

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

In the Matter of:)
)
 V K) OAH No. 14-1353-MDS
) Agency Case No.
_____)

DECISION

I. Introduction

The issue in this case is whether Ms. V K is currently eligible to participate in the Medicaid Home and Community-Based Waiver Services Program (waiver services program). Based on the applicable regulations, an applicant is eligible to receive waiver services if he or she requires either skilled nursing care, intermediate level nursing care, or extensive assistance with three or more designated ("shaded") activities of daily living (ADLs). The Division of Senior and Disabilities Services (DSDS or Division) conducted an assessment on June 5, 2014 and subsequently determined that Ms. K does not require skilled or intermediate level nursing care, and does not require extensive assistance with three or more ADLs.¹

This decision concludes that Ms. K requires a greater level of physical assistance with some of her ADLs than was indicated in her assessment, and that she requires extensive assistance with two "shaded" ADLs. However, under the Division's regulations, an applicant or recipient must require extensive assistance with three or more shaded ADLs in order to qualify for waiver services on that basis. As a result, Ms. K is not presently eligible to participate in the waiver services program.² The Division's decision denying Ms. K's application for participation in the waiver services program is therefore affirmed.

II. Facts

A. Ms. K's Medical Diagnoses and Care Needs

Ms. K is a 62-year-old woman who lives alone in a single level duplex style apartment.³ Ms. K's primary medical diagnoses are uncontrolled type II diabetes with neurological symptoms, closed fracture of the ankle, and proximal fracture of the humerus (the long bone in the upper arm).⁴ Ms. K's secondary diagnoses are athropathy (arthritis), anxiety, bone and

¹ Ex. D.

² Should Ms. K's condition decline in the future, she is free to re-apply for waiver services at that time.

³ Ex. E3.

⁴ Ex. E5.

cartilage disorder, cardiomyopathy, depression, diabetes-related circulatory and renal problems, hypertension, hypoxemia, incontinence, morbid obesity, and neurogenic bladder.⁵ Ms. K weighed about 270 pounds at the time of the assessment.⁶

Ms. K is on oxygen.⁷ In addition, she takes a number of prescription medications including Amlodipine, Amoxicillin, Atrovent, Crestor, Escitalopram, Furosemide, HCTZ (hydrochlorothiazide), Hydrocodone, Hydroxychloroquine, Lantus, Metoclopramide, Novolog, Pantoprazole, potassium chloride, Rozerum, Tamsulosin, and Zofran.⁸

M X, Ms. K's PCA, credibly testified at hearing in relevant part as follows:

1. She has worked as Ms. K's PCA for about five years.
2. She is only paid to spend 3.75 hours per day assisting Ms. K, but she actually spends more time than that helping Ms. K each day.
3. She arrives at Ms. K's house at about 6:30 a.m. She awakens Ms. K, fixes her breakfast, and makes sure that she takes her medications. Then, after working for about 90 minutes, she leaves Ms. K's house at about 8:00 a.m.
4. She comes back to Ms. K's house between 1:00 p.m. - 2:00 p.m. She then helps Ms. K until about 6:00 p.m. or later, when Ms. X leaves for the day.

N F, Ms. K's Care Coordinator, credibly testified at hearing in relevant part that Ms. K needs to have access to her "Lifeline" device because of her blood sugar "dips." Lifeline is not available as a non-waiver Medicaid service.

Ms. K credibly testified at hearing in relevant part as follows:

1. She sometimes requires weight-bearing physical assistance from her PCA to reposition herself when in bed, but not very often.
2. She requires weight-bearing physical assistance from her PCA to get up from a seated position. She needs this transfer assistance about 20 times per week.
3. She can move around her apartment independently by using her cane and by "wall-walking." She uses her walker when she goes to medical appointments.
4. She has a "frozen shoulder," and agrees with the Division's finding that she requires extensive physical assistance with dressing.

⁵ Ex. E5.

⁶ Ex. E11.

⁷ Ex. E5.

⁸ Ex. E22.

5. At the time of the assessment she could previously eat and drink independently, but just recently she has started to have swallowing problems.
6. Her PCA must give her weight-bearing assistance with toileting at least once each day.
7. Her PCA must help her wash her face and brush her teeth because of the peripheral neuropathy in her hands, but she can perform the remainder of her personal hygiene tasks herself.
8. She agrees with the Division's assessment finding that she requires extensive physical assistance with bathing.
9. She does not know whether she has any skilled or intermediate-level nursing needs.

