

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

In the Matter of:)
)
 C S) OAH No. 14-1145-MDS
) Agency Case No.

POST-REMAND DECISION

I. Introduction

The issue in this case is whether C S remains eligible for Medicaid Home and Community-Based Waiver services (waiver services). The Division of Senior and Disabilities Services (Division) conducted an assessment on December 17, 2013 and subsequently determined that Ms. S no longer requires a nursing facility level of care (NFLOC), and is therefore no longer eligible to receive waiver services.¹

This decision concludes that although Ms. S has significant physical impairments, and although these impairments limit her ability to function independently, she does not currently require skilled or intermediate level nursing care. This decision further concludes that, although Ms. S has significant cognitive problems, and requires a greater level of physical assistance with her activities of daily living (ADLs) than was originally determined by the Division, she does not currently require enough assistance with her activities of daily living to qualify for waiver services on that basis. As a result, Ms. S is not presently eligible to receive waiver services. The Division's termination of Ms. S's waiver services is therefore affirmed.²

II. Facts

A. Ms. S's Medical Diagnoses and Reports from Medical Providers

Ms. S is a 77-year-old woman who lives on one level of a multi-level private residence.³ She lives with two adult children, and two other adults.⁴ She is five feet, seven inches tall and weighs about 182 pounds.⁵ Her medical diagnoses are post-cerebrovascular accident (CVA or stroke), diabetes mellitus type II, hyperlipidemia, hypertension, panic attacks, and retinopathy.⁶

¹ Exs. D, E.

² Should Ms. S's condition worsen, she may reapply for waiver services at any time.

³ Ex. E3.

⁴ Ex. E3.

⁵ Exs. E11 and E25.

⁶ Exs. E5 and F3.

Ms. S receives insulin injections twice per day.⁷ She had a doctor's prescription for blood sugar checks three times per day, and blood pressure and heart rate checks one time per day.⁸ This prescription was valid from December 16, 2013 through December 15, 2014.⁹ The prescription was renewed on April 21, 2014, with the renewal valid through April 20, 2015.¹⁰

On April 8, 2014 the Division sent a form titled "Level of Care Verification Request" to Dr. B S. N, M.D., one of Ms. S's healthcare providers.¹¹ In response to the question, "[a]t this time, would you admit this patient to a skilled nursing facility?," Dr. N answered "no." In response to the question, "[a]t this time, does this patient have intermediate nursing needs?," Dr. N answered neither yes or no, but stated that Ms. S requires assistance with blood sugar checks and mobility.

B B is Ms. S's daughter, and holds a power of attorney to handle her mother's affairs.¹² At hearing, Ms. B testified in relevant part as follows:

1. Her mother lives with her in her home. Her husband acts as Ms. S's primary personal care assistant (PCA), while she acts as her mother's back-up PCA.
2. Her mother is in pain; she is currently taking the highest allowable dosage of Neurontin. If she was not taking Neurontin, she would be crying in pain all the time.
3. Her mother has cataracts, has very limited vision in one eye, and has poor vision in the other eye.
4. Her mother had a stroke about twelve years ago (circa 2002 - 2003). Her memory of events which occurred before the stroke is fair, but her memory of events which occurred after the stroke is very poor. She needs reminders and assistance due to memory problems. She cannot recognize the names of close friends or relatives (members of her immediate family without prompting).
5. Her mother has significant difficulty remembering and using information, needs directions or reminders, and cannot follow written instructions (in part because her vision is such that she cannot read).
6. Her mother is periodically confused throughout the day.
7. Her mother does not get lost within her home, (which has a fairly simple layout), but when riding in a car, she does not know where she is or where she is going.

⁷ B B hearing testimony. At hearing, Denise Kichura, R.N. testified that insulin injections do not require nursing oversight.

⁸ Ex. F44.

⁹ Ex. F44.

¹⁰ Ex. F45.

¹¹ All factual findings in this paragraph are based on Exs. F32 - F33 unless otherwise stated.

¹² All factual findings in this paragraph are based on Ms. B's hearing testimony unless otherwise stated.

8. Her mother is able to engage in only simple conversations.

N K is Ms. S's care coordinator.¹³ At hearing, Ms. K testified that:

1. Ms. S's cognition is worse than found by the nurse-assessor. Ms. K has asked Ms. S what she should do in case of a fire, and Ms. S answered "jump out the window." Ms. K then asked Ms. S what she should do if her blood sugar level is high, Ms. S again answered "jump out the window."

