the preponderance of the evidence indicates that Ms. E requires weight bearing assistance with transfers at least three times per week, and that this ADL should be 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.[90] 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.[91]

Ms. Atanoa reported that she was told by Ms. E that she was able to walk on her own, and go up and down the stairs on her own, but that she "sometimes" has someone with her when using the stairs in case she needs help. Ms. Atanoa reported that she observed Ms. E walk from the kitchen table to her bedroom, into the bathroom, back into the bedroom, and then back to the kitchen, without assistance and without using assistive devices (scored 0/0).

Ms. Q's testimony was generally consistent with Ms. Atanoa's. She stated that the ALF is fairly small, about 1700 square feet; that Ms. E usually uses a walker inside the house; and that the ALF staff usually keeps a wheelchair handy for "rest stops." The only real inconsistency in the testimony regarding locomotion is that Ms. Atanoa reported that Ms. E was able to maneuver her oxygen tubing out of the way while walking, while Ms. Q testified that someone must always assist Ms. E with her oxygen tank. However, it is not necessary to resolve this factual issue for purposes of this decision. This is because, even if Ms. E's oxygen tank and/or tubing must be positioned or maneuvered by the ALF staff, the CAT characterizes those activities as "set-up help" rather than as direct assistance to the recipient. Accordingly, even if this factual issue is resolved in Ms. E's favor, it does not change her self-performance score (which would remain at zero), and it would only increase her support score from a zero to a one. This would have no effect on Ms. E's waiver services scoring. In summary, given

[90] Ex. I p. 7.
[91] Ex. I p. 7.

Ms. E's use of a walker, the preponderance of the evidence indicates that she is independent 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."[92] 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.[93]

Ms. Atanoa reported she was told by Ms. E that the ALF staff prepares and sets-up all her meals, but that she can eat, drink, and take pills with water without assistance. Ms. Atanoa therefore scored Ms. E as being able to eat independently but with supervision (scored 0/1). In her post-hearing brief, Ms. E confirmed that she does not need physical assistance with eating.[94] Accordingly, this score is undisputed, and the preponderance of the evidence indicates that Ms. E 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."[95] 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.[96] Ms. Atanoa reported she was told by Ms. E that she can transfer on and off the toilet by herself and clean herself, and that she sometimes wears pads due to occasional urinary incontinence. Ms. Atanoa wrote that the ALF staff told her that they sometimes assist Ms. E with post-toileting hygiene. Ms. Atanoa scored Ms. E's need for assistance with toileting as requiring supervision and set-up help only (scored 1/1).

On the other hand, Ms. Q testified that she must help Ms. E sit down on the toilet, and that when Ms. E has a bowel movement, she must do the wiping. Then, when Ms. E is done, Ms. Q testified that she usually must physically pull Ms. E up off the toilet, to a standing position, providing weight bearing assistance in doing so.

---

92 Ex. I p. 9.
93 Ex. I p. 9.
94 Ms. E's post-hearing brief at page 9.
95 Ex. I p. 9.
96 Ex. I p. 9.

In resolving the factual dispute on this issue, the undersigned does not doubt that Ms. E told Ms. Atanoa that she can transfer on and off the toilet and clean herself independently. However, the undersigned finds it more likely than not that Ms. E requires extensive assistance with toileting, for the following reasons. First, the undersigned's experience indicates that waiver and PCA recipients often over-report their abilities with regard to toileting due to embarrassment. Second, it was determined in Section III(E)(1)(b), above that Ms. E requires extensive assistance with transfers due to the advanced patellofemoral arthritis in both her knees, and Ms. E's need for assistance with transfers would logically extend to transfers associated with toileting. Finally, there is no indication in the record that the ALF's bathrooms are equipped with elevated toilets or grab bars, and this makes it more likely that Ms. E would require weight bearing assistance to get on and off the toilet. Accordingly, the preponderance of the evidence indicates that Ms. E 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 Ms. E requires a greater degree of assistance than was found by the Division with regard to the "shaded" ADLs of transfers and toilet use. However, this review indicates that Ms. E 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 Ms. E does not require extensive assistance with regard to three or more of the "shaded" ADLs, she does not meet NFLOC under NF1(e).

