

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

In the Matter of:)	
)	OAH No. 13-1235-MDS
J G)	HCS Case No.
_____)	Medicaid ID No.

DECISION

I. Introduction

The issue in this case is whether J G is eligible to receive Medicaid Home and Community-Based Waiver Services (Waiver Services). Based on applicable regulations, an applicant is eligible to receive waiver services if he or she requires either skilled or intermediate level nursing care, or achieves a sufficiently high score on the Consumer Assessment Tool (CAT). The Division of Senior and Disabilities Services (DSDS or Division) conducted an assessment on May 29, 2013 and subsequently determined that Ms. G does not require skilled or intermediate level nursing care.¹ The Division also determined that Ms. G's CAT scores were not high enough to allow her to qualify for Waiver Services on that basis. This decision concludes that, while Ms. G clearly has significant cognitive and behavioral problems, and requires physical assistance with certain activities, she does not currently require skilled or intermediate level nursing care, and her CAT scores are not high enough to qualify her to receive Waiver Services on that basis. As a result, Ms. G is not presently eligible to participate in the Medicaid Home and Community-Based Waiver Services Program ("Waiver Services program").² The Division's decision denying Ms. G's application for participation in the Waiver Services program is therefore affirmed.

II. Facts

A. Ms. G's Medical Condition and Care Needs

Ms. G is an 89-year-old woman who currently lives in an assisted living facility (ALF).³ She grew up in No Name but has lived in Anchorage for the last 20 years.⁴ She wants to return

¹ Ex. D.

² However, as demonstrated by the analysis at pages 8-14 of this decision, Ms. G is not far from qualifying for Waiver Services under the CAT. Accordingly, Ms. G may wish to re-apply for Waiver Services in the future.

³ Ex. E1.

⁴ N B' hearing testimony.

to No Name.⁵ Her primary medical diagnosis is senile dementia with delusional features.⁶ Her secondary diagnoses include osteoarthritis and uterine prolapse.⁷

Ms. G has lived in her ALF since 2012.⁸ The ADL's staff assists Ms. G on a daily basis with reminding her when her diaper is wet or soiled, with toileting, and with bathing.⁹ Ms. G sometimes resists care, both by being argumentative, and also by physical resistance.¹⁰ She can get very upset and is sometimes quite disruptive.¹¹

N B is Ms. G's daughter.¹² She testified that Ms. G is a "sundowner" who is sometimes up all night and who wanders at night. She is a risk to herself because of her wandering.¹³ She is often confused; she was once found in the lobby of the ALF at about 7:30 p.m. waiting to go to lunch.¹⁴

M T is Ms. G's Care Coordinator.¹⁵ He testified that Ms. G does not have any intermediate or skilled nursing needs, but believes that she qualifies for Waiver Services based on the severity of her dementia and her need for extensive assistance with showering / bathing and with toileting.

Dr. C R, M.D. has been Ms. G's primary care provider for many years.¹⁶ On November 5, 2013 Dr. R wrote a letter to the Division which states in relevant part as follows:¹⁷

[Ms. G] struggles with a number of complex health issues which impact her ability to care for herself. She has significant loss of vision due to . . . cataracts. She also has significant difficulty with remembering simple things because of her dementia. She has struggled with joint pain and stiffness for years due [to] osteoarthritis [which has] limited her ability to walk and her ability to do activities with her hands. She has periodic difficulties with her breathing due to reactive airway disease . . . [T]he combination of all of these problems makes performing activities of daily living difficult if not impossible.

⁵ N B' hearing testimony.

⁶ Ex. E3.

⁷ Ex. E3.

⁸ N B' hearing testimony.

⁹ M T's hearing testimony.

¹⁰ M T's hearing testimony.

¹¹ M T's hearing testimony.

¹² N B' hearing testimony.

¹³ M T's hearing testimony.

¹⁴ N B' hearing testimony.

¹⁵ All factual findings in this paragraph are based on Mr. T's hearing testimony unless otherwise stated.

¹⁶ All factual findings in this paragraph are based on Ex. 1 unless otherwise stated.

¹⁷ Ex. 1.

B. Ms. G's Abilities and Impairments as Determined by the CAT

On May 29, 2013 Ms. G was assessed as to her eligibility for the Waiver Services program by Amanda McCrary, R.N. of DSDS.¹⁸ Ms. McCrary used the Consumer Assessment Tool or "CAT," a system for scoring disabilities that is described in detail in Part III.

