

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

In the Matter of:)	
)	OAH No. 14-0056-MDS
S Y)	HCS Case No.
_____)	Medicaid ID No.

DECISION

I. Introduction

The issue in this case is whether Mr. S Y remains eligible for Medicaid Home and Community-Based Waiver Services (waiver services). To do so he must demonstrate that he requires either skilled or intermediate level nursing care, or 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 June 21, 2013 and subsequently determined that Mr. Y no longer requires skilled nursing care, intermediate level nursing care, or extensive assistance with three or more "shaded" activities of daily living (ADLs).¹ DSDS notified Mr. Y of this on December 11, 2013.² Mr. Y contests the Division's determination.³

This decision concludes that Mr. Y does not currently require either skilled or intermediate level nursing care. However, the preponderance of the evidence indicates that Mr. Y requires extensive assistance with body / bed mobility, transfers, and toileting. Because Mr. Y requires extensive assistance with these three "shaded" ADLs, he remains eligible for waiver services. The Division's decision terminating Mr. Y's waiver services is therefore reversed.

II. Facts

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

Mr. Y is a 49-year-old man who lives in a single family home which he shares with an adult child.⁴ His diagnoses include occlusion of a cerebral artery, cerebral infarction, acute cerebrovascular disease, atrial fibrillation, congestive heart failure, primary cardiomyopathy nec, and hemiplegia.⁵ He returned home from an extended care nursing facility on December 24, 2012 and has lived at home since then.⁶ He was hospitalized once within the past year for

¹ Exs. D, E.
² Ex. D.
³ Ex. C.
⁴ Ex. E p. 1.
⁵ Ex. E p. 3.
⁶ Ex. E p. 3.

"pacer placement."⁷ Within the last year he has been to an emergency room once after falling and hitting his head, and one or more times as a result of pneumonia with coughing and pain.⁸ He uses a wheelchair due to his hemiplegia.⁹ He had a manual wheelchair at the time of the assessment at issue, but had obtained a power wheelchair by the date of the hearing.¹⁰ He weighs about 250 pounds.¹¹

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

The assessment which resulted in the filing of this case was performed on June 21, 2013 by Sharon Schober, R.N. of DSDS.¹² Ms. Schober 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.¹³ In completing the CAT, Ms. Schober reported that Mr. Y has the following abilities and limitations relevant to this case:¹⁴

Functional Assessment:¹⁵ Ms. Schober reported that Mr. Y uses a wheelchair due to his hemiplegia and was therefore unable to touch his hands over his head or behind his back, place his hands across his chest and stand up, lift his legs enough to reach his feet, or touch his feet while sitting. Ms. Schober wrote that Mr. Y has a strong grip with his right hand, but that he has no functional range of motion or effective grip with his left hand and arm, which are flaccid.

Physical Therapy:¹⁶ Ms. Schober reported that Mr. Y is not currently receiving speech or language therapy, respiratory therapy, or physical therapy, but that he is receiving occupational therapy two days per week. Ms. Schober also reported that Mr. Y does not currently have any prescriptions for walking, range of motion, foot care, or other care requiring hands-on assistance.

Bed / Body Mobility:¹⁷ Ms. Schober reported that Mr. Y told her (1) that he sleeps in a hospital bed with an overhead trapeze; (2) that he can turn himself to his left side in bed using his trapeze; and (3) that he needs help to turn over to his right side in bed because he cannot use his left arm. Ms. Schober reported that she observed (1) Mr. Y move from a lying position to a sitting position with assistance; and (2) observed him shift his position in bed himself using his trapeze.

⁷ Ex. E p. 3.

⁸ Ex. E p. 3.

⁹ Ex. E p. 7.

¹⁰ T C hearing testimony; observation by the administrative law judge at hearing.

¹¹ Ex. E p. 9.

¹² Ex. E.

¹³ Ex. E.

¹⁴ Ex. E pp. 1 - 31.

