

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

In the Matter of: )  
 )  
 T X ) OAH No. 14-0993-MDS  
 ) Agency Case No.

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**DECISION**

**I. Introduction**

The issue in this case is whether Mr. T X 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 13, 2013 and subsequently determined that Mr. X no longer requires skilled nursing care, intermediate level nursing care, or extensive assistance with three or more "shaded" activities of daily living (ADLs).<sup>1</sup> DSDS notified Mr. X of its determination on December 20, 2013.<sup>2</sup> Mr. X requested a hearing to contest the Division's determination on or about December 27, 2013.<sup>3</sup>

This decision concludes that Mr. X does not currently require skilled nursing care, intermediate level nursing care, or extensive assistance with three or more "shaded" ADLs. Accordingly, Mr. X is no longer eligible for waiver services. The Division's decision terminating Mr. X's waiver services is therefore affirmed.

**II. Facts**

**A. Mr. X's Current Medical Diagnoses**

Mr. X is 60 years old.<sup>4</sup> At the time of his 2013 assessment he lived alone in a single-level apartment; at the time of his 2014 hearing he was homeless.<sup>5</sup> Mr. X's diagnoses include blood clots (emboli) of the left leg, causing ischemia, cardiac dysrhythmia, cerebrovascular accident / cerebral embolism with infarction (CVA or stroke), hemiplegia, a hip fracture, and peripheral artery disease (PAD).<sup>6</sup> He has spasticity in his left arm,<sup>7</sup> and he fell once during the

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<sup>1</sup> Exs. D, E.

<sup>2</sup> Ex. D.

<sup>3</sup> Ex. C3.

<sup>4</sup> All factual findings in this paragraph are based on Ex. E, pages 1 - 3 unless otherwise stated.

<sup>5</sup> Ex. E p. 1; T X's hearing testimony.

<sup>6</sup> Ex. E p.3.

<sup>7</sup> Ex. E. p.4.

assessment period and fractured one of his ribs. Mr. X was hospitalized once, during the year prior to his current assessment, due to blood clots.<sup>8</sup> During the same period he had to make about five trips to hospital emergency departments due to pain.<sup>9</sup> Mr. X is currently on a pain contract and must visit the doctor who dispenses his pain medications every two weeks.<sup>10</sup>

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

The assessment at issue in this case was performed on June 13, 2013 by Sam Cornell, R.N. of DSDS.<sup>11</sup> Mr. Cornell used the Consumer Assessment Tool or "CAT," a system for scoring the need for nursing assistance and physical assistance which is described in detail in Part III of this decision, to record the results of the assessment.<sup>12</sup> Mr. Cornell reported that Mr. X has the following functional abilities and limitations, and the following nursing needs:<sup>13</sup>

Functional Assessment:<sup>14</sup> Mr. Cornell reported that Mr. X was able to touch his hands over his head and behind his back, and touch his feet while seated, and that he had a strong grip with each hand, but that he was unable to place his hands across his chest and stand up.

Physical Therapy:<sup>15</sup> Mr. Cornell reported that Mr. X is not currently receiving physical therapy, speech or language therapy, occupational therapy, or respiratory therapy. Mr. Cornell also reported that Mr. X does not currently have any prescriptions for walking for exercise, range of motion exercises, or foot care.

Bed / Body Mobility:<sup>16</sup> Mr. Cornell reported that Mr. X told him that he has no wounds or areas of skin breakdown, and that he is able to reposition himself in bed without assistance. Mr. Cornell reported that he observed that Mr. X sleeps in a standard (non-hospital) bed, with no assistive devices, and that Mr. X repositioned himself on a sofa without assistance (CAT score 0/0).