2. She believes that Ms. S requires intermediate care as defined by the Division's regulations (rather than under the CAT).

B. The Division's Findings From its 2012 and 2013 Assessments

Ms. S has received Medicaid Home and Community-Based Waiver services since 2011 or before.¹⁴ Ms. S was previously assessed as to her eligibility for waiver services on August 16, 2012 by D C, R.N.¹⁵ Then as now, the Division used the Consumer Assessment Tool or "CAT," a system for scoring a person's need for nursing assistance and physical assistance (described in detail in Part III of this decision) to record and score the assessment.¹⁶ Based on her 2012 assessment, the Division found that Ms. S required the following levels of assistance with her ADLs:¹⁷ body mobility - independent (CAT score 0/0); transfers - required extensive physical assistance (CAT score 3/2); locomotion - required limited assistance (CAT score 2/2); dressing - required extensive assistance (CAT score 3/2); eating - was independent, requiring only set-up assistance (CAT score 0/1); toilet use - required extensive physical assistance (CAT score 3/2); personal hygiene - required limited assistance (CAT score 2/2); and bathing - required extensive physical assistance (CAT score 3/2). Based on the assessment, Ms. C concluded that Ms. S no longer required nursing care and was no longer eligible for waiver services.¹⁸

The nurse-assessor's determination was subsequently reviewed by a different registered nurse employed by the Division.¹⁹ The reviewing nurse likewise concluded that Ms. S no longer required a nursing facility level of care and was no longer eligible for waiver services.

The Division's 2012 determination was reviewed by Qualis Health on September 28, 2012.²⁰ Qualis did not concur with the Division's determination. Qualis concluded that, due to cognitive

¹³ All factual findings in this paragraph are based on Ms. K's hearing testimony unless otherwise stated.

¹⁴ Ex. F.

¹⁵ Ex. F.

¹⁶ Ex. F.

¹⁷ All factual findings in this paragraph are based on Exs. F6 - F18 unless otherwise stated.

¹⁸ Ex. F30.

¹⁹ All factual findings in this paragraph are based on Exs. I9 - I10 unless otherwise stated.

²⁰ All factual findings in this paragraph are based on Exs. I1 - I3 unless otherwise stated.

issues and a need for assistance with blood sugar monitoring, medication administration, and assistance with ADLs, Ms. S did not have the ability to function in a home setting without waiver services, and would require nursing home placement in the absence of her waiver services.

The assessment which resulted in the filing of the present case was performed on December 17, 2013 by nurse-assessor Denise Kichura, R.N. of DSDS.²¹ In completing the CAT, Ms. Kichura reported that Ms. S has the following care needs, abilities, and limitations:²²

Significant Problems Since Last Assessment:²³ Ms. Kichura reported (1) that Ms. S had no falls, no emergency room (ER) visits, no hospitalizations, and no critical incident reports since her prior assessment; (2) that she had been diagnosed with breast cancer in July 2013; and (3) that she does stretching exercises with arm pulleys five to six times per week to prevent stiffness.

Functional Assessment:²⁴ Ms. Kichura reported that Ms. S is able to touch her hands over her head and behind her back, can touch the floor while sitting, and has a strong grip in both hands, but cannot place her hands across her chest and stand up. Ms. Kichura also wrote that Ms. S reported having a stroke in 2003 which affected her right side.

Physical Therapy:²⁵ Ms. Kichura reported that Ms. S is not currently receiving occupational therapy, physical therapy, respiratory therapy, or speech / language therapy, and has no current prescription for range of motion exercises, walking for exercise, or foot care.

Bed / Body Mobility:²⁶ Ms. Kichura reported that Ms. S told her (1) that she has no bed sores; (2) that she can reposition herself in bed with and without using her bed's controls; (3) that she can reposition herself while in a chair; and (4) that she can support herself without difficulty using her arms. Ms. Kichura reported that she observed Ms. S use her bed's controls, reposition her blankets, sheets, and pillows, and sit up in bed (scored 0/0).

Transfers:²⁷ Ms. Kichura reported she was told by Ms. S that she can transfer independently by using her bed rails, her commode, or her walker for support, and that she does not use a gait belt. Ms. Kichura reported that she observed Ms. S transfer on and off her bed by using her walker for support, and transfer on and off her rocking chair "independently and without difficulty" (scored 0/1).

