

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

In the Matter of )  
 )  
 F L )  
\_\_\_\_\_ )

OAH No. 13-1567-MDS  
Agency No.

**DECISION**

**I. Introduction**

F L has been receiving services under the Medicaid Home and Community-based Waiver program since 2009. The Division of Senior and Disabilities services reassessed Ms. L in April 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. L appealed this decision, and proved that her condition had deteriorated between the date of the decision and the date of the decision terminating her waiver services. Because she needs extensive assistance in bed mobility, transferring, and toileting, the termination of her waiver services is reversed.

**II. Facts**

Ms. L is 86 years old. She lives in an assisted-living home. She has a variety of ailments, including diabetes, dementia, and hypertension.

This hearing involves Ms. L’s eligibility for the Medicaid Home and Community-Based Waiver Services program. 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. To determine eligibility for waiver services, the division employs a structured assessment tool called the “Consumer Assessment Tool,” better known as the “CAT.”<sup>1</sup> 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.

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<sup>1</sup> See 7 AAC 160.900(d)(6) (adopting CAT by reference); *see also* Division Exhibit E.

Ms. L was first assessed for eligibility for waiver services in 2009. At that time, she needed extensive assistance with three structural/physical activities of daily living: bed mobility, transfers, and toileting. She was determined to be eligible for waiver services.<sup>2</sup> She was reassessed in 2010, 2011, and 2012, and the Division reports that in each of those years her assessments indicated that she did not qualify for waiver services.<sup>3</sup> She continued on waiver services during that time, however, because of a court order regarding termination of waiver services.<sup>4</sup>

On April 12, 2013, Amanda McCrary, RN, assessed Ms. L. She determined that Ms. L had limitations in her range of motion and in her cognitive capabilities.<sup>5</sup> For purposes of eligibility for waiver services, a person's score on the "structural" or "physical" activities of daily living are very important. On the five structural/physical activities of daily living, Ms. McCrary made the following findings:

- Bed mobility ( "[h]ow person moves to and from lying position, turns side to side, and positions body while in bed"): Ms. L could independently move herself in her bed. In the terms used by the CAT, this means she received a score of 0/0.<sup>6</sup>

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<sup>2</sup> Division Exhibit F.

<sup>3</sup> Division Exhibit D at 2. The assessments for 2010-2012 are not part of the record in this case.

<sup>4</sup> *Id.*

<sup>5</sup> Division Exhibit E at 4. .

<sup>6</sup> *Id.* at 6. The numbers used in the CAT scoring of ADLs are first a "self-performance score" and second a "support score." The self-performance score is the classification for the amount of assistance a person needs, and the support score is the most support provided over the last 7 days. For self-performance scores, the codes have the following meaning:

0. Independent – No help or oversight – or – Help/oversight provided only 1 or 2 times during last 7 days.
1. Supervision – Oversight, encouragement or cueing provided 3 + times during last 7 days –OR– Supervision plus nonweight-bearing physical assistance provided only 1 or 2 times during last 7 days.
2. Limited Assistance – Person highly involved in activity; received physical help in guided maneuvering of limbs, or other nonweight-bearing assistance 3+ times – OR – Limited assistance (as just described) plus weight-bearing 1 or 2 times during the last 7 days.
3. Extensive Assistance – While person performed part of activity, over last 7-day period, help of following types(s) provided 3 or more times:
  - Weight-bearing support
  - Full staff/caregiver performance during part (but not all) of last 7 days.
4. Total Dependence – Full staff/caregiver performance of activity during ENTIRE 7 days.
5. Cueing – Spoken instruction or physical guidance which serves as a signal to do an activity are required 7 days a week. Cueing is typically used when caring for individuals who are cognitively impaired.
8. ACTIVITY DID NOT OCCUR during entire 7 days.

For support scores, the codes have the following meaning:

0. No setup or physical help from staff
1. Setup help only
2. One-person physical assist
3. Two+ persons physical assist

- Transfers (“[h]ow person moves between surfaces – to/from bed, chair, wheelchair, standing position ([e]xclude to/from bath/toilet”): By using her walker to stabilize herself, Ms. L can independently get up from bed. She received a score of 0/0.<sup>7</sup>
- Locomotion (“[h]ow person moves between locations in his/her room and other areas on the same floor”): Ms L was able to walk independently using her walker. She received a score of 0/0.<sup>8</sup>
- Eating (“[h]ow person eats and drinks regardless of skill”): Ms. L has a strong bilateral grip and is able to feed herself. She received a score of 0/0.<sup>9</sup>
- Toileting (“[h]ow person uses the toilet room (or commode, bedpad, urinal); transfers on/off toilet, cleanses, changes pad, manages ostomy or catheter, adjusts clothes”): Ms. L wears pull-ups and frequently has accidents. She is unable to reach behind her back and clean herself, and needs help getting her pull-ups and clothes on and off. She received a score of 2/2, indicating limited physical assistance.<sup>10</sup>

