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

In the Matter of:	)	
	)	OAH No. 13-1572-MDS
M L, JR.	)	HCS Case No.
	)	Medicaid ID No.

DECISION

I. Introduction

The substantive issue in this case is whether Mr. M L remains eligible for Medicaid Home and Community-Based Waiver Services (waiver services). To do so he must demonstrate either that he continues to require skilled or intermediate level nursing care, or that he requires extensive assistance with at least three designated activities of daily living (ADLs). The Division of Senior and Disabilities Services (DSDS or Division) conducted an assessment on April 22, 2013 and subsequently determined that Mr. L no longer requires skilled nursing care, intermediate level nursing care, or extensive assistance with three or more "shaded" activities of daily living.[1] DSDS notified Mr. L of this on October 7, 2013.

Mr. L contests the Division's determination. He asserts (1) that the Division took too long in making its determination; (2) that he requires intermediate nursing care based on an uncontrolled seizure disorder; and (3) that he requires extensive assistance with body / bed mobility, transfers, and toileting.

This decision concludes, with regard to the procedural issue raised by Mr. L, that while it is possible that the Division violated federal Medicaid regulations by taking over five months to determine Mr. L's continued waiver services eligibility, the Office of Administrative Hearings does not have the regulatory authority to grant relief for procedural delay occurring prior to referral of a case to this Office. Accordingly, this issue has been noted for the record, but cannot be addressed in this decision.

On the merits of the case, this decision concludes that Mr. L does not currently require either skilled or intermediate level nursing care based on his seizure disorder. However, the preponderance of the evidence indicates that Mr. L requires extensive assistance with body / bed mobility, transfers, and toileting. Because Mr. L requires extensive assistance with three "shaded" ADLs, he remains eligible for waiver services. The Division’s decision terminating Mr. L's waiver services is therefore reversed.

---

[1] Ex. D.

II. Facts

A. Mr. L's Current Diagnoses and Relevant Medical History

Mr. L is a 72-year-old man who lives in the downstairs portion of a split-level home which he shares with his two adult children and one other person.[2] His diagnoses include acute bronchitis, degenerative joint disease, right knee pain, epileptic seizures n.o.s., gastro esophageal reflux disease (GERD), depression, and altered mental status.[3] He also has an abnormal EKG and absence seizures.[4] He weighs about 268 pounds.[5] Mr. L has had both his right and left knees replaced, and on November 14, 2013 reported to his physician that his right knee was weak and unstable and had been going out on him, causing falls.[6] He has muscle weakness in his lower extremities, his balance is poor, he has difficulty walking, and his physician has opined that he needs a cane or wheelchair.[7] He takes four Percocet tablets each day for back pain.[8]

In April 2012 Mr. L fell in his bathroom, was taken to the emergency room, and had to be hospitalized for five days.[9] During the next year he suffered two more falls, but these did not require trips to the emergency room or hospitalization.[10]

On October 7, 2013 Mary Down, M.D. wrote a letter regarding Mr. L which states in relevant part as follows:[11]

> I have been treating [Mr. L] for a diagnosis of seizures. He is on medication for this. It is uncertain as to [the] current frequency [of his] seizures, as they are not necessarily all recognized. There has also been concern regarding cognitive functioning. I believe that Mr. L requires continued supervision to assist him in preparing meals and taking his medications appropriately.

On December 20, 2013 a physician with Independence Park Medical Services, whose signature is indiscernible, completed the Division's "Level of Care Verification Request" form.[12] In response to the question "[w]ould you admit this patient to a skilled nursing facility?" the physician wrote "[t]he patient does not need nursing level of care, but does need

---

2 Ex. E1.
3 Ex. H p. 3.
4 Ex. H p. 5.
5 Ex. E p. 23.
6 Ex. H p. 3. However, an x-ray of Mr. L's right knee taken on November 14, 2013 showed that the prosthetic portions of the knee were in good condition, and that there was no evidence of fracture, loosening, infection, or joint effusion (Ex. H p. 15).
7 Ex. H p. 5.
8 Ex. H p. 7.
9 Ex. E3.
10 Ex. E3.
11 Ex. 1 p. 1 (format of original letter modified for brevity).
12 Exs. H1, H2 (source for all factual findings in this paragraph).

PCA assistance with ADLs . . ." In response to the question "does this patient have intermediate nursing needs at this time?" the physician answered "no."