¹⁵ Ex. E p. 4.

¹⁶ Ex. E p. 5.

¹⁷ Ex. E p. 6.

Ms. Schober concluded that Mr. Y cannot turn completely to his right side in bed because of lack of mobility in his left arm, and that Mr. Y is at risk of developing pressure ulcers if he spends prolonged periods in bed on his back (scored 2/2).

Transfers:¹⁸ Ms. Schober reported she was told by Mr. Y that his son helps him transfer in and out of bed and in and out of his wheelchair. Ms. Schober reported that she observed Mr. Y stand up by holding onto his son's arm with his right hand and pulling himself up (scored 2/2).

Locomotion:¹⁹ Ms. Schober reported she was told by Mr. Y that he cannot propel his manual wheelchair by himself (he can use his right hand but not his left), and is therefore trying to obtain a power wheelchair. Ms. Schober reported that she observed (1) that Mr. Y cannot propel his wheelchair independently because his left arm is not functional, and (2) that it would not be possible for Mr. Y to use his wheelchair independently inside his home due to clutter and a lack of room to maneuver (scored 2/2).

Dressing:²⁰ Ms. Schober reported she was told by Mr. Y (1) that he needs help putting his left arm into his shirt sleeve and his left foot into his pant leg; (2) that he needs help pulling his shirt down in the back and pulling his pants up; (3) that he needs help putting on his leg brace; and (4) that he cannot use buttons or zippers. Ms. Schober reported that she observed that Mr. Y's son dress Mr. Y's upper body consistent with the above (scored 2/2).

Eating:²¹ Ms. Schober reported she was told by Mr. Y that he needs help preparing meals, but does not require assistance with eating or drinking. Ms. Schober reported that she observed that Mr. Y was able to grip eating utensils with his right hand and raise his right hand to his face (scored 0/0).

Toileting:²² Ms. Schober reported she was told by Mr. Y that he is occasionally incontinent,²³ can use a urinal independently, and needs help to transfer on and off the toilet. Ms. Schober reported that Mr. Y's functional assessment supports his stated need for assistance with toilet use (scored 2/2).

Personal Hygiene:²⁴ Ms. Schober reported Mr. Y told her he can comb his hair, brush his teeth, and wash and dry his face without assistance. Ms. Schober wrote she observed Mr. Y to have

¹⁸ Ex. E p. 6.

¹⁹ Ex. E p. 7.

²⁰ Ex. E p. 8.

²¹ Ex. E p. 9.

²² Ex. E p. 9.

²³ Ex. E p. 23.

²⁴ Ex. E p. 10.

a full range of motion as to his right arm, and that he should be able to perform personal hygiene tasks with set-up assistance (scored 1/1).

Bathing:²⁵ Ms. Schober reported she was told by Mr. Y that he needs help to transfer into and out of the shower / bathtub and to wash his feet and under his right arm. Ms. Schober reported that Mr. Y's functional assessment supports his stated need for assistance with bathing (scored 3/2).

Professional Nursing Services:²⁶ Ms. Schober found that Mr. Y has no current need for professional nursing services. Specifically, Ms. Schober found that Mr. Y is currently receiving no 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. Schober further found that Mr. Y does not currently have any unstable medical conditions, and specifically, that he does not use a catheter or ventilator / respirator, is not comatose, and does not have an uncontrolled seizure disorder.²⁸ In addition, Ms. Schober found that Mr. Y does not receive speech, respiratory, or physical therapy; that he receives occupational therapy twice per week; and that he does not require professional nursing assessment, observation, and/or management at least once per month.²⁹ Ms. Schober also found that Mr. Y 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. Schober found that Mr. Y does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.³¹

Cognition:³² Ms. Schober found that Mr. Y has no short or long-term memory problems. She also found that Mr. Y is generally able to recall names and faces, where he is, the location of his room, and the current season. She rated Mr. Y as being mostly independent in making decisions in everyday matters, having difficulty only in new situations. She concluded that Mr. Y has no cognitive problems requiring professional nursing assessment, observation, or management three days per week, or even once per month.

