

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

In the Matter of)
)
 W J)
_____)

OAH No. 13-1477-MDS
Agency No.

DECISION

I. Introduction

W J has been receiving services under the Medicaid Home and Community-based Waiver program. The Division of Senior and Disabilities services reassessed Ms. J in May 2013. The Division determined that she was no longer eligible for Waiver services because she did not require skilled or intermediate level nursing care. Ms. J appealed this decision, and offered evidence that Ms. J' condition had deteriorated between the date of the decision and the date of the decision terminating her Waiver services. The evidence shows that Ms. J' memory and hip pain have deteriorated since May. At this time, however, the evidence does not show that she meets the requirements for Waiver services. Accordingly, the termination of her Waiver services is affirmed.

II. Facts

W J is a 73-year woman who suffers from a variety of ailments. Her primary diagnosis is chronic obstructive pulmonary disease (COPD).¹ Secondary diagnoses include Rheumatoid Arthritis, and disorder of bone and cartilage.² She experiences considerable pain in her hips, and takes medication for pain.³

In 2007, Ms. J lived alone.⁴ Due to declining health and dementia, she then moved in with her daughter, N J. N is a widow who works long hours and has to care for her daughter. When Ms. J' health declined even further, she moved into the No Name Assisted Living home, which is where she currently lives. N holds a power of attorney for Ms. J.⁵

¹ Division Exhibit E at 3.

² ___ testimony; Division Exhibit E at 3.

³ J Exhibit (*e.g.*, Outpatient Office/Clinic Note (Sarah Smith; 10/3/2013); Medical Clinic Notes (Dr. K. Norris; 9/5/2013)); Division Exhibit Russell-Brown testimony.

⁴ J Exhibit (letter from N J at 1 (Oct. 14, 2013)).

⁵ *Id.*; N J testimony.

This hearing involves Ms. J’ eligibility for the Medicaid Home and Community-Based Waiver Services program.⁶ Under this program, if an eligible applicant is determined to have “a functional limitation or cognitive impairment that would result in the need for nursing home placement” the applicant may elect to receive home or community-based services in lieu of placement in a nursing home.⁷ To determine eligibility for Waiver services, the division employs a structured assessment tool called the “Consumer Assessment Tool,” better known as the “CAT.”⁸ Under the CAT, an applicant’s need for assistance to perform activities of daily living (“ADLs”) such as eating, dressing, and walking, are scored on two scales that assess the degree of assistance required. The CAT also scores other aspects of the applicant’s life, including the applicant’s need for assistance on instrumental activities of daily living, (activities like cooking, housework, and managing finances), need for skilled or intermediate nursing care, cognitive ability, and tendency to engage in problem behaviors.

Ms. J was assessed by the Division of Senior and Disability Services in 2012 for eligibility for Waiver Services.⁹ Under the 2012 CAT assessment, Ms. J was determined to be eligible for Waiver services.¹⁰ The basis for this decision was that Ms. J required “[a]dministration of oxygen on a regular and continuing basis seven days per week” and at that time, Ms. J’ “condition warrant[ed] professional observation for a new/recent (within 30 days) condition.”¹¹

The issue in this case is the 2013 CAT. On May 10, 2013, Mr. J was reassessed by Michelle Russell-Brown, RN. At the start of the assessment, Ms. Russell-Brown administered a functional physical assessment that assessed Ms. J’ range of motion and grip strength as good. Ms. Russell-Brown also administered a cognition test, and found that Ms. J was alert and oriented, with a good short-term memory.¹² She was able to draw a clock, and knew what season it was.¹³ Ms. Russell-Brown testified that the results of these assessments were useful in validating other findings that she made when administering the CAT.¹⁴

⁶ Division Exhibit D.

⁷ See AS 47.07.045.

⁸ Division Exhibit E. See also 7 AAC 160.900(d)(6) (adopting CAT by reference).

⁹ Division Exhibit D.

¹⁰ Division Exhibit F at 30.

¹¹ *Id.* at 13.

¹² Division Exhibit E at 4; Russell-Brown testimony.

¹³ *Id.*

¹⁴ Russell-Brown testimony.

