

visits since the last assessment, and advised that Ms. C's condition had remained stable during that time.⁴

Progress notes by Ms. C's doctor dated June 27, 2014 state that Ms. C suffers from cognitive / memory impairment, right-sided facial droop, hearing loss, and impaired gait due to arthritis pain.⁵ Ms. C's doctor wrote that, given Ms. C's "severe memory impairment and gait impairment," she "should qualify for 24 hour care."

N B, holder of a power-of-attorney from Ms. C, credibly testified in relevant part as follows:

1. Ms. C is almost deaf. She can only hear about 10% of what is said. In order to communicate with her you must generally do so in writing.
2. She has observed Ms. C using her walker, and Ms. C requires hands-on (but not weight-bearing) assistance with locomotion due to balance issues.
3. Ms. C is confused when she is alone, so she does not like to be left alone.

O G, who works at the facility which provides adult daycare for Ms. C, credibly testified in relevant part as follows:

1. Ms. C attends adult daycare up to six hours per day, six days per week.⁶
2. While Ms. C is at the adult daycare facility, Ms. G herself often provides direct assistance to Ms. C as part of her job.
3. Ms. C requires constant one-on-one supervision because "she does not know where she is."
4. Ms. C wears a hearing aid, but even using it, she is essentially deaf. She also has vision problems.
5. She does not have direct knowledge regarding Ms. C's level of need for assistance with body mobility, personal hygiene, or bathing.
6. She agrees with the Division's determination that Ms. C requires extensive assistance with transfers.
7. She must walk beside Ms. C and put her hand on her back when walking, to guide her, "because she will fall," and "because she can get lost." Ms. C requires

⁴ Ex. E. p.5. Importantly, the ALH staff did not feel that Ms. C's condition had improved since the last assessment.

⁵ All factual findings in this paragraph are based on Ex. G, pp. 4 - 6 unless otherwise stated.

⁶ This is confirmed by the Division's assessment at Ex. E p. 4.

weight-bearing assistance with multi-level locomotion, but does not require weight-bearing assistance when using her walker for single-level locomotion.

8. Ms. C often requires weight-bearing assistance with dressing, because otherwise she will fall over due to balance issues.

9. Ms. C can put food and liquids in her mouth, but has trouble chewing, swallowing, and keeping the food in her mouth.

10. Ms. C must be guided when moving to the bathroom. Once she gets to the bathroom, Ms. C is assisted in lowering herself to the toilet by facility staff, and by holding on to a grab bar. Ms. C is able to clean herself after toileting, but she requires assistance from staff getting up off the toilet seat.

B. Ms. C's Care Needs and Functional Abilities as Determined by the CAT

Ms. C was previously assessed as to her continuing eligibility for waiver services on August 10, 2012.⁷ Based on her 2012 assessment, Ms. C was found to require the following levels of assistance with her ADLs:⁸ body mobility - limited one-person physical assistance (CAT score 2/2); transfers - extensive one-person physical assistance (CAT score 3/2); locomotion - limited one-person physical assistance (CAT score 2/2); dressing - limited one-person physical assistance (CAT score 2/2); eating - supervision and set-up help only (CAT score 1/1); toilet use - extensive one-person physical assistance (CAT score 3/2); personal hygiene - limited one-person physical assistance (CAT score 2/2); and bathing - extensive one-person physical assistance (CAT score 3/2). At the same 2012 assessment, Ms. C's cognitive skills were found to be severely impaired,⁹ and she scored a 16 on the cognitive portion of the Division's Supplemental Screening Tool (SST).¹⁰ Ms. C also scored an 11 on the behavioral portion of the SST.¹¹

The assessment at issue in this case was performed on December 23, 2013 by Scott Chow, R.N. of DSDS.¹² Mr. Chow 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. Mr. Chow reported that Ms. C has the following functional abilities and limitations, and the following nursing needs:

⁷ Ex. F.

⁸ Ex. F pp. 6 - 12.