B. Mr. L's Care Needs and Functional Abilities as Determined by the CAT

The assessment which resulted in the filing of this case was performed on April 22, 2013 by Amanda McCrary, R.N. of DSDS.[13] Ms. McCrary 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 results of the assessment.[14] In completing the CAT, Ms. McCrary reported that Mr. L has the following abilities and limitations relevant to this case:[15]

Functional Assessment:[16] Ms. McCrary reported that Mr. L is able to touch his hands over his head, but not behind his back, and has a strong grip in both hands, but cannot touch his feet while sitting, and cannot place his hands across his chest and stand up. Ms. McCrary wrote that Mr. L has a history of surgery to his right shoulder as well as arthritis pain. She stated Mr. L told her he had been lifting weights and working out, but that he needed to use his walker for weight bearing assistance in order to stand from a sitting position.

Physical Therapy:[17] Ms. McCrary reported that Mr. L is not currently receiving speech / language therapy, respiratory therapy, physical therapy, or occupational therapy, and that he does not currently have any prescriptions for walking, range of motion, foot care, or other care requiring hands-on assistance from a PCA.

Bed / Body Mobility:[18] Ms. McCrary reported that Mr. L told her (1) that when in bed, his PCA must lift his legs and put a body pillow beneath them to keep his legs elevated; and (2) that he "can slide out of bed" directly to his stroller. Ms. McCrary reported that she observed that Mr. L's bedroom has a regular bed with no assistive devices. Ms. McCrary scored Mr. L as requiring only supervision with regard to bed mobility (scored 1/1; frequency 0/0).

Transfers:[19] Ms. McCrary reported she was told by Mr. L that he uses his walker to get to a standing position from his reclining couch, that he rocks himself back and forth on the couch to gain momentum, and that he needs assistance for balance only. Ms. McCrary reported that she observed Mr. L seated on his reclining couch with his four wheeled walker nearby (scored 2/2.

---

13 Ex. E.
14 Ex. E.
15 Ex. E pp. 1 - 31.
16 Ex. E p. 4.
17 Ex. E p. 5.
18 Ex. E p. 6.
19 Ex. E p. 6.

Locomotion:[20] Ms. McCrary reported she was told by Mr. L that he requires standby assistance with locomotion due to balance issues; that he requires assistance going up and down the stairs; that he has fallen in the past when he has tried to use the stairs by himself; and that he uses a wheelchair to go to doctor appointments because he tires after short distances. Ms. McCrary reported that she observed that Mr. L's stairways have no railings, and that Mr. L has a history of falls and a diagnosis of seizures (scored 1/1, frequency 0/0 inside the house).

Dressing:[21] Ms. McCrary reported she was told by Mr. L that he needs help pulling on his pants and pulling his shirt over his head, and is fully dependent on his PCA for donning and doffing his socks and shoes. Ms. McCrary reported that she observed that Mr. L's right shoulder was painful, and that Mr. L is only able to reach down to his shins (scored 2/2).

Eating:[22] Ms. McCrary reported she was told by Mr. L that his dentures fit poorly but that he is able to eat soft food by gumming it. Ms. McCrary did not observe Mr. L eat or drink, but noted that Mr. L could raise his hands up to his face, had a strong grip with each hand, received his main meal via Meals on Wheels, and had not lost weight (scored 0/1).

Toileting:[23] Ms. McCrary reported she was told by Mr. L that he is not incontinent, and that he can use the toilet by himself once he reaches it, but that his PCA provides stand-by assistance while he transfers on or off the toilet using his walker and grab bars located by the toilet. Ms. McCrary wrote that she observed that Mr. L's bathroom was equipped with grab bars in front of the toilet (scored 2/2; frequency 4/7).

Personal Hygiene:[24] Ms. McCrary reported Mr. L told her he can comb his hair with his right arm, but that his PCA brushes his hair. Ms. McCrary wrote she observed Mr. L comb his hair, and noted that he wears a beard and has no teeth or dentures to brush (scored 0/1).

Bathing:[25] Ms. McCrary reported she was told by Mr. L's PCA that Mr. L is able to wash his front, but that she does everything else (i.e. helps him get into and out of the shower / bathtub, washes his back, and washes his lower legs). Ms. McCrary reported that she observed that the bathtub at issue was equipped with a hand-held shower head and a bath bench (scored 3/3).

Professional Nursing Services:[26] Ms. McCrary found that Mr. L has no current need for professional nursing services. Specifically, Ms. McCrary found that Mr. L is currently receiving no

---

20 Ex. E p. 7.
21 Ex. E p. 8.
22 Ex. E p. 9.
23 Ex. E p. 9.
24 Ex. E p. 10.
25 Ex. E p. 11.
26 Ex. E pp. 13 - 15.

injections, intravenous feedings, feedings via nasogastric, gastrostomy, or jejunostomy tubes, suctioning or tracheotomy care, treatments for open lesions, ulcers, burns, or surgical sites, and is not receiving oxygen for a new medical problem / condition.[27] Ms. McCrary further found that Mr. L 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.[28] In addition, Ms. McCrary found that Mr. L 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.[29] Ms. McCrary also found that Mr. L 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.[30] Finally, Ms. McCrary found that Mr. L does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.[31]

