

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

In the Matter of)
)
 N N) OAH No. 14-1434-MDS
) Division No.

DECISION

I. Introduction

A. Procedural Background

N N applied for Medicaid Home and Community-Based Waiver program (Waiver) services. The Division of Senior and Disabilities Services (Division) initially assessed Ms. N for program eligibility on July 28, 2014. It denied her application on August 11, 2014,¹ and Ms. N requested a hearing.²

Ms. N's hearing took place on November 18, 2014 before Administrative Law Judge Kay Howard. Ms. N was represented by her daughter and power-of-attorney (POA), D J. G. Ms. G and Care Coordinator L L testified on Ms. N's behalf. Tammy Smith represented the Division. Janice Bragwell, R.N, a supervisor, but not the nurse who initially assessed Ms. N, testified for the Division.

The hearing was followed by a long delay in preparation of a proposed decision due to events beyond the parties' control. The Office of Administrative Hearings apologizes for the delay. On June 19, 2015, this case was transferred to the undersigned, who has listened carefully to the recorded hearing and reviewed all of the documentary evidence.

B. Summary of Decision

Based on the record, it appears that the assessing nurse did not follow best practices in all respects when she assessed Ms. N, because Ms. G sometimes was not allowed to provide input on her mother's abilities or needs for assistance. However, there was an opportunity to correct any omissions in the assessment during the appeal. Ms. N had the burden to show that she is eligible for the program, and she did not meet that burden. Although Ms. N clearly has significant physical health problems and some cognitive impairment, she has not shown she

¹ Ex. D.

² Ex. C.

requires a nursing facility level of care. As a result, she is not eligible for Waiver services. The denial of her application is upheld.

The delay in resolving this case means that Ms. N's situation may have changed since the original assessment and denial from the Division. She is free to reapply to the program and request a new assessment.

II. Facts³

The following facts were established by a preponderance of the evidence.

N N is 88 years old. Her medical diagnoses include compression fractures of her lumbar spine, severe kyphosis, extensive arthritis in her spine, hips and shoulders, osteoporosis, and intractable pain. She has a tumor in her spine.⁴ She has a prosthetic eye, damaged vision in her remaining eye, and she is legally blind. She is also hard of hearing. Because of her limited vision and acute back pain, Ms. N uses a walker to move from place to place. Her poor vision and back problems raise her risk of falling, and she has sustained significant injuries in a fall. Ms. N's short term memory is poor. Her pain medications may exacerbate this condition. If unsupervised, she would not remember to take her medications regularly.

In December 2013, a fall on the ice led to a nine-day hospital stay for a broken pelvis, followed by six weeks of transitional care. Based on advice from medical providers that she should no longer live alone, Ms. N moved into an assisted living home in February 2014.⁵ Ms. N has done very well with the supports and supervision offered by assisted living.

T E, R.N., assessed Ms. N for Waiver eligibility on July 28, 2014. Ms. E's conclusions regarding Ms. N's physical and mental function are documented on the Consumer Assessment Tool (CAT). Ms. G was present during the assessment, but was not allowed to fully explain some of her mother's responses to questions, or to provide her own views regarding her mother's abilities. Mr. L also was present.

The assessment concludes that: (1) Ms. N does not need professional nursing services, therapies, or special treatments; (2) she does not display problem behaviors, except that she sometimes has difficulty understanding her needs, but she cooperates when given direction or

³ These facts are based upon Ex. E (Consumer Assessment Tool), Ex. 1 (D J. G letter dated September 3, 2014 letter), Ex. 2 (Dr. O letter dated September 15, 2014), Ex. 3 (No Name letter dated August 13, 2014), Ex. 4 (Medical records, 15pp.), Ex. 5 (Providence Medical Center medical records, pp. 1-95), and the testimonies of Janice Bragwell, D G and L L.

⁴ Ex. 2.

⁵ Ex. 1.

explanation;⁶ and (3) she exhibits some cognitive deficits. On the date of her assessment visit, she knew where she was, how to find her room, and the names and faces of people who are close to her, but she did not recall the current season of the year. The assessment rates her decision-making skills regarding the tasks of daily living “moderately impaired,” meaning her decision-making is poor, and she requires cues or supervision.⁷ The cognition assessment tool adds that Ms. N often cannot recall details or sequences of recent events or remember names of meaningful acquaintances; she requires direction and reminding from others one to three times per day, but can follow simple written instructions. In addition, the assessment notes that she experiences some global confusion, limited spatial confusion, and minor difficulty with speech or word-finding.⁸ This resulted in a total cognitive score of 7 out of a possible 16.