Ms. Russell-Brown then proceeded to assess Ms. J' activities of daily living. In the activities of bed mobility, transfers, locomotion, dressing, and eating, Ms. Russell-Brown scored Ms. J as either independent or needing only supervision/setup help from a caregiver.¹⁵ In toilet use, Ms. Russell-Brown, relying on an interview with the staff at No Name ALH, determined that Ms. J requires limited one-person assistance because staff assists with the cleansing. In bathing, Ms. Russell-Brown scored Ms. J as needing physical help in part of bathing activity.

In the instrumental activities of daily living, in telephone use, Ms. J was scored as "independent with difficulty." In meal preparation, housework, managing finances, grocery shopping, and laundry, Ms. J was scored as needing and receiving physical assistance.¹⁶

The CAT was reviewed by another nurse within the Division, Sam Cornell. Mr. Cornell noted that "no skilled or intermediate level care needs" were identified, and that Ms. J had "stabilized on her chronic use of oxygen."¹⁷ He concluded that "[s]he continues to have some needs, but those needs do not rise to the level of institutional care."¹⁸ He concluded that "[h]er needs for activity completion can be met by a personal care assistant (PCA), and noted that if she is not already receiving PCA services, "she has the option of applying for PCA services, which we believe would adequately meet her current needs."¹⁹

Following Mr. Cornell's review, the CAT was reviewed by a nurse and doctor in Washington State who are not employed by the State of Alaska.²⁰ This review also affirmed the determination that Ms. J did not qualify for waiver Services.²¹ On October 9, 2013, the Division sent a letter to Ms. J terminating her eligibility for payment for Waiver services.²² Ms. J appealed.²³

A telephonic hearing was held on December 9, 2013. N J presented the case on behalf of her mother. Ms. J produced additional documentation for the record, including letters from several individuals and medical charts for the doctor visits and hospitalizations that Ms. J had experienced since the May assessment and before the October termination. N and W J testified,

¹⁵ Russell-Brown testimony; Division Exhibit E at 6-11.

¹⁶ Division Exhibit E at 26.

¹⁷ Division Exhibit F at 40.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Division Exhibit G.

²¹ *Id.*

²² Division Exhibit D.

²³ Division Exhibit C.

as did F B, the owner and operator of the No Name Assisted Living Home. Angela Ybarra and Anita Halterman presented the case for the Division, and testimony was received from Ms. Russell-Brown.

The medical records confirm N's and Ms. B's testimony that Ms. J' hip pain has increased since the May assessment, resulting in several clinic visits and one emergency room visit.²⁴ The records also show that she was hospitalized for COPD and had two emergency room visits for COPD shortly before the May assessment.²⁵

During the testimony, the parties agreed that Ms. J is able to eat without assistance and that she needs limited assistance when using the toilet.²⁶ They had somewhat different views, however, about Ms. J' ability to transfer and walk, and about her cognitive ability.²⁷ First, with regard to Ms. J' ability to transfer—that is, get in and out of a bed or chair—her worsening hip pain has affected her ability to make these transfers. Ms. B explained that the steroid treatments being received by Ms. J are widely spaced, and only effective for a time. When that wears off, she will need physical assistance in and out of bed 3-4 times per week, depending on her pain. Ms. B confirmed that in the last seven days, Ms. J needed physical assistance to get out of bed 3-4 times.

With regard to Ms. J' ability to walk, Ms. J testified that she could only walk a little ways before she had to sit down on her walker.²⁸ Then she would be pushed or have to wait for the pain to go away until she could walk again. N testified that when Ms. J goes out, she will usually use a wheelchair, although sometimes she will use a walker, particularly if she is catching a bus. Ms. J is not strong enough to propel her wheel chair by herself, and must be pushed by an attendant.²⁹ Ms. B explained, however, that inside the house, Ms. J only needs to walk about 15 feet between her bedroom and the dining room. Even with a walker Ms. J is

²⁴ J Exhibit (Medical Clinic Notes of Dr. Norris for September 5, August 15, and July 18, 2013, visits to clinic for hip/back pain; Emergency Department Note of PA-C Corinth, August 5, 2013, for emergency room visit for hip pain).