⁹ Ex. F p. 16.

¹⁰ Ex. F p. 17.

¹¹ Ex. F. p. 19.

¹² All factual findings in this paragraph are based on Ex. E unless otherwise stated.

Functional Assessment:¹³ Mr. Chow reported that Ms. C has a strong grip with her left hand, and was able to place her hands across her chest and stand up, but has a weak grip with her right hand, was not able to touch her hands together over her head or behind her back, and was not able to touch her feet while seated.

Physical Therapy:¹⁴ Mr. Chow reported that Ms. C is not currently receiving physical therapy, speech or language therapy, occupational therapy, or respiratory therapy. Mr. Chow also reported that Ms. C does not currently have any prescriptions for walking for exercise, range of motion exercises, or foot care.

Bed / Body Mobility:¹⁵ Mr. Chow reported that the ALH staff told him that Ms. C is able to reposition herself in bed, primarily using her left arm and leg, without assistance. Mr. Chow reported that he observed that Ms. C has good fine motor skills and no limitations with her left arm and leg, and can perform gross movements with her right arm and leg (CAT score 0/0).

Transfers:¹⁶ Mr. Chow reported that he was told by the ALH staff that Ms. C stands up by holding onto her walker with her left hand while staff pulls her up using her right arm; has episodes of vertigo while standing; has very poor balance, and sometimes falls to one side during transfers. Mr. Chow reported that he observed Ms. C stand up with staff assistance as described above (CAT score 3/2).

Locomotion:¹⁷ Mr. Chow reported that he was told by the ALH staff that Ms. C can walk using her walker, but that she is unsteady, has an uneven gait, and is given standby assistance due to balance issues. Mr. Chow reported that he observed Ms. C walking within the ALH using her walker and standby assistance, but that she had an uneven gait and bumped into furniture (CAT score 1/1).

Dressing:¹⁸ Mr. Chow reported that he was told by the ALH staff that Ms. C requires assistance putting on her shoes and dressing the right side of her body (putting on shirts and pants). Mr. Chow reported that he observed that Ms. C has a limited range of motion and poor fine motor skills on her right side, but good range of motion, good fine motor skills and good grip strength on her left side (CAT score 2/2).

¹³ Ex. E p. 6.

¹⁴ Ex. E p. 7.

¹⁵ Ex. E p. 8.

¹⁶ Ex. E p. 8.

¹⁷ Ex. E p. 9.

¹⁸ Ex. E p. 10.

Eating:¹⁹ Mr. Chow reported that he was told by ALH staff that Ms. C can feed herself, but is supervised because she has decreased sensation in her mouth, and has previously bitten her tongue hard enough to require an emergency room visit. Mr. Chow reported that he observed that Ms. C has no limitations as to her left side (CAT score 1/1).

Toileting:²⁰ Mr. Chow reported that he was told by ALH staff that they must assist Ms. C with transferring on and off the toilet, but that she can manage the other aspects of using the toilet independently (CAT score 2/2).

Personal Hygiene:²¹ Mr. Chow reported that ALH staff told him that Ms. C is able to wash her face and brush her hair, but that they must clean her dentures. Mr. Chow reported that he observed that Ms. C has no limitations as to her left side (CAT score 2/2).

Bathing:²² Mr. Chow reported that he was told by ALH staff that although Ms. C can hold onto the grab bar, they must help her transfer into and out of her shower chair, and must help her wash parts of her body. Mr. Chow reported that he observed that Ms. C has a weak grip, poor fine motor skills, and a limited range of motion on her right side (CAT score 3/2).

Professional Nursing Services:²³ Mr. Chow found that Ms. C has no current need for professional nursing services. Specifically, Mr. Chow found that Ms. C 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.²⁴ Mr. Chow further found that Ms. C does not currently have any unstable medical conditions, and specifically, that she does not use a catheter or ventilator / respirator, is not comatose, and does not have an uncontrolled seizure disorder.²⁵ In addition, Mr. Chow found that Ms. C does not receive speech, occupational, respiratory, or physical therapy, and that she does not require professional nursing assessment, observation, and/or management at least once per month.²⁶ Mr. Chow also found that Ms. C 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

¹⁹ Ex. E p. 11.

