

making.⁶ She is able to walk short distances using a walker, but cannot propel herself in a wheelchair.⁷

Mr. Chow evaluated Ms. X on January 23, 2014, using the division's Consumer Assessment Tool (CAT).⁸ Based on this evaluation, the division notified Ms. X on February 25, 2014, that she was not eligible for participation in the Choice Waiver program.⁹

III. Discussion

A. Medicaid Home and Community-Based Waiver Program

An older adult or an adult with a physical disability is eligible to receive benefits under the Medicaid Home and Community-Based Waiver program, also called the Choice Waiver program, if he or she meets the eligibility requirements, including requiring the level of care that is normally provided in a nursing facility.¹⁰ If eligible, the program pays for services that allow the recipient to stay in his or her home – or in an assisted living home – rather than move into a nursing facility. The level of care that is provided in a nursing facility is described by regulation. Skilled nursing facility services are defined in 7 AAC 140.515. Intermediate care facility services are defined in 7 AAC 140.510.

The division determines whether an applicant requires nursing facility level of care services by conducting an assessment.¹¹ For older adults or adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and 515,¹² and incorporates the results of the CAT.¹³ The CAT is an evaluation tool created by the Department of Health and Social Services, and the January 29, 2009 version of that tool is adopted by reference in 7 AAC 160.900(d)(6).

Nursing facility level of care is divided into two categories: Skilled nursing and intermediate level nursing.

Skilled nursing services are the observation, assessment, and treatment of a recipient's unstable condition requiring the care of licensed nursing personnel to identify and evaluate the recipient's need for possible modification of

⁶ Testimony of U X.

⁷ *Id.*

⁸ Exhibit E.

⁹ Exhibit D.

¹⁰ 7 AAC 130.205(d)(2).

¹¹ 7 AAC 130.213.

¹² 7 AAC 130.215(4)(A) & (B).

¹³ 7 AAC 130.215(4).

treatment, the initiation of ordered medical procedures, or both, until the condition stabilizes.^{14]}

The services must be ordered by a physician,¹⁵ and provided by or supervised by the appropriate licensed healthcare professional who is on the premises at the time the services are rendered.¹⁶

Intermediate nursing services are the observation, assessment, and treatment of a recipient with long-term illness or disability whose condition is relatively stable and where the emphasis is on maintenance rather than rehabilitation, or care for a recipient nearing recovery and discharge whose condition is relatively stable but who continues to require professional medical or nursing supervision.^{17]}

These services must also be ordered by a physician.¹⁸ Unlike skilled nursing services, this regulation does not include a requirement that the supervising nurse be on the premises at the time the services are provided.

The CAT looks at whether the applicant needs specific skilled or intermediate nursing services.¹⁹ It also looks at the applicant's cognitive impairment and behavioral problems. If sufficiently severe, these are factored into the CAT scoring when assessing whether an individual is eligible for the Choice Waiver program. Finally, the CAT also assesses five Activities of Daily Living (ADLs): Bed Mobility, Transfers, Locomotion, Eating, and Toilet Use.²⁰ These are referred to as the "shaded" ADLs, and if the applicant needs at least limited assistance with one or more of these, they may be factored into the CAT scoring as well.²¹

Because this case involves the application for new services or benefits, Ms. X has the burden of proving her eligibility by a preponderance of the evidence.²²

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¹⁴ 7 AAC 140.515(b). "Licensed nursing personnel" means registered nurses or licensed practical nurses. 7 AAC 140.595(1).

¹⁵ 7 AAC 140.515(a)(2).

¹⁶ 7 AAC 140.515(a)(3).

¹⁷ 7 AAC 140.510(b).

¹⁸ 7 AAC 140.510(a)(2). Medically necessary occupational, physical, or speech-language therapy may be under the direction of the appropriately licensed therapist. 7 AAC 140.510(c).

¹⁹ Exhibit E. The division looks at whether the person "needs" the services, and not whether the recipient has been receiving them. The inability to pay for medically necessary services does not preclude a finding of eligibility when those services are needed.

²⁰ See Exhibit E18.

²¹ The extent of required assistance, and the number of different ADLs that need assistance varies depending on the applicant's other nursing, behavioral, or cognitive issues.

²² 7 AAC 49.135.