During the assessment Ms. McCrary asked Ms. G to draw a clock.¹⁹ Ms. G, although wearing glasses, said she could not see well. She pushed the paper back to Ms. McCrary and told her to do it. She refused to try to reach above her head, stating she could not do so. She refused to walk across the room for purposes of the assessment, but did so later to ask about a book.

Ms. G has a strong grip in both hands, and is able to touch her feet while sitting.²⁰ However, she cannot touch her hands behind her back, or stand up with her arms crossed on her chest. To get up from a chair she pushes up using the arms of the chair.

Ms. McCrary determined, based on the assessment she conducted, that Ms. G has the following abilities and limitations with regard to her Activities of Daily Living (ADLs) (the numeric scores referenced are the CAT scores assigned by Ms. McCrary):²¹

Bed Mobility:²² Ms. McCrary reported (1) that Ms. G told her that she can roll over in bed by herself, and (2) that the ALF staff told her that Ms. G gets up by herself during the night and wanders. Ms. McCrary reported that she observed Ms. G get up from a chair independently by pushing off the arms of the chair, and walk across a room independently (scored 0/0; frequency 0/0).

Transfers:²³ Ms. McCrary reported that she observed Ms. G get up from a chair independently by pushing off the arms of the chair, and walk across a room independently. Ms. G carried her cane with her but drug it behind her and did not use it for weight bearing support (scored 0/0; frequency 0/0).

Locomotion:²⁴ Ms. McCrary reported that the ALF staff told her that Ms. G walks independently within the ALF both during the day and at night, but that she uses a wheelchair when going to medical appointments. Ms. McCrary scored Ms. G as

¹⁸ Ex. E1.

¹⁹ All factual findings in this paragraph are based on Ex. E4.

²⁰ All factual findings in this paragraph are based on Ex. E4.

²¹ Exs. E6 - E11.

²² All factual findings in this paragraph are based on Ex. E6.

²³ All factual findings in this paragraph are based on Ex. E6.

²⁴ All factual findings in this paragraph are based on Ex. E7.

independent with regard to in-home walking (scored 0/0; frequency 0/0), but as requiring limited assistance when going to medical appointments (scored 2/2; frequency 2/1).

Dressing:²⁵ Ms. McCrary reported that Ms. G told her that she is independent with dressing ("I can do everything"). Ms. McCrary noted in her assessment that Ms. G "has no diagnoses which would cause limited [range of motion] in [her upper extremities]," and that Ms. G was dressed in pants, shirt, and a coat at the time of the assessment (scored 0/0; frequency 0/0).

Eating:²⁶ Ms. McCrary reported that Ms. G told her that she is independent with eating ("I wouldn't let anybody feed me"), and that ALF staff told her that the ALF makes Ms. G's meals; that she eats a normal diet; and that she has no trouble chewing or swallowing (scored 0/1; frequency 0/0).

Toileting:²⁷ Ms. McCrary reported that the ALF staff told her that Ms. G can use the bathroom by herself, but that the staff checks on her to ensure that she performs post-toileting hygiene and that she puts her clothes back on correctly. Ms. McCrary reported that she attempted to discuss this topic with Ms. G but that Ms. G became agitated and dismissed her (scored 1/5; frequency 0/0).

Personal Hygiene:²⁸ Ms. McCrary reported that the ALF staff told her that Ms. G is physically able to perform her own personal hygiene independently, but that Ms. G requires supervision or cueing to make sure she completes the tasks (scored 5/5; frequency 0/0).

Bathing:²⁹ Ms. McCrary reported that the ALF staff told her that Ms. G can complete the physical aspects of showering independently, but that the staff must insist that she bathe / shower because she does not do so on her own (scored 5/5; frequency 0/0).

C. Relevant Procedural History

At some time prior to May 29, 2013 Ms. G's Care Coordinator submitted an application to the Division for Ms. G's participation in the Waiver Services program.³⁰ As discussed above, on May 29, 2013 a nurse employed by the Division conducted an in-person assessment using the CAT.³¹ The nurse found that Ms. G requires neither a nursing facility level of care,

²⁵ All factual findings in this paragraph are based on Ex. E8.

²⁶ All factual findings in this paragraph are based on Ex. E9.