²⁵ J exhibit medical notes of May 7, May 4, and April 30, 2013.

²⁶ Division Exhibit E at 9. In the terminology of the CAT, Ms. J had a support score of one for eating and two for toileting.

²⁷ A fourth issue was the score on dressing. The testimony proved that Ms. J needs physical assistance to get dressed because on most days she is unable to pull her pants up without assistance. This issue would be important in a personal care assistance case, but in an appeal involving Waiver services, the score on the ADL of dressing is not one of the items that affects eligibility for the services.

²⁸ W J testimony.

²⁹ N J testimony.

unsteady and a fall risk, and an attendant will frequently walk alongside her, but no actual physical assistance is provided.³⁰

The third factual dispute in this case involves Ms. J’ dementia and memory. Both Ms. B and N testified that Ms. J will have memory lapses. She will forget to use her walker, and will ask to take medications that she has already taken. Sometimes she does not recognize people whom she knows.³¹ The extent of Ms. J’ memory and cognitive deficiencies are further discussed below.

III. Discussion

At the outset, it is important to establish that this hearing is not about whether Ms. J placement at the No Name Assisted Living Home is appropriate. This hearing is about whether Ms. J’ scores on the CAT qualify her for Waiver services.³² The CAT tells us whether a person needs nursing home care, which is a very different inquiry from whether a person should be in an assisted living home.³³ Thus, even if N can prove that her mother needs to be at No Name—and the evidence in this record indicates that assisted living is appropriate for Ms. J—it will not qualify Ms. J for Waiver services unless Ms. J’ CAT scores indicate that she is eligible for Waiver services.

The CAT has several different tests under which a person can qualify for Waiver services. These tests are found on page 29 of the CAT. The various tests are abbreviated as “NF.1, NF.2,” and so on, up to “NF.6.” Under NF.1, a person can qualify if any of the questions are answered “yes.” Under the other tests, the scores a person receives can be aggregated for a “total nursing and ADL Needs Score” (which is called “NF.7”). If this score is three or more, a person qualifies for waiver services.

Here, the following three issues could change Ms. J’ “NF” scores:

³⁰ B testimony.

³¹ B testimony; N J testimony.

³² Before the Division can terminate a recipient’s Waiver services, the Division is required to prove that the recipient has materially improved. AS 47.07.045(b)(3). A recipient has materially improved if the recipient does not have “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 waiver services.” *Id.* Under regulation, the determination of when a person has a limitation or impairment that would result in the need for nursing home placement depends on the outcome of the person’s CAT assessment. 7 AAC 130.211; 7 AAC 130.213; 7 AAC 160.900(d)(6).

³³ Waiver services recognize that some people can receive care at home or in an assisted living home that obviates the need for nursing-home care.

- Ms. J’ use of oxygen;³⁴
- The amount of assistance Ms. J needs to perform the ADLs of locomotion and transferring;³⁵ and
- Ms. J’ cognitive abilities.³⁶

These three issues are discussed below.

1. Ms. J’ use of oxygen

A person may qualify for Waiver services if a person receives “[a]dministration of oxygen on a regular and continuing basis when recipient’s condition warrants professional observation for a new/recent (within 30 days) condition.”³⁷ Ms. J’ need for oxygen made her eligible for Waiver services in 2012. Now, however, although Ms. J continues to require oxygen, her condition is not new or recent. As Mr. Cornell noted, her use of oxygen has stabilized.³⁸ Therefore, Ms. J use of oxygen does not qualify her for Waiver services.

2. Transferring and locomotion

Ms. B testified that, given the worsening of Ms. J’ hip pain, three or four times per week Ms. J is unable to get in or out of bed without physical assistance. This assistance involved more than merely guiding of limbs.³⁹ Therefore, Ms. J should be scored as needing extensive assistance with transfers.⁴⁰

The Division argued that the Ms. J did not need this degree of support on May 10, 2013. The Division believes that Ms. J should have filed a change of information form, and without that form, Ms. J is ineligible to introduce new evidence that contradicts the May 10 assessment.

The Division’s point is well-taken—if it had been aware of Ms. J’ changes in condition, it could have addressed them, and adjusted the CAT if necessary. But as the Commissioner held in

³⁴ Use of oxygen could affect the determination under NF.1a or NF.2a. Division Exhibit E at 29.