²⁰ Ex. E p. 11.

²¹ Ex. E p. 12.

²² Ex. E p. 13.

²³ All factual findings in this paragraph are based on Ex. E pp. 15 - 17 unless otherwise stated.

²⁴ Ex. E p. 15.

²⁵ Ex. E p. 16.

²⁶ Ex. E p. 16.

condition.²⁷ Finally, Mr. Chow found that Ms. C does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.²⁸

Cognition:²⁹ Mr. Chow found that Ms. C has no short-term or long-term memory problems, and that Ms. C is generally able to recall names and faces, where she is, the location of her room, and the current season. Mr. Chow rated Ms. C as being independent when making decisions in everyday matters. Mr. Chow concluded that Ms. C has no cognitive problems requiring professional nursing assessment, observation, or management three days per week or once per month. Mr. Chow completed the Division's SST for cognitive issues and assigned Ms. C a score of zero, *16 points lower than the previous year's assessment.*³⁰

Behavioral Problems:³¹ Mr. Chow found that Ms. C does not wander, is not verbally or physically abusive, does not engage in socially inappropriate or disruptive behavior, and does not resist care. Mr. Chow concluded that Ms. C does not need professional nursing assessment, observation, or management due to any behavioral problems. Mr. Chow completed the Division's SST for behavioral issues and assigned Ms. C a score of zero, *11 points lower than the score assigned by a different nurse the previous year.*³²

Medication Management:³³ Mr. Chow reported that Ms. C takes four different prescription medications; that she does not prepare her own medications, but does self-administer her own medications, and that Ms. C is always compliant in taking her medications.

Senses:³⁴ Mr. Chow found that Ms. C is able to hear only in special situations; is usually able to understand others as well as make herself understood, and has impaired vision.

Balance:³⁵ Mr. Chow found that Ms. C has balance problems when standing and has an unsteady gait.

Oral health, skin conditions, and foot problems:³⁶ Mr. Chow found that Ms. C has dentures but no other oral health problems, no pressure sores, open sores, or lesions, no burns or abrasions, no rashes or bruises, and no foot problems, but that someone inspects her feet on a regular basis.

²⁷ Ex. E p. 17.

²⁸ Ex. E p. 17.

²⁹ Ex. E p. 18.

³⁰ Ex. E p. 1; Ex. F p. 17.

³¹ Ex. E p. 19.

³² Ex. E p. 2; Ex. F p. 19.

³³ Ex. E p. 22.

³⁴ Ex. E p. 24.

³⁵ Ex. E p. 25.

³⁶ Ex. E p. 26.

Mood:³⁷ Mr. Chow found that Ms. C has no sleep or mood problems whatsoever, *which findings are significantly different than those of the nurse who performed Ms. C's prior (2012) assessment.*³⁸

Based on the foregoing CAT scores, Mr. Chow found that Ms. C does not currently require skilled level or intermediate level nursing care, and does not otherwise qualify for waiver services based on her level of need for assistance with her activities of daily living (ADLs).³⁹ Mr. Chow's determination was subsequently reviewed by another DSDS nurse-assessor, Marianne Sullivan, R.N., who concurred with Mr. Chow's determination.⁴⁰ Finally, Mr. Chow's determination was reviewed by a registered nurse employed by the Division's contractor, Qualis Health, who also concurred with Mr. Chow's determination.⁴¹

C. Relevant Procedural History

Ms. C was originally found eligible for waiver services in 2011 or before.⁴² The assessment which resulted in the filing of this case was performed on December 23, 2013 by Scott Chow, R.N. of DSDS.⁴³ Based on that assessment, the Division concluded that Ms. C is no longer eligible for participation in the waiver services program.⁴⁴ On June 13, 2014 the Division mailed a notice to Ms. C advising that she was no longer eligible for waiver services, and that her waiver services would be terminated in thirty days.⁴⁵ On June 16, 2014 Ms. C requested a hearing to contest the Division's determination.⁴⁶

