

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

In the Matter of)
)
 N X)
_____)

OAH No. 13-1682-MDS
Agency No.

DECISION

I. Introduction

N X applied to receive Medicaid Home and Community-Based Waiver benefits (Waiver program or Waiver services). His application was denied on October 23, 2013 because the Division of Senior and Disabilities Services’ (division) concluded he did not require a nursing facility level of care (NFLOC). He requested a hearing, and after several continuances a telephonic hearing was held. Michelle Russell-Brown, R.N., testified for the division. Mr. X’s caregivers, D and K-F Q; his power of attorney and niece, T E; and his care coordinator, L T, testified for Mr. X.

A person is eligible for Waiver services if he or she accumulates enough points to establish the need for NFLOC. As scored by the division, Mr. X will have enough points and be eligible for Waiver services if he requires “hands on” assistance with one of the “shaded” activities of daily living (ADLs) more than twice a week. The evidence presented at hearing establishes that it is more likely than not that Mr. X requires “hands on” assistance with toileting. When the points awarded for hands on assistance with toileting are combined with Mr. X’s scores for cognitive and behavioral functioning, Mr. X will have accumulated the minimum required number of points, and is therefore eligible for Waiver services.

II. Mr. X and Waiver Services Eligibility Determination

Mr. X is 70 years old and suffers from advanced dementia and Alzheimer’s. He moved to Anchorage from No Name after his behavior made it dangerous for him to remain in his home. T E is his niece. Mr. X’s conditions make it impossible to conduct his own affairs, so Ms. E is his power of attorney. Mr. X lives in an assisted living facility where he is cared for by D and K-F Q. Other than his dementia and Alzheimer’s, he is generally in good health.

Mr. X applied for Waiver services. The Waiver program pays for services that allow a person who requires NFLOC to stay in his or her home (which may be an assisted living home) rather than move into a nursing facility.¹

Under the Waiver program, before an application will be granted it must be determined whether that applicant has a functional limitation or cognitive impairment that would result in the need for nursing home placement. If he or she does, then the applicant may elect to receive home or community-based services in lieu of placement in a nursing home. Mr. X, if eligible would like to remain in his assisted living home.

To determine eligibility for this program, the division relies upon a structured assessment tool called the “Consumer Assessment Tool,” which is better known as the “CAT.”² Under the CAT, an applicant’s need for assistance to perform activities of daily living (“ADLs”) such as toileting, eating, dressing, and walking are scored on two scales that assess the degree of assistance required – the level of assistance needed to complete the ADL (self-performance) and the amount of support required, e.g. a one person physical assist (support score).³ The CAT also scores other aspects of the applicant’s life, such as cognitive ability and whether there is a tendency to engage in problem behaviors.⁴

¹ 7 AAC 130.200.

² See 7 AAC 130.215(2) (incorporating the CAT adopted by reference at 7 AAC 160.900(d)(6)).

³ 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

There are five ADLs used to assess whether an applicant requires NFLOC.⁵ They are referred to as the “shaded” ADLs because on the page summarizing the applicant’s scoring on all of the ADLs, these five are shaded.⁶

On August 26, 2013, Michelle Russell-Brown, RN, assessed Mr. X using the CAT.⁷ On the five shaded ADLs, Ms. Russell-Brown 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”): Mr. X could independently move and reposition himself in a chair or in bed. He received a score of 0/0.⁸
- Transfers (“[h]ow person moves between surfaces – to/from bed, chair, wheelchair, standing position ([e]xclude to/from bath/toilet”): Observed Mr. X transfer from a chair to a standing position without assistance or assistive devices. He received a score of 5/5.⁹
- Locomotion (“[h]ow person moves between locations in his/her room and other areas on the same floor”): Mr. X was observed to ambulate independently without assistance and with stable balance and gait. He received a score of 1/5.¹⁰
- Eating (“[h]ow person eats and drinks regardless of skill”): Mr. X is able to feed himself. He received a score of 0/1.¹¹
- Toileting (“[h]ow person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, cleanses, changes pad, manages ostomy or catheter, adjusts clothes”): Ms. Russell-Brown agreed that Mr. X requires constant supervision due to his confusion and diminished cognition. He received a score of 1/5.¹²

On October 23, 2014, the Division sent a letter to Mr. X informing him that he was not eligible to receive Waiver services because he did not require NFLOC as determined by the

5. Cueing- Cueing support required 7 days a week

⁴ The CAT also scores the applicant’s need for assistance on instrumental activities of daily living (activities like cooking, housework, and managing finances), and need for certain types of nursing care. However, those scores are not relevant to Mr. X’s application or challenge at this time.

⁵ Exhibit E at 31.

⁶ *Id.* at 20.

⁷ Exhibit D; Exhibit E.

⁸ Exhibit E at 6.

⁹ *Id.* at 6.

¹⁰ *Id.* at 7.