Cognition:[32] At the assessment Ms. McCrary reported that Mr. L was able to draw a clock and recall three specific items (using hints) within a five minute period. Ms. McCrary reported that Mr. L was alert and oriented during the assessment, and told her he felt his memory was "pretty good," and that he was "very good at math." Ms. McCrary found that Mr. L has a short-term memory problem, but no long-term memory deficit. She also found that Mr. L is generally able to recall names and faces, where he is, the location of his room, and the current season. She rated Mr. L as independent in making consistent and reasonable decisions in everyday matters. She concluded that Mr. L's memory does not require professional nursing assessment, observation, or management three days per week, or even once per month.

Behavioral Problems:[33] Ms. McCrary found that Mr. L does wander, but is not verbally or physically abusive; does not engage in socially inappropriate or disruptive behavior; and does not resist care. Ms. McCrary also found that Mr. L does not need professional nursing assessment, observation, or management due to any behavioral problems.

---

27 Ex. E p. 13.

28 Ex. E p. 14. Mr. L asserts that his seizure disorder is uncontrolled. The Division does not dispute that Mr. L has a seizure disorder, but asserts that it is controlled. This issue is discussed in Section III, below.

29 Ex. E p. 14.

30 Ex. E p. 15.

31 Ex. E p. 15.

32 Ex. E pp. 4, 16 - 17.

33 Ex. E p. 17.

Mood:[34] Ms. McCrary found that Mr. L exhibited no indication of depression or anxiety, but sometimes suffers from insomnia.

Medication Management:[35] Ms. McCrary reported that Mr. L does not prepare his own medications, but that he does self-administer his medications, and that Mr. L is always compliant in taking his medications.

Senses:[36] Ms. McCrary found that Mr. L is moderately impaired as to his vision and hearing, and that he has mild to moderate difficulty in verbal communication with others.

Balance:[37] Ms. McCrary found that Mr. L has balance problems, has an unsteady gait, limits his activities due to a fear of falling, and had fallen in the 30 days prior to the assessment.

Based on the foregoing CAT scores, Ms. McCrary found that Mr. L 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 his activities of daily living (ADLs).[38]

C. Mr. L's Care Needs and Functional Abilities According to his PCA

Mr. L's PCA, C A, has worked as a PCA for about 10 years, and has been Mr. L's PCA for about two years.[39] Until the recent decrease in Mr. L's services, she worked as his PCA Monday through Friday from 9:00 am - 2:00 p.m. She currently works with Mr. L on Tuesday, Thursday, and Friday from 5:00 - 7:00 p.m., and on Saturday from 10:30 am - 12:30 p.m. Ms. A testified at hearing in relevant part as follows:

1. She and Mr. L's sons and daughters take him to see his physician's assistant about once per month. She takes Mr. L to see his neurologist once per month. She does not actually go into the doctors' offices with Mr. L because he does not have PCA time for this. She thinks he is having panic attacks when he goes to the doctor.

2. She attended Mr. L's most recent assessment, which was about one hour long.

3. She believes Mr. L is still having seizures, and that, on average, Mr. L has about one seizure per week. Sometimes when he is in bed, will be shaking, will be dizzy, and will call Ms. A his daughter's name. There are times when he looks uncomfortable and confused. On one occasion his legs were stuck straight out and would not bend. On that occasion Mr. L was taken to the hospital, and the hospital staff concluded that he had in fact had a seizure.

---

34 Ex. E p. 25.
35 Ex. E p. 20.
36 Ex. E p. 22.
37 Ex. E p. 23.
38 Ex. E p. 29.
39 All factual finding in this section are based on C A's (formerly C Z's) hearing testimony at approximately 2:01:17 - 2:48:47 of the hearing's digital recording.

4. She takes Mr. L's blood pressure when she thinks he is having a seizure.

5. She must elevate Mr. L's legs with a pillow when he is in bed. She does this every time she is there.

6. Mr. L has gained weight and can no longer get off his bed unassisted. She must pull him up, providing weight-bearing assistance when doing so.

7. She began having to assist Mr. L with transfers, other than transfers out of his bed, in or about September 2013, after the April 2013 assessment but prior to the Division's October 2013 termination letter.

8. She walks with Mr. L at all times "because he gets dizzy." She walks directly behind him or in front of him when using stairs in order to prevent falls. This is for guidance only - she provides no weight-bearing assistance with locomotion.

9. She started giving Mr. L assistance with toileting shortly after the April 22, 2013 assessment. She must help Mr. L wipe, stand up, and pull up his pants. There is a grab bar across from the toilet, but Mr. L often cannot reach across to the grab bar because his knees are going out on him. She must therefore usually pull Mr. L up off the toilet to a standing position, providing weight bearing assistance in doing so.