³⁵ ADLs that involve physical or structural problems (the “shaded” ADLs in section E of the CAT) are relevant to NF.1e , NF.3d, NF.4b, and NF.6. Toilet use is also a structural/physical ADL, and the parties agree that Ms. J requires limited assistance in toilet use. Eating and bed mobility are also physical/structural ADLs, but the parties agree that Ms. J can eat without assistance and turn in bed without assistance, so the CAT scores on those two ADLs are not at issue here.

³⁶ Ms. J’ cognition/dementia is considered under NF.3.

³⁷ Division Exhibit E at 13.

³⁸ Division Exhibit F at 40.

³⁹ B testimony.

⁴⁰ This would translate to a self-performance score of “3” on page 6 of the CAT because it is weight-bearing support that occurs three or more times per week. Division Exhibit E at 6.

the case *In re TC*, the record is not closed until the denial letter is sent.⁴¹ No regulation prevents a person from introducing new evidence at the hearing. Given that change is often gradual, a recipient and the recipient's family or caregivers might not be aware of the significance of the change or differing view of the condition until they are preparing for hearing. As required under *In re T.C.*, the respondents may introduce new evidence, and the evidence of changes in condition up to the date of the denial letter will be considered. Therefore, Ms. J' transfers should be scored as needing extensive assistance.

With regard to Ms. J' locomotion, the evidence showed that out of the house, Ms. J receives physical assistance, either in pushing the wheelchair or pushing the walker when Ms. J tires and sits.⁴² Inside the house, however, Ms. J does not receive any physical assistance. She is able to walk independently with her walker for the short distances required. Because she is a fall risk, a caregiver will supervise her walking, but no physical assistance is actually provided.

For purposes of eligibility for Waiver services, the activity that matters is walking inside the home.⁴³ Although Ms. J needs physical assistance for locomotion outside the home, inside the home, she can walk with her walker without having a caregiver physically assist her. Therefore, she is properly scored as needing only supervisory assistance for this activity.⁴⁴

In sum, Ms. J needs limited assistance with two structural/physical ADL—transferring and toilet use. For other structural/physical ADLs, she needs only supervisory assistance. This is not sufficient to qualify her under the automatic qualification provision of NF.1e, which would require extensive assistance in three structural/physical ADLs. These scores may be relevant under a different test—one which aggregates different scores. Whether this level of support for these two ADLs will affect her eligibility under a different section of the CAT depends on Ms. J' scores under the cognition section (NF.3) of the CAT. Ms. J' cognition/dementia is considered next.

⁴¹ *In re T.C.*, OAH No. 13-0204-MDS at 7 (Commissioner of Dep't of Health and Soc. Servs., 2013). As the commissioner noted in *In re T.C.*, the Division's willingness to consider new information during this time period is an indication that the record is not closed. *Id.* Here, Ms. J' witnesses testified that Ms. J hip pain had worsened before the denial letter was sent on October 9, 2013, and the medical records corroborate this testimony.

⁴² N J testimony.

⁴³ Division Exhibit E at 7 (describing the activity of "locomotion" as "How a person moves between locations in his/her room and other areas on the same floor").

⁴⁴ In the terminology of the CAT, this means a self-performance score of one.

3. Cognition/dementia

The cognition section of the CAT (Section C) asks three initial questions to determine if an applicant or recipient meets the cognitive impairment threshold. First, it asks about short-term memory. On the day of the assessment, Ms. J demonstrated no short-term memory problems—she was able to recall three words after five minutes.⁴⁵ Therefore, she was scored as a “0” (meaning no short-term memory problems).⁴⁶ In contrast, in 2012, when the same skill test was administered, she could not recall any of the three items after a five minute delay, and she was scored as a “1” (meaning short-term memory deficits).⁴⁷

Second, the CAT asks about four different memory/recall skills that a person is normally able to demonstrate during the last seven days: current season, location of own room, names/faces, and where she is.⁴⁸ If the recipient is unable to recall one out the four, she would be marked as a “1,” meaning deficient in long term memory. On the 2013 CAT, Ms. J was able to answer all four of these inquiries.⁴⁹ In 2012, she could remember the season and where she was, but not the location of her room or names and faces.⁵⁰

Third, the CAT asks about the recipient’s “cognitive skills for daily decision-making.” In 2013, Ms. J scored as “modified independence – some difficulty in new situations only.”⁵¹ In 2012, she scored as “moderately impaired – decisions poor, cues/supervision required.”⁵² The 2012 score resulted in a score of “one” for this question. The 2013 score yields a zero.