²¹ Ex. E.
²² Ex. E.
²³ Ex. E5.
²⁴ Ex. E6.
²⁵ Ex. E7.
²⁶ Ex. E8.
²⁷ Ex. E8.

Locomotion:²⁸ Ms. Kichura reported she was told by Ms. S's PCA that Ms. S (1) sometimes uses a walker, but often gets around inside her home without using her walker by "wall-walking" (leaning on the walls and/or furniture); (2) uses a wheelchair when she goes out to doctor appointments; and (3) gets tired quickly and cannot walk very far. Ms. Kichura reported that she observed Ms. S move independently from her bed to the living room using her walker (scored 1/1).

Dressing:²⁹ Ms. Kichura reported she was told by Ms. S that (1) she wears pajamas unless she needs to go outside to an appointment; (2) she can dress herself and adjust her clothing while at home; and (3) she can button her pajamas and put on her socks and slippers. Ms. Kichura reported that she observed Ms. S touch her feet and raise her arms above her head, but noted that putting her hands behind her back caused Ms. S pain (scored 2/2).

Eating:³⁰ Ms. Kichura reported she was told by Ms. S that (1) she is diabetic; (2) her PCA administers her insulin; (3) she can eat and drink on her own; and (4) that she is able to swallow oral medications and liquids. Ms. Kichura reported that she observed Ms. S drink from a cup using a straw, and noted that Ms. S has good fine motor skills (scored 0/1).

Toileting:³¹ Ms. Kichura reported she was told by Ms. S that (1) she prefers to use a bedside commode in order to avoid tripping on rugs when walking to the bathroom; and (2) she can transfer on and off her bedside commode and clean herself. Ms. Kichura concluded that functional tests, and Ms. S's ability to walk, transfer, and grip items independently, indicate that Ms. S requires only supervision and set-up assistance with toileting (scored 1/1).

Personal Hygiene:³² Ms. Kichura reported she was told by Ms. S that (1) she can brush her teeth at her bedside using a cup to spit into; (2) she can groom herself at her bedside; (3) she can reach her backside, but requires cueing for cleaning and washing; and (4) she applies skin cream to her dry skin and her feet. Ms. Kichura reported she observed Ms. S brush her hair using her left hand, and noted that Ms. S has good fine motor skills (scored 2/2).

Bathing:³³ Ms. Kichura reported she was told by Ms. S that (1) she is normally able to transfer in and out of the bathtub / shower by herself; (2) she has a shower chair, but normally stands up; (3) she is able to wash the front of her body, but needs assistance washing the rear of her body, her feet, and her hair; and (4) she requires cueing to rinse off. Ms. Kichura observed that Ms.

²⁸ Ex. E9.

²⁹ Ex. E10.

³⁰ Ex. E11.

³¹ Ex. E11.

³² Ex. E12.

³³ Ex. E13.

S has no rashes or sores, and concluded that the functional tests indicate that Ms. S requires extensive assistance with bathing (scored 3/2).

Professional Nursing Services:³⁴ Ms. Kichura found that Ms. S has no current need for professional nursing services. Specifically, Ms. Kichura found that Ms. S is currently receiving no injections or intravenous feedings, is not using any type of feeding tube, does not require nasopharyngeal suctioning or tracheotomy care, is not receiving treatment for open lesions, ulcers, burns, or surgical sites, and has not begun using oxygen within the last 30 days.³⁵ Ms. Kichura further found that Ms. S 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.³⁶ In addition, Ms. Kichura found that Ms. S is not receiving physical therapy, speech therapy, occupational therapy, or respiratory therapy, and does not require professional nursing assessment, observation, and/or management at least once per month.³⁷ Ms. Kichura also found that Ms. S 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.³⁸ Finally, Ms. Kichura found that Ms. S does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.³⁹

Cognition:⁴⁰ Ms. Kichura found that Ms. S has both short-term and long-term memory problems, but that Ms. S is generally able to recall names and faces, where she is, the location of her room, and the current season. Ms. Kichura rated Ms. S's cognitive status for daily decision-making as moderately impaired, requiring cueing and supervision due to poor decision-making. Finally, Ms. Kichura determined that Ms. S's cognitive status does not require professional nursing assessment, observation, or management at least once per month.⁴¹

Behavioral Problems:⁴² Ms. Kichura found that Ms. S does not wander, is not verbally abusive, is not physically abusive, does not engage in socially inappropriate or disruptive behavior,

³⁴ Exs. E15 - E17.