²⁵ Ex. E p. 11.

²⁶ Ex. E pp. 13 - 15.

²⁷ Ex. E p. 13.

²⁸ Ex. E p. 14.

²⁹ Ex. E p. 14.

³⁰ Ex. E p. 15.

³¹ Ex. E p. 15.

³² Ex. E p. 16.

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

Medication Management:³⁴ Ms. Schober reported that Mr. Y prepares and self-administers his medications, and that Mr. Y is always compliant in taking his medications.

Senses:³⁵ Ms. Schober found that Mr. Y is not impaired as to his vision and hearing, and that he has no difficulty in verbal communication with others.

Balance:³⁶ Ms. Schober found that Mr. Y limits his activities due to a fear of falling, and had fallen in the 30 days prior to the assessment.

Mood:³⁷ Ms. Schober found that Mr. Y exhibited no indication of depression or anxiety, and does not suffer from insomnia.

Based on the foregoing CAT scores, Ms. Schober found that Mr. Y 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. Y's Testimony Regarding his Care Needs and Functional Abilities

Mr. Y credibly testified at hearing in relevant part as follows:³⁹

1. He was formerly a commercial truck and bus driver. In 2011 he drove the Alaska-Canada highway five times. In 2012 the tour bus company that he was working for sent him to No Name State and No Name State 2 to drive tours of scenic canyons and casinos. He was spending the night in No Name State 2 on June 8, 2012. That night in his hotel room he began having trouble with his breathing and his heartbeat. He was taken to the hospital where his heart stopped twice. When he woke up the next morning, he was paralyzed on his left side.

2. He fractured his left elbow recently when his wheelchair overturned. On two occasions when he has fallen, he had to call the fire department to help him back up.

³³ Ex. E p. 17.

³⁴ Ex. E p. 20.

³⁵ Ex. E p. 22.

³⁶ Ex. E p. 23.

³⁷ Ex. E p. 25.

³⁸ Ex. E p. 29.

³⁹ All factual finding in this section are based on Mr. Y's hearing testimony unless otherwise stated.

3. He fell at home the week before the assessment and his son, who is also his PCA, was not able to get him back up. Fortunately his son's friend, who is six-foot-four-inches tall, was able to help him back up.
4. He has a hemi walker, but can only use it when undergoing therapy.
5. His son assists him with taking his heart / vascular medication to make sure he takes it correctly.
6. He needs to have surgery on both his hips and on his shoulder.
7. When he is going to bed each night, his son must lift his left leg and lay it out on the bed in the proper position. His son must also lift his left arm and put it where Mr. Y can reach it with his right hand, so he does not accidentally sleep on top of it at night.
8. His son must always help pull him up in order to transition from a sitting position to a standing position. His son provides weight bearing assistance with each of these transfers.
9. He has trouble using even his powered wheelchair inside his house because his trailer is small, and because his left limbs (which he cannot control) sometimes fall or hang out of the wheelchair and strike or catch on objects.
10. When dressing, he can dress his left side, but he can't dress his right side.
11. He can eat by himself using his good (right) hand.
12. His son must provide weight bearing assistance getting him on and off the toilet. A grab bar was installed by the toilet, but it is on his left (bad) side, so it does him no good.
13. He requires only set-up assistance with his personal hygiene tasks.
14. He requires "maximum" (his words) weight bearing assistance with transfers into and out of his bathtub / shower. On one occasion Mr. Y got stuck in his bathtub, and his son had to remove the bathtub / shower door in order to get him out.

Mr. Y's Care Coordinator, T C, testified in relevant part as follows:⁴⁰

1. Mr. Y requires weight-bearing assistance with transfers, including getting in and out of his wheelchair.
3. Mr. Y also requires weight-bearing assistance with the transfers associated with using the toilet.
4. Mr. Y resumed physical therapy in January 2014.