Transfers:<sup>17</sup> Mr. Cornell reported that he was told by Mr. X that it is difficult for him to transfer to and from low surfaces, and that he seeks help with transfers if someone is available to help, but that he is able to transfer in and out of bed, on and off his recliner, and on and off his toilet (which is equipped with an elevated seat) by himself. Mr. Cornell reported that he observed that

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<sup>8</sup> Ex. E p.3.  
<sup>9</sup> Ex. E p.3.  
<sup>10</sup> Ex. E p.4  
<sup>11</sup> Ex. E.  
<sup>12</sup> Ex. E.  
<sup>13</sup> Ex. E pp. 1 - 31.  
<sup>14</sup> Ex. E p. 4.  
<sup>15</sup> Ex. E p. 5.  
<sup>16</sup> Ex. E p. 6.  
<sup>17</sup> Ex. E p. 6.

Mr. X has poor balance, but that he was able to complete transfers himself with only supervision (CAT score 0/0).

Locomotion:<sup>18</sup> Mr. Cornell reported that he was told by Mr. X that he seeks help with locomotion if someone is available to help, but that, when alone, he can walk unassisted within his home either by "wall-walking," using his cane, or using a walker. Mr. Cornell reported that he observed Mr. X walking in his home, that his gait was somewhat ataxic, and that his balance was fair to poor immediately after transferring (CAT score 1/1).

Dressing:<sup>19</sup> Mr. Cornell reported that he was told by Mr. X that he sometimes requires assistance putting on his pants and shoes, but that he was otherwise able to dress and undress himself. Mr. Cornell reported that he observed Mr. X to be appropriately dressed on the day of the assessment (CAT score 2/2).

Eating:<sup>20</sup> Mr. Cornell reported that he was told by Mr. X that he has no chewing or swallowing problems, and that he can eat unassisted once his food is prepared and served for him, but that, since his strokes, both of his hands shake, and for this reason he sometimes spills some food and drink during meals. Mr. Cornell also reported that Mr. X's PCA prepares medication reminders for him, and that Mr. X's weight has improved (CAT score 0/1).

Toileting:<sup>21</sup> Mr. Cornell reported that he was told by Mr. X that he can transfer on and off the toilet independently using grab bars and an elevated toilet seat, and that he can manage all other aspects of using the toilet independently (CAT score 0/0).

Personal Hygiene:<sup>22</sup> Mr. Cornell reported that Mr. X told him that he can wash his face and brush his teeth, but that his PCA must shave him and trim his mustache, and that he requires assistance trimming his toenails due to spasticity (CAT score 2/2).

Bathing:<sup>23</sup> Mr. Cornell reported that he was told by Mr. X that he can transfer into and out of the shower / bathtub himself, can stand while showering using grab bars, and can wash parts of his body, but that he requires PCA assistance washing his hair and back (CAT score 2/2).

Professional Nursing Services:<sup>24</sup> Mr. Cornell found that Mr. X has no current need for professional nursing services. Specifically, Mr. Cornell found that Mr. X is currently receiving no

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<sup>18</sup> Ex. E p. 7.

<sup>19</sup> Ex. E p. 8.

<sup>20</sup> Ex. E p. 9.

<sup>21</sup> Ex. E p. 9.

<sup>22</sup> Ex. E p. 10.

<sup>23</sup> Ex. E p. 11.

<sup>24</sup> Ex. E pp. 13 - 15.

injections, intravenous feedings, feedings via nasogastric, gastrostomy, or jejunostomy tubes, suctioning or tracheotomy care, treatments for open lesions, ulcers, burns, or surgical sites, and is not receiving oxygen for a new medical problem / condition.<sup>25</sup> Mr. Cornell further found that Mr. X 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.<sup>26</sup> In addition, Mr. Cornell found that Mr. X does not receive speech, occupational, respiratory, or physical therapy, and that he does not require professional nursing assessment, observation, and/or management at least once per month.<sup>27</sup> Mr. Cornell also found that Mr. X 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.<sup>28</sup> Finally, Mr. Cornell found that Mr. X does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.<sup>29</sup>

Cognition:<sup>30</sup> Mr. Cornell found that Mr. X has short-term memory problems, but no long-term memory problems. Mr. Cornell also found that Mr. X is generally able to recall names and faces, where he is, the location of his room, and the current season. Mr. Cornell rated Mr. X as being moderately impaired in making decisions in everyday matters. Mr. Cornell concluded that Mr. X has no cognitive problems requiring professional nursing assessment, observation, or management three days per week, but that he does need such care once per month.