³⁵ Ex. E15.

³⁶ Ex. E16.

³⁷ Ex. E16.

³⁸ Ex. E17.

³⁹ Ex. E17.

⁴⁰ Ex. E18.

⁴¹ Ex. E18. Ms. Kichura did, however, complete the Division's supplemental screening tool (SST) for cognitive difficulties for Ms. S (Ex. E1). Ms. S received a total score of zero points on the cognitive SST.

⁴² Ex. E19.

and does not resist care. Ms. Kichura also found that Ms. S does not need professional nursing assessment, observation, or management at least once per month due to any behavioral problems.⁴³

Medication Management:⁴⁴ Ms. Kichura reported that Ms. S takes ten different prescription medications on a daily basis; that she cannot prepare, but can administer, her own medications;⁴⁵ and that she is always compliant in taking her medications.

Communication:⁴⁶ Ms. Kichura found that Ms. S has some minimal difficulty hearing, speaking, understanding others, and making herself understood, and that her vision is moderately impaired, making it difficult to read.

Mood:⁴⁷ Ms. Kichura found that Ms. S has no depression, anxiety, or sleep issues.

Based on the foregoing CAT scores, Ms. Kichura found that Ms. S does not currently require skilled level or intermediate level nursing care, and does not otherwise qualify for waiver services based on cognitive issues, behavioral issues, and/or her level of need for assistance with her activities of daily living (ADLs).⁴⁸

On June 13, 2014 a different registered nurse reviewed nurse-assessor Kichura's waiver services eligibility decision.⁴⁹ The nurse-supervisor agreed that Ms. S is not currently eligible to participate in the waiver services program.⁵⁰

Finally, the nurse-assessor's eligibility decision underwent a second-level review by a registered nurse and/or licensed physician employed by the Division's independent contractor Qualis Health.⁵¹ Qualis also concurred with the nurse-assessor's determination that Ms. S had "materially improved" and no longer required a nursing home facility level of care.⁵²

C. Relevant Procedural History

On June 18, 2014 the Division mailed a notice to Ms. S advising her that she was no longer eligible for waiver services, and that her waiver services would be terminated in thirty days.⁵³ On July 7, 2014 Ms. S requested a hearing to contest the Division's determination.⁵⁴

⁴³ Ex. E19. Ms. Kichura did, however, complete the Division's supplemental screening tool (SST) for behavioral problems for Ms. S (Ex. E2). Ms. S received a total score of zero points on the behavioral SST.

⁴⁴ Ex. E22.

⁴⁵ The one exception to this finding is that Ms. S's PCA administers her insulin (Ex. E22).

⁴⁶ Ex. E24.

⁴⁷ Ex. E27.

⁴⁸ Exs. E31, E32.

⁴⁹ Ex. D2; Exs. F35 - F43.

⁵⁰ Ex. D2; Exs. F35 - F43.

⁵¹ Exs. D2 - D4.

⁵² Exs. D2 - D4.

⁵³ Ex. D.

⁵⁴ Ex. C.

Ms. S's hearing was rescheduled multiple times to accommodate the parties, but was ultimately held on December 22, 2014.⁵⁵ Ms. S attended the hearing but did not testify. She was represented by her daughter and power-of-attorney holder, B B, who testified on her behalf. Ms. S's care coordinator, N K, attended the hearing and testified for Ms. S. Tammy Smith attended the hearing and represented the Division. Denise Kichura, R.N. (who conducted the 2013 assessment), and L J, participated in the hearing by phone and testified for the Division. The record closed at the end of the hearing.

On April 28, 2015 the undersigned issued the original proposed decision in this case. The Division filed a Proposal for Action (PFA) on May 11, 2015. As a result of the Division's filing of its PFA, the proposed decision was forwarded to the designee of the Commissioner of Health and Social Services for review on May 12, 2015. On June 10, 2015 the Commissioner's designee remanded the case with instructions to issue a revised proposed decision on the merits of the case.