B. Ms. X' CAT Evaluation²³

1. Cognition and Functional Assessment

In administering the CAT, the division asks the applicant to perform a few quick tests. These are reflected on the CAT at page E8. The first test asks the applicant to draw a clock. Mr. Chow indicated that Ms. X was able to do this. Mr. X stated that she was only able to draw a circle with random numbers and no hands.²⁴ The drawing itself was not included as an exhibit, but given Ms. X' level of dementia discussed in more detail below, it is likely that Mr. X' description is accurate. While that drawing may be sufficient to warrant a "yes" answer for this particular test, Ms. X' response does raise questions about her cognition.

The second test asks the applicant to recall three items after five minutes. Mr. Chow provided a "yes" answer to this, but then indicated in his notes that she was not able to recall three items after five minutes. His notes are likely to be more accurate, as he had to enter them specifically rather than simply checking a yes or no box on a computer form. In addition, having short term memory issues is consistent with the other testimony about her cognition problems.

The next part of this initial inquiry looks at the applicant's ability to perform simple tasks. Mr. X disagreed with the CAT findings, stating that Ms. X cannot touch her hands over her head, and does not have either the flexibility or balance to touch her feet while sitting.²⁵

2. Activities of Daily Living

a. Bed Mobility

This ADL refers to a person's ability to sit up from a lying position, or move his or her body from side to side.²⁶ Mr. X points out that his mother often turns in bed in a way that leaves her legs hanging over the side. This had led to severe edema in her leg.²⁷ Ms. C

²³ Ms. X and the No Name staff contest nearly every aspect of the scoring on Ms. X' CAT. While the CAT is also used in assessing the Personal Care Assistance (PCA) services a person may receive, this case is limited to whether Ms. X is eligible to participate in the Choice Waiver program. Accordingly, only those areas of the CAT that impact Choice Waiver eligibility will be addressed here.

²⁴ Exhibit 1, page 2.

²⁵ Exhibit 1, page 3.

²⁶ See Exhibit E6.

²⁷ Exhibit E6; Exhibit 1, page 3; Testimony of Ms. C.

wrote that the staff must “attempt to cue her to reposition self.”²⁸ The existing record does not indicate how often those attempts are unsuccessful and staff must use physical hands on assistance to reposition Ms. X. In addition, Ms. C testified that on bad days, staff needed to use some physical guidance when assisting Ms. X out of bed. She was not, however, able to say whether these bad days occurred more than twice a week. Mr. Chow’s assessment indicates that she needs hands on assistance less than three times a week for bed mobility.²⁹ Ms. X has not met her burden of proving that this score was inaccurate.

b. Transfers

This ADL refers to movement between surfaces, such as getting out of bed, or standing up from or sitting down in a chair.³⁰ Ms. X is able to do this herself, using her walker or some other object for assistance.³¹ She does need someone to place her walker nearby and to supervise in case she falls, but she does not need physical hands on assistance. Mr. Chow scored Ms. X as needing supervision only, and it has not been proven that this score was inaccurate.

c. Locomotion

Locomotion refers to the ability to move around in one’s own room or other areas on the same floor.³² The parties agree that Ms. X can move a short distance from her room to the bathroom or to the sun room where meals are served, and that she can do this using her walker without hands on assistance. Mr. Chow concluded that she was also able to propel herself in a wheelchair because her grip was strong.³³ Ms. C stated that Ms. X does not have the cognitive ability to use a wheelchair independently, and probably doesn’t have the physical strength to do so.³⁴

For purposes of this case, it is sufficient that she is able to move short distances on her own. While she needs someone with her while she does that, she does not need physical, hands on assistance. It has not been proven that Mr. Chow’s scoring for this task was incorrect.

²⁸ Exhibit 5, page 1.

²⁹ Exhibit E6.

³⁰ See Exhibit E6.

³¹ Exhibit 5, page 2.

³² See Exhibit E7.

³³ Testimony of Mr. Chow.