Behavioral Problems:<sup>31</sup> Mr. Cornell found that Mr. X does not wander, and does not engage in socially inappropriate or disruptive behavior, but that he is often verbally abusive, and sometimes resists care. Mr. Cornell also found that Mr. X's sleep is restless with multiple nightly awakenings; that he wanders inside and around his residence, but in a way that does not jeopardize his health or safety; that Mr. X's attitudes and emotional states create consistent difficulties, but that with intervention they can be modified and kept within manageable levels; that he is sometimes disruptive or aggressive, or is sometimes extremely anxious or agitated, even after proper evaluation and treatment; and that he frequently has difficulty understanding needs that must be met, but will

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<sup>25</sup> Ex. E p. 13.

<sup>26</sup> Ex. E p. 14.

<sup>27</sup> Ex. E p. 14.

<sup>28</sup> Ex. E p. 15.

<sup>29</sup> Ex. E p. 15.

<sup>30</sup> Ex. E p. 16.

<sup>31</sup> Ex. E pp. 17 - 18.

cooperate when others provide explanation or direction. Mr. Cornell ultimately concluded that Mr. X does not need professional nursing assessment, observation, or management due to any behavioral problems.

Medication Management:<sup>32</sup> Mr. Cornell reported that Mr. X takes six different prescription medications; that he does not prepare his own medications, but does self-administer his own medications, and that Mr. X is rarely or never compliant in taking his medications.

Senses:<sup>33</sup> Mr. Cornell found that Mr. X is able to hear and communicate adequately, is usually able to understand others as well as make himself understood, and has adequate vision when corrected with his eyeglasses.

Balance:<sup>34</sup> Mr. Cornell found that Mr. X has balance problems when standing, has an unsteady gait, and had fallen in the 30 days prior to the assessment.

Oral health, skin conditions, and foot problems:<sup>35</sup> Mr. Cornell found that Mr. X has no oral health problems, no pressure sores, open sores, or lesions, and no burns or abrasions, but that he does have rashes and bruises. Mr. Cornell also found that Mr. X has foot problems, but that someone inspects his feet on a regular basis.

Mood:<sup>36</sup> Mr. Cornell found that Mr. X has insomnia or abnormal sleep patterns, has an unpleasant mood in the mornings, is often angry at himself or others, is often anxious, and has a reduced level of social interaction, but that he exhibited no indications of depression.

Based on the foregoing CAT scores, Mr. Cornell found that Mr. X 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).<sup>37</sup> Mr. Cornell's determination was subsequently reviewed by another DSDS nurse-assessor, Amanda McCrary, R.N., who concurred with Mr. Cornell's determination.<sup>38</sup> Finally, Mr. Cornell's determination was reviewed by a registered nurse employed by the Division's independent contractor, Qualis Health, who also concurred with Mr. Cornell's determination.<sup>39</sup>

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<sup>32</sup> Ex. E p. 21.

<sup>33</sup> Ex. E p. 23.

<sup>34</sup> Ex. E p. 24.

<sup>35</sup> Ex. E p. 25.

<sup>36</sup> Ex. E p. 26.

<sup>37</sup> Ex. E pp. 30, 31.

<sup>38</sup> Ex. D. p. 2.

<sup>39</sup> Ex. D. p. 2.

### ***C. Relevant Procedural History***

Mr. X was originally found eligible for waiver services in 2010 or before.<sup>40</sup> The assessment which resulted in the filing of this case was performed on June 13, 2013 by Sam Cornell, R.N. of DSDS.<sup>41</sup> Based on that assessment, Mr. Cornell concluded that Mr. X is no longer eligible for participation in the waiver services program.<sup>42</sup> Accordingly, on December 20, 2013 the Division mailed a notice to Mr. X advising that he was no longer eligible for waiver services, and that his waiver services would be terminated in thirty days.<sup>43</sup> On December 27, 2013 Mr. X requested a hearing to contest the Division's decision.<sup>44</sup>

Mr. X's hearing was held on August 14, 2014. Mr. X participated in the hearing by phone, represented himself, and testified on his own behalf. The Division was represented by Angela Ybarra, who participated in the hearing by phone. Sam Cornell, R.N., a registered nurse employed by the Division, participated in the hearing by phone and testified on behalf of the Division. The record closed at the end of the hearing.

