

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

In the Matter of	)	
	)	
N C. N	)	OAH No. 14-1312-MDS
_____	)	Agency No.

**DECISION**

**I. Introduction**

N N receives Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (Division) notified Ms. N that she was no longer eligible for Waiver services and that they would be discontinued.<sup>1</sup> Ms. N requested a hearing.<sup>2</sup>

Ms. N’s hearing was held on December 9, 2014. Ms. N represented herself and testified on her own behalf. She was assisted in the hearing by O B, the administrator of the assisted living home where she resides. Fair hearing representative Tammy Smith represented the Division, and nurse assessor Scott Chow testified on behalf of the Division.

Because this is a case in which a claimant is appealing the termination of eligibility for benefits, the Division has the burden of proving by a preponderance of the evidence that the Division’s decision to terminate benefits was correct.<sup>3</sup>

Although Ms. N experiences physical difficulties, her impairments do not rise to the level necessary to qualify her for Waiver services. As a result, the denial of her application for Waiver services is upheld.

**II. Facts<sup>4</sup>**

Ms. N is 73 years old. She was previously found eligible for Waiver services in 2012. Her diagnoses include diabetes, end stage renal disease, atrial tachycardia, and chronic airway obstruction. She undergoes dialysis treatments three times per week.

Ms. N was reassessed on February 10, 2014 by registered nurse Scott Chow. Mr. Chow testified at the hearing. In addition, his conclusions regarding Ms. N’s physical and mental

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<sup>1</sup> Exh. D.

<sup>2</sup> Exh. C.

<sup>3</sup> 7 AAC 49.135.

<sup>4</sup> These facts are based upon Exh. E (the Division’s Consumer Assessment Tool, or CAT) and the testimonies of Ms. N, Mr. B, and Scott Chow, RN.

function, as of the date of her assessment visit, are documented on the Consumer Assessment Tool (CAT) as follows:

- Mr. Chow performed a functional assessment of Ms. N that showed she had good upper extremity range of motion, was able to touch her hands over her head and touch her hands behind her back, had strong grips with both hands, and was able to lean forward to touch her feet while seated, but she was not able to cross her hands over her chest and stand up.<sup>5</sup> In his notes accompanying the functional assessment, he wrote that Ms. N “is ambulatory with a cane, she demonstrates strong grips, good fine motor skills and no limitations to her range of motion.”<sup>6</sup>
- He performed a cognition assessment of Ms. N and noted she could draw a clock, and she could recall two of three items, five minutes after having the items mentioned.<sup>7</sup> Mr. Chow wrote that she “communicates needs, answers questions pleasantly and appropriately, makes decisions regarding her care, and follows directions.”<sup>8</sup>
- Ms. N did not require any assistance with bed mobility, based upon the assessor’s observation of her repositioning herself in bed and sitting up “independently without help from staff,” as well as her own report that she can turn on her side without help from staff.<sup>9</sup>
- Ms. N did not require any assistance with transfers, based upon the assessor’s observation of her standing up from her bed “using her cane without help from staff,” and upon Ms. N’s statement that she can stand up from surfaces without assistance.<sup>10</sup>
- Ms. N did not require any assistance with locomotion within the home, based upon the assessor’s observation of her walking in the assisted living home using her cane, and Ms. N’s report that she “can walk independently with her walker or cane.”<sup>11</sup>
- Ms. N did not require any assistance with eating, based upon her statement to that effect and Mr. Chow’s observation that she “demonstrates strong grips, good fine motor skills and no limitations to her range of motion with her extremities.”<sup>12</sup>

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<sup>5</sup> Exh. E6.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Exh. E8.

<sup>10</sup> *Id.*

<sup>11</sup> Exh. E9.