Ms. C's hearing was held on September 29 and November 17, 2014. Ms. C attended the hearing in person but did not testify. She was represented by her power-of-attorney holder, N B, who also testified on her behalf. Ms. C's care coordinator, Q L, and her adult day care facility provider, O G, also attended the hearing and testified on her behalf. The Division was represented by Tammy Smith, who attended the hearing in person. Scott Chow, R.N., a registered nurse employed by the Division, attended the hearing and testified on behalf of the Division. The record closed at the end of the hearing.

³⁷ Ex. E p. 27.

³⁸ Ex. F p. 27.

³⁹ Ex. E pp. 31, 32.

⁴⁰ Ex. D p. 2.

⁴¹ Ex. D p. 2.

⁴² Ex. F p. 1.

⁴³ Ex. E.

⁴⁴ Ex. D; Ex E pp. 30 - 31.

⁴⁵ Ex. D.

⁴⁶ Ex. C.

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.⁴⁷ The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.⁴⁸ 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.⁴⁹ States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program⁵⁰ ("waiver services").⁵¹ 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.⁵² Alaska participates in the waiver services program.⁵³

⁴⁷ 42 CFR § 435.930, 7 AAC 49.135.

⁴⁸ 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).

⁴⁹ 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.

⁵⁰ 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.*

⁵¹ See 42 USC § 1396a(a)(10)(A).

⁵² 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].

⁵³ 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 . . .

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 Ms. C), that level of care must be either “intermediate care” as defined by 7 AAC 140.510, or “skilled care” as defined by 7 AAC 140.515.⁵⁴ 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.⁵⁵

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.⁵⁶ 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.⁵⁷

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.⁵⁸

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 . . .”⁵⁹ To remove a recipient from the program, the assessment must find:

⁵⁴ 7 AAC 130.215.

⁵⁵ 7 AAC 130.215.

⁵⁶ Ex. E p. 31.

⁵⁷ Ex. E p. 31.

⁵⁸ Ex. E p. 31.

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.^[60]

Any 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.⁶¹

Finally, in an order issued recently in the class action⁶² case *Krone et. al. v. State of Alaska, Department of Health and Social Services et. al.*, Case No. 3AN-05-10283CI, an Anchorage Superior Court judge held that, "in order to determine if a recipient is 'materially improved,' for purposes of AS 47.07.045(3)(C), the State must compare the results of the current assessment with those of the most recent assessment that concluded that the recipient was eligible for the Waiver program," and that "[t]he State may not conclude that a recipient is no longer eligible based only on the results of the current assessment."⁶³ The judge further held that "[t]he State may not base its annual determination of whether a recipient is 'materially improved' solely upon the scoring obtained from the CAT," and that "[t]he State must consider all reasonably available information relevant to that determination." Those rulings are binding in this case.

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

⁵⁹ AS 47.07.045(b)(1).

⁶⁰ AS 47.07.045(b)(3).

⁶¹ 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.

⁶² Although a Superior Court decision generally does not constitute binding precedent for the Office of Administrative Hearings (except in the particular case being appealed), a class action like the *Krone* case is binding in all cases involving class members, one of whom is Ms. C.

⁶³ *Krone* order dated October 1, 2014 at page 6.

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.⁶⁴ 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 the five "shaded" ADLs listed at page 18 of the CAT.⁶⁵ The five "shaded" ADLs are bed / body mobility, transfers, locomotion, eating, and toilet use.⁶⁶

D. Does Ms. C Require Skilled or Intermediate Level Nursing Care?

The findings in the Division's assessment that Ms. C currently has no nursing needs, and Mr. Chow's hearing testimony that Ms. C currently has no nursing needs, were consistent and credible. Ms. C's representatives did not assert at hearing that she has nursing needs, and no testimony or other evidence was presented on Ms. C's behalf indicating that she currently has any nursing needs. Accordingly, the Division proved, by a preponderance of the evidence, that Ms. C does not require nursing services as defined by regulation. The next issue is whether Ms. C qualifies for waiver services based on her cognitive problems and level of need for assistance with activities of daily living (ADLs).