¹¹ *Id.* at 9.

¹² *Id.* at 9.

CAT.¹³ Mr. X appealed.¹⁴

III. Discussion

It is undisputed that Mr. X has a cognitive score over 13 and a behavioral score that is 14 or more.¹⁵ Because of these scores, if he requires at least limited assistance (score of 2/2) in any of the five “shaded” ADLs, he would receive one point for cognitive issues and one point for behavioral problems.¹⁶ He would also receive one point for each “shaded” ADL with a score of 2/2 or higher. The entire dispute in this case is over whether Mr. X requires at least limited assistance with just one of the “shaded” ADLs. If he does, then he will have the required three points and be eligible to receive Waiver services.¹⁷

As the person applying for benefits, Mr. X has the burden of proving eligibility by a preponderance of the evidence.¹⁸ To score a 2/2 Mr. X must prove that he requires hands on assistance more than twice a week, or hands on assistance plus weight-bearing assistance at least once in the past seven days. Because there is no dispute that if Mr. X required limited assistance in one of the “shaded” ADLs he would have three points and therefore be eligible for NFLOC, this decision is restricted to answering whether he has met his burden of establishing that he requires limited assistance in one or more “shaded” ADLs.

Since the CAT was administered in August 2014, Mr. X’s condition has worsened.¹⁹ His gait has become unstable and he has trouble balancing. His memory problems and confusion have increased. His doctor, N H, M.D., submitted a letter summarizing Mr. X’s chart notes spanning the period from August 12, 2013 through January 2014. The notes capture Mr. X’s increasing needs as his Alzheimer’s and dementia advance.²⁰

Dr. H summarized the chart notes as follows:

August 12, 2013 – Mr. X has an unsteady gait and needs assistance with ambulation and direction.

November 18, 2013 – records recent “wandering” incidents where Mr. X was found in

¹³ Division Exhibit D.

¹⁴ Division Exhibit C.

¹⁵ *Id.* at 17, 19.

¹⁶ *Id.* at 31.

¹⁷ *Id.* A person requires three points to be considered as needing NFLOC. When a person suffers from cognitive deficit and exhibits problem behaviors to receive a point under each category, the person must also require, at a minimum, limited assistance to complete any one of the five shaded ADLs.

¹⁸ 7 AAC 49.135.

¹⁹ Testimony of E; Testimony of Mr. and Ms. Q

²⁰ January 22, 2014 letter from Dr. H to L T.

the street not knowing where he was or where he was going. He walks with a staggering gait. Six percent weight loss.

January 9, 2014 – loses balance and falls.²¹

Because the evidence presented by Mr. X covers a continuum of time including up to the day of hearing, it is necessary to address the relevant time period for assessing Mr. X's eligibility for Waiver services.

A. *Relevant time period for assessing Mr. X's eligibility.*

Ms. E and Ms. T have placed evidence into the record regarding Mr. X's current condition and a letter from his treating physician describing Mr. X's condition as recently as January 2014. They and the Qs have testified regarding Mr. X's physical condition from the time of the assessment visit up to the day of hearing.

As the Commissioner held in the case *In re T.C.*, respondents may introduce evidence of changes in condition up to the date of the denial letter.²² Here, that date is October 23, 2014. Applying *In re T.C.*, any evidence of new conditions or treatments that occurred after October 23, 2013 will not be considered unless that evidence is relevant to show a condition that existed before October 23.

Because of the progressive nature of Mr. X's conditions, the chart note summaries dated August 12, 2013 and November 18, 2013 are relevant. Even though the latter summary is after the denial letter, it will be considered because the November 18, 2013 chart note's proximity to the date of denial make that chart note relevant to Mr. X's condition on October 23, 2013. However, evidence tending to establish how Mr. X's need for assistance has increased since the denial letter was issued is not relevant to this proceeding.

B. *Shaded Activities of Daily Living.*

1. Bed Mobility

The ADL of body mobility includes the activity of positioning or turning in a bed or chair.²³ The CAT refers to this as bed mobility, which is described as how a person moves

²¹ *Id.*

²² *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.*

²³ 7 AAC 125.030(b)(1).

to or from a lying position, or turns side to side, or positions his or her body while lying in bed.²⁴ Mr. X does not challenge the division's determination that he is independent with this ADL.

2. Transfers

Transferring is the act of moving between surfaces, such as getting out of or into a bed, or getting up from a chair to a standing position.²⁵ The division scored Mr. X as requiring cueing (score 5/5). Ms. Russell-Brown testified consistent with her written observations. She described how Mr. X transferred from a chair to a standing position with no assistance or assistive devices. She characterized him as independent with this ADL. Mr. X's witnesses do not dispute that in August, Ms. Russell-Brown's observations were correct. Rather, the parties' dispute what Mr. X's needs were as of October 23rd.