- Regarding the activity of toileting, based upon Ms. N’s statement to Mr. Chow that she “toilets herself independently without help from staff,” and Mr. Chow’s observations of her transferring independently with her cane, she was deemed to not require any assistance with toileting.<sup>13</sup>
- Ms. N had no wounds that required care, and she was not receiving any nursing services or therapies at the time of the assessment.<sup>14</sup> It was noted on the CAT, however, that Ms. N receives dialysis treatments three times per week, which gave her a score of 2 for “treatments/procedures” under “special treatments and therapies.”<sup>15</sup>
- Ms. N was noted to have no impairments in cognition or short-term and long-term memory.<sup>16</sup> Accordingly, Mr. Chow’s total “cognition” score for Ms. N was 0.<sup>17</sup>
- Ms. N was noted to have no behavioral impairments or issues,<sup>18</sup> so her total behavior score in the CAT was a 0.<sup>19</sup>

After the assessment was complete, the Division informed Ms. N of its determination to terminate her Waiver eligibility in a letter dated July 24, 2014.<sup>20</sup>

Ms. Smith explained at the hearing that Waiver services are provided to persons who require professional nursing or medical attention, and that eligibility for residency in an assisted living home does not equate to eligibility for Waiver services. Mr. Chow explained in his testimony at the hearing how the Division used the information recorded in the CAT to determine whether Ms. N continued to be eligible for Waiver services. First he noted that she does not require professional nursing for acute medical conditions, nor does she require therapies such as physical therapy, occupational therapy, or speech language therapy. In connection with the scoring for professional nursing needs, Ms. N testified during the hearing that she uses oxygen and injects insulin four times per day. Mr. Chow, however, pointed out Ms. N did not

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<sup>12</sup> Exh. E11.  
<sup>13</sup> *Id.*  
<sup>14</sup> Exh. E15, 16.  
<sup>15</sup> Exh. E17.  
<sup>16</sup> Exh. E18.  
<sup>17</sup> Exh. E1.  
<sup>18</sup> Exh. E19.  
<sup>19</sup> Exh. E2.  
<sup>20</sup> Exh. D.

receive a qualifying score for oxygen administration because she is not required to be under the observation or monitoring of a skilled nurse or medical professional.<sup>21</sup>

Regarding Ms. N's insulin injections, Mr. Chow explained that the CAT explicitly excludes administration of "daily insulin for a person whose diabetes is under control" from the category of nursing services that can result in a qualifying score.<sup>22</sup> Because Ms. N has had no reports of uncontrolled blood sugar levels or other critical incident reports regarding her diabetes, it is considered to be "under control."

Ms. N pointed out that her physician wrote a letter authorizing the assisted living home staff to assist her with her blood sugar testing and insulin injections. Mr. Chow responded, however, that the physician did not order that the assistance with her insulin be provided by a medical professional.<sup>23</sup> Mr. B confirmed that he assists Ms. N with blood sugar testing and her insulin injections, and that he is not a professional nurse.

### **III. Discussion**

#### **A. Method for Assessing Eligibility**

The Alaska Medicaid program provides Waiver services to adults with physical disabilities who require "a level of care provided in a nursing facility."<sup>24</sup> The nursing facility level of care<sup>25</sup> requirement is determined by an assessment which is documented by the CAT.<sup>26</sup> The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,<sup>27</sup> and whether an applicant has impaired cognition or displays problem behaviors.<sup>28</sup> Each of the assessed items is coded and contributes to a final numerical score. For instance, if an individual requires 5 days or more of therapies (physical, speech/language, occupation, or respiratory therapy) per week, he or she would receive a score of 3.<sup>29</sup>

The CAT also records the degree of assistance an applicant requires for certain activities of daily living ("ADLs"), which include five specific categories: bed mobility (moving within a bed, also referred to as "body mobility"), transfers (i.e., moving from the bed to a chair or a

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<sup>21</sup> Exh. E15.

<sup>22</sup> *Id.*

<sup>23</sup> See Dr. S. U letter, 12/9/14.

<sup>24</sup> 7 AAC 130.205(d)(4).

<sup>25</sup> See 7 AAC 130.205(d)(4); 7 AAC 130.215.

<sup>26</sup> 7 AAC 130.215(4)

<sup>27</sup> Exh. E15-17.

<sup>28</sup> Exh. E18-19.