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.⁵⁶ The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.⁵⁷ In this case, evidence was presented at hearing that was not available to the Division's reviewers. The administrative law judge may independently weigh the evidence and reach a different conclusion than did the Division's staff and/or Qualis Health, 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.⁵⁸ States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program⁵⁹ ("waiver

⁵⁵ The hearing in this case was consolidated with a hearing involving Ms. S's Medicaid Personal Care Assistant (PCA) services (OAH Case No. 14-1726-MDS). Prior to the hearing, the parties discussed the cases off-the-record, and were able to settle Ms. S's PCA case, which was subsequently dismissed on December 23, 2014.

⁵⁶ 42 CFR § 435.930, 7 AAC 49.135.

⁵⁷ 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).

⁵⁸ 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.

⁵⁹ 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.*

services”).⁶⁰ 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.⁶¹ Alaska participates in the waiver services program.⁶²

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. S), that level of care must be either “intermediate care” as defined by 7 AAC 140.510, or “skilled care” as defined by 7 AAC 140.515.⁶³ 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.

⁶⁰ See 42 USC § 1396a(a)(10)(A).

⁶¹ 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].

⁶² 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

⁶³ 7 AAC 130.215.

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.⁶⁴

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.⁶⁵ 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.⁶⁶ An individual may also 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.⁶⁷

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 . . .”⁶⁸ 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.^[69]

Finally, in an order issued recently in the class action⁷⁰ 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;" that "[t]he State may not conclude that a recipient is no longer eligible based only on the results of the current assessment;"⁷¹ that "[t]he State may not base its annual determination of whether a recipient is 'materially improved' solely upon the

⁶⁴ 7 AAC 130.215.

⁶⁵ Ex. E31.

⁶⁶ Ex. E31.

⁶⁷ Ex. E31.

⁶⁸ AS 47.07.045(b)(1).

⁶⁹ AS 47.07.045(b)(3).

⁷⁰ 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. S.

⁷¹ *Krone* order dated October 1, 2014 at page 6.

scoring obtained from the CAT;" and that "[t]he State must consider all reasonably available information relevant to that determination."

C. The Consumer Assessment Tool (CAT)

Under state Medicaid regulation 7 AAC 130.230(b)(2)(B), 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 CAT covers both the recipient's need for nursing services, as well as the recipient's ability to perform his or her activities of daily living (ADLs). The ADLs scored by the CAT are body mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room, between levels, and to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, and bathing.⁷²

The CAT numerical scoring 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.⁷³ The possible scores are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance); **3** (the person requires extensive assistance); and **4** (the person is totally dependent). There are also codes that are not treated as numerical scores for purposes of calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).⁷⁴

The second component of the CAT scoring system for ADLs is the *support score*. These scores rate the degree of assistance that 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).

D. Does Ms. S Require Intermediate or Skilled Nursing Care?

As discussed above, there are several ways in which a waiver services applicant or recipient can qualify for (or remain qualified for) waiver services. The first way is to demonstrate a need for either skilled nursing care or intermediate level nursing care.⁷⁵

⁷² The CAT also scores the recipient's ability to perform Instrumental Activities of Daily Living (IADLs). However, although IADL scores are important for determining the recipient's eligibility for Medicaid Personal Care Assistant (PCA) services, the recipient's IADL scores are not considered in determining eligibility for waiver services.

⁷³ 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."

⁷⁴ See, for example, Ex. E8.

⁷⁵ 7 AAC 140.510, 7 AAC 140.515.

Because skilled care is a higher level of care than intermediate care, the minimum level of nursing care for which Ms. S must demonstrate a need, in order to remain eligible for waiver services on that basis, is intermediate care. Ms. K asserted at hearing that Ms. S requires intermediate nursing care is defined by 7 AAC 140.510.

The intermediate care regulation (7 AAC 140.510) has three subsections (see text of regulation quoted in Section III(B), above). Ms. S clearly satisfies *some* of the criteria stated in the regulation. For example, Ms. S has a long-term illness or disability. Her condition is relatively stable, and her treatments emphasize maintenance of her condition rather than rehabilitation. However, one of the mandatory requirements, under 7 AAC 140.510(a) and (c), is that the recipient *either* require services ordered by and under the direction of a physician, *or* be receiving 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. There is no evidence in the record indicating that Ms. S satisfies either of these requirements.⁷⁶

The Division's nurse-assessor, reviewing nurse, and independent contractor all agreed that Ms. S does not require nursing services. More importantly, one of Ms. S's own physicians opined that Ms. S does not currently require nursing services. Finally, my own independent review of the record likewise indicates that Ms. S currently has no nursing needs as defined by the applicable regulations.