10. Mr. L formerly had physical therapy, and was getting better, but he is no longer receiving this, and he is now gaining weight.

D. Relevant Procedural History

Mr. L was originally found eligible for waiver services in early 2012 or before.[40] He receives Personal Care Assistant (PCA) services in addition to his waiver services.[41]

The assessment which resulted in the filing of this case was performed on April 22, 2013 by Amanda McCrary, R.N. of DSDS.[42] Based on that assessment, the nurse-assessor (Ms. McCrary) concluded that Mr. L is no longer eligible for participation in the Waiver Services program.[43] Accordingly, on October 7, 2013 the Division mailed a notice to Mr. L advising that he was no longer eligible for waiver services and that his waiver services would be

---

40 Ex. F pp. 22, 23.

41 C A's hearing testimony.

42 Ex. E.

43 Ex E pp. 29 - 30; Ex. D.

terminate after thirty days.[44] On October 28, 2013 Mr. L requested a hearing to contest the Division's decision.[45]

Mr. L's hearing was held on February 25, 2014. Mr. L participated by phone but did not testify. He was represented by Daniel C. Coons, Esq. of Alaska Legal Services Corporation. C A (formerly C Z), Mr. L's Personal Care Assistant and primary caregiver, participated in the hearing by phone and testified on Mr. L's behalf. The Division was represented by Assistant Attorney General Kimberly J. Allen. Amanda McCrary, R.N. and Susan Findley, R.N., both nurses employed by the Division, participated by phone and testified on behalf of the Division. Grace Ingrim, R.N. also testified by phone on behalf of the Division; she was represented by Kyle Gotchy, Esq. The record was held open for post-hearing filings through March 10, 2014, 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.[46] The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.[47] 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 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.[48]

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, even if the original decision is factually supported and has a reasonable basis in law. Likewise, the Commissioner is not required to give deference to factual determinations or legal interpretations of his staff its contractors.

---

[44] 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, and 7 AAC 140.515; and federal statute 42 USC 1396r, in support of its determination.

[45] Ex. C p. 1.

[46] 42 CFR § 435.930, 7 AAC 49.135.

[47] *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).

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

B. Relevant Medicaid Waiver Services Statutes and Regulations

The Medicaid program has a number of coverage categories. One of those coverage categories is the Home and Community-Based Waiver Services program[49] ("waiver services"). Congress created the waiver services program in 1981 to allow states to offer long-term care, not otherwise available through the states' Medicaid programs, to serve eligible individuals in their own homes and communities instead of in nursing facilities.[50]

States participating in Medicaid must provide certain mandatory services under a state medical assistance plan.[51] States may also, at their option, provide certain additional services, one of which is the waiver services program.[52] To obtain approval from the federal Center for Medicare & Medicaid Services ("CMS") for a home and community-based care waiver, the state seeking the waiver must demonstrate that its average per capita expenditures for persons receiving benefits under the waiver do not exceed the average estimated per capita cost of providing Medicaid services to the same group of individuals in an institutional setting.[53] Any failure to abide by this requirement will result in CMS' termination of the state's Waiver Services program.[54]

Alaska participates in the waiver services program.[55] Alaska's program pays for specified individual services for recipients.[56] The Division must approve each specific service as part of a

---

[49] The program is called a "waiver" program because certain statutory Medicaid requirements are waived by the Secretary of Health and Human Services. *See* 42 U.S.C. § 1396n(c). Before a state receives federal funding for the program, the state must sign a waiver agreement with the United States Department of Health and Human Services. *Id.* The agreement waives certain eligibility and income requirements. *Id*.

[50] *See* 42 USC § 1396n(c)(1); 42 CFR §§ 435.217; 42 CFR §§441.300 - 310. Federal Medicaid regulation 42 CFR § 440.180, titled "Home or Community-Based Services," provides in relevant part:

> (a) Description and requirements for services. "Home or community-based services" means services, not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of Part 441, subpart G of this chapter . . . .
>
> (b) Included services. Home or community-based services may include the following services . . . (1) Case management services. (2) Homemaker services. (3) Home health aide services. (4) Personal care services. (5) Adult day health services. (6) Habilitation services. (7) Respite care services. (8) Day treatment . . . (9) Other services requested by the agency and approved by CMS *as cost effective and necessary to avoid institutionalization*. [Emphasis added].

[51] *See* 42 USC §§ 1396a(a)(10)(A); 1396d(a)(1) -(5), 1396a(a)(17), and 1396a(a)(21); *see also* 42 CFR 440.210 & 440.220.

[52] *See* 42 USC § 1396a(a)(10)(A). The program is called a "waiver" program because certain statutory Medicaid requirements are waived by the Secretary of Health and Human Services. *See* 42 USC 1396n(c).

