

2014 and she continues to decline.⁶ Ms. D does not have any skilled nursing needs and was not receiving any therapies at the time of the division's evaluation.⁷

Ms. Sullivan evaluated Ms. D on October 7, 2013.⁸ Ms. Sullivan also conducted the previous evaluation on July 19, 2012.⁹ She concluded that Ms. D needed limited assistance with transfers and dressing.¹⁰ Ms. Sullivan also concluded that Ms. D needed extensive assistance with bathing.¹¹ Based on her evaluation, the division determined that Ms. D was no longer eligible for the Waiver program.¹² The division notified Ms. D of its decision to terminate Waiver services on February 24, 2014.¹³

III. Discussion

A. *Medicaid Home and Community-Based Waiver Program*

An adult with a physical disability is eligible to receive benefits under the Medicaid Home and Community-Based Waiver program, also called the Waiver program, if he or she meets the eligibility requirements, including requiring the level of care that is normally provided in a nursing facility.¹⁴ 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.¹⁵

The division determines whether an applicant requires nursing facility level of care services by conducting an assessment.¹⁶ For older adults or adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and 515,¹⁷ and incorporates the results of the Consumer Assessment Tool (CAT).¹⁸ 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).

⁶ Testimony of Ms. D; Testimony of Ms. J; Testimony of Ms. N.

⁷ Exhibits E15 – E17.

⁸ Exhibit E; Testimony of Ms. Sullivan.

⁹ See Exhibit F.

¹⁰ Exhibit E14.

¹¹ Exhibit E14.

¹² Exhibit D.

¹³ Exhibit D.

¹⁴ 7 AAC 130.205(d)(2).

¹⁵ Skilled nursing facility services are defined in 7 AAC 140.515. Intermediate care facility services are defined in 7 AAC 140.510.

¹⁶ 7 AAC 130.213.

¹⁷ 7 AAC 130.213(4)(A) & (B).

¹⁸ 7 AAC 130.213(4).

Once an individual has qualified to participate in the Waiver program, certain requirements must be met before he or she can be removed from that program. Specifically, the individual must have had an annual assessment, the assessment must find that the individual has materially improved, and the assessment must have been reviewed by an independent qualified health professional.¹⁹ For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska and qualified to assess adults with physical disabilities.²⁰ Material improvement for an adult with physical disabilities is defined as

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 Waiver services.^[21]

Based on this definition, a “material improvement” determination is focused on whether the individual currently qualifies for the Waiver program rather than on any specific changes in functional limitation or cognitive impairment since a prior assessment.²² In deciding whether a person is eligible, the division looks at the recipient’s level of care needs as of the date the division notified the person of its determination.²³ Because the division seeks to terminate Ms. D’s participation in the program, it has the burden of proof.²⁴

B. Ms. D’s Assessment

As noted above, the division’s assessment incorporates the results of the CAT evaluation. There are several different ways in which the scoring on the CAT will indicate that a person qualifies for the Waiver program. The nurse’s evaluation is summarized on the scoring page.²⁵

Ms. D would qualify for the program if she had certain skilled nursing needs listed in section NF1 of the summary sheet. She does not have skilled nursing needs.²⁶ Ms. D would also qualify if she needed at least extensive assistance with three or more of the “shaded” activities of daily living (ADLs). The shaded ADLs are Bed Mobility, Transfers,

¹⁹ AS 47.07.045(b)(1) – (3).

²⁰ AS 47.07.045(b)(2)(B).

²¹ AS 47.07.045(b)(3)(C).

²² *In re E H*, OAH No. 13-1000-MDS, at 3 (Comm’r of Health & Soc. Serv. 2013).

²³ *In re T C*, OAH No. 13-0204-MDS, at 7 (Comm’r of Health & Soc. Serv. 2013).

²⁴ 7 AAC 49.135.

²⁵ Exhibit E31 – 32.

²⁶ Exhibit. E15; Testimony of Ms. Hanley.

Locomotion, Eating, and Toilet Use.²⁷ Extensive assistance is defined as needing weight-bearing support to perform the task three or more times during a week, or being totally dependent on a caretaker to perform the task during some, but not all, of the prior week.²⁸

Based on her observations during the CAT evaluation, Ms. Sullivan concluded that Ms. D needed limited assistance with only one shaded ADL: transfers. According to the CAT, she did not need extensive assistance with any of her shaded ADLs.

Ms. D could also be found eligible for the Waiver program if she has sufficiently severe cognitive deficits and needs at least limited assistance with two or more of the shaded ADLs.²⁹ However, even if it is assumed that Ms. D has a more severe cognitive impairment than found by the division, she still does not qualify for the Waiver program because she only needs limited assistance with one of the shaded ADLs. Although she needs assistance with dressing and bathing, and with her instrumental activities of daily living, those needs are not considered in deciding whether someone meets the Waiver eligibility requirements.

1. Bed Mobility

Ms. Sullivan concluded that Ms. D was able to independently turn herself in bed and sit up in bed.³⁰ This finding was based on Ms. Sullivan's observation of Ms. D ambulating unassisted with her oxygen in use. It was also based on Ms. D's statement that her skin is intact, and that she sleeps with her Ambient and CPap, which her daughter helps set up.³¹ The other testimony at the hearing did not dispute this finding. The division has met its burden of proving that Ms. D is independent with this ADL.