⁴⁰ All factual finding in this section are based on Ms. C's hearing testimony unless otherwise stated.

D. Relevant Procedural History

Mr. Y was originally found eligible for waiver services in 2012 or before.⁴¹ The assessment which resulted in the filing of this case was performed on June 21, 2013 by Sharon Schober, R.N. of DSDS.⁴² Based on that assessment, Ms. Schober concluded that Mr. Y is no longer eligible for participation in the waiver services program.⁴³ Accordingly, on December 11, 2013 the Division mailed a notice to Mr. Y advising that he was no longer eligible for waiver services and that his waiver services would be terminated after thirty days.⁴⁴ On January 3, 2014 Mr. Y requested a hearing to contest the Division's decision.⁴⁵

Mr. Y's hearing was held on February 6, 2014. Mr. Y attended the hearing in person, represented himself, and testified on his own behalf. T C, Mr. Y's Care Coordinator, participated in the hearing by phone and testified on Mr. Y's behalf.

The Division was represented by Angela Ybarra, who attended the hearing in person. Sharon Schober, R.N., a nurse employed by the Division, participated in the hearing by phone and testified on behalf of the Division. Following the hearing the record was held open for post-hearing filings through February 28, 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

⁴¹ Ex. F.

⁴² Ex. E.

⁴³ Ex E pp. 29 - 30; Ex. D.

⁴⁴ Ex. D.

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).

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.

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 program⁴⁹ (“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).

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

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. Y), 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

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.

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 case on June 21, 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 December 11, 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.

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 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

⁶³ Ex. E p. 29.

⁶⁴ Ex. E p. 29.

⁶⁵ Ex. E p. 29.

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.

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 "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); and **4** (the person is totally dependent).

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); and **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.⁷¹ The five "shaded" ADLs are bed / body mobility, transfers, locomotion, eating, and toilet use.⁷²

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.

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 Ex. E pp. 18, 29.

⁷² Ex. E pp. 18, 29.

D. Does Mr. Y Require Intermediate Level Nursing Care?

At hearing, Mr. Y did not contest the Division's finding that he does not currently require intermediate or skilled nursing care. The Division's findings on this issue in Exhibits E and F, and Ms. Schober's hearing testimony that Mr. Y currently has no nursing needs, were credible. Mr. Y presented no testimony tending to show that he currently has any nursing needs. Accordingly, Mr. Y failed to demonstrate a need for nursing services as defined by 7 AAC 140.510 and the Consumer Assessment Tool. The final issue is whether Mr. Y qualifies for waiver services based on the extent of his need for assistance with his activities of daily living.

E. Does Mr. Y 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.⁷³ 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. Y 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 page 18 of the CAT.⁷⁴ The CAT scores which the Division assigned to Mr. Y with regard to the five "shaded" ADLs are: bed mobility: 2/2; transfers: 2/2; locomotion: 2/2; eating: 0/0; and toilet use: 2/2.⁷⁵ Mr. Y disagrees with some of the ADL scores assigned by Ms. Schober, and asserts that he requires extensive assistance with bed / body mobility, transfers, and toilet use.⁷⁶ These three ADLs are addressed below.

⁷³ Ex. E p. 29.

⁷⁴ Ex. E pp. 18, 29.

⁷⁵ Ex. E p. 18.

⁷⁶ See Mr. Y's and Ms. C's hearing testimony. Mr. Y also asserted that he requires extensive assistance with regard to bathing. However, bathing is not one of the five "shaded" ADLs considered for purposes of eligibility for waiver services. Accordingly Mr. Y's need for assistance with bathing need not be discussed here.