Another important category that is assessed under the CAT is a person’s cognition. Ms. McCrary noted significant cognition problems, including both long-term and short-term memory issues. Ms. L was not able to say what the season was or where she was, although she did know where her room was and remember the names/faces of staff.<sup>11</sup> On the category of “cognitive skills for daily decision making,” Ms. McCrary scored Ms. L as “Moderately impaired – decision poor, cues/supervision required.”<sup>12</sup> She noted, however, that professional nursing assessment, observation, and management were not required to manage Ms. L’s cognitive patterns.<sup>13</sup> To further measure Ms. L’s cognitive deficits, Ms. McCrary filled out a supplemental cognition form that asks the assessor to rate the client’s memory for events, memory and use of information, global confusion, spatial orientation, and verbal communication. Ms. McCrary

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4. Cueing- Cueing support required 7 days a week

8. Activity did not occur during entire 7 days

7 Division Exhibit E at 6.

8 *Id.* at 7.

9 *Id.* at 8.

10 *Id.* at 9.

11 McCrary testimony; Division Exhibit E at 16.

12 Division Exhibit E at 16.

13 *Id.*

gave Ms. L a total cognitive score of 10 on this form.<sup>14</sup> Under the CAT, a person who does not need professional nursing assessment, observation, and management at least three days per week to manage the person’s cognitive patterns must score at least a 13 on this form to be eligible for waiver services under the cognition category.

Since the CAT was administered in April, Ms. L’s condition has worsened.<sup>15</sup> Her dizziness increased substantially in August. She had two falls in September.<sup>16</sup> Her incontinence problem has increased, and now includes bowel incontinence in addition to urine incontinence. Her memory problems and confusion have increased. Her dizziness has affected her ability to turn in bed and sit up in bed. The medication she has been given has not helped with the dizziness.<sup>17</sup> Her doctor, Captain JoAnna Slobodnjak, M.D., submitted the following to the record:

F L (DOB 11/19/27) is a patient under the care of the Internal Medicine Clinic, 673<sup>rd</sup> Medical Group. Due to her current medical issues and recent physical and mental decline she requires assistance with all ADL’s to include bathing, toileting, grooming, hygiene, dressing, eating, moving about, and transfer in and out of bed. She also needs reminders to take her medications and is unable to arrange her medications without assistance. Patient has lower extremity pain, weakness, and unsteadiness, and has had multiple falls thus requiring assistance with all transfers. She also requires the use of a walker with assistance for safe ambulation. There is a referral to physical therapy to evaluate these issues. Due to her progressively declining health she will be requiring an increasing level of assistance.<sup>18</sup>

Dr. Slobodnjak also filled out a form entitled “General Relief for Assisted Living Care.” That form included a checklist for the “frequency of assistance” and “extent of assistance” that Ms. L needed on her ADLs. With regard to the frequency of assistance, Dr. Slobodnjak designated that assistance was always needed for each ADL.<sup>19</sup> For determining the extent of assistance, the form offered three choices, “minimum,” “moderate,” and “maximum.”<sup>20</sup> For the ADL of “eating,” Dr. Slobodnjak checked “minimum.” For dressing, grooming, oral hygiene, moving

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<sup>14</sup> *Id.* at 17.

<sup>15</sup> J testimony; C testimony. M J is Ms. L’s daughter and has Power of Attorney. S C is Ms. L’s care coordinator.

<sup>16</sup> Ms. C testified that three critical incident reports, regarding the increased dizziness and subsequent hospital visits, were filed during this time period. During the hearing, however, the Division seemed to be able to locate only two of the critical incident reports.

<sup>17</sup> J testimony.

<sup>18</sup> L Exhibit (letter from JoAnna Slobodnjak (Nov. 14, 2013)).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

about, and in/out bed, she checked “moderate.” For bathing and toileting, she checked “maximum.”<sup>21</sup>

On August 16, 2013, the April CAT was reviewed by another nurse within the Division, Sam Cornell, who prepared a “material improvement” report. Mr. Cornell noted “no falls in the six months prior to the assessment” and that no assistance was needed for bed mobility, transfers, locomotion, or eating.<sup>22</sup> He concluded that “[t]he client’s level of need with activities of daily living (ADL) can be met [by] a personal care attendant (PCA).”<sup>23</sup> He affirmed that her waiver services should be terminated.<sup>24</sup>

On October 3, 2013, the Division sent a letter to Ms. L terminating her eligibility for payment for Waiver services.<sup>25</sup> Ms. L appealed.<sup>26</sup> A telephonic hearing was held on December 30, 2013. Ms. L’s daughter, M J, represented Ms. L, and Angela Ybarra represented the Division.