2. Transfers

Ms. D told Ms. Sullivan that she tires easily and becomes short of breath during activities.³² Ms. D asks her granddaughter and PCA, Ms. N, for help when she is very short of breath.³³ Ms. Sullivan observed Ms. D stand independently using her arms to push herself up from the couch in the living room.³⁴ Both the division and Ms. D's description of

²⁷ Exhibit E20.
²⁸ See Exhibit E20.
²⁹ See Exhibit E31.
³⁰ Exhibit E8.
³¹ Exhibit E8.
³² Exhibit E8.
³³ Exhibit E8.
³⁴ Exhibit E8.

how she transfers support the division's 2/2, or limited assistance with a one-person physical assist score. The division has met its burden of proving that Ms. D needs limited assistance with this ADL.

3. *Locomotion*

Locomotion is defined as the way in which a person moves between locations in his or her own room or other areas on the same floor. During the assessment, Ms. D explained to Ms. Sullivan that she goes down the stairs very carefully, holding onto the handrails.³⁵ She does not use her walker in her home, but does use it outside the home.³⁶ Ms. Sullivan observed Ms. D ambulate unassisted from the bedroom to the living room.³⁷ The division found that Ms. D was independent with this ADL,³⁸ and Ms. D did not dispute this finding. The division has met its burden of proof on this ADL.

4. *Eating*

This ADL refers to how a person eats and drinks, regardless of skill. It does not include the activity of cooking or preparing the meal. Ms. D has no problems swallowing or chewing foods.³⁹ Ms. Sullivan found that Ms. D was independent with this ADL based on her statements,⁴⁰ and Ms. D did not dispute this finding at hearing. The division has met its burden of proof on this ADL.

5. *Toilet Use*

Ms. D told Ms. Sullivan that she was able to use the toilet independently,⁴¹ and this was not disputed at hearing. The division has met its burden of proof on this ADL.

6. *Cognition Issues*

At hearing, Ms. D's primary challenge to the division's findings was based on her declining memory and cognition.⁴² Ms. D, her daughter, and her granddaughter testified credibly that Ms. D's memory is declining and her mood is unstable. The changes she is

³⁵ Exhibit E9.

³⁶ Exhibit E9.

³⁷ Exhibit E9.

³⁸ Exhibit E9; Exhibit E20.

³⁹ Exhibit E11.

⁴⁰ Exhibit E11.

⁴¹ Exhibit E11.

⁴² Testimony of Ms. D. Ms. D also testified that she needs assistance with the personal hygiene task of brushing and drying her hair because of shoulder pain. Personal hygiene score is not a "shaded ADL" and is not considered for a Waiver determination.

experiencing cause Ms. D fear and stress.⁴³ During the two-hour hearing, Ms. D's testimony was organized, logical, and thoughtful.

Ms. Sullivan scored Ms. D as having some short-term memory problems and listed her as "modified independence- some difficulty in new situation only" for cognition skills for daily decision-making on the CAT.⁴⁴ Ms. D's medical records,⁴⁵ submitted after the division's denial of Waiver services, do not show a level of cognition impairment that would qualify her for Waiver services. Her physician notes⁴⁶ that her dementia scoring, from a test administered on March 13, 2014,⁴⁷ is normal. Ms. Sullivan reviewed the records submitted by Ms. D and determined that, although there is some evidence of decline, it does not reach a level that qualifies Ms. D for the Waiver program. The division has met its burden with regard to cognition scoring.

IV. Conclusion

Ms. D previously qualified for the Waiver program because she needed extensive assistance with three ADLs.⁴⁸ She was not receiving physical therapy at the time of her most recent CAT evaluation or when the division issued its notice of termination. Nor was she receiving professional nursing assessments or home doctor visits. In addition, Ms. D is now independent with locomotion and toileting. Accordingly, she no longer qualifies for the Waiver program and the division's decision is affirmed. Ms. D may reapply if her condition has declined since the division's decision date.⁴⁹

Dated this 31st day of July, 2014.

Signed
Bride Seifert
Administrative Law Judge

⁴³ Testimony of Ms. D.

⁴⁴ Exhibit 18.

⁴⁵ See Exhibits 1 – 12.23. The exhibits include prescriptions for brain training, walking exercises, and foot care. The brain training prescription does not overcome Ms. D's March 2014 cognition assessment that shows normal cognition. The foot care prescription is not considered for a Waiver determination. In regards to walking exercises, neither the CAT nor the hearing testimony supports the need for hands-on assistance in order to walk.

⁴⁶ Exhibit 7.1.

⁴⁷ Exhibit 11.1.

⁴⁸ Exhibits D2, F18, and F29.

⁴⁹ See *T C*, OAH No. 13-0204-MDS (Comm'r of Health & Soc. Serv. 2013). The division's decision date is the date of the division's denial letter. At the time of the division's decision, February 24, 2014, Ms. D did not meet the level of care required to qualify for Waiver services.

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 19th day of August, 2014.

By: *Signed* _____
Name: **Bride Seifert** _____
Title/Division: **ALJ/OAH** _____

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