²⁷ All factual findings in this paragraph are based on Ex. E9.

²⁸ All factual findings in this paragraph are based on Ex. E10.

²⁹ All factual findings in this paragraph are based on Ex. E11.

³⁰ Exhibit D1. The exact date of the submittal of Ms. G's application is not at issue in this case.

³¹ Exhibits E1 - E33.

nor extensive assistance with three or more ADLs, and therefore concluded that Ms. G is not eligible for participation in the Waiver Services program.³²

On August 8, 2013 the Division mailed a notice to Ms. G advising her that it had denied her application for Waiver Services.³³ The letter cited state Medicaid regulations 7 AAC 130.205, 7 AAC 140.505, 7 AAC 140.510, and 7 AAC 140.515 in support of its determination.³⁴ On September 3, 2013 Ms. G's daughter requested a hearing to contest the Division's denial of her mother's Waiver Services application.³⁵

Ms. G's hearing was held on November 5, 2013. Ms. G was represented by her daughter and legal guardian N B, who participated in the hearing by phone and testified on her mother's behalf. Ms. G's Care Coordinator, M T, also participated by phone and testified on Ms. G's behalf. The Division was represented by Angela Ybarra, who participated by phone. Amanda McCrary and Susan Findley, both registered nurses employed by DSDS, participated in the hearing by phone and testified on the Division's behalf. The hearing concluded on November 5 and the record closed on November 8, 2013.

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.³⁶ 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).³⁷ For older adults such as Ms. G, that level of care must be either "intermediate care" as defined by 7 AAC 140.510, or "skilled care" as defined by 7 AAC 140.515.³⁸ Intermediate level care is a lower standard of nursing care than skilled level nursing care, and so it is the easier of the two standards for an applicant to meet. Alaska Medicaid regulation 7 AAC 140.510 defines "Intermediate Care Facility Services" 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

³² Exhibits D, E32.

³³ Exhibit D.

³⁴ Exhibit D.

³⁵ Exhibit C.

³⁶ 7 AAC 130.200.

³⁷ 7 AAC 130.205(d)(2).

³⁸ 7 AAC 130.230(b)(2).

- (1) needed to treat a stable condition;
- (2) ordered by and under the direction of a physician, except as provided in (c) of this section; and
- (3) provided to a recipient who does not require the level of care provided by a skilled nursing facility.

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

Thus, in order to qualify for an intermediate level of care under 7 AAC 140.510, the applicant must, among other things, require professional medical or nursing supervision.

B. The Consumer Assessment Tool (CAT)

Pursuant to Alaska 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 Consumer Assessment Tool (CAT). The CAT is adopted into regulation by 7 AAC 160.900(d)(6).

The CAT numerical coding system has two components. The first component is the *self-performance code*. These codes rate how capable a person is of performing a particular activity of daily living (ADL).³⁹ 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).⁴⁰

The second component of the CAT scoring system is the *support code*. These codes rate the degree of assistance that a person requires for a particular activity of daily living (ADL). The possible codes are **0** (no setup or physical help required); **1** (only setup help required); **2** (one person physical assist required); **3** (two or more person physical assist required). Again, there are

³⁹ 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."

⁴⁰ See, for example, Ex. E at page 6.

additional codes that do not add to the service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).⁴¹

The ADLs 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 also scores certain other activities which are not technically ADLs (medication, vital signs/glucose levels, dressings/bandages/oxygen, sterile wound care, and documentation).

The CAT also scores certain activities known as "instrumental activities of daily living" (IADLs).⁴² These are light meal preparation, main meal preparation, light housekeeping, laundry (in-home), laundry (out-of-home), and shopping. The CAT scores one other IADL-like activity which is not technically an IADL (oxygen maintenance). Finally, the CAT scores professional nursing needs,⁴³ cognitive problems,⁴⁴ and behavioral problems.⁴⁵

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 made solely on an applicant's CAT score, and that other relevant factors, including the testimony of the applicant's treating physician, must be considered.⁴⁶ While these decisions are not binding here, they are persuasive because they allow the qualifying criteria expressed in the Division's regulations to be harmonized with the qualifying criteria expressed in the CAT.

D. Ms. G Does Not Require Intermediate Nursing Care as Defined by Alaska Medicaid Regulation 7 AAC 140.510

Ms. G can qualify for the Waiver Services program if she requires intermediate level nursing services. The testimony of Ms. B and Mr. T establishes that Ms. G needs a substantial amount of supervision and cueing in order to ensure her safety.