### **III. Discussion**

#### **A. What is the time period for new evidence?**

The ultimate question here is whether Ms. L’s scores on the CAT should be adjusted because the scores she received on the April assessment do not accurately reflect her condition. The first question to be addressed, however, is what is the relevant time period for assessing Ms. L’s condition? Ms. J has put new evidence into the record, including some evidence of physical therapy that was prescribed by Ms. L’s doctor as recently as November. Is that evidence admissible to show that Ms. L needs nursing services?

The answer is no. As the Commissioner held in the case *In re TC*, unless the Division offers to keep the record open, the record generally closes when the denial letter is sent.<sup>27</sup> Under

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<sup>21</sup> *Id.*

<sup>22</sup> Division Exhibit F at 24-25.

<sup>23</sup> *Id.* at 26.

<sup>24</sup> *Id.*

<sup>25</sup> Division Exhibit D. The adverse action letter reports that the CAT was reviewed by a nurse and doctor in Washington State who are not employed by the State of Alaska, and that this review affirmed the result. The record does not contain verification of this review, which is required under AS 47.07.045(b)(2) before the Division can terminate waiver services. Ms. J did not contest the third party review.

<sup>26</sup> Division Exhibit C.

<sup>27</sup> *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 the time period between the assessment and the termination letter is an indication that the record is not closed. *Id.* Here, the termination letter offered that “You may supplement your application with additional information to support your position that you meet level of care for the waiver program at anytime through the fair hearing process.” Division Exhibit D at 5.

*In re T.C.*, the respondents may introduce evidence of changes in condition up to the date of the denial letter. Here, that date is October 3, 2013. Any evidence of new conditions or treatments that occurred after October 3, 2013, will not be considered unless that evidence is offered to show a condition that existed before October 3.

**B. Does the evidence in the record require changing Ms. L’s CAT score in a manner that affects her eligibility for waiver services?**

Although a respondent can qualify for waiver services in many different ways under the CAT, close examination of the CAT and the evidence reveals only two areas in which Ms. L might qualify.<sup>28</sup> First, if Ms. L requires extensive assistance or is completely dependent on others for three or more of the structural/physical activities of daily living, she would qualify.<sup>29</sup> Second, if Ms. L’s cognition/memory debilitation is scored at a 13 or higher on the supplemental screening tool, then she would qualify.<sup>30</sup>

**1. Does Ms. L require extensive assistance on three or more physical/structural activities of daily living?**

*Bed mobility.* Ms. J testified that Ms. L cannot sit up in bed on her own. She must have physical assistance from a caregiver.<sup>31</sup> Ms. J testified that Ms. L was extremely weak during September. Although during most months Ms. L would occasionally spend the night at Ms. J’s house, during September she was too weak to spend the night at Ms. J’s house. In April-May, just lending an arm was sufficient. Ms. L did spend Christmas at Ms. J’s, and at that time, it took two people to bring Ms. L to a sitting position.<sup>32</sup> Ms. J also testified that Ms. L was not mobile

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<sup>28</sup> The CAT has several different tests under which a person can qualify for Waiver services. These tests are found on page 30 of Division Exhibit E. 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.

<sup>29</sup> This qualification is listed under NF.1.e. *See* Division Exhibit E at 30. Ms. L does not qualify under any of the other “NF.1.” categories—during the relative time period, she did not require nursing services, a ventilator, or therapies, and she did not have uncontrolled seizures.

<sup>30</sup> *See* Division Exhibit E at 30, section NF.3.d. Ms. L meets the requirements of NF.3.a., b., and c., and for purposes of NF.3.d, she has a CAT score of 2/2 in one physical/structural ADL (toileting), which answers the threshold question posed by NF.3.d. Therefore, the issue regarding her cognition under NF.3.d is whether she should receive a score of 13 or higher on the supplemental screening tool. *Id.* As for the categories scored under the CAT at NF.2., Ms. L does not receive the services or therapies that would enable her to score a point in this section. And under NF.4., Ms. L does not have the behavioral issues that would score a point under this section.

<sup>31</sup> J testimony.