The Qs testified that, by the end of April 2014, Mr. X's condition deteriorated to the point that every morning they must now lift his legs and position him so that he is sitting on the bedside. Next, whoever is getting Mr. X up will stand in front of him so Mr. X can wrap his arms around the caregiver's neck and be pulled up to a standing position. It is more likely than not that there has been a material change in Mr. X's condition that, were he assessed today, the division would likely score Mr. X differently in the ADL of transfer. Given that there is no factual dispute that the CAT correctly scored Mr. X on August 26, 2013, it is unlikely that two months later Mr. X would need limited assistance to complete this ADL. Therefore, the division's decision on this ADL is affirmed.

3. Locomotion

The ADL of locomotion refers to the manner in which a person moves within his or her own room or other areas on the same floor.²⁶ As with the ADL of transfers, at the time of the assessment Ms. Russell-Brown observed Mr. X walk independently on a level surface with what she characterized as a steady balance and gait. He was scored as requiring supervision and cueing (score 1/5).

Ms. Russell-Brown's observations conflict with the summary of an August 12, 2013 and November 18, 2013 chart note contained in Mr. X's medical file. The August summary

²⁴ Exhibit E at 6.

²⁵ *Id.*

²⁶ *Id.* at 7.

describes Mr. X as having an unsteady gait and needing assistance with ambulation and direction.²⁷ The November summary reports Mr. X walking with a staggering gait. It is unknown whether the author of the letter, Dr. H, wrote the chart notes and whether the information recorded was from his own personal observations or someone else's. These are all factors to be taken into consideration when weighing the evidence.

Ms. Russell-Brown testified credibly regarding Mr. X's gait at the time of the assessment interview. Under the section of the CAT for recording what Mr. X and his caregivers reported at the time of the assessment interview, Mr. X stated, "I can walk w/o help, watch."²⁸ Ms. Q reported that Mr. X required assistance using stairs and supervision outside.²⁹ These statements corroborate the scoring in the CAT.

When weighing the evidence, the burden is on Mr. X to tip the scales in his favor. However, the evidence presented is given equal weight and the scales are even. Mr. X has not met his burden of proof. He does not require assistance with walking on the one floor of his home, but only on stairs or outside. These activities are not captured under this ADL.

4. Eating

The ADL of eating refers to how a person eats and drinks regardless of skill.³⁰ Although Mr. X has lost weight, there is nothing in the record to establish a connection between his weight loss and his ability to eat and drink.

5. Toilet Use

Toilet use includes transfers on and off the toilet, cleaning post-toileting, adjusting clothing, and routine incontinence care.³¹ Mr. X was scored as requiring supervision and cuing (1/5). At the time of the assessment interview, Ms. Russell-Brown reported Ms. Q stating that, "he needs help all the time or he will go in the closet[,] in a hamper or on the floor. We have to ask him [if] he has to go & make sure he does."³² During the interview, Mr. X denied needing help in the bathroom, but the observations recorded on the CAT state

²⁷ January 22, 2014 letter.

²⁸ Exhibit E at 7.

²⁹ *Id.*

³⁰ Exhibit E at 9.

³¹ 7 AAC 125.030(b)(6).

³² Exhibit E at 9.

a need for constant supervision for toileting due to confusion and diminished cognition.³³ Ms. Russell-Brown did not observe Mr. X toilet. Mr. Q testified that Mr. X preferred to stand while toileting and, unless he kept him facing forward and focused on the toilet, Mr. X would “wander” from the toilet while urinating. Mr. Q testified that he must clean Mr. X after a bowel movement. The issues presented when Mr. X stands to urinate may be resolved by him sitting, but sitting will not assist in cleansing after a bowel movement.

The assistance provided by the caregivers is consistent with the care required by a person who suffers from cognitive and behavioral problems such as Mr. X’s. He has established by a preponderance of the evidence that by October 23, 2013, he required hands-on physical assistance for cleansing more than twice per week. This is limited assistance. A score of 2/2 accurately reflects Mr. X’s need for physical assistance with this ADL.

6. Total Score

Mr. X must score at least 3 points to demonstrate he requires NFLOC and is therefore eligible for Waiver services. He receives one point for his cognitive score and one point for his behavioral score. He receives one point for each shaded ADL with a score of 2/2 or higher, so he receives one point for toileting. Mr. X has a total score of 3 and is eligible for Waiver services.

IV. Conclusion

The division’s scoring is affirmed in all areas except for toileting. In this area a score of 2/2 accurately reflects Mr. X’s needs. When his points are totaled, he has a total nursing and ADL score of 3. The denial of Mr. X’s application for Waiver services is reversed.

DATED this 14th day of August, 2014.

By: Signed
Rebecca L. Pauli
Administrative Law Judge

³³ *Id.* at 9.

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 August, 2014.

By: Signed
Name: Rebecca L. Pauli
Title: Administrative Law Judge

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