[53] *See* 42 USC § 1396n(c)(2)(D).

[54] See 42 USC § 1396n(f)(1).

[55] AS 47.07.045, the Alaska statute that authorizes Medicaid Waiver Services, states in relevant part:

> Home and community-based services. (a) The department may provide home and community-based services under a waiver in accordance with 42 USC 1396 – 1396p (Title XIX Social Security Act), this chapter, and regulations adopted under this chapter, if the department has received approval from the federal government and the department has appropriations allocated for the purpose. To supplement the standards in (b) of this section, the department shall establish in regulation additional standards for eligibility and payment . . . .

[56] 7 AAC 130.240 - 7 AAC 130.305.

recipient's Plan of Care (POC).[57] Services must be "of sufficient amount, duration, and scope to prevent institutionalization."[58] A recipient's plan of care is subject to review on an annual basis.[59]

There are three basic ways in which an applicant or recipient can qualify for waiver services. First, an individual is eligible for waiver services if he or she requires the level of care specified in 7 AAC 130.205.[60] For older adults and adults with disabilities (such as Mr. L), 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 care, a lower level of care than skilled 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 . . . .
>
> (c) Intermediate care may include occupational, physical, or speech-language therapy provided by an aide or orderly under the supervision of licensed nursing personnel or a licensed occupational, physical, or speech-language therapist.

The Division is required to incorporate the results of the Consumer Assessment Tool (CAT) in determining whether an applicant requires intermediate or skilled nursing care.[62]

The second way an individual may qualify for waiver services is by showing that the individual's requirements for physical assistance with his or her activities of daily living (ADLs) are sufficiently high.[63] Under the CAT, an individual can qualify for waiver services

---

57 7 AAC 130.209, 7 AAC 130.217.

58 7 AAC 130.217(b).

59 7 AAC 130.213.

60 At the time the Division performed the assessment at issue in this on April 22, 2013, 7 AAC 130.230 (adopted on February 1, 2010) was the primary regulation governing eligibility for waiver services. However, 7 AAC 130.230 was repealed on July 1, 2013 (Register 206) and was succeeded by 7 AAC 130.205, 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). The Division did not issue its waiver termination notice until October 7, 2013, two months after the repeal of 7 AAC 130.230. Accordingly, 7 AAC 130.205, and the rest of the new waiver services regulations, apply in this case. *See Allen v. State*, 945 P.2d 1233, 1237 (Alaska App. 1997). The recent decision *In re E.D.*, OAH No. 13-1369 (Commissioner Health & Social Services, 2014), (available online at http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS131369.pdf), is not controlling here because it dealt with *an application requesting new, additional waiver services*, while *this case* involves a *termination of previously existing waiver services*. Finally, even were the former waiver services regulations applicable here, they would not affect the outcome of this case.

61 7 AAC 130.215.

62 7 AAC 130.215.

63 Ex. E29.

by demonstrating a need for extensive assistance with at least three designated ADLs, even without demonstrating a need for skilled or intermediate level nursing care.[64]

Finally, 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 ADLs.[65]

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 . . ."[66] 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 . . . . 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.[67]

Thus, 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.[68]

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.[69]

C. The Consumer Assessment Tool (CAT)

Under state Medicaid regulation 7 AAC 130.215, level of care determinations for waiver services applicants seeking services under the "adults with physical disabilities" or

---

64 Ex. E29.

65 Ex. E29.

66 AS 47.07.045(b)(1).

67 AS 47.07.045(b)(3).

68 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.

69 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." However, the *de novo* hearing process used here provides an opportunity for recipients to present additional information beyond that previously provided and to challenge the reliability of the information provided to Qualis.

"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.[70] 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).[71]

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).

An individual can qualify for waiver services by scoring 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.[72] The five "shaded" ADLs are bed / body mobility, transfers, locomotion, eating, and toilet use.[73]

D. The Procedural Delay Issue Raised by Mr. L

Mr. L's assessment was conducted on April 22, 2013, and the Division's denial letter was issued five and one-half months later on October 7, 2013. Based on this, Mr. L asserts that the Division failed to determine his continuing waiver services eligibility with reasonable promptness as required by federal statutes and regulations.[74]

---

[70] 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."

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

[72] Ex. E pp. 18, 29.

[73] Ex. E pp. 18, 29.

[74] *See* Mr. L's counsel's opening statement at hearing and Mr. L's post-hearing brief at pp. 1, 4, and 5.