## **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.<sup>45</sup> The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.<sup>46</sup> Under this standard of review, the administrative law judge may independently weigh the evidence and reach a different conclusion than did the Division's staff, even if the original decision is factually supported and has a reasonable basis in law.

### ***B. Relevant Medicaid Waiver Services Statutes and Regulations***

States participating in the Medicaid program must provide certain mandatory services under the state's medical assistance plan.<sup>47</sup> States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program<sup>48</sup> ("waiver

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<sup>40</sup> Ex. F p. 1.

<sup>41</sup> Ex. E.

<sup>42</sup> Ex E pp. 30 - 31.

<sup>43</sup> Ex. D.

<sup>44</sup> Ex. C p. 3.

<sup>45</sup> 42 CFR § 435.930, 7 AAC 49.135.

<sup>46</sup> 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).

<sup>47</sup> 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.

<sup>48</sup> 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

services”).<sup>49</sup> 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.<sup>50</sup>

Alaska participates in the waiver services program.<sup>51</sup> Alaska's program pays for specified individual services for recipients.<sup>52</sup> The Division must approve each specific service as part of a recipient's Plan of Care (POC).<sup>53</sup> Services must be “of sufficient amount, duration, and scope to prevent institutionalization.”<sup>54</sup> A recipient's plan of care is subject to review on an annual basis.<sup>55</sup>

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. For older adults and adults with disabilities (such as Mr. X), 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.<sup>56</sup> 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

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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.*

<sup>49</sup> See 42 USC § 1396a(a)(10)(A).

<sup>50</sup> 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].

<sup>51</sup> AS 47.07.045, the Alaska statute that authorizes Medicaid Waiver Services, states in relevant part: Home and community-based services. (a) The department may provide home and community-based services under a waiver in accordance with 42 USC 1396 – 1396p (Title XIX Social Security Act), this chapter, and regulations adopted under this chapter, if the department has received approval from the federal government and the department has appropriations allocated for the purpose. To supplement the standards in (b) of this section, the department shall establish in regulation additional standards for eligibility and payment . . . .

<sup>52</sup> 7 AAC 130.240 - 7 AAC 130.305.

<sup>53</sup> 7 AAC 130.209, 7 AAC 130.217.

<sup>54</sup> 7 AAC 130.217(b).

<sup>55</sup> 7 AAC 130.213.

<sup>56</sup> 7 AAC 130.215.

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.<sup>57</sup>

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.<sup>58</sup> Under the CAT, an individual can qualify for waiver services by demonstrating a need for extensive assistance with at least three designated ADLs, known as "shaded" ADLs, even without demonstrating a need for professional nursing care.<sup>59</sup>

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.<sup>60</sup>

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 . . . ."<sup>61</sup> 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.<sup>[62]</sup>

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.<sup>63</sup>

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<sup>57</sup> 7 AAC 130.215.

<sup>58</sup> Ex. E p. 30.

<sup>59</sup> Ex. E p. 30.

<sup>60</sup> Ex. E p. 30.

<sup>61</sup> AS 47.07.045(b)(1).

<sup>62</sup> AS 47.07.045(b)(3).

<sup>63</sup> 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



An assessment finding that a recipient's condition has materially improved must, pursuant to AS 47.07.045(b)(2), be reviewed by "an independent qualified health care professional under contract with the department." "Independent qualified health care professional" is defined, for purposes of those waiver categories which are not based on mental retardation or developmental disability, as "a registered nurse licensed under AS 08.68 who is qualified to assess" recipients of the waiver category at issue.<sup>64</sup>

**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) 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, and bathing.

The CAT numerical coding system has two components. The first component is the *self-performance score*. These scores rate how capable a person is of performing a particular ADL.<sup>65</sup> The scores which generate points are **1** (person requires supervision); **2** (person requires limited assistance); **3** (person requires extensive assistance); and **4** (person is totally dependent).