⁴¹ See, for example, Ex. E at page 6.

⁴² The federal Medicaid statutes state that "instrumental activities of daily living" includes (but is not limited to) meal planning and preparation, managing finances, shopping for food, clothing, and other essential items, performing essential household chores, communicating by phone or other media, and traveling around and participating in the community. See 42 USC § 1396n(k)(6)(F). In Alaska, pursuant to AS § 47.33.990(11), "instrumental activities of daily living" means "doing laundry, cleaning of living areas, food preparation, managing money and conducting business affairs, using public transportation, writing letters, obtaining appointments, using the telephone, and engaging in recreational or leisure activities."

⁴³ Exs. E13 - E15.

⁴⁴ Exs. E16 - E17.

⁴⁵ Exs. E18 - E19.

⁴⁶ See *Bogie v. State, Division of Senior and Disabilities Services*, Superior Court Case No. 3AN-05-10936 (decision dated August 22, 2006); *Casey v. State, Division of Senior and Disabilities Services*, Superior Court Case No. 3AN-06-6613 (decision dated July 11, 2007).

The Division did not dispute the fact that Ms. G requires a substantial amount of supervision.⁴⁷ The Division asserts, rather, that Ms. G does not require professional medical or nursing supervision as defined by 7 AAC 140.510(b).

The record reflects that, as of the date of the hearing, it was not necessary for a nurse or other medical professional to review or monitor the provision of services to Ms. G. Further, Ms. G's Care Coordinator specifically acknowledged at hearing that Ms. G currently has no nursing needs, and that she was seeking to qualify for Waiver Services based on her need for assistance with her ADLs. Because Ms. G does not require professional medical or nursing supervision, she does not satisfy the intermediate level of care criteria as stated in 7 AAC 140.510. However, this does not end the inquiry because, under the CAT, an applicant can qualify for Waiver Services, even without requiring professional medical or nursing supervision, if the applicant's CAT scores in other areas are sufficiently high.

E. Ms. G does not Qualify for Waiver Services Based on Her Cognitive Impairments, Behavioral Problems, and/or Need for Assistance With ADLs

The Consumer Assessment Tool's scoring summary is located at page 31 of the CAT.⁴⁸ As indicated by that scoring summary, there are numerous scoring combinations through which one may qualify for Waiver Services. Some of these combinations (discussed below) allow a person to meet the Nursing Facility Level of Care (NFLOC), without a need for professional nursing services, based on the level of assistance which the person requires in order to perform their ADLs. The CAT divides these possible combinations into six different areas, designated "NF1" through "NF6."

1. NF1

There are five different ways to meet NFLOC under NF1. The first way (under NF1(a)) is to require nursing services seven days per week. Ms. G did not assert that she satisfies NF1(a), and the record indicates that she does not.⁴⁹ The second way (under NF1(b)) is to require use of a ventilator or respirator at least three days per week. Ms. G did not assert that she satisfies NF1(b), and the record indicates that she does not.⁵⁰ The third way (under NF1(c)) is to require care due to uncontrolled seizures at least once per week. Ms. G did not

⁴⁷ See hearing testimony of Amanda McCrary, R.N. and Susan Findley, R.N.

⁴⁸ Ex. E31.

⁴⁹ Exs. E13, E14.

⁵⁰ Ex. E14.

assert that she satisfies NF1(c), and the record indicates that she does not.⁵¹ The fourth way (under NF1(d)) is to receive some form of therapy at least five days per week. Ms. G did not assert that she satisfies NF1(d), and the record indicates that she does not.⁵²

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 "shaded" ADLs listed at page 20 of the CAT.⁵³ The "shaded" ADLs are bed mobility, transfers, locomotion, eating, and toilet use. Ms. G asserts that she meets NFLOC under NF1(e). The CAT scores which the Division gave Ms. G with regard to the "shaded" ADLs are bed mobility: 0/0; transfers: 0/0; locomotion: 0/0; eating: 0/1; and toileting: 1/5.⁵⁴ Ms. G asserts, however, that she requires extensive assistance by one person (*i.e.*, a score of 3/2) as to three or more of these ADLs.