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.⁷⁷ 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.⁷⁸

Ms. Schober reported that Mr. Y told her that he can turn himself to his left side in bed using his trapeze, but that he needs help to turn over to his right side in bed because he cannot use his left arm. Ms. Schober reported that she observed (1) Mr. Y move from a lying position to a sitting position with assistance; and (2) observed him shift his position in bed himself using his trapeze. Ms. Schober concluded that Mr. Y cannot turn completely to his right side in bed because of lack of mobility in his left arm, and that Mr. Y is at risk of developing pressure ulcers if he spends prolonged periods in bed on his back (scored 2/2).

On the other hand, Mr. Y testified that, when he goes to bed each night, his son / PCA must lift his left leg and lay it out on the bed in the proper position. His son must also lift his left arm and put it where Mr. Y can reach it with his right hand, so he does not accidentally sleep on top of it at night. Given that Mr. Y has left-side hemiplegia, this testimony was credible. Further, the fact that Mr. Y cannot use his left arm and leg, and that fact that he weighs at least 250 pounds, means that his son / PCA is necessarily providing weight-bearing assistance when he positions Mr. Y's left arm and leg. Mr. Y testified that this assistance was required every night (*i.e.* seven times per week). Thus, Mr. Y receives extensive assistance with bed / body mobility more than three times per week, and should therefore receive a self-performance score of three as to this "shaded" ADL.⁷⁹

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

⁷⁷ Ex. E p. 6.

⁷⁸ Ex. E p. 6.

⁷⁹ 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, with the help of his wheelchair, at least somewhat 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).⁸⁰ 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.⁸¹

Ms. Schober reported she was told by Mr. Y that his son helps him transfer in and out of bed and in and out of his wheelchair. Ms. Schober reported that she observed Mr. Y stand up by holding onto his son's arm with his right hand and pulling himself up (scored 2/2). Mr. Y testified that his son must *always* help pull him up in order to transition from a sitting position to a standing position, and that his son provides weight bearing assistance with *each* of these transfers.

Both Ms. Schober and Mr. Y reported that Mr. Y needs assistance with transfers - the only issue is the *extent* of the assistance provided. Ms. Schober assigned her "limited assistance" score based on one fairly brief assessment. On the other hand, Mr. Y's testimony that he requires weight bearing assistance with transfers every day, though self-serving, was credible. Further, a finding that Mr. Y requires extensive assistance with transfers is completely consistent with his medical diagnosis of hemiplegia, the fact that he weighs at least 250 pounds, and his credible testimony regarding multiple falls. Accordingly, the preponderance of the evidence indicates that Mr. Y 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).

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."⁸² 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.⁸³ Ms. Schober reported she was told by Mr. Y that he needs help to transfer on and off the toilet. Ms. Schober reported that Mr. Y's functional assessment supported his stated need for assistance with toilet use (scored 2/2). Mr. Y testified that his son / PCA must provide assistance getting him on and off the toilet, and that this assistance is weight bearing.

⁸⁰ Ex. E p. 6.

⁸¹ Ex. E p. 6.

⁸² Ex. E p. 9.

⁸³ Ex. E p. 9.

Here again, both Ms. Schober and Mr. Y reported that Mr. Y needs assistance with toileting - the only issue is the *extent* of the assistance provided. Ms. Schober assigned her "limited assistance" score based on one fairly brief assessment. On the other hand, Mr. Y's testimony that he requires weight bearing assistance with toileting transfers every day, though self-serving, was credible. Further, a finding that Mr. Y requires extensive assistance with transfers is completely consistent with his medical diagnosis of hemiplegia, the fact that he weighs at least 250 pounds, and his credible testimony regarding multiple falls. Accordingly, the preponderance of the evidence indicates that Mr. Y 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).

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. Y 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. Y requires extensive assistance as to these three shaded ADLs. Because Mr. Y 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. Y therefore remains eligible for waiver services.

IV. Conclusion

Mr. Y 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. Y's waiver services is reversed.

Dated this 9th day of May, 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 20th day of May, 2014.

By: *Signed*
Name: Jay D. Durych
Title: Administrative Law Judge, DOA/OAH

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