³⁴ Testimony of Ms. C. Ms. X has never attempted to propel her own wheelchair, so Ms. C was unable to say with certainty that it could not happen.

d. Eating

Eating refers to how a person eats and drinks regardless of the skill level.³⁵ The parties do not dispute that Ms. X does not need physical assistance with the task of eating once the meal has been prepared for her.

e. Toilet Use

Ms. X needs at least limited assistance with toileting. She is cognitively unaware of her own needs, and will sit in wet or soiled clothing for hours if not attended to.³⁶ Ms. C wrote

While it requires extensive cueing and behavioral support to accomplish, Ms. X absolutely requires hands-on assist to complete and manage the area of toileting and peri-care. She is incontinent of both bowel and bladder. She wears briefs and while the staff attempt to prove a toileting regime of every two hours to prevent incontinence, she does still experience episodes of it. She does attempt to take herself to the toilet at times, putting herself at risk, but can not manage cleaning herself and instead “smears” and spreads fecal matter. When staff find her in this situation not only does it require extensive hands-on physical care to clean her up, but also presents behavioral challenges, she does not recognize she is “dirty” and may become combative during the process, particularly when a shower is required to ensure she is thoroughly clean. This can occur daily and at times occurs more than once daily.^[37]

The CAT evaluation seems to acknowledge the need for physical assistance, noting that the No Name staff reported Ms. X “needs help to get cleaned up because she can’t due [sic] it effectively.”³⁸ Ms. X should have been scored with at least a 2/2 in this area, indicating a need for hands on physical assistance by one person at least three times a week.

3. *Professional Nursing Services*

Section A of the CAT addresses professional nursing services. The preface to this section states that it is scored based on the need for care “that is or otherwise would be performed by or under the supervision of a registered professional nurse.”³⁹ “Registered professional nurse” is not a recognized title in Alaska’s nursing licensure statutes,⁴⁰ and is interpreted here to mean either a registered nurse or a practical nurse so as to be consistent

³⁵ See Exhibit E9.

³⁶ Testimony of Ms. C.

³⁷ Exhibit 5, page 3. Also testimony of Ms. C (needs physical help toileting daily).

³⁸ Exhibit E9.

³⁹ See Exhibit E13.

⁴⁰ See AS 08.68.

with the requirements for skilled nursing set out in 7 AAC 140.515(b) and 7 AAC 140.595(1).

This section lists a variety of services that might be performed or supervised by a licensed nurse. The three that might apply here are A4 (treatment and dressing), A6 (assessment/management), and A13 (assessment/management).⁴¹ Treatment and dressing is only scored if irrigation, application of medications, or sterile dressings are prescribed, and the treatment or dressing *must be performed by a registered nurse*.⁴² Ms. X's skin rash and edema are monitored several times a week, and she has been prescribed medication for those conditions which is used as needed.⁴³ The evidence in the record does not show that the application of that medication must be performed by a registered nurse. Accordingly, Ms. X was appropriately scored as not needing this skilled nursing service.

The next two services involve assessment and management of a medical condition. Service A6 looks at whether professional nursing assessment, observation, and management are needed for an unstable condition *at least every eight hours*.⁴⁴ Ms. X does not need assessment and management with that frequency. Service A13 asks whether professional nursing assessment, observation and management of a medical condition is needed once a month.⁴⁵ Ms. X requires and has been receiving professional nursing assessment of her rash and her edema.⁴⁶ She should have been scored with a "1" for section A13, indicating a yes answer.

4. *Special Treatments and Therapies*

Section B of the CAT looks at specified treatments for post-operative or chronic conditions. As stated above, Ms. X receives nursing monitoring for her edema and her rash. Ms. C wrote that a registered nurse monitors the edema at least weekly, and sometimes two or three times a week.⁴⁷ The nurse monitors the skin rash at least monthly.⁴⁸ These are chronic conditions that should have been scored with a "1" under section B1j.

⁴¹ Exhibits E13 & E14.

⁴² Exhibit E13.

⁴³ Testimony of Ms. C.

⁴⁴ Exhibit E14.

⁴⁵ *Id.*

⁴⁶ Testimony of Ms. C.

⁴⁷ Exhibit 5, page 4.

⁴⁸ *Id.*

5. *Cognition*

The next part of the CAT provides a more detailed look at an applicant's cognitive abilities. The scoring of this section indicates a much higher level of functioning than one would expect for a woman living in a secure Alzheimer's unit. Mr. Chow testified that he asked Ms. X what month it was, and she answered "January." Mr. X was present during the evaluation, and he testified that she answered "January, February, March, April, etc." The division does not record these evaluations, so it is difficult to resolve the discrepancy between these two witnesses.