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.⁵⁵ 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.⁵⁶

Ms. McCrary's assessment reports that Ms. G herself stated that she does not require any assistance to reposition her body while in bed.⁵⁷ Further, the fact that Ms. G is able to get out of bed by herself to wander around at night indicates that she is independent as to bed mobility. Accordingly, the preponderance of the evidence indicates that Ms. G is independent with regard to bed / body mobility (CAT score 0/0).

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).⁵⁸ In order to receive a self-performance score of three (extensive assistance)

⁵¹ Ex. E14.
⁵² Ex. E5.
⁵³ Ex. E20.
⁵⁴ Ex. E20.
⁵⁵ Ex. E6.
⁵⁶ Ex. E6.
⁵⁷ Ex. E6.
⁵⁸ Ex. E6.

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.⁵⁹

Ms. McCrary reported that she observed Ms. G rise independently from her chair,⁶⁰ indicating that Ms. G is independent as to transfers. This was not disputed by Ms. G's witnesses at hearing. Accordingly, the preponderance of the evidence indicates that Ms. G is independent as to transfers (CAT score 0/0).

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.⁶¹ 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.⁶²

Ms. McCrary reported that she observed Ms. G walk across a room without assistance, and that she was told by ALF staff that Ms. G walks around the ALF independently during the day and at night.⁶³ This was not disputed by Ms. G's witnesses at hearing. Accordingly, the preponderance of the evidence indicates that Ms. G is independent as to locomotion (CAT score 0/0).

d. Eating

For purposes of Waiver Services eligibility, eating is defined as how a "person eats or drinks regardless of skill."⁶⁴ 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.⁶⁵

Ms. McCrary reported she was told by Ms. G that she can feed himself, and that this was confirmed by the ALF staff.⁶⁶ This was not disputed by Ms. G's witnesses at hearing. Accordingly, the preponderance of the evidence indicates that Ms. G can eat independently, requiring only assistance with set-up (CAT score 0/1).

⁵⁹ Ex. E6.
⁶⁰ Ex. E6.
⁶¹ Ex. E7.
⁶² Ex. E7.
⁶³ Ex. E7.
⁶⁴ Ex. E9.
⁶⁵ Ex. E9.
⁶⁶ Ex. E9.

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."⁶⁷ To receive a self-performance score of three (extensive assistance) as to toilet use, a person must receive either weight bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁶⁸

Ms. McCrary reported that the ALF staff told her that Ms. G does not require assistance to get to the toilet or to transfer on and off the toilet, but that they needed to check her afterwards "to be sure she remembers to clean herself and has her clothes back on correctly."⁶⁹ Ms. G's Care Coordinator testified that the ADL staff assists Ms. G on a daily basis with toileting and reminds her when her diaper is wet or soiled.⁷⁰ This indicates that the ALF staff provides Ms. G with *some form* of help with toilet use. However, it is not clear that the ALF staff provides hands-on physical assistance as opposed to just supervision and cueing. In order to receive a self-performance score of two (limited assistance) with regard to toilet use, a person must receive some form of hands-on assistance three or more times per week.⁷¹ Accordingly, the preponderance of the evidence indicates that Ms. G requires only supervision and cueing for the ADL of toileting (CAT score 1/5).

f. Summary - Degree of Assistance Required With Shaded ADLs

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. Independent review by the undersigned indicates that Ms. G does not require extensive assistance as to any shaded ADL.⁷² Because Ms. G does not require extensive assistance with regard to three or more of the "shaded" ADLs, she does not qualify for Waiver Services on that basis.

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

⁶⁷ Ex. E9.

⁶⁸ Ex. E9.

⁶⁹ Ex. E9.

⁷⁰ M T's hearing testimony.

⁷¹ Ex. E9.

⁷² Mr. T asserted at hearing that Ms. G requires more assistance with bathing than was found by the Division. However, even if this is true, it would not affect Ms. G's CAT score, because bathing is not one of the 5 "shaded" ADLs considered when determining eligibility for Waiver Services.

other subsections of NF1 - NF6, can qualify the applicant for NFLOC. The first way (under NF2(a)) is to obtain a score of two or three with regard to injections and/or IV hookups, feeding tubes, tracheotomy care or nasopharyngeal suctioning, applying treatments or dressings, administering oxygen, observing, assessing, and managing unstable conditions, catheter management, and/or care required due to a comatose condition. The record does not show that Ms. G requires any of these services,⁷³ so she gets 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. G requires any of these therapies,⁷⁴ 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, veni-puncture, or barrier dressings for ulcers, at least three days per week. Again, however, the record does not show that Ms. G requires any of these procedures,⁷⁵ so she gets no points 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, however, the record does not show that Ms. G requires any of these treatments,⁷⁶ 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. The parties agree that Ms. G has short-term memory problems, and Ms. G received the maximum score (one) in this category.⁷⁷

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. Ms. G was not able to recall any of these specific items of information during the assessment, and she received the maximum score (one) in this category.⁷⁸

⁷³ Exs. E13, E14.