B. Ms. K's Functional Abilities and Nursing Needs as Determined by the CAT

On June 5, 2014 Ms. K was assessed as to her eligibility for the waiver services program by Denise Kichura, R.N. of DSDS.⁹ Ms. Kichura assessed Ms. K using the Consumer Assessment Tool or "CAT," a system for scoring functional abilities and nursing needs described in detail in Part III.

Ms. Kichura reported that Ms. K was alert and oriented during the assessment, was a good historian, and indicated that she managed her own finances and her apartment building.¹⁰ Ms. Kichura reported that Ms. K was able to draw a clock face correctly, and was able to perform a test in which she was asked to recall three designated words within five minutes. Ms. Kichura reported that Ms. K was able to touch her hands together behind her back, touch her feet while sitting, and grip strongly with both her hands. However, she was not able to touch her hands together over her head, or stand up with her arms crossed on her chest.

Ms. Kichura reported that, at the time of the assessment, Ms. K was not undergoing occupational therapy, physical therapy, respiratory therapy, or speech / language therapy, and did not have any prescriptions requiring hands-on help from a personal care assistant (PCA).¹¹

Ms. Kichura determined, based on the assessment she conducted, that Ms. K has the following abilities and limitations with regard to her Activities of Daily Living (ADLs):¹²

⁹ Ex. E.

¹⁰ All factual findings in this paragraph are based on Ex. E6 unless otherwise stated.

¹¹ Ex. E7.

¹² Exs. E8 - E13. The numeric scores referenced are the CAT scores assigned by Ms. Kichura.

Bed Mobility:¹³ Ms. Kichura reported that Ms. K told her that she sleeps in her bed in her bedroom and is able to turn and reposition herself independently. Ms. Kichura reported that she observed Ms. K lie down in bed and sit back up independently, and reposition herself in an auto-left recliner (scored 0/0; frequency 0/0).

Transfers:¹⁴ Ms. Kichura reported that Ms. K told her that she transfers several times each day from her tilt-lift recliner without assistance. Ms. Kichura reported that she observed Ms. K (1) stand up from her auto-left recliner; (2) use her hands to push off and transfer independently from her bed; and (3) use her cane to help her stand independently (scored 0/0; frequency 0/0).

Locomotion:¹⁵ Ms. Kichura reported that Ms. K told her that (1) she uses her cane indoors because she does not like using her walker inside the house; (2) has not yet tripped over her dog; and (3) has not fallen except outside due to ice. Ms. Kichura reported that she observed (1) Ms. K walk across her living room using her cane; and (2) that Ms. K wears a special raised boot on her left foot, which helps her walk upright with better posture (scored 1/1; frequency 0/0).

Dressing:¹⁶ Ms. Kichura reported that Ms. K told her that (1) she needs help threading her left arm into shirts, and putting her boot on her left foot, but (2) does not require weight-bearing assistance with dressing. Ms. Kichura reported that she observed Ms. K thread her left arm through a sweater sleeve by herself (scored 3/2; frequency 2/7).

Eating:¹⁷ Ms. Kichura reported that Ms. K told her that she can heat up food by herself, use regular eating utensils and cups without difficulty, and feed herself when her PCA is not there. Ms. Kichura reported that she observed Ms. K bring her hands up to her mouth, drink from an open cup, grip a plate, use a microwave oven, and use a faucet (scored 0/0; frequency 0/0).

Toileting:¹⁸ Ms. Kichura reported that Ms. K told her (1) that she can transfer on and off her toilet using her bathroom counter for support; and (2) that she can clean herself using a "bottom buddy" device (scored 2/2; frequency 4/7).

Personal Hygiene:¹⁹ Ms. Kichura reported that Ms. K told her that she is physically able to comb her hair, wash her face, clean her pelvic areas, and manage her own medications

¹³ All factual findings in this paragraph are based on Ex. E8.

¹⁴ All factual findings in this paragraph are based on Ex. E8.

¹⁵ All factual findings in this paragraph are based on Ex. E9.

¹⁶ All factual findings in this paragraph are based on Ex. E10.

¹⁷ All factual findings in this paragraph are based on Ex. E11.

¹⁸ All factual findings in this paragraph are based on Ex. E11.