In summary, the preponderance of the evidence demonstrates that Ms. S does not currently require the types of services which indicate a need for intermediate level nursing care under 7 AAC 140.510. Accordingly, the Division correctly determined that Ms. S does not qualify for waiver services based on a need for skilled or intermediate level nursing care. The next issue is whether Ms. S qualifies for waiver services based on cognitive problems or the extent of her need for assistance with her ADLs.

E. Does Ms. S Qualify for Waiver Services Based on her Need for Assistance with her Activities of Daily Living?

The Consumer Assessment Tool's scoring summary is located at page 29 of the CAT.⁷⁷ 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

⁷⁶ Ms. S does receive *prescriptions* ordered by a physician. However, the intermediate care regulation requires that the recipient receive therapy or *services* prescribed by a physician.

⁷⁷ Ex. E p. 31.

waiver services. The first way, discussed immediately above, is to require skilled or intermediate level nursing care, as defined by the regulations and the CAT. However, under the CAT, an individual may also qualify for waiver services, even without demonstrating a need for skilled or intermediate level nursing care, if the individual has serious cognitive or behavioral problems, and/or if his or her need for assistance with activities of daily living (ADLs) is sufficiently high.⁷⁸ The CAT divides the possible scoring 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. As discussed above, Ms. S does not receive or require nursing services seven or more days per week. The second way (under NF1(b)) is to require use of a ventilator or respirator at least three days per week. As discussed above, Ms. S does not use a ventilator or respirator. The third way (under NF1(c)) is to require care due to uncontrolled seizures at least once per week. As discussed above, Ms. S does not currently require nursing care due to uncontrolled seizures at least once per week. The fourth way (under NF1(d)) is to receive some form of therapy from a qualified therapist at least five days per week. As discussed above, Ms. S was not receiving any therapy from the time of her assessment through the date of the hearing.

The fifth and 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 five "shaded" ADLs listed at page 18 of the CAT.⁷⁹ The CAT scores which the Division assigned to Ms. S with regard to the five "shaded" ADLs were: body mobility: 0/0; transfers: 0/1; locomotion: 1/1; eating: 0/1; and toilet use: 1/1.⁸⁰

This waiver services case was consolidated for hearing with another Medicaid case involving Ms. S's Personal Care Assistant (PCA) services, (OAH Case No. 14-1726-MDS). The PCA case was settled just prior to hearing, with the parties stipulating to certain scores to resolve the case.

At hearing, the Division's representative asserted that the stipulated scores agreed to in settlement of the PCA case are binding in this (waiver services) case. However, "[w]hen a consent judgment entered upon settlement by the parties of an earlier suit is invoked by a

⁷⁸ Ex. E p. 31.

⁷⁹ Ex. E20.

⁸⁰ Ex. E20.

defendant as preclusive of a later action, the preclusive effect of the earlier judgment is determined by the intent of the parties.”⁸¹ Further, the burden is on the moving party to show that application of res judicata is appropriate.⁸² The statements made on record regarding the settlement in the PCA case do not convince me that Ms. S's representative agreed that the scores used to settle the PCA case would be preclusive in the waiver services case. Accordingly, I will proceed to determine the appropriate scores for the five "shaded" ADLs.

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.⁸³ In order to receive a self-performance score of three (extensive assistance) with regard to bed / body mobility, a person must require either weight-bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁸⁴

Both Ms. S's 2012 and 2013 assessments found that Ms. S is independent as to bed mobility (CAT score 0/0). The information written on this issue in the two assessments appears to be credible, and Ms. S's witnesses did not provide testimony at hearing to dispute these findings. For these reasons, I find that the preponderance of the evidence indicates that Ms. S is currently independent as to bed / body mobility (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).⁸⁵ 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.⁸⁶

In 2012 Ms. S was found to require extensive assistance with transfers (CAT score 3/2). In 2013 Ms. S was found to require only set-up help with transfers (CAT score 0/1).