<sup>32</sup> *Id.* Because the termination letter was issued in early October, and because Ms. L has deteriorated since April, the key months for determining how much assistance is needed are August and September. Here, Ms. J had no first-hand evidence of how much assistance Ms. L needed in bed mobility in September. Given that September was a time of great weaknesses, however, and given Ms. J’s general description of how much assistance Ms. L

in bed and would not turn herself. When Ms. L spent the night at Ms. J's, Ms. J would turn her once during the night. According to Ms. J, the staff at Ms. L's assisted living home have confirmed that the Ms. L is not mobile in bed.<sup>33</sup>

Assistance is considered "limited assistance" if the client is highly involved in the activity and the caregiver provides only physical help in guiding or maneuvering of limbs, or other nonweight-bearing assistance, three or more times per week. Assistance that includes weight-bearing assistance only once or twice per week is still limited assistance. If weight-bearing assistance occurs three or more times per week, however, then the assistance is considered extensive assistance. Alternatively, if the caregiver has to do the entire task without any help from the patient on some, but not all, occasions, the assistance would be considered extensive.

During the relevant time period, Ms. L required weight-bearing assistance, either all the time or several times per week, to help Ms. L sit up in bed. As stated above, the evidence of Ms. L's ability in December is considered only as it relates back to the relevant time period. Given Ms. J's testimony that September was a particularly weak period for Ms. L, however, and given that even before September some physical assistance was needed to help Ms. J sit up or turn in bed, the evidence supports a conclusion that Ms. L needed extensive assistance during the relevant time period in bed mobility.

*Transferring.* To assist Ms. L from going to a sitting position to a standing, Ms. J described the process as "we have to put pillows and prop her up and push her up so that she's not falling over . . . . I hold under her arm and help her up." Ms. J described that Ms. L cannot get into bed without weight-bearing assistance: "I get her on the bed and lift her legs up and move her onto the bed."<sup>34</sup> Ms. J confirmed that sometimes Ms. L can stand on her own by using a piece of furniture to pull herself up—similar to the process Ms. McCrary observed in April, when Ms. L used her walker to help herself stand up independently. The testimony indicates, however, that because of weakness and dizziness, she is not always able to pull herself up without weight-bearing assistance. The need for weight bearing assistance in transferring is consistent with the doctor's report that Ms. L requires assistance with all transfers due to lower

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needed to sit up or turn in bed, the evidence is sufficient to support an inference that she required extensive assistance during the relevant time period.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* Both Ms. J and Ms. C confirmed that Ms. L needed extensive assistance during the time period before the termination letter.

extremity pain and weakness. Because Ms. L does some of the activity, but needs weight-bearing assistance more than three times per week, she qualifies as needing extensive assistance in transferring.

*Locomotion.* Ms. L can walk around the home with her walker. Because of her dizziness she now needs supervision when walking, but she does not require physical assistance.

*Eating.* Ms. L eats without assistance.

*Toileting.* Ms. McCrary found that Ms. L required limited assistance in toileting. Ms. J, however, described that toileting issues have become a significantly greater problem for Ms. L. Ms. L now has bowel incontinence, and apparently is not aware of when she needs to use the toilet. She also suffers from loose stools. Her dizziness, lower extremity pain and weakness, and limited reach all contribute to the assistance she needs to complete the activities covered under toileting. Dr. Slobodnjak indicated that Ms. L needed maximum assistance on toileting. Based on the testimony, the assistance she receives in toileting is extensive.

Thus, based on this evidence, Ms. L needs extensive assistance on three out of the five structural/physical ADLs. At the hearing, however, the Division argued that the form filled out by Dr. Slobodnjak showed that Ms. L did not need extensive assistance in three or more structural/physical ADLs. The Division noted that Dr. Slobodnjak had checked “moderate” assistance for the categories of “moving about” and “in/out of bed,” and minimum assistance for “eating.” Of the structural/physical ADLs, only “toileting” was checked as needing maximum assistance. The Division therefore concluded that Dr. Slobodnjak’s form confirmed that Ms. L needed only limited or no assistance on all structural/physical ADLs except toileting. The Division noted that the form the doctor filled out was the General Relief form. The Division may have concluded that the report impliedly endorsed its position that Ms. L’s needs could be met by a general relief grant, rather than waiver services.