⁶⁴ 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."

⁶⁵ Ex. E p. 20.

⁶⁶ Ex. E p. 20.

E. Does Ms. C Qualify for Waiver Services, Under the CAT's Scoring Matrix, due to Cognitive Problems and Need for Assistance With ADLs?

The Consumer Assessment Tool's scoring summary is located at page 29 of the CAT.⁶⁷ 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. Some of these combinations (discussed below) allow a person to meet the Nursing Facility Level of Care (NFLOC), without demonstrating a need for professional nursing services, based on the level of assistance which the person requires in order to perform their ADLs. The CAT divides these possible combinations into six different areas, designated "NF1" through "NF6."

1. NF1

There are five different ways to meet NFLOC under NF1. The first way (under NF1(a)) is to require nursing services seven days per week. Ms. C did not assert that she satisfies NF1(a), and the record indicates that she does not. The second way (under NF1(b)) is to require use of a ventilator or respirator at least three days per week. Ms. C did not assert that she satisfies NF1(b), and the record indicates that she does not. The third way (under NF1(c)) is to require care due to uncontrolled seizures at least once per week. Ms. C did not assert that she satisfies NF1(c), and the record indicates that she does not. The fourth way (under NF1(d)) is to receive a form of therapy at least five days per week. Ms. C did not assert that she satisfies NF1(d), and the record indicates that she does not.

The fifth/last way to meet NFLOC under NF1, under NF1(e), is to score a three (extensive assistance required) or a four (completely dependent) in the self-performance portion of *three or more* of the "shaded" ADLs listed at page 18 of the CAT.⁶⁸ The "shaded" ADLs are body / bed mobility, transfers, locomotion, eating, and toilet use. Ms. C's level of need for assistance with the five "shaded" ADLs is analyzed below.

a. 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.⁶⁹ In order to receive a self-performance score of three (extensive assistance) with regard to bed / body

⁶⁷ Ex. E p. 31.

⁶⁸ Ex. E p. 20.

⁶⁹ Ex. E p. 8.

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.⁷⁰

Mr. Chow found that Ms. C is able to turn and reposition herself independently (CAT score 0/0). Ms. C did not contest this finding, and the finding appears to be credible based on the evidence in the record. Accordingly, the Division's finding that Ms. C is independent with bed / body mobility is affirmed (CAT score 0/0).

b. 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 separate ADLs).⁷¹ 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.⁷²

Mr. Chow found that Ms. C requires extensive assistance with transfers, and assigned a CAT score of 3/2. Ms. C did not contest this finding, and the finding appears to be credible based on the evidence in the record. Accordingly, the Division's finding that Ms. C requires extensive assistance with transfers is affirmed (CAT score 3/2).

c. Locomotion

For purposes of waiver services eligibility, locomotion is defined as how a person moves between locations in his or her room and other areas on the same floor / level.⁷³ In order to receive a self-performance score of three (extensive assistance) with regard to locomotion, 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.⁷⁴

Mr. Chow reported that he was told by the ALH staff that Ms. C can walk using her walker, but that she is unsteady, has an uneven gait, and is given standby assistance due to balance issues. Mr. Chow reported that he observed Ms. C walking within the ALH using her walker and standby assistance, but that she had an uneven gait and bumped into furniture; he assigned her a CAT score of 1/1. However, N B testified at hearing that she has observed Ms. C using her walker, and that Ms. C requires hands-on (but not weight-bearing) assistance with locomotion due to balance issues.

⁷⁰ Ex. E p. 8.

⁷¹ Ex. E p. 8.

⁷² Ex. E p. 8.