Mr. L is correct that federal law requires that periodic renewals or redeterminations of Medicaid eligibility be made "promptly."[75] It is also arguable that, under the case law cited by Mr. L,[76] the Division's redetermination of eligibility in this case was not prompt. However, 7 AAC 49.170, one of the Department of Health and Social Services' (DHSS's) "Fair Hearings" regulations, limits the power of the Office of Administrative Hearings (OAH) in cases like this to whether the relevant law was properly applied, and whether the benefit amount (if in dispute) was properly calculated. OAH's own regulations give its administrative law judges (ALJs) the power to levy sanctions in certain limited circumstances,[77] but those circumstances are not present in this case. OAH simply does not, under its own regulations or DHSS's regulations, have the power to grant the injunctive relief[78] requested here by Mr. L. Accordingly, Mr. L's procedural delay argument is noted for the record, but it cannot be adjudicated in this forum.

E. Does Mr. L Require Intermediate Level Nursing Care?

The first way in which Mr. L can demonstrate continuing eligibility for waiver services is by proving that he requires intermediate level nursing care. Mr. L asserts that he requires intermediate level nursing care for his seizure disorder, which he asserts is currently uncontrolled.[79]

Intermediate level nursing care is defined by 7 AAC 140.510 (quoted in Section III(B), above). One of the three defining features of intermediate level nursing care under 7 AAC 140.510(a) is that it must be ordered by and under the direction of a physician. In this case, one of Mr. L's medical providers, who is presumably aware of Mr. L's medical history and seizure disorder, opined that Mr. L does not require either skilled or intermediate level nursing care.[80] In other words, one of Mr. L's own doctors / physician's assistants does not believe that Mr. L's seizure disorder requires physician-directed care. There is no testimony in the record by any doctor or nurse controverting this opinion. Accordingly, the preponderance of the

---

75 42 CFR § 435.916(d)(1). The statute cited by Mr. L, 42 USC § 1396a(a)(8), and its implementing regulation, 42 CFR § 435.912, appear to apply only to initial applications, and therefore do not directly apply in this case. However, 42 CFR § 435.916, titled "Periodic Renewal of Medicaid Eligibility," *does* apply to this case.

76 *See* Mr. L's post-hearing brief at page 4 and footnotes 4 and 5.

77 *See* 2 AAC 64.360.

78 An injunction (injunctive relief) is defined as "[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury." Black's Law Dictionary at 784 (West Publishing, 6th Edition, 1990).

79 See Mr. L's post-hearing brief at pages 1, 3, and 4.

80 Exs. H1, H2 (source for all factual findings in this paragraph).

evidence indicates that Mr. L does not currently require intermediate level nursing care as defined by 7 AAC 140.510.

This does not end the inquiry, however. Under the CAT, an individual can be found to require a nursing facility level of care if he or she requires direct assistance from others, for the safe management of an "uncontrolled" seizure disorder, at least once per week.[81]

Mr. L's PCA testified that she believes he is still having seizures about once per week. She stated that sometimes when Mr. L is in bed he will be shaking, will be dizzy, and will call Ms. A his daughter's name. She stated that, on another occasion, Mr. L's legs were stuck straight out and would not bend, and that on that occasion Mr. L was taken to the hospital where the hospital staff concluded that he had in fact had a seizure. The testimony of Mr. L's PCA was credible, and the Division presented no witness with first-hand knowledge disputing the PCA's testimony. Thus, the preponderance of the evidence indicates that Mr. L is currently having *some form of seizure*[82] at least once per week.

The only remaining question is whether Mr. L's seizures are "controlled" or "uncontrolled." Neither the Division's regulations nor the CAT provide any definitions to facilitate differentiation between a "controlled seizure disorder" and an "uncontrolled seizure disorder," and this became one of the primary issues in this case.

One neurologist has written that "satisfactory seizure control should be defined as having no seizures."[83] In the same vein, another neurologist has stated that "controlled seizures mean that the seizures have stopped," while "[u]ncontrolled seizures are ones which continue, even though the person has tried one (or many) medications."[84] On the other hand, another neurologist has stated that, "[w]hen epilepsy is uncontrolled, it indicates the continued occurrence of an unacceptable quantity of seizures despite reasonable treatment."[85] Thus, there

---

81 Ex. E pp. 14, 29.

82 Mr. L's physician's assistant thought that, based on the description provided to him, Mr. L is probably having "absence seizures" (Ex. H p. 5). Similarly, Ms. McCrary and Ms. Findley, both registered nurses, testified that Mr. L's quiet spells or staring spells are absence seizures or petit mal seizures, as opposed to grand mal seizures.

83 Sperling, M. R., *The Consequences of Uncontrolled Epilepsy*, CNS Spectr. 2004 Feb 9(2): 98-101, 106-9. Review PubMed PMID: 14999166 (abstract accessed online at http://www.ncbi.nlm.nih.gov/pubmed/14999166 (date accessed April 15, 2014).