⁸¹ Wright & Miller, *Federal Practice and Procedure*, § 4443; see also *United States v. Armour & Co.*, 402 U.S. 673, 682, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971); *United States v. ITT Continental Baking Company*, 420 U.S. 223, 236, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975) (“since consent decrees . . . have many of the attributes of ordinary contracts, they should be construed basically as contracts”); *May v. Parker–Abbott Transfer & Storage, Inc.*, 899 F.2d 1007, 1010 (10th Cir. 1990) (“[t]his court recognizes that consent decrees are of a contractual nature . . .”).

⁸² *Greenberg v. Board Of Governors, Federal Reserve System*, 968 F.2d 164, 170 (2nd Cir. 1992).

⁸³ Ex. E p. 8.

⁸⁴ Ex. E p. 8.

⁸⁵ Ex. E p. 8.

⁸⁶ Ex. E p. 8.

At hearing, Ms. B asserted that her mother reasonably requires *some* assistance with transfers, and I agree. Based on my observation of Ms. S at hearing, and the fact that she is post-CVA or stroke, I find that she sometimes (but not always) requires assistance when transferring. However, I find that Ms. S does not require weight-bearing assistance with transfers, based on my own observations, and the fact that Ms. S's witnesses did not assert a need for such help.

Accordingly, I find that Ms. S normally requires assistance with transfers, but that the assistance rendered is not weight-bearing assistance, and that the preponderance of the evidence indicates that Ms. S requires limited assistance with transfers (CAT score 2/2).

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.⁸⁷ In order to receive a self-performance score of three (extensive assistance) for locomotion, a person must require either weight-bearing support three or more times per week, or full caregiver performance part of the time.⁸⁸ In 2012 Ms. S was found to require limited assistance with locomotion (CAT score 2/2). In 2013 Ms. S was found to require only supervision and set-up help with locomotion (CAT score 1/1).

Ms. Kichura reported that she observed Ms. S move independently from her bed to the living room using her walker. Ms. S's witnesses did not provide testimony to the contrary at hearing. Thus, the preponderance of the evidence indicates that Ms. S currently requires only supervision and set-up help with locomotion (CAT score 1/1).

d. Eating

For purposes of waiver services eligibility, eating is defined as how a "person eats or drinks regardless of skill."⁸⁹ 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.⁹⁰

In 2012 Ms. S was found to require only set-up assistance with eating (CAT score 0/1). In 2013 Ms. S was again found to require only set-up help with eating (CAT score 0/1). Ms. Kichura reported in her assessment and testified at hearing that Ms. S can eat, drink, and take her pills without assistance. Ms. S's witnesses did not provide any testimony to the contrary at hearing.

⁸⁷ Ex. E p. 9.

⁸⁸ Ex. E p. 9.

⁸⁹ Ex. E p. 11.

⁹⁰ Ex. E p. 11.

Accordingly, the preponderance of the evidence indicates that Ms. S requires only set-up assistance with eating (CAT score 0/1).

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."⁹¹ In order to receive a self-performance score of three (extensive assistance) with regard to toilet use, a person must require either weight-bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁹² In 2012 Ms. S was found to require extensive assistance with toileting (CAT score 3/2). In 2013 Ms. S was found to require only supervision and set-up help with toilet use (CAT score 1/1).

Based on my observation of Ms. S sitting in and getting up from her chair at hearing, and the fact that she is post-CVA or stroke, I find that she reasonably requires some assistance with toilet use. However, I find that Ms. S does not generally require weight-bearing assistance with transfers, based on my own observations, and the fact that Ms. S's witnesses did not assert a need for that level of assistance. Accordingly, the preponderance of the evidence in the record indicates that Ms. S generally requires limited assistance with toileting (CAT score 2/2).

f. Summary - Degree of Assistance Required With Shaded ADLs

Independent review indicates that Ms. S requires a greater degree of assistance than was found by the Division with regard to the "shaded" ADLs of transfers and toilet use. However, 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. Because Ms. S does not require extensive assistance with three or more of the "shaded" ADLs, she does not meet NFLOC under NF1(e).

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 needing injections and/or IV hookups, feeding tubes, tracheotomy care or nasopharyngeal suctioning, treatments or

⁹¹ Ex. E p. 11.

⁹² Ex. E p. 11.

dressings, oxygen, requiring observation, assessment, and management of unstable conditions, catheter management, and/or care required due to a comatose condition. The record does not show that Ms. S requires any of these services, so she scores 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. S requires any of these therapies at least three days per week, 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, venipuncture, or barrier dressings for ulcers, at least three days per week. The record does not show that Ms. S requires any of these procedures three or more days per week, so no points are awarded under NF2(c).