¹⁹ All factual findings in this paragraph are based on Ex. E12.

independently. Ms. Kichura reported that she observed Ms. K grip her eyeglasses, brush her hair, manage her medications, twist her torso, transfer, and ambulate (scored 0/0; frequency 0/0).

Bathing:²⁰ Ms. Kichura reported that Ms. K told her that she can walk to the bathroom, but that she requires assistance transferring in and out of the shower and washing her feet and back. Ms. Kichura reported that she observed that Ms. K has a left shoulder limitation but a good grip with each hand (scored 3/2; frequency 1/4).

Professional Nursing Services:²¹ Ms. Kichura found that Ms. K has no current need for professional nursing services. Specifically, Ms. Kichura found that Ms. K 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 open surgical sites, and is not receiving oxygen for a new medical condition.²² Ms. Kichura further found that Ms. K 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.²³ In addition, Ms. Kichura found that Ms. K does not receive occupational, physical, respiratory, or speech therapy, and that she does not require professional nursing assessment, observation, and/or management at least once per month.²⁴ Ms. Kichura also found that Ms. K 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.²⁵ Finally, Ms. Kichura found that Ms. K does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.²⁶

Cognition:²⁷ Ms. Kichura found that Ms. K has no short-term or long-term memory problems. Ms. Kichura also found that Ms. K is generally able to recall names and faces, where she is, the location of her room, and the current season. Ms. Kichura rated Ms. K as being independent with making decisions regarding everyday matters. Ms. Kichura concluded that Ms. K has no

²⁰ All factual findings in this paragraph are based on Ex. E13.

²¹ Ex. E pp. 15 - 17.

²² Ex. E p. 15.

²³ Ex. E p. 16.

²⁴ Ex. E p. 16.

²⁵ Ex. E p. 17.

²⁶ Ex. E p. 17.

²⁷ Ex. E p. 18.

cognitive problems requiring professional nursing assessment, observation, or management either three days per week or once per month.²⁸

Behavioral Problems:²⁹ Ms. Kichura found that Ms. K's behavioral issues were significant enough to require use of the Division's Supplemental Screening Tool (SST).³⁰ Ms. Kichura found that Ms. K has no sleep issues and does not wander. Ms. Kichura also found that Ms. K's attitudes, disturbances, and emotional states create consistent difficulties, but that with intervention they can be modified and kept within manageable levels. Ms. Kichura found that Ms. K is sometimes disruptive or aggressive, or is sometimes extremely anxious or agitated, even after proper evaluation and treatment. Finally, Ms. Kichura found that Ms. K sometimes has difficulty understanding self-care needs that must be met, but will cooperate when others provide explanation or direction. Ms. Kichura ultimately concluded that Ms. K does not need professional nursing assessment, observation, or management due to any behavioral problems.³¹

Medication Management:³² Ms. Kichura reported that Ms. K takes 18 different prescription medications; that she prepares and administers some (not all) of her own medications; and that she is always compliant in taking her medications.

Senses:³³ Ms. Kichura found that Ms. K is able to hear and communicate adequately, is usually able to understand others as well as make herself understood, and has impaired vision even when corrected with eyeglasses.

Balance:³⁴ Ms. Kichura found that Ms. K limits her activities due to balance problems and had fallen during the 180 days prior to the assessment.

Oral health, skin conditions, and foot problems:³⁵ Ms. Kichura found that Ms. K has no serious oral health problems, and no pressure sores, open sores, lesions, burns, abrasions, rashes, or bruises. Ms. Kichura also found that Ms. K has foot problems, but that someone inspects her feet on a regular basis.

²⁸ Ms. Kichura assigned Ms. K a score of zero on the Division's Supplemental Screening Tool (SST) for cognitive issues (Ex. E1).

²⁹ Exs. E2, E19.

³⁰ All factual findings in this paragraph are based on Ex. E2 unless otherwise stated.

³¹ Ex. E19.

³² Ex. E22.

³³ Ex. E24.

³⁴ Ex. E25.

³⁵ Ex. E26.

Mood:³⁶ Ms. Kichura found that Ms. K makes negative statements, calls out for help, is often angry at herself or others, is self-deprecating, has repetitive, anxious complaints which are not health-related, has an unpleasant mood in the morning, has insomnia, is tearful and crying, has a sad, worried, or pained expression on her face, performs repetitive physical movements, has withdrawn from activities of interest, has a reduced level of social interaction, and exhibits symptoms of depression. Ms. Kichura found that these problems currently occur at least one day per week, but no more than five days per week, but that Ms. K's mood is declining.