84 *See* article by Stephen C. Karceski, M.D., accessed online at http://epilepsynyc.com/2012/05/what-is-uncontrolled-epilepsy/ (date accessed April 15, 2014).

85 *See* article by Akila Venkataraman, M.D., accessed online at http://epilepsynyc.com/2012/06/what-is-uncontrolled-epilepsy-part-ii/ (date accessed April 15, 2014).

appears to be no generally accepted dictionary or textbook definition of when seizures are deemed controlled, and neurologists currently differ significantly on the issue.[86]

Because there is no definition of "controlled" versus "uncontrolled" seizures which would allow this issue to be determined as a matter of law, the question becomes a matter of fact to be determined based on the weight of witness testimony. Grace Ingram, R.N. of Qualis testified that even people with a controlled seizure disorder can be expected to have occasional seizures; that, to tell whether seizures are uncontrolled, she would look at the frequency of the seizures, the duration of the seizures, and what occurs during the seizures; and that in her view Mr. L's seizures are "controlled." Similarly, Susan Findley, R.N. of DSDS testified that a person may still have some seizures even when their seizures are considered to be well-controlled, and that Mr. L's seizures are "controlled." On the other hand, Mr. L's witness was not a medical professional, and the record contains no opinion from Mr. L's neurologist or P.A. controverting Ms. Ingram's and Ms. Findley's testimony on this issue. Accordingly, based on the medical evidence in the record,[87] the preponderance of the evidence is that Mr. L's seizures, while undoubtedly still occurring, are "controlled." This being the case, Mr. L fails to demonstrate a need for nursing services based on the criteria of the Division's Consumer Assessment Tool. The final issue is whether Mr. L qualifies for waiver services based on the extent of his need for assistance with his ADLs.

F. Does Mr. L Qualify for Waiver Services Based on a Need for Extensive Assistance with Three or More "Shaded" Activities of Daily Living?

The Consumer Assessment Tool's scoring summary is located at page 29 of the CAT.[88] 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. Mr. L does not currently qualify for waiver services on that basis.

An alternative means by which one may demonstrate a need for a Nursing Facility Level of Care 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

---

[86] The articles on epilepsy and seizures cited in the previous footnotes are not part of the record and do not constitute substantive evidence in this case. They are cited here only for the proposition that even experts currently disagree as to when a seizure is controlled versus uncontrolled.

[87] Had Mr. L been able to present testimony from a medical professional controverting the testimony of the Division's nurses on this issue, the result reached in this case might well have been different.

[88] Ex. E p. 29.

page 18 of the CAT.[89] The CAT scores which the Division assigned to Mr. L with regard to the five "shaded" ADLs are: bed mobility: 1/1; transfers: 2/2; locomotion: 1/1; eating: 0/1; and toilet use: 2/2.[90]

Amanda McCrary, the nurse who performed Mr. L's 2013 assessment, testified at hearing, and her testimony regarding Mr. L's ability to perform his ADLs was generally credible. Mr. L disagrees, however, with some of the ADL scores assigned by Ms. McCrary, asserting that he requires extensive assistance with bed / body mobility, transfers, and toilet use.[91] These three ADLs are addressed below.

1. 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.[92] 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.[93]

Ms. McCrary reported that Mr. L told her (1) that when in bed, his PCA must lift his legs and put a body pillow beneath them to keep his legs elevated; and (2) that he "can slide out of bed" directly to his walker. Based on this, Ms. McCrary scored Mr. L as requiring only supervision with regard to bed mobility (scored 1/1). On the other hand, Mr. L's PCA testified that she must elevate Mr. L's legs with a pillow when he is in bed, and that she does this every time she is there (previously five days per week; currently four days per week). The PCA's testimony was credible, and indicates that she provides weight-bearing assistance for Mr. L three or more times per week. This constitutes extensive assistance and results in a self-performance score of three as to this "shaded" ADL.[94]

2. 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

---

89 Ex. E pp. 18, 29.

90 Ex. E p. 18.

91 *See* Mr. L's post-hearing brief at pages 2 - 3.

92 Ex. E p. 6.

93 Ex. E p. 6.

94 7 AAC 125.030, one of the Division's regulations governing Personal Care Assistant (PCA) services, allows "points" for bed / body mobility only where the recipient is non-ambulatory (*see* 7 AAC 125.030((b)(1)(A)). The Division's lay hearing representatives have on occasion asserted in other cases that this PCA regulation prevents a waiver services recipient from receiving a score for bed / body mobility in situations where (as here) the recipient is ambulatory. However, there is no *waiver services regulation* incorporating this *PCA regulation* into waiver services eligibility determinations. Even were there such a regulation, the Division has not asserted its applicability in this case.

separate ADLs).[95] 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.[96]

Ms. McCrary reported she was told by Mr. L that he uses his walker to get to a standing position from his reclining couch, that he rocks himself back and forth on the couch to gain momentum, and that he needs assistance for balance only. Ms. McCrary scored Mr. L as requiring limited physical assistance with transfers (score 2/2). On the other hand, Mr. L's PCA testified that she began having to assist Mr. L with transfers, other than transfers out of his bed, in or about September 2013, which was after the April 2013 assessment, but prior to the Division's October 2013 waiver termination letter.