If these three threshold indicators all show cognitive impairment, then a fourth test becomes critical. The fourth test relates to the need for professional nursing assessment, observation, and management of the cognitive deficits. This test has two alternative prongs, and might involve administration of certain supplemental screening tools. It does not appear that the supplemental screening tools were administered in this case.

The record provides support for the conclusion that Ms. J is cognitively impaired. Although she was able to pass the memory tests associated with the CAT, several sources indicate that she is forgetful and confused. In her testimony, Ms. J did appear confused and

⁴⁵ Division Exhibit E at 4.
⁴⁶ Division Exhibit E at 16.
⁴⁷ Division Exhibit F at 16.
⁴⁸ Division Exhibit E at 16.
⁴⁹ *Id.*
⁵⁰ Division Exhibit F at 16.
⁵¹ Division Exhibit E at 16.
⁵² Division Exhibit F at 16.

frightened—she said several times that she worries all the time. She stated that her appetite is not good and she is losing weight, which is confirmed by the record. And the fact that Ms. J did not meet the cognitive impairment threshold in 2012 raises questions about whether her 2013 scores may have been the result of an unusually good day.

Taken as a whole, however, this record does not document the cognitive deficits sufficient to reverse the Division’s conclusion that Ms. J does not meet the cognitive impairment threshold. The record contains many outpatient office or clinic notes from her medical providers, and these records do not document significant cognitive impairment. The records show general diagnoses of senility, depression, and insomnia. There is some non-compliance with medications, but often for a reason such as difficulty in properly using the metered dose inhalers. The records indicate that she presented as a pleasant person, and as recently as July had intended to travel to her home village. This does not mean that Ms. J is not cognitively impaired—these records relate to her COPD, her hip pain, or other medical issues, not to cognition. Yet, although these records do not refute the existence of cognitive impairment, neither do they support it.

At this time, the strongest evidence of Ms. J’ cognitive impairment is the tests administered by Ms. Russell-Brown in May 2013.⁵³ N indicated that given Ms. J decline since May, she may request a re-assessment. Without a re-assessment or medical evidence on her cognitive impairment, however, the Division’s May 2013 assessment is sufficient to meet the Division’s burden of proving that Ms. J does not meet the threshold level of cognitive impairment. Because the remaining ways in which Ms. J might qualify for Waiver services all required a finding that she meet that level of impairment, the Division’s decision is affirmed.

IV. Conclusion

The evidence in this record documents that Ms. J is very ill, and frequently requires medical attention. On the specific issue of her eligibility for Waiver services, however, Ms. J’ score on the 2013 CAT indicate that she no longer qualifies for Waiver services. Although the evidence indicates that Ms. J needs extensive assistance in transferring in and out of bed, increasing that score does not make Ms. J eligible for Waiver services. In addition, the evidence

⁵³ Given the testimony of N and Ms. B that Ms. J is confused regarding many important issues, it seems very unlikely that Ms. J could be independent except for new situations in cognitive skills for daily decision-making. More likely she has reverted to the moderately impaired level that she was at in 2012 or perhaps fallen even to severely impaired. Reversing the Division on that one factor, however, will not change the outcome, and the evidence is not sufficient to reverse the Division’s other findings on her cognitive impairment.

in this record shows that Ms. J does not meet the cognitive impairment threshold. Therefore, the Division's finding of material improvement and denial of waiver services is affirmed.

DATED this 16th of December, 2013.

By: Signed
Stephen C. Slotnick
Administrative Law Judge

Adoption

The undersigned, by delegation from 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 14th day of January, 2014.

By: Signed
Signature
Stephen C. Slotnick
Name
Administrative Law Judge
Title

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