C. Relevant Procedural History

At some time prior to June 5, 2014 Ms. K's Care Coordinator submitted an application to the Division for Ms. K's participation in the waiver services program.³⁷ As discussed above, on June 5, 2014 a nurse-assessor employed by the Division conducted an in-person assessment using the CAT.³⁸ The nurse found that Ms. K requires neither a nursing facility level of care, nor extensive assistance with three or more "shaded" ADLs, and therefore concluded that Ms. K is not currently eligible for the waiver services program.³⁹

On July 22, 2014 the Division mailed a notice to Ms. K advising her that it had denied her application for waiver services.⁴⁰ The letter cited state Medicaid regulations 7 AAC 130.205, 7 AAC 130.207, 7 AAC 130.213, 7 AAC 130.215, and 7 AAC 130.219 in support of its determination.⁴¹ On July 31, 2014 Ms. K's Care Coordinator requested a hearing to contest the Division's denial of Ms. K's application for waiver services.⁴²

Ms. K's hearing was held on September 17, 2014. Ms. K participated in the hearing by phone, represented herself, and testified on her own behalf. Her PCA, M X, and her Care Coordinator, N F, participated in the hearing by phone, helped represent Ms. K, and testified on her behalf.

The Division was represented by Tammy Smith, who participated by phone. Denise Kichura, a registered nurse employed by DSDS, participated in the hearing by phone and testified on the Division's behalf. The record closed at the end of the hearing.

³⁶ Ex. E27.

³⁷ Exhibit E. The exact date of the submittal of Ms. K's application is not at issue in this case.

³⁸ Exhibits E1 - E33.

³⁹ Exhibits D, E31.

⁴⁰ Exhibit D.

⁴¹ Exhibit D1.

⁴² Exhibit C.

III. Discussion

A. *Relevant Alaska Medicaid Statutes and Regulations*

Alaska's Medicaid Waiver Services Program provides eligible Alaskans with a choice between home and community based care and institutional care.⁴³ An applicant who otherwise satisfies the eligibility criteria is eligible for waiver services if he or she requires the level of care specified in 7 AAC 130.230(b).⁴⁴ For adults such as Ms. K, that level of care must be either “intermediate care” as defined by 7 AAC 140.510, or “skilled care” as defined by 7 AAC 140.515.⁴⁵ Intermediate level care is a lower standard of nursing care than skilled level care and is thus the easier of the two standards for an applicant to meet. Medicaid regulation 7 AAC 140.510 defines "Intermediate Care Facility Services" 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, or care for a recipient nearing recovery and discharge whose condition is relatively stable but who continues to require professional medical or nursing supervision.

Thus, in order to qualify for an intermediate level of care under 7 AAC 140.510, the applicant must, among other things, require professional medical or nursing supervision.

B. *The Consumer Assessment Tool (CAT)*

Pursuant to Alaska 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 Consumer Assessment Tool (CAT). The CAT is adopted into regulation by 7 AAC 160.900(d)(6).

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 activity of daily living (ADL).⁴⁶ The possible scores are 0 (the person is independent and requires no help or

⁴³ 7 AAC 130.200.

⁴⁴ 7 AAC 130.205(d)(2).

⁴⁵ 7 AAC 130.230(b)(2).

⁴⁶ 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 §

oversight); **1** (the person requires supervision); **2** (the person requires limited assistance); **3** (the person requires extensive assistance); **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).⁴⁷

The second component of the CAT scoring system is the *support score*. These scores rate the degree of assistance that a person requires for a particular ADL. The possible scores are **0** (no setup or physical help required); **1** (setup help required); **2** (one person physical assist required); **3** (two or more person physical assist required). Again, there are additional codes that do not add to the service level: **5** (cueing required); and **8** (activity did not occur during the past week).⁴⁸

The 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.

C. Does Ms. K Require Skilled or Intermediate Nursing Care?

A person can qualify for the waiver services program if he or she requires skilled level nursing services as defined by 7 AAC 140.515, or intermediate level nursing services as defined by 7 AAC 140.510. The Division's nurse-assessor testified at hearing that Ms. K currently has no skilled or intermediate level nursing needs. Ms. K did not testify at hearing as to any nursing needs, and I am unable to identify any skilled or intermediate level nursing needs from my independent review of the record. Accordingly, the preponderance of the evidence indicates that Ms. K currently has no skilled or intermediate level nursing needs.