Five activities of daily living (ADL) are assessed as part of the Waiver eligibility process: bed mobility, transfers, locomotion (walking), eating and toileting.⁹ The assessment concluded that Ms. N can independently manage all five activities without setup or physical help from staff. As a result, her self-performance scores were 0, and her support scores were 0 for all five ADLs. For purposes of the CAT, “independence” means she received no help or oversight for the activity, or that help or oversight was provided only 1-2 times during the last seven days.¹⁰

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.”¹¹ The purpose of these services is “to offer a choice between home and community-based waiver services and institutional care.”¹²

The nursing facility level of care¹³ requirement is determined in part by an assessment which is documented by the CAT.¹⁴ The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,¹⁵ and whether an applicant has impaired

⁶ Ex. E, p. 3.

⁷ Ex. E, p. 18.

⁸ Ex. E, p. 2.

⁹ Ex. E, p. 20 (shaded areas).

¹⁰ Ex. E, p. 20.

¹¹ 7 AAC 130.205(d)(1)(B) and (d)(2).

¹² 7 AAC 130.200.

¹³ See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

¹⁴ 7 AAC 130.230(b)(2)(B).

¹⁵ Ex. E, pp. 15-17.

cognition or displays problem behaviors.¹⁶ Each of the assessed items is coded and contributes to a final numerical score. For instance, if an individual required five days or more of therapies (physical, speech/language, occupation, or respiratory therapy) per week, he or she would receive a score of 3.¹⁷

The CAT also records the degree of assistance an applicant requires for activities of daily living, which include five specific categories: bed mobility (moving within a bed), transfers (i.e., moving from the bed to a chair or a 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 personal hygiene care.¹⁸

If a person has a self-performance code of 2 (limited assistance, which consists of non-weight bearing physical assistance three or more times during the last seven days, or limited assistance plus weight-bearing assistance one or two times during the last seven days) or 3 (extensive assistance, which consists of weight-bearing support three or more times during the past seven days, or the caregiver provides complete performance of the activity during a portion of the past seven days), plus a support code of 2 (physical assistance from one person) or 3 (physical assistance from two or more persons), that person receives points toward his or her total eligibility score on the CAT.

A person also can receive points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive behaviors, etc.), and required assistance with the five specified activities of daily living.¹⁹

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 activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting).²⁰

The results of the assessment portion of the CAT are then scored.²¹ If an applicant's score is a 3 or higher, the applicant is medically eligible for Waiver services.²²

¹⁶ Ex. E, pp. 18-19.

¹⁷ Ex. E, p. 31.

¹⁸ Ex. E, p. 20.

¹⁹ Ex. E, p. 31 (NF.2 – NF.6).

²⁰ Ex. E, p. 31 (NF.1e).

²¹ The various tests are abbreviated “NF.1, NF.2” and so on up to “NF.6.” Under NF.1, a person can qualify if any of the questions are answered “yes.” Under the other tests, the scores are aggregated for a total nursing and ADL needs score, at NF.7. Ex. E, p. 31.

B. Burden of Proof

Ms. N seeks Waiver services and bears the burden to prove by a preponderance of the evidence that she satisfies the eligibility requirements.²³ She can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs.²⁴

C. Eligibility

As an initial matter, Ms. G challenges her mother's assessment because she was denied the opportunity to provide information that contradicted or better explained some of her mother's responses. Ms. G stated that her mother is not someone who complains, and she sometimes understates her needs. Ms. G offered specific instances where her mother gave incorrect responses during the assessment visit, for example, regarding her showering assistance needs, medication management needs, and her reasons for moving into assisted living. Ms. G's testimony at hearing and her letter, dated September 3, 2014, corrected or better explained Ms. N's inaccuracies.²⁵ They also provided her with the opportunity to give her own assessment of her mother's needs. Nonetheless, as part of the assessment information-gathering process, it is agreed that best practices would allow the people who are most familiar with the applicant to provide information relevant to the assessment. This is particularly true in cases involving cognitive impairment.

Waiver eligibility is determined by a point matrix set out in the CAT. As discussed previously, there are different ways to qualify.²⁶ Ms. N does not set out specific points of disagreement with the CAT's scoring of her needs, so the potential areas in which she could record eligibility points are addressed below.