Both Ms. McCrary and Mr. L's PCA reported that Mr. L needs assistance with transfers - the only issue is the *extent* of the assistance provided. Ms. McCrary assigned her "limited assistance" score based on one fairly brief assessment, and the input of Mr. L, whose hearing is moderately impaired, and who Ms. McCrary rated as having mild to moderate difficulty in verbal communication with others.[97]

On the other hand, the PCA's testimony that Mr. L requires weight bearing assistance with transfers several times per day is based on longer familiarity with Mr. L, 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 Mr. L requires extensive assistance with transfers is more consistent with his medical records indicating that (1) he suffers from degenerative joint disease and right knee pain; (2) he weighs about 268 pounds; (3) he has had both his right and left knees replaced; (4) he has reported to his physician that his right knee is weak and unstable and has been going out on him, causing falls; (5) he has muscle weakness in his lower extremities; (6) his balance is poor; and (7) he has difficulty walking.[98] Accordingly, the preponderance of the evidence indicates that Mr. L requires weight bearing assistance with transfers at least three times per week, and that he should therefore be scored as requiring extensive one-person assistance with this ADL (a CAT score of 3/2).

---

[95] Ex. E p. 6.

[96] Ex. E p. 6.

[97] Ex. E p. 22. This is not meant to criticize Ms. McCrary in any way. Rather, it is simply a limitation inherent in the waiver services assessment process.

[98] *See* discussion in Section II, above.

3. 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."[99] 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.[100]

Ms. McCrary reported she was told by Mr. L that he is not incontinent, and that he can use the toilet by himself once he reaches it, but that his PCA provides stand-by assistance while he transfers on or off the toilet using his walker and grab bars located by the toilet. Ms. McCrary wrote that she observed that Mr. L's bathroom was equipped with grab bars in front of the toilet (scored 2/2; frequency 4/7).

On the other hand, Mr. L's PCA testified that Mr. L began requiring assistance with toileting shortly after the April 22, 2013 assessment. She testified that, when Mr. L has a bowel movement, she must do the wiping, and that she must also help him stand up and pull up his pants. She acknowledged that a grab bar has been installed across from the toilet, but testified that Mr. L often cannot reach across to the grab bar because his knees are going out on him. She stated that she must therefore usually pull Mr. L up off the toilet, to a standing position, providing weight bearing assistance in doing so.

In resolving the factual dispute on this issue, the undersigned does not doubt that Mr. L told Ms. McCrary that he can use the toilet by himself when he reaches it and that his PCA provides only stand-by assistance. However, the undersigned finds it more likely than not that Mr. L 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(G)(2), above that Mr. L requires extensive assistance with transfers, and Mr. L's need for assistance with transfers would logically extend to transfers associated with toileting. Finally, there is no indication in the record that Mr. L knew that the regulatory definition of toileting included the transfers on and off the toilet at the time he told Ms. McCrary that he could use the toilet by himself. Accordingly, the preponderance of the evidence indicates that Mr. L requires extensive one-person assistance with toileting (a CAT score of 3/2).

---

[99] Ex. E p. 9.
[100] Ex. E p. 9.

4. Summary - Degree of Assistance Required With Shaded ADLs

In order to qualify for waiver services under Section NF(1)(e) of the CAT, a person must demonstrate either full dependence, or a need for extensive assistance, as to at least three of the shaded ADLs. Independent review indicates that Mr. L requires a greater degree of assistance than was found by the Division with regard to the "shaded" ADLs of bed / body mobility, transfers, and toilet use. Specifically, the preponderance of the evidence indicates that Mr. L requires extensive assistance as to these three shaded ADLs. Because Mr. L requires extensive assistance with regard to three or more of the "shaded" ADLs, he meets NFLOC under Section NF(1)(e) of the CAT. Mr. L therefore remains eligible for waiver services.

IV. Conclusion

Mr. L remains eligible to receive waiver services because he requires extensive assistance with three of the five "shaded" ADLs scored by the Division's Consumer Assessment Tool. Accordingly, the Division's decision terminating Mr. L's waiver services is reversed.

Dated this 16th day of April, 2014.

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 25th day of April, 2014.

By: *Signed*
Name: Lawrence A. Pederson
Title/Agency: Admin. Law Judge, DOA/OAH

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