2. *NF2*

An applicant cannot meet NFLOC under NF2 alone. However, under NF2 an applicant can obtain points towards qualifying for NFLOC which, when added to points obtained under *other* subsections of NF1 - NF6, can qualify the applicant for NFLOC. The first way (under NF2(a)) is to obtain a score of two or three with regard to 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 Ms. E requires any of these services, so she 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 Ms. E requires any of these therapies at least three days per week, so she 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 Ms. E 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 Ms. E requires any of these treatments, so she gets no points under NF2(d).

3. NF3

An applicant cannot meet NFLOC under NF3 alone. However, under NF3 an applicant can obtain points towards qualifying for NFLOC which, when added to points obtained under *other* subsections of NF1 - NF6, can qualify the applicant for NFLOC. The first way (under NF3(a)) is to have short-term memory problems. Ms. E has short-term memory problems, so Ms. E 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 Ms. E has short term memory problems, she is generally able to recall these particular items.[97] Accordingly, Ms. E 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. Ms. Atanoa found that Ms. E's cognitive skills for daily decision-making are only slightly impaired (when she is in an unfamiliar situation). However, the evidence in the record indicates that Ms. E's cognitive skills for daily decision-making are at least moderately impaired (see Section II(A), above). Further, it is not likely that a guardianship would have been established for Ms. E, at public expense, if her cognitive skills were not at least moderately impaired. Accordingly, Ms. E should receive one point under NF3(c).

The fourth/last way to obtain points (under NF3(d)) is to require *either* professional nursing care at least three days per week 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 the cognitive portion of the Division's

[97] Ex. I p. 16.

Supplemental Screening Tool (SST). Ms. E scored 3/2 as to two shaded ADLs, but she only received two points on the cognitive portion of the SST. Although the record indicates that a score of nine on the cognitive portion of the SST would be appropriate,[98] this does not help Ms. E's overall score, because she would need to receive a score of 13 or more on the cognitive part of the SST in order to receive one point under NF3(d). Accordingly, Ms. E 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, Ms. E received one point under NF3(a) and another under NF3(c), but received no points under the other two subsections. Accordingly, Ms. E 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, to receive a point.

Ms. Atanoa found that Ms. E does not wander, is verbally abusive one to three days per week but is not physically abusive; does not engage in socially inappropriate or disruptive behavior; and does not resist care. Ms. P testified that Ms. E engages in socially inappropriate or disruptive behavior or is verbally abusive more than three days per week. Ms. P's testimony on this issue is more credible because Ms. P spends much more time with Ms. E than does the assessor and can observe frequency of behavior first-hand. Accordingly, Ms. E should receive one point under NF4(a).

Under NF4(b), an applicant must *either* require professional nursing care *at least three days per week* 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 the behavioral portion of the Division's Supplemental Screening Tool (SST). Ms. Atanoa found that Ms. E does not require or receive professional nursing assessment, observation, or management of behavioral problems three or more days per week. This finding is supported by the record and was not seriously challenged.

---

98 *See* Section II(A) at pages 2 - 3, above.

Ms. E did receive scores of 3/2 with regard to two "shaded" ADLs. However, she did not receive a sufficiently high score on the SST. Ms. Atanoa gave Ms. E a score of three on the behavioral portion of the SST. Review of the record indicates that Ms. E should have received a score of eight on the behavioral portion of the SST.[99] However, this does not help Ms. E's overall score, because she would need to receive a score of 14 or more on the behavioral portion of the SST in order to receive one point under NF4(b). Accordingly, Ms. E 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, Ms. E'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, Ms. E does not require either an intermediate or skilled level of care as defined under the relevant regulations and the Consumer Assessment Tool. Further, her scores on the five "shaded" ADLs are too high to qualify her for waiver services on that basis. Accordingly, the Division's decision that Ms. E is no longer eligible for the Waiver Services program is affirmed.

Dated this 17th day of October, 2013.

Signed
Jay Durych
Administrative Law Judge

[99] *See* Section II(A) at pages 2 - 3, above.

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 25th day of November, 2013.

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

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