⁷³ Ex. E p. 9.

⁷⁴ Ex. E p. 9.

O G similarly testified that Ms. C requires weight-bearing assistance with multi-level locomotion, but does not require weight-bearing assistance when using her walker for single-level locomotion. Finally, the Division's prior (2012) assessment found that Ms. C required limited assistance with locomotion (CAT score 2/2). It is likely that Ms. B's and Ms. G's appraisals of Ms. C's abilities are more reliable because they have spent more time observing her than did the nurse-assessor. Accordingly, I find that the preponderance of the evidence indicates that Ms. C requires limited assistance with locomotion (CAT score 2/2).

d. Eating

For purposes of waiver services eligibility, eating is defined as how a "person eats or drinks regardless of skill."⁷⁵ In order to receive a self-performance score of three (extensive assistance) with regard to eating, 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.⁷⁶

Mr. Chow found that Ms. C requires only supervision and setup with eating (CAT score 1/1). Ms. G testified that Ms. C can put food and liquids in her mouth, but has trouble chewing, swallowing, and keeping the food in her mouth. Thus evidence presented by each side indicates that, although Ms. C may soon require assistance with eating and drinking, she did not require assistance at the time of the assessment. Accordingly, the preponderance of the evidence indicates that, at the time of the assessment, Ms. C required only supervision and set-up help with eating (CAT score 1/1).

e. 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."⁷⁷ To receive a self-performance score of three (extensive assistance) as to toilet use, a person must receive either weight-bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁷⁸

Mr. Chow reported that he was told by ALH staff that they must assist Ms. C with transferring on and off the toilet, but his assessment does not state whether or not these assists are weight-bearing assists. Ms. G testified that Ms. C is assisted in lowering herself to the toilet by facility staff, and by holding on to a grab bar, and that, after toileting, she requires assistance from

⁷⁵ Ex. E p. 11.

⁷⁶ Ex. E p. 11.

⁷⁷ Ex. E p. 11.

⁷⁸ Ex. E p. 11.

staff to get up off the toilet seat. Ms. G's testimony indicates that Ms. C requires weight-bearing assistance with toileting, and this is consistent with the scoring from Ms. C's prior (2012) assessment.⁷⁹ Accordingly, the preponderance of the evidence indicates that Ms. C requires extensive assistance with toileting (CAT score 3/2).

f. Summary - Degree of Assistance Required With Shaded ADLs

In order to qualify for waiver services under NF1(e), 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 Ms. C requires extensive assistance with transfers and toilet use, but not as to bed / body mobility, locomotion, or eating. Because Ms. C does not require extensive assistance with three or more of the "shaded" ADLs, she does not qualify for waiver services at the NF1 level of the CAT's scoring matrix.

2. NF2

An applicant cannot meet NFLOC under NF2 alone. However, under NF2 an applicant can obtain points towards qualifying for NFLOC which, when added to points obtained under other subsections of NF1 - NF6, can qualify the applicant for NFLOC. The first way (under NF2(a)) is to obtain a score of two or three with regard to injections and/or IV hookups, feeding tubes, tracheotomy care or nasopharyngeal suctioning, applying treatments or dressings, administering oxygen, observing, assessing, and managing unstable conditions, catheter management, and/or care required due to a comatose condition. The record does not show that Ms. C requires any of these services, so she gets no points under NF2(a).

The second way to obtain points (under NF2(b)) is to require speech therapy, respiratory therapy, physical therapy, and/or occupational therapy at least three days per week. However, the record does not show that Ms. C requires any of these therapies, so she receives no points under NF2(b).

The third way to obtain points (under NF2(c)) is to require medications via tube, tracheotomy care, urinary catheter changes or irrigation, veni-puncture, or barrier dressings for ulcers, at least three days per week. Again, however, the record does not show that Ms. C requires any of these procedures, so she gets no points under NF2(c).