<sup>29</sup> Exh. E31.

couch, etc.), locomotion (walking or movement when using a device such as a cane, walker, or wheelchair) within the home, eating, and toilet use (which includes transferring on and off the toilet and related cleansing and hygiene care).<sup>30</sup> These five ADLs are often referred to as the “shaded ADLs,” because they are shaded on the CAT to indicate their relevance to Waiver eligibility.<sup>31</sup>

In order for a person who only has physical assistance needs to score as eligible for Waiver services on the CAT, he or she would need a self-performance code of 3 (extensive assistance) or 4 (total dependence) and a support code of 2 or 3 for three or more of the five specified ADLs (bed mobility, transfers, locomotion within the home, eating, and toileting).<sup>32</sup>

A person can also receive points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive behaviors, etc.), and if they require either limited<sup>33</sup> or extensive assistance with the five specified, shaded ADLs.<sup>34</sup> In Ms. N’s case, because she received a 2 for “treatments/procedures” under “special treatments and therapies” (in recognition of her three times per week dialysis treatments), she would only need a score of “2/2” for two of the five shaded ADLs in order to qualify for waiver services.<sup>35</sup>

All of the results of the assessment portion of the CAT are scored. If an applicant’s total score is a 3 or higher, the applicant is medically eligible for Waiver services.<sup>36</sup>

***B. Eligibility***

Ms. N does not receive professional nursing services, although she may require them in the future if her condition deteriorates. The assistance provided to her by the staff of the assisted living home, even though it is provided at the direction of her doctor, does not qualify as professional nursing or medical services. Therefore she is not eligible for Waiver services based upon the criteria of receiving professional nursing services or therapy five times or more per week.<sup>37</sup>

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<sup>30</sup> Exh. E20.

<sup>31</sup> *Id.*

<sup>32</sup> Exh. E31.

<sup>33</sup> “Limited assistance” is defined to describe a “person highly involved in activity; received physical help in guided maneuvering of limbs, or other non weight-bearing physical assistance 3+ times – or – limited assistance (as just described) plus weight-bearing [assistance] 1 or 2 times during last 7 days.” Exh. E8.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*, sections NF 1(a) and (d).

In addition, Ms. N does not have impaired cognition, nor does she experience behavioral impairments or difficulties, so those areas of scoring are of no assistance to her. As mentioned above, however, Ms. N's scoring properly reflects the fact that she receives dialysis three times per week. Therefore, she would qualify for Waiver services if she also had a self-performance score of at least 2 (limited assistance), and a support code of 2 (one-person physical assist), for at least two of the five shaded ADLs (bed mobility, transfers, locomotion within the home, eating, and toileting). The Division established, however, that Ms. N does not require even limited physical assistance with any of the five shaded ADLs. The Division's coding of her needs, with a 0 for self-performance for each of those ADLs, was established by Mr. Chow's scoring for Ms. N on the CAT, and it was supported by his testimony and his written notations on the CAT, some of which recorded his own observations and some of which reported Ms. N's own comments to him during the assessment.

Ms. N generally responded to Mr. Chow's testimony regarding the shaded ADLs by arguing that he only saw her for a limited period of time, and therefore he did not see her when she was tired, experiencing pain or having trouble walking on her own or standing for extended periods of time. She did not assert, however, that Mr. Chow mischaracterized her statements during the assessment or that his observations of her were exaggerated or inaccurate. Overall, her testimony was not sufficiently persuasive to rebut Mr. Chow's credible testimony regarding his observations of Ms. N's physical abilities and her comments to him during the assessment.<sup>38</sup>

Because Ms. N did not receive a 2/2 score for at least two of the five shaded ADLs, her scoring did not qualify her for Waiver services. Ms. N should reapply for the Waiver program at any point in the future if her medical condition significantly changes to the point that she would receive additional scoring for nursing services, therapies or treatments, or if she believes her need for assistance with at least two of the five shaded ADLs has reached the point where she requires limited physical assistance (i.e., a self-performance score of 2).

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<sup>38</sup> Mr. Chow noted in the CAT, and in his testimony, that the assessment visit took place immediately after Ms. N had finished a dialysis treatment. Dialysis patients typically feel weaker after dialysis than they do before.

#### **IV. Conclusion**

The Division met its burden of establishing that Ms. N's needs do not rise to the level that would qualify her for Waiver services. The Division's decision to deny her application, therefore, is upheld.

Dated this 23<sup>rd</sup> day of April, 2015.

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

Andrew M. Lebo

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 11<sup>th</sup> day of May, 2015.

By: *Signed* \_\_\_\_\_

Name: Andrew M. Lebo

Title: Administrative Law Judge

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