The fourth and 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. Again, the record does not show that Ms. S requires any of these treatments at least three days per week, so she receives no points under NF2(d).

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 (under NF3(a)) is to have short-term memory problems. The Division found that Ms. S has short-term memory problems, so she receives one point under NF3(a).

The second way to obtain points (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. Ms. Kichura found that Ms. S was able to recall all four of these items at the assessment, and Ms. S did not dispute this. Thus, Ms. S gets no points under NF3(b).

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. Ms. Kichura found that Ms. S's cognitive skills for daily decision-making are moderately impaired. Accordingly, Ms. S receives one point under NF3(c).

The last way to obtain points (under NF3(d)) is to require *either* professional nursing care at least three days per week 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 cognitive portion of the Division's

Supplemental Screening Tool (SST). The Division found that Ms. S does not require professional nursing care at least three days per week due to cognitive problems, and Ms. S's witnesses provided no testimony at hearing to contradict this. However, Ms. S scored 2/2 or higher as to one or more shaded ADLs. And although Ms. S received a score of zero on the cognitive portion of the SST, testimony was received from Ms. B and Ms. K contesting that score at hearing. The undersigned finds, based on the testimony of Ms. B and Ms. K, that:

- i. Ms. S often cannot recall entire events, or the names of some close friends and relatives, without prompting (score of 2);
- ii. Ms. S 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. Ms. S has periodic confusion (score of 2);
- iv. Ms. S would get lost outside her home were she not driven or escorted by family members (score of 2); and
- v. Ms. S is able to carry out only simple conversations (score of 2).

Based on the above, I find that Ms. S should receive a total score of 11 on the cognitive portion of the SST. This does not help Ms. S's overall waiver score, however, because she would need to receive a score of 13 or more on the cognitive portion of the SST in order to receive one point under NF3(d). Accordingly, Ms. S receives no points under NF3(d).

Under NF3, an applicant must receive a score of one *on all four subsections* in order to receive a single "overall" point at the conclusion of NF3. Here, Ms. S received a score of one on NF3(a) and NF3(c), but received scores of zero on NF3(b) and NF3(d). Accordingly, Ms. S receives an "overall" score of zero on NF3.

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, to receive a point.

Ms. Kichura found that Ms. S does not wander, is not verbally abusive, is not physically abusive, does not engage in socially inappropriate or disruptive behavior, and does not resist care. Ms. S's witnesses did not contest these findings at hearing. The preponderance of the evidence therefore indicates that Ms. S should receive no points under NF4(a).

Under NF4(b), an applicant must *either* require professional nursing care *at least three days per week* 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 behavioral portion of the Division's Supplemental Screening Tool (SST). Ms. Kichura found that Ms. S does not require or receive professional nursing assessment, observation, or management of behavioral problems three or more days per week. This finding is supported by the record and was not challenged.

Ms. S did receive a score of 2/2 or better as to one or more "shaded" ADLs. However, Ms. Kichura gave Ms. S a score of zero on the behavioral portion of the SST,⁹³ which is not a sufficiently high score on the SST to receive a point at NF4(b). Ms. S's witnesses did not contest this finding at hearing. Accordingly, Ms. S receives no points under NF4(b).

5. NF5

At NF5, the total 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, however, Ms. S's overall score as to NF2, NF3, and NF4 is zero. Accordingly, in this case, the CAT's scoring analysis ends here and does not proceed to NF6 or NF7.

IV. Conclusion

Based on the Division's 2013 assessment, the opinion of one of her own doctors, and my own independent review of the record, Ms. S does not currently require either an intermediate or skilled level of care as defined under the relevant regulations and the Consumer Assessment Tool. Further, although Ms. S's cognitive state is worse than was found by the Division, and although Ms. S requires more assistance with her ADLs than was found by the Division, her cognitive functioning is not poor enough, and her level of need for assistance with ADLs is not high enough, to qualify her for waiver services on that basis. Accordingly, Ms. S's condition has materially improved since her 2012 assessment, and she is

⁹³ Ex. E2.

not currently eligible for the waiver services program. The Division's decision terminating Ms. S's waiver services is therefore affirmed.

DATED this 29th day of June, 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 8th day of July, 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.]