1. Eligibility Through NF.1

First, Ms. N could be automatically eligible for nursing facility level of care if any of the five questions in NF.1 on the assessment scoring page is answered "yes."²⁷ The first four questions of NF.1 refer to her needs for professional nursing services or certain therapies.²⁸

²² Ex. E, p. 31 (NF.7).

²³ 7 AAC 49.135.

²⁴ 2 AAC 64.290(a)(2).

²⁵ The record also includes information about Ms. N's needs from her medical providers and her assisted living facility provider. Ms. G's letter dated June 17, 2015 is noted, but it is not part of the record for decision.

²⁶ Ex. E, p. 31 (CAT scoring summary page). Financial status or need is not assessed by the CAT, and it is not relevant to the determination whether an applicant requires a nursing facility level of care.

²⁷ See Ex. E, p. 31 (NF.1).

²⁸ Those needs are summarized in CAT Section A. Ex. E, pp. 15-16.

Listed professional nursing services include, for example, injections or IV feeding, wound or catheter care, oxygen, care for an uncontrolled seizure disorder, or assessment for an unstable medical condition. Qualifying therapies include the need for regular physical therapy, speech therapy, occupational or respiratory therapy.²⁹ The assessment indicates that Ms. N does not require any of the listed nursing services or therapies, and Ms. N has not contradicted this conclusion.

A second way to establish automatic Waiver eligibility is through the fifth question in NF.1, which requires Ms. N to show that she needs extensive one person assistance (self-performance code 3, support code 2) with three or more of the five ADLs (eating, toileting, bed mobility, transfers, and locomotion).³⁰ Ms. N's functional abilities with regard to her ADLs are addressed below.

Eating: For purposes of the CAT, eating includes how a person eats and drinks regardless of skill.³¹ It does not include food preparation. Ms. N's physical ability to feed herself is not in dispute. Therefore, her self-performance code of 0 is appropriate.

Toileting: Toileting refers to how a person uses the toilet room, transfers on/off the toilet, cleanses, changes pads, and adjusts clothes.³² Assistance needs for bathing or showering are not included. The assessment indicates that Ms. N independently manages her toileting needs. The assessor did not observe these skills directly, but noted that Ms. N is independent with transferring and locomotion, has good range-of-motion to manage self-care, and has toileting aids such as grab bars and toilet cage to facilitate independence. The assessment states that Ms. N said she is self-sufficient in all aspects of toileting, and that Ms. G agreed with her mother's report.³³

Although Ms. G testified that her mother provided inaccurate information on several topics during the assessment visit, Ms. G did not report any miscommunication involving this ADL. She did not indicate that Ms. N requires hands-on assistance to manage her toileting needs. As a result, there is no evidence contradicting the statements in the assessment or the conclusion that

²⁹ Ex. E, pp. 15-16. The weekly frequency of these needs also is relevant.

³⁰ Ex. E, p. 31 (NF.1e). Extensive assistance includes weight-bearing support three or more times per week. Ex. E, p. 8.

³¹ Ex. E, p. 11.

³² Ex. E, p. 11.

³³ Ex. E, p. 11.

Ms. N can independently manage in this area. The toileting score therefore is appropriate (self-performance code 0).

Bed mobility: Bed mobility refers to how someone moves to and from a lying position, turns side to side, and positions her body while in bed.³⁴ The nurse assessor observed Ms. N reposition herself in a chair and transfer from a seated position to standing without hands-on help. She noted that Ms. N does not have a hospital bed, and she does not have bed sores. From this, the assessing nurse concluded that Ms. N is able to move freely and adjust her position in bed, even though she is unable to lie flat. The assessor concluded that Ms. N requires no help with bed mobility, or she requires oversight only 1-2 times per week (self-performance code 0). As in the preceding discussion, there is nothing in the record that contradicts this information.

Locomotion: Locomotion refers to how a person moves between locations in her room and other areas on the same floor.³⁵ To move from place to place within the assisted living home, Ms. N uses a walker. The assessor observed her to move independently within the home, and Ms. N reported to the assessor that she can get around the home on her own.

Ms. N's poor vision and back problems have resulted in prior falls, and Ms. N's severe osteoporosis also places her at great risk of falling. For this reason, her doctor recommended that she receive "walking assistance."³⁶ Ms. N's falling risk suggests that she may need supervision for locomotion (self-performance code 1). The supports and assistance offered by the assisted living home no doubt provide an important margin of safety in this regard. Without more specific detail, however, there is not sufficient evidence in the record to conclude that Ms. N requires hands-on physical assistance to get from place to place within her home.