The last way to obtain points (under NF2(d)) is to require chemotherapy, radiation therapy, hemodialysis, and/or peritoneal dialysis, at least three days per week. The record does not show that Ms. C requires any of these, so she gets no points under NF2(d).

⁷⁹ Ex. F p. 9.

3. NF3

An applicant cannot meet NFLOC under NF3 alone. However, under NF3 an applicant can obtain points towards qualifying for NFLOC which, when added to points obtained under other subsections of NF1 - NF6, can qualify the applicant for NFLOC.

The first way to obtain a point (under NF3(a)) is to have short-term memory problems. Mr. Chow found that Ms. C has no short-term memory problems. However, this finding is contrary to the testimony of Ms. B and Ms. G, and is also contrary to the Division's prior assessment. Accordingly, I find that Ms. C has short-term memory problems, and she therefore receives the maximum score (one) in this category.⁸⁰

The second way to obtain a point (under NF3(b)) is to be generally unable to recall names and faces, the season of the year, where you are, and the location of your room. Mr. Chow reported that Ms. C was able to recall all these things. However, on June 27, 2014 Ms. C's doctor characterized her memory impairment as "severe," and the Division's 2012 assessment indicates that Ms. C was unable to recall any of these items. Further, there is no medical evidence in the record of any improvement in Ms. C's cognitive status between the 2012 and 2013 assessments. Accordingly, I find that Ms. C normally cannot recall these four items, and Ms. C therefore receives the maximum score (one) in this category.⁸¹

The third way to obtain points (under NF3(c)) is to be moderately or severely impaired in one's cognitive skills for daily decision-making. Mr. Chow found that Ms. C has no cognitive impairments. Again however, on June 27, 2014 Ms. C's doctor characterized her memory impairment as "severe," and the Division's 2012 assessment similarly characterized Ms. C's cognitive skills for daily decision-making as "severely impaired." Ms. B and Ms. G also testified regarding Ms. C's cognitive difficulties, and there is no medical evidence in the record of any improvement in Ms. C's cognitive status between the 2012 and 2013 assessments. Accordingly, I find that Ms. C is severely impaired as to her cognitive skills for daily decision-making, and Ms. C therefore receives the maximum score (one) in this subsection.⁸²

The fourth way to obtain points (under NF3(d)) is to require *either* professional nursing care due to cognitive problems, *or both* (1) score at least a 2/2 as to any shaded ADL, *and* (2) score 13 or more on the Division's Supplemental Screening Tool (SST) for cognitive issues.

⁸⁰ Ex. E pages 18, 31.

⁸¹ Ex. E pages 18, 31.

⁸² Ex. E pp. 18, 31.

As to the first item, Mr. Chow found that Ms. C does not require professional nursing observation, assessment, and management for her cognitive problems, and the 2012 assessment supports this finding.

With regard to scores on the shaded ADLs, Ms. C scored a 2/2 or better as to transfers, locomotion, and toilet use. She therefore satisfies one requirement under NF3(d).

The last issue under NF3(d) is whether Ms. C should receive a score of 13 or higher on the Division's Supplemental Screening Tool (SST) for cognitive issues.⁸³ Mr. Chow found that Ms. C has no cognitive issues and assigned her a score of zero on the SST, a score *16 points lower than the score assigned by a different nurse the previous year.*⁸⁴ The undersigned finds, based on the testimony of Ms. B and Ms. G, and on Ms. C's 2012 assessment, that:

- i. Ms. C is unable to recall entire events, or the names of some close friends and relatives, without prompting (score of 2);
- ii. Ms. C has difficulty remembering and using information, cannot follow written instructions, and requires direction and reminders from others four or more times per day (score of 3);
- iii. To the extent that she is required to think, Ms. C is nearly always confused (score of 3);
- iv. Ms. C gets lost in her ALH, or would get lost were it not for the intervention of the ALH staff (score of 3); and
- v. Ms. C is able to carry out only simple conversations (score of 2).