⁷⁴ Exs. E5, E15.

⁷⁵ Ex. E15.

⁷⁶ Ex. E15.

⁷⁷ Exs. E16, E31.

⁷⁸ Exs. E16, E31.

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. The Division agreed that Ms. G is severely impaired as to her cognitive skills for daily decision-making, and she received the maximum points available (one) under this subsection.⁷⁹

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 the Division's Supplemental Screening Tool (SST) for cognitive issues. The Division found that Ms. G does not require professional nursing care to manage her cognitive problems.⁸⁰ This finding is supported by the record, and Ms. G's witnesses did not assert otherwise. Ms. G received a score of 14 on the SST as to her cognitive problems. Accordingly, she satisfies that portion of the test. However, as discussed above, Ms. G did not receive a score of 2/2 as to any shaded ADL. Accordingly, Ms. G 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. G received one point under subsections (NF3(a) through NF3(c)), but scored a zero at NF3(d). Accordingly, Ms. G 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. The Division found that these behaviors occur with the required frequency.⁸¹ Accordingly, Ms. G gets one point 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 the portion of the Division's Supplemental Screening Tool (SST) dealing with

⁷⁹ Exs. E16, E31.

⁸⁰ Ex. E16.

⁸¹ Exs. E18, E31.

problem behavior. In this case, although the Division found that Ms. G has significant behavioral problems, it found that she does not require professional nursing care due to those behavioral problems.⁸² This finding is supported by the record, and Ms. G's witnesses did not assert otherwise.

Likewise, Ms. G failed to score a 2/2 or above as to any shaded ADL, and so she fails to satisfy that part of the test.

The final issue under NF4(b) concerns the Division's scoring on the behavioral portion of the SST at page 19 of the assessment.⁸³ The Division gave Ms. G a score of 13 on the behavioral portion of the SST. Review of the record indicates that the behavioral portion of the SST was scored correctly as to sleep patterns, wandering, behavioral demands on others, and awareness of needs / judgment.⁸⁴ However, on the issue of whether Ms. G is a danger to herself or others, the assessor scored Ms. G with a zero ("is not disruptive or aggressive").⁸⁵ But, the assessment itself indicates that Ms. G is sometimes disruptive.⁸⁶ Further, Mr. T testified that Ms. G sometimes resists care, both by being argumentative, and also by physical resistance, and that she can get very upset and is sometimes quite disruptive.⁸⁷ Accordingly, the preponderance of the evidence indicates that this item should have been scored as a two ("is sometimes . . . disruptive or aggressive") instead of a zero. Adjusting this score results in a total score of 15 on the behavioral portion of the SST. However, Ms. G failed to score at least a 2/2 as to any shaded ADL. Accordingly, Ms. G receives no points for NF4(b), and in turn Ms. G receives no "overall" points for NF4.

5. NF5

At NF5, the 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. In this case, Ms. G scored no "overall" points at NF1, NF2, NF3, or NF4, giving her a total score of zero at NF5. Accordingly, the analysis in this case does not proceed to NF6, and Ms. G is considered currently ineligible for Waiver Services based on her CAT scores.

⁸² Ex. E18.

⁸³ Ex. E19.

⁸⁴ Ex. E19.

⁸⁵ Ex. E19.

⁸⁶ Exs. E4, E9.

⁸⁷ M T's hearing testimony.

IV. Conclusion

The Division correctly determined that Ms. G does not currently require skilled or intermediate level nursing services as those are defined by the applicable regulations. The Division also correctly determined that Ms. G's CAT scores are currently not high enough to allow her to qualify for Waiver Services on that basis. Accordingly, the Division's decision that Ms. G is not currently eligible for the Waiver Services program is affirmed.

Dated this 10th day of December, 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 20th day of December, 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.]