Transfers: Transfers refers to how a person moves between surfaces, including to and from her bed or chair to a standing position, but it excludes transfers to and from the toilet or bath. The assessor observed Ms. N stand up without any assistance from others by pushing off a table. Her notes indicate that Ms. N reported being able to get herself up from her bed and from chairs using her walker for help. Ms. N indicated that no one helps her get out of bed or up from chairs.³⁷

³⁴ Ex. E, p. 8.

³⁵ Ex. E, p. 9.

³⁶ Ex. 2 (letter from Dr. Z O dated September 15, 2014). Dr. O also noted Ms. N's need for assistance with medication management, bathing and dressing. He otherwise generically stated that she "needs assistance with almost all activities of daily living." Without more detail, it is difficult to place significant weight on this statement.

³⁷ Ex. E, p. 8.

For the same reasons discussed with regard to locomotion, Ms. N's falling risk suggests that she may require supervision for transfers (self-performance code 1).

Ms. N has not established that she requires extensive assistance (self-performance code 3) with any of the five measured ADLs. As a result, she is not eligible for Waiver services based solely on her need for assistance with these ADLs.

2. Other CAT eligibility methods

Ms. N does not meet any of the tests set out in NF.1 that automatically establish a need for nursing facility level of care. The CAT provides other modes of qualification that use points from combinations of required nursing services, therapies, impaired cognition or difficult behaviors, along with a showing of need for limited or higher assistance (self-performance code 2, 3 or 4) with two or more ADLs.³⁸ However, Ms. N does not record eligibility points under any of these alternatives.

Special treatments and therapies that may result in eligibility points are listed in CAT Section B.³⁹ These include medications via tube, tracheostomy care, urinary catheter care, veni puncture, monthly injections, barrier dressings for ulcers, chest PT, oxygen therapy, chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis. Ms. N does not require any of the listed services, so she does not record points under NF.2 of the CAT scoring page.

The threshold for cognitive impairment that is necessary for a point under NF.3 is high. While Ms. N unquestionably displays memory problems and some confusion, she does not experience the acute level of impairment that is required for eligibility using this subsection.⁴⁰ She also does not exhibit the problem behaviors that would register under NF.4. In addition, there is insufficient evidence in the record to conclude that Ms. N needs hands-on physical assistance (self-performance code 2 or higher) with two or more of the five ADLs.

³⁸ See Ex. E, p. 31 (NF.2 - NF.6). Limited assistance includes physical help in the guided maneuvering of limbs or other nonweight-bearing physical assistance 3 or more times per week, or it may include those actions plus weight-bearing assistance 1 or 2 times per week. Ex. E, p. 8.

³⁹ Ex. E, p. 17.

⁴⁰ Ex. E, p. 31. To qualify for Waiver services based in part on cognitive impairment, Ms. N would have to show that: (1) her memory is worse than that recorded in the assessment at Ex. E, p15; and (2) her cognitive skills for daily decision-making are rated "moderately impaired;" and (3) she requires at least limited physical assistance (self-performance code 2; support code 2) on two or more ADLs; *and either* (4) professional nursing intervention is required at least 3 days a week to manage her cognitive issues, *or* her cognitive disabilities are rated 13 or higher on the supplemental screening tool at Ex. E, p. 2.

IV. Conclusion

The evidence is that, as of the time of the decision to deny eligibility, Ms. N's health condition was controlled and relatively stable. Continuous unskilled assessment and management, such as that offered in an assisted living facility, adequately met her health care needs.⁴¹ There is no dispute that Ms. N has benefitted significantly from the services and oversight at her current placement, and she may require this kind of continuous oversight. The question for Waiver eligibility, however, is whether Ms. N's physical health care needs, in conjunction with her cognitive or behavioral condition, require a nursing home level of care. Ms. N did not establish by a preponderance of the evidence that her physical care needs were sufficiently acute to qualify her for Medicaid Waiver services. The Division's August 11, 2014 decision to deny her application is upheld.

DATED this 30th day of June, 2015.

Signed

Kathryn A. Swiderski
Administrative Law Judge

Adoption

The undersigned, by delegation from 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 14th day of July, 2015.

By: *Signed*

Name: Jeffrey A. Friedman
Title: Administrative Law Judge

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

⁴¹ The director of her assisted living facility seems to agree with this assessment, writing that Ms. N requires assistance with bathing and dressing, managing her medications, and with household tasks such as meal preparation and laundry. She also benefits from regular safety checks and the supervision and assistance available at the facility. Ex. 1, pp. 4-5 (letter from No Name dated August 13, 2014).