The testimony from Ms. C and Mr. X was that Ms. X frequently had to be reminded where she sat for meals, would get lost if she went too far down the hall away from her room, and could not recall most names or faces. She will frequently stand at her doorway confused until someone suggests she come sit down for a meal. She will forget to shower, change her clothes, or use the toilet unless reminded.

Given the other testimony about Ms. X' condition, and the fact that she was first diagnosed ten years ago, it is probable that she does not know the current season or month.

6. *Problem Behavior*

Section D of the CAT looks at problem behavior. Based on the testimony of Mr. X and Ms. C, Ms. X is verbally abusive daily, and physically abusive towards staff weekly. She exhibits socially inappropriate behavior such as smearing feces or eating other residents' food. She constantly resists necessary care, in part because she is not cognitively aware of the need for that care. None of these behaviors are easily altered. She is on medication to help control her problem behavior. The medication has reduced the abusive behavior, but has not eliminated it.

C. *Scoring the CAT*

The scoring from each section of the CAT is summarized on a final page.⁴⁹ A person who receives at least three points on the summary page qualifies to participate in the Choice Waiver program.

Section NF1 lists five subparts. A person who receives a "yes" answer to any of those five questions is presumed to need at least intermediate nursing level of care, and therefore qualifies for the Choice Waiver program.

⁴⁹ See Exhibit E29.

Section NF2 looks at less serious nursing needs. Depending on the scores given in section A and section B, a person could earn up to four points towards the total nursing needs score on this summary page. None of Ms. X' scores in sections A or B qualify her for a point in section NF2.

NF3 looks at memory problems, and is divided into four subparts. The first asks "Is Section C1a (short-term memory), code with a "1"? Mr. Chow indicated a "yes" answer to this question. The next part asks "In section C2 (memory recall) are 1 or 2 boxes checked in C2a-C2d or is C2e None of the Above Checked?" Section C2 is on page E16. As discussed in section B 1 above, no more than one of the boxes should have been checked as able to recall. She should have received a "yes" answer to this question.

The next part asks "Is Section C3 coded with a 2 or 3?" Section C3 looks at daily decision-making. A score of 2 indicates moderate impairment with poor decisions requiring cueing and supervision. The evidence in this case is that Ms. X is not capable of making her own decisions. Ms. X' decision-making is at least moderately impaired, and more likely severely impaired. She should have received a "yes" answer here.

The fourth part asks two different questions. First, it asks if the applicant needs professional nursing assessment, observation and management at least three days a week to manage the cognitive impairment. The evidence in this case is not sufficient to find this need. The second question is whether the applicant needs at least limited assistance with one of the shaded ADLs *and* scored at least 13 points on the supplemental screening tool for cognition.⁵⁰ Ms. X needs limited assistance with the shaded ADL of toileting.

Mr. Chow's evaluation only gave Ms. X ten points on the five different areas assessed in this supplemental tool. For the first area, Memory for Events, Mr. Chow gave her a score of 2, indicating that she cannot recall entire events or names of close friends or relatives without prompting. A three would indicate inability to recall entire events or the name of her spouse even with prompting. Because of Ms. X' limited ability to communicate, it is difficult to know what she is able to recall. This is a close question, but the evidence in the record is insufficient to show by a preponderance of the evidence that Mr. Chow's score of two points is incorrect.

⁵⁰ Exhibit G1. This supplemental screening tool was scored by Mr. Chow, but inadvertently left out of the hearing exhibits. It was submitted by the division after the hearing.

The second area addresses Memory and Use of Information. Mr. Chow gave her three points, indicating Ms. X has difficulty remembering and using information, and needs direction and reminding four or more times a day. Ms. X needs continual verbal cueing, and should have received four points for this area.

The third area on the supplemental tool is for Global Confusion. Mr. Chow scored Ms. X as having periodic confusion during the daytime. In fact, she is nearly always confused. She should have been given three points in this area.

The next area addresses Spatial Orientation. Ms. X doesn't always know how to get from her room to the sun room across the hallway. She gets lost in No Name if she goes anywhere other than her room, the bathroom, or the sun room. She should have received three points for this area.