The second component of the CAT scoring system for ADLs is the *support score*. These scores rate the degree of assistance which a person requires in order to perform a particular ADL. The relevant scores 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

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addition, prior assessments may contain admissible evidence that could be used to support or controvert the Division's current assessment.

<sup>64</sup> The statute does not impose any specific requirements as to the scope or nature of the third-party 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 the third party reviewer.

<sup>65</sup> 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."

the five "shaded" ADLs listed at page 18 of the CAT.<sup>66</sup> The five "shaded" ADLs are bed / body mobility, transfers, locomotion, eating, and toilet use.<sup>67</sup>

***D. Does Mr. X Require Skilled or Intermediate Level Nursing Care?***

The findings in the Division's assessment that Mr. X currently has no nursing needs, and Mr. Cornell's hearing testimony that Mr. X currently has no nursing needs, were consistent and credible. No testimony or other evidence was presented on Mr. X's behalf tending to show that he currently has any nursing needs. Accordingly, the Division carried its burden and proved, by a preponderance of the evidence, that Mr. X does not require nursing services as defined by 7 AAC 140.510 and the Consumer Assessment Tool. The final issue is whether Mr. X qualifies for waiver services based on his level of need for assistance with his activities of daily living (ADLs).

***E. Does Mr. X 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.<sup>68</sup> 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. As indicated above, Mr. X does not currently qualify for waiver services on that basis. An alternative means by which he 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.<sup>69</sup> The CAT scores which the Division assigned to Mr. X with regard to the five "shaded" ADLs are: bed mobility: 0/0; transfers: 1/1; locomotion: 1/1; eating: 2/2; and toilet use: 0/0.<sup>70</sup>

The findings in the Division's assessment concerning Mr. X's need for assistance with ADLs were credible. The only ADL score disputed by Mr. X was his locomotion score (1/1). Mr. X testified that he has peripheral artery disease (PAD), that he cannot walk, and that he must crawl instead. However, even if Mr. X's testimony on this point is accepted, and even if

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<sup>66</sup> Ex. E p. 19.

<sup>67</sup> Ex. E p. 19.

<sup>68</sup> Ex. E p. 30.

<sup>69</sup> Ex. E p. 19.

<sup>70</sup> Ex. E p. 19.

he were found to be totally dependent with locomotion (score of 4/3 or 4/4), he would still not qualify for waiver services based on a need for assistance with ADLs.<sup>71</sup>

Finally, it is arguable, based on the information in the CAT itself, that Mr. X should have received scores of 2/2 as to the shaded ADLs of transfers, locomotion, and eating. Again, however, even if Mr. X's scores as to these three shaded ADLs are raised to 2/2, he would still not qualify for waiver services.<sup>72</sup> Accordingly, the Division satisfied its burden and proved, by a preponderance of the evidence, that Mr. X does not meet NFLOC, and does not qualify for waiver services, based on his need for assistance with shaded ADLs.

#### **IV. Conclusion**

The Division correctly determined that Mr. X does not currently require skilled or intermediate level nursing services as defined by the Division's regulations and the CAT. The Division also correctly determined that Mr. X does not qualify for waiver services, under the CAT, based on the level of his need for assistance with ADLs. Accordingly, the Division has satisfied AS 47.07.045's "material improvement" requirement; it has shown that Mr. X no longer has a nursing need or functional limitation that would result in the need for nursing home placement. The Division's decision that Mr. X is no longer eligible for the waiver services program is therefore affirmed. Should Mr. X's condition deteriorate in the future, he may reapply for waiver services at that time. Finally, this decision has no adverse effect on Mr. X's eligibility for Personal Care Assistant (PCA) services.

Dated this 23rd day of December, 2014.

*Signed* \_\_\_\_\_

Jay Durych

Administrative Law Judge

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<sup>71</sup> See Ex. E, p. 30 at NF-1.

<sup>72</sup> See Ex. E p. 30 at NF-3(d) and NF-4(b).

## 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 6<sup>th</sup> day of January, 2015.

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.]