Because Ms. K does not require professional nursing supervision, she does not satisfy the intermediate level of care criteria as stated in 7 AAC 140.510. However, this does not end the inquiry because, under the CAT, an applicant can qualify for waiver services, without requiring professional nursing supervision, if the applicant's CAT scores in other areas are sufficiently high.

D. Does Ms. K Qualify for Waiver Services Based on her CAT Scores?

The Consumer Assessment Tool's nursing facility level of care scoring summary is located at page 29 of the CAT.⁴⁹ As indicated by that scoring summary, there are numerous

47.33.990(1), "activities of daily living" means "walking, eating, dressing, bathing, toileting, and transfer between a bed and a chair."

⁴⁷ See, for example, Exs. E8 - E13.

⁴⁸ See, for example, Ex. E6.

⁴⁹ Ex. E31.

scoring combinations through which one may qualify for waiver services. Some of these combinations (discussed below) allow a person to meet the Nursing Facility Level of Care (NFLOC), without 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. K 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. K 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. K 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 some form of therapy at least five days per week. Ms. K 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.⁵⁰ The "shaded" ADLs are body / bed mobility, transfers, locomotion, eating, and toilet use. Ms. K'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.⁵¹ 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.⁵²

Ms. Kichura reported that Ms. K told her that she sleeps in her bed in her bedroom and is able to turn and reposition herself independently. Ms. Kichura reported that she observed Ms. K lie down in bed and sit back up independently, and reposition herself in an auto-left recliner (scored

⁵⁰ Ex. E20.

⁵¹ Ex. E8.

⁵² Ex. E8.

0/0; frequency 0/0). Ms. K testified at hearing that she *sometimes* requires weight-bearing physical assistance from her PCA to reposition herself when in bed, but not very often.

Ms. K's testimony was credible. However, it does not establish that she requires weight-bearing assistance with body mobility three or more times per week, which is the frequency necessary to show a need for extensive assistance.

In addition, the body mobility regulation, 7 AAC 125.030(b)(1), defines the ADL of body mobility such that positioning or turning in a bed or chair is a covered activity only if the applicant or recipient is *nonambulatory*. The regulation governing locomotion, 7 AAC 125.030(b)(3), defines locomotion as including ambulation by means of a walker, cane, gait belt, braces, crutches, or a manual wheelchair. As discussed below in the section on locomotion, I find that Ms. K is capable of walking within her home using her cane and by "wall-walking," and is able to move using her walker when outside of her home. Accordingly, under the Division's regulations, Ms. K is considered ambulatory for purposes of the regulation on bed / body mobility. Because she is ambulatory, under the regulation, Ms. K is considered not to require assistance with bed / body mobility, even if she does. In other words, because Ms. K is ambulatory, the Division's regulations create an irrebutable presumption that Ms. K does not require assistance with bed / body mobility. Accordingly, for CAT scoring purposes, Ms. K is considered independent with regard 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).⁵³ 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.⁵⁴

Ms. Kichura reported that Ms. K told her that she transfers several times each day from her tilt-lift recliner without assistance. Ms. Kichura reported that she observed Ms. K (1) stand up from her auto-left recliner; (2) use her hands to push off and transfer independently from her bed; and (3) use her cane to help her stand independently (scored 0/0).⁵⁵

On the other hand, Ms. K testified that she requires weight-bearing physical assistance from her PCA to get up from a seated position, and that she needs this level of assistance with

⁵³ Ex. E8.

⁵⁴ Ex. E8.

⁵⁵ Ex. E8.

transfers about 20 times per week. I find, given Ms. K's diagnoses and her weight, that her testimony regarding her need for weight-bearing assistance with transfers was credible. Accordingly, the preponderance of the evidence indicates that Ms. K requires extensive assistance to perform transfers (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.⁵⁶ 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.⁵⁷

Ms. Kichura reported Ms. K told her that she can walk using her cane indoors and her walker outdoors, and Ms. Kichura reported that she observed Ms. K walk across her living room using her cane. Ms. K testified that she can move around her apartment independently by using her cane and by "wall-walking," and can walk using her walker when she goes to medical appointments. Accordingly, the preponderance of the evidence indicates that Ms. K may require supervision or cueing as to locomotion, but does not require physical assistance (CAT score 0/0).

d. Eating

For purposes of waiver services eligibility, eating is defined as how a "person eats or drinks regardless of skill."⁵⁸ 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.⁵⁹

Ms. Kichura reported that Ms. K told her that she can use regular eating utensils and cups without difficulty and feed herself when her PCA is not there. Ms. K testified that at the time of the assessment she could eat and drink independently, but just recently she has started to have swallowing problems. Accordingly, the preponderance of the evidence indicates that, at the time of the assessment, Ms. K could eat and drink independently (CAT score 0/0).