The Division did not call Dr. Slobodnjak as a witness, however, and the inferences drawn by the Division from this form are not valid. Because the form is not based on the “self-performance” scores used in the CAT, the form only provides three categories of assistance, whereas the CAT provides for five. The most supportable inference from this evidence is that the “maximum” column would generally coincide with a self-performance CAT score of “4,” which indicates total dependence. “Moderate” would include both CAT categories of “2” and “3”—limited and extensive assistance. Here, Dr. Slobodnjak’s action of checking “maximum”



only for toileting and bathing, and “minimum” for eating, adds credibility to her scoring. She clearly has given thought to Ms. L’s condition, and how the ADLs differ from each other. Extensive assistance on the CAT would not coincide with “maximum” assistance on *this* form, unless it was an extreme instance of extensive assistance. Therefore, Dr. Slobodnjak’s action in considering transferring/walking/bed mobility (which are collapsed into two categories on this form) as needing “moderate” assistance does not support the Division’s conclusion that she needs only “limited” assistance, as that term is used on the CAT. Therefore, as described above, Ms. L should receive a self-performance score of “extensive assistance” or “3” on the physical/structural ADLs of bed mobility, transfers, and toilet use. These scores qualify her for waiver services.<sup>35</sup>

**2. Should Ms. L’s scores on the Supplemental Screening form be increased so that Ms. L scores a 13 on this form?**

Ms. J’s testimony clearly described that Ms. L suffers from dementia and that her cognition is significantly affected. Ms. McCrary confirmed that Ms. L has severe cognition issues, and administered the supplemental screening tool to determine the extent of those problems. As explained above, because Ms. L scored a 10 on that form, she would not be eligible for waiver services under the cognition category.<sup>36</sup> The question here is whether the evidence indicates that Ms. L should score a 13 on that form. If so, that would provide an alternative ground for finding Ms. L eligible for waiver services.

At the hearing, Ms. J went through the five issues that are listed on the supplemental screening tool. The only issue that Ms. J clearly identified as being incorrectly scored by Ms. McCrary was issue number four, spatial orientation. On this question, Ms. McCrary scored Ms. L as a “1”, which signifies that Ms. L has “spatial confusion when driving or riding in local community.”<sup>37</sup> A score of “2”, which signifies “gets lost when walking neighborhood,” might be more appropriate, however, because if Ms. L were to walk in the neighborhood, she would surely get lost.

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<sup>35</sup> Division Exhibit E at 30. Having a self-performance score of three or higher qualifies a person for waiver services under NF.1.e.

<sup>36</sup> If Ms. L was deemed to require professional nursing assessment, observation, and management at least three days per week to manage her cognitive patterns, she would qualify for waiver services under the cognition category. Division Exhibit E at 30. Although there is considerable evidence that Ms. L does suffer from significantly impaired cognition, and that her cognition has deteriorated since the April assessment, this evidence is not sufficient to demonstrate that she needs professional nursing assessment, observation, and management three times per week to manage her cognitive patterns.

<sup>37</sup> Division Exhibit E at 17.

For the other issues on the supplemental form, however, the evidence provided in the hearing does not support increasing the scores awarded by Ms. McCrary. Ms. J went through each of the issues and generally agreed with Ms. McCrary's scores, although she did comment for several of them that, during the month of September, when Ms. L was particularly confused and disoriented, a higher score might be possible.

For example, under "Global Confusion," a score of "2" means "periodic confusion during daytime" and a score of "3" means "nearly always confused." While Ms. J indicated that a score of "3" could be justified at times during September, she was very hesitant to say that her mother was "nearly always confused." Taking this record as a whole, including the letter from Serendipity Adult Day Services, the letter from Dr. Slobodnjak, the scores given by Ms. McCrary on the CAT, and the testimony of Ms. J, Ms. C, and Ms. McCrary, the highest score that can be justified on the supplemental screening tool is 11. Therefore, at this time, Ms. L's cognitive impairments do not provide an additional ground for finding Ms. L eligible for waiver services.

#### **IV. Conclusion**

Ms. L needs extensive assistance on three structural/physical activities of daily living: bed mobility, transfers, and toileting. Therefore, she qualifies for services under the Medicaid Home and Community-based Waiver program. The Division's decision terminating her waiver services is reversed.

DATED this 6<sup>th</sup> of January, 2014.

By: Signed  
Stephen C. Slotnick  
Administrative Law Judge

**Amendment of the Proposed Decision and  
Adoption of the Decision as Amended**

Under a delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(5), I amend the proposed decision in this case as follows:

Part III.A of the decision is not adopted. The discussion in this section is not necessary for purposes of reaching a final decision because the evidence in question would not change the outcome.

The remainder of the decision is unchanged. I adopt the decision as amended.

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 29<sup>th</sup> day of January, 2014.

By: Signed  
Jared C. Kosin, Executive Director  
Office of Rate Review, DHSS

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