The final area is Verbal Communication. Mr. Chow indicated that Ms. X has only minor difficulty with speech. In fact, she is not able to make her needs known other than indicating a desire to resist care. She should have been given at least two points in this area, indicating that she is able to carry out only simple conversations.

Ms. X should have received a total of at least 14 points in the supplemental screening tool. This would result in a yes answer in NF3, part d. Since Ms. X should have received a yes answer to all four parts of NF3, she should have received one point for cognitive problems.

Section NF4 looks at behavior problems. Ms. X is verbally abusive daily, and resists care daily. NF4 part a asks if that behavior occurs at least four times a week. It does, so she should have received a yes answer to NF4, part a.

NF4, part b asks two different questions. First, it asks if section D2A of the CAT is coded with a 1. D2A asks if professional nursing assessment, observation and management is needed at least three days a week to manage Ms. X' behavioral problems.⁵¹ Ms. X is on medication to control her behavioral problems.⁵² It is likely that Ms. X does need professional nursing assessment, observation, and management to determine if the medication is effective or needs adjustment. However, there is insufficient information in

⁵¹ Exhibit E17.
⁵² Testimony of Ms. C.

the record from which it could be found that she needs that assessment from a licensed nurse at least three times a week.

The second question in DF4, part b asks if Ms. X needs physical assistance with at least one of the shaded ADLs and scored at least 14 points on the supplemental screening tool for behavior.⁵³ Ms. X needs limited assistance with the shaded ADL of toileting.

As with the cognition tool, the behavioral supplement also asks the evaluator to enter the code that “most accurately describes the person’s [behavior] for last 7 days,”⁵⁴ and is divided into five areas. The first area is for Sleep Patterns. Mr. Chow testified that this measures changes in a person’s normal sleep patterns. Ms. X sleeps most of the day and night, but because that is normal for her, and because there are no recent changes in her sleep pattern, he gave her zero points. Ms. X could receive four points for this area if her normal behavior was wandering for most of the night, but since she does not do this, she was properly scored.

The next area also addresses Wandering. Ms. X does not wander, and therefore she was correctly given zero points in this area.

The third area addresses Behavioral Demands on Others. Ms. X should have received four points in this area because her behavior cannot be “changed to reach the desired outcome.” Her inappropriate behaviors have been significantly reduced through medication and supervision, but those behaviors have not been eliminated.

The fourth area addresses Danger to Self and Others. Mr. Chow gave Ms. X two points in this area, but because she is verbally abusive daily, Ms. X should have received at least three points. Because she is physically abusive on a weekly basis, a more appropriate score is five points.⁵⁵

The final behavioral area is Awareness of Needs/Judgment. Ms. X does not understand her own self care needs, and does not cooperate with staff attempting to meet those needs. She should have been given three points in this area.

⁵³ Exhibit G2. This supplemental screening tool was scored by Mr. Chow, but inadvertently left out of the hearing exhibits. It was submitted by the division after the hearing.

⁵⁴ This document actually asks the evaluator to score behavior based on the applicant’s “cognition,” but it is assumed that this is a typographical error on the form.

⁵⁵ There is no scoring option for four points in this area.

Although Ms. X presents significant behavioral challenges, she should only receive 12 points on the behavioral supplemental tool. Accordingly, she does not qualify for a point under section NF4 of the CAT scoring page.

Section NF5 of the CAT totals the nursing needs from NF2, NF3, and NF4. Ms. X receives one point under NF3. Accordingly, section NF6 is also scored.

Section NF6 counts the number of shaded ADLs in which the applicant needs at least limited assistance. Ms. X needs limited physical assistance with toileting. She gets one point for this section.

Section NF7 then adds the points under NF5 to the points under NF6. Ms. X has only two points total. It takes a minimum of three points in this section to qualify, so Ms. X does not qualify for the Choice Waiver program.

IV. Conclusion

Ms. X has severe cognitive and behavioral problems, and some physical limitations. Her needs are not sufficiently severe, however, to meet the stringent eligibility standards for the Choice Waiver program. The division's determination denying her application is affirmed.

Dated this 15th day of April, 2014.

Signed
Jeffrey A. Friedman
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 7th day of May, 2014.

By: Signed
Signature
William J. Streur
Name
Commissioner
Title

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