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,

⁵⁶ Ex. E9.

⁵⁷ Ex. E9.

⁵⁸ Ex. E11.

⁵⁹ Ex. E11.

manages ostomy or catheter, adjusts clothes."⁶⁰ 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.⁶¹

Ms. Kichura reported that Ms. K told her that she can transfer on and off her toilet using her bathroom counter for support (scored 2/2). Ms. K testified that her PCA must give her weight-bearing assistance with toileting at least once each day. I find, given Ms. K's diagnoses and her weight, that her testimony regarding her need for weight-bearing assistance with transfers is credible. Accordingly, the preponderance of the evidence indicates that Ms. K requires extensive assistance from one person 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. K requires extensive assistance with transfers and toileting, but not as to bed mobility, locomotion, or eating. Because Ms. K does not require extensive assistance with three or more of the "shaded" ADLs, she does not qualify for waiver services on that basis.

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. K 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. K requires any of these therapies, so she receives no points under NF2(b).

⁶⁰ Ex. E11.

⁶¹ Ex. E11.

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. K requires any of these procedures, so she gets no points under NF2(c).

The fourth/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, however, the record does not show that Ms. K requires any of these treatments, so she gets 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 record shows that Ms. K has no memory problems, so Ms. K received no points in this category.

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. K was able to recall these items of information during the assessment, and so she received no points in this category.

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. The Division found that Ms. K is independent as to her cognitive skills for daily decision-making, and she did not assert otherwise at hearing. Accordingly, Ms. K received no points under this subsection.

The fourth/last 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. The Division found that Ms. K does not require professional nursing care to manage her cognitive problems. This finding is supported by the record, and Ms. K did not assert otherwise. As discussed above, Ms. K received a score equal to or greater than 2/2 as to one or more shaded ADLs. However, Ms. K's cognitive problems were not severe enough to require use of the Division's SST, and so she received no score on the SST. Because Ms. K satisfied only one of the three elements of NF3(d), Ms. K 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. K received no points under subsections NF3(a), NF3(b), NF3(c), or NF3(d). Accordingly, Ms. K 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. The Division found that Ms. K engages in these behaviors.⁶² Accordingly, Ms. K gets one point 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. K a score of six on the behavioral portion of the SST, and found that she does not require professional nursing care for any behavioral problems.⁶³ Ms. K did not assert otherwise. I find, based on the CAT and testimony at hearing, that Ms. K should have received a score of 12 or 13 on the behavioral portion of the SST. However, because these scores fall short of the "threshold" score of 14 needed to obtain points under NF4(b), this finding does not increase Ms. K's overall score.

As discussed above, Ms. K did receive a score of 2/2 or more as to one or more shaded ADLs. However, Ms. K 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. K receives no points under NF4(b), and in turn Ms. K receives no "overall" points under NF4.

5. NF5

At NF5, the scores from NF2, NF3, and NF4 are added together. If an applicant receives a score of one or more, then the analysis proceeds to NF6. In this case, Ms. K scored

⁶² Ex. E2.

⁶³ Exs. E2, E19.

no "overall" points at NF1, NF2, NF3, or NF4, giving her a total score of zero at NF5. Accordingly, the analysis in this case does not proceed to NF6, and Ms. K is considered currently ineligible for waiver services based on her CAT scores.

IV. Conclusion

The Division correctly determined that Ms. K does not currently require skilled or intermediate level nursing services as defined by the applicable regulations. The Division also correctly determined that Ms. K's CAT scores are currently not high enough to allow her to qualify for waiver services on that basis. Accordingly, the Division's decision that Ms. K is not currently eligible to participate in the Medicaid Home and Community-Based Waiver Services Program is affirmed.

DATED this 6th day of April, 2015.

Signed _____
Jay D. Durych
Administrative Law Judge, DOA/OAH

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 21st 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.]