Based on the foregoing, the undersigned finds that Ms. C should receive a total score of 13 on the SST for cognitive issues. This finding is consistent with Ms. C's physician's opinion, and with the Division's own 2012 assessment.

Under NF3, an applicant must receive a score of one *on all four subsections of NF3* in order to receive a single "overall" point at the conclusion of NF3. Here, with the undersigned's rescoring as to Ms. C's cognitive abilities, Ms. C now receives one point under each of subsections NF3(a), NF3(b), NF3(c), and NF3(d). Accordingly, Ms. C receives an overall score of one point on NF3 of the CAT.

⁸³ Ex. E pp. 1, 31.

⁸⁴ Ex. E p. 2; Ex. F p. 19.

4. NF4

An applicant cannot meet NFLOC under NF4 alone. However, under NF4 an applicant can obtain one point towards qualifying for NFLOC which, when added to points obtained under other subsections of NF1 - NF6, can qualify the applicant for NFLOC.

There are two subsections to NF4, and an applicant must qualify under both of these subsections in order to receive the one point available under NF4. Under NF4(a), an applicant must either wander, engage in socially inappropriate or disruptive behavior, be verbally abusive, or be physically abusive at least four days per week. Mr. Chow found that Ms. C has no behavioral issues.⁸⁵ While this scoring differs from the 2012 CAT's scoring on behavioral issues, Ms. C's witnesses did not testify as to any current behavioral issues. Accordingly, Ms. C gets no points under NF4(a).

Under NF4(b), an applicant must *either* require professional nursing care as a result of problem behaviors, *or both* (1) score at least 2/2 as to any shaded ADL, *and* (2) score 14 or more on the portion of the Division's Supplemental Screening Tool (SST) dealing with problem behavior. In this case, the Division assigned Ms. C a score of zero on the behavioral portion of the SST, and found that she does not require professional nursing care for any behavioral problems.⁸⁶ Ms. C did not assert otherwise, and there is no evidence in the record of current behavioral problems. Because Ms. C's score of zero on the behavioral portion of the SST falls short of the "threshold" score of 14 needed to obtain points under NF4(b), this finding does not increase Ms. C's overall score.

As discussed above, Ms. C did receive a score of 2/2 or more as to one or more shaded ADLs. However, Ms. C did not score 14 points or more on the Division's SST for behavioral issues, and does not require professional nursing oversight due to behavioral issues. Accordingly, Ms. C receives no points under NF4(b), and in turn Ms. C receives no "overall" points under NF4.

5. NF5

At NF5, the scores from NF2, NF3, and NF4 are added together. If an applicant or recipient receives a score of one or more, then the analysis proceeds to NF6. In this case, Ms. C received a score of one point on NF3 of the CAT, giving her a total score of one at NF5. Accordingly, the analysis in this case proceeds to NF6.

⁸⁵ Ex. E pp. 2, 19.

⁸⁶ Ex. E pp. 2, 19.

6. NF6

NF6 asks how many of the applicant's "shaded" ADLs were scored with self performance scores and support scores of two or higher.⁸⁷ Here, Ms. C received a score of 2/2 or higher as to transfers, locomotion, and toilet use, and receives three points at NF6.

7. NF7

At NF7, the applicant's points from NF1 through NF6 are totaled. If the applicant's point total is three or more, the applicant qualifies for waiver services.⁸⁸ Ms. C has now received one point at NF3 and three points at NF6, for a total of four points. Accordingly, Ms. C continues to be eligible to receive waiver services based on her CAT scores.

IV. Conclusion

Ms. C remains qualified for waiver services, based on the Consumer Assessment Tool's scoring matrix, due to the extent of her cognitive problems and her need for physical assistance with transfers, locomotion, and toilet use. Accordingly, the Division erred in terminating Ms. C's waiver services. The Division's decision terminating Ms. C's waiver services is therefore reversed.

Dated this 13th day of April, 2015.

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 27th day of April, 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.]

⁸⁷ Ex. E p. 31.

⁸⁸ Ex. E p. 31.