

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

In the Matter of)
)
 S T) OAH No. 14-1533-MDS
) Division No.

DECISION

I. Introduction

S T applied for Medicaid Home and Community-Based Waiver program (Waiver) services. The Division of Senior and Disabilities Services (Division) denied her application.¹ Ms. T requested a hearing.²

Ms. T's hearing took place on December 9, 2014. Daniel Coons represented Ms. T. Testifying on Ms. T's behalf were D N, the owner of the assisted living home where Ms. T has lived since August 1, 2014, and E L, her daughter and guardian. Assistant Attorney General Elizabeth Smith represented the Division. Angela Hanley, R.N, testified for the Division.

Ms. T has shown that her health care needs require a nursing facility level of care. As a result, she is eligible for Waiver services and the denial of her application is reversed.

II. Facts³

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

S T is 62 years old. Her documented medical diagnoses include paraplegia, schizophrenia, diabetes, neurogenic bladder, metabolic syndrome, and depression.⁴ She uses a wheelchair to move from place to place. Ms. T's judgment is impaired; she can be delusional, but she also often presents herself appropriately and pleasantly. She frequently is drowsy or lethargic, and she spends much of her day sleeping. When she is alert, she is capable of moving independently within her residence using her wheelchair. She has a history of pressure sores and open decubitus ulcers (bed sores). She lived in a nursing facility from 2008 until she was asked to leave in 2014 because she repeatedly broke facility smoking rules. She moved into an assisted living home on August 1, 2014.

¹ Ex. D.

² Ex. C.

³ These facts are based upon Ex. E, Ex. 1-3, and the testimonies of D N, E L, and Angela Hanley.

⁴ Ex. E, pp. 5, 23; Ex. 1.

Angela Hanley, R.N., assessed Ms. T for Waiver eligibility on July 24, 2014, while Ms. T still resided at the nursing facility. Ms. Hanley's conclusions regarding Ms. T's physical and mental function are documented on the Consumer Assessment Tool (CAT).

The assessment concludes that Ms. T does not need professional nursing services, therapies, or special treatments. A few problem behaviors are noted but these behaviors are considered easily altered and are not at issue.⁵ Ms. T's cognitive assessment indicates that she has both short-term and long-term memory problems. However, she was well-oriented and able to accurately recall pertinent information on the date of her assessment. Her decision-making skills regarding the tasks of daily life are rated "moderately impaired," meaning her decision-making is poor, and she requires cues or supervision.⁶

Five activities of daily living (ADL) are assessed as part of the Waiver eligibility process: bed mobility, transfers, locomotion (walking), eating and toileting.⁷ The CAT concluded that Ms. T requires extensive one person assistance with transfers and toilet use (self-performance score 3, support score 2).⁸ It found that Ms. T can independently manage eating and bed mobility without setup or physical help from staff (self-performance score 0, support score 0). It concluded that she is independent in locomotion, though she requires setup help with her wheelchair (self-performance score 0, support score 1).⁹

Ms. T disagrees with the assessment's conclusions about her independence with bed mobility, arguing that she requires extensive one person assistance for that activity.

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."¹⁰ The purpose of these services is "to offer a choice between home and community-based waiver services and institutional care."¹¹

The nursing facility level of care¹² requirement is determined in part by an assessment which is documented by the CAT.¹³ The CAT records an applicant's needs for professional

⁵ Ex. E, p. 19.

⁶ Ex. E, p. 18.

⁷ Ex. E, p. 20 (shaded areas).

⁸ Extensive assistance includes weight-bearing support provided at least 3 times over the last 7 days, or full caregiver performance of the activity during part (but not all) of the last 7 days. Ex. E, pp. 8, 11.

⁹ Ex. E, p. 20.

¹⁰ 7 AAC 130.205(d)(1)(B) and (d)(2).

¹¹ 7 AAC 130.200.

nursing services, therapies, and special treatments,¹⁴ and whether an applicant has impaired cognition or displays problem behaviors.¹⁵ Each of the assessed items is coded and contributes to a final numerical score. For instance, if an individual required 5 days or more of therapies (physical, speech/language, occupation, or respiratory therapy) per week, he or she would receive a score of 3.¹⁶

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.¹⁷

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.¹⁸

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).¹⁹

¹² See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

¹³ 7 AAC 130.230(b)(2)(B).

¹⁴ Ex. E, pp. 15-17.

¹⁵ Ex. E, pp. 18-19.

¹⁶ Ex. E, p. 31.

¹⁷ Ex. E, p. 20.

¹⁸ Ex. E, p. 31.

¹⁹ Ex. E, p. 31 (NF. 1.e).

The results of the assessment portion of the CAT are then scored.²⁰ If an applicant's score is a 3 or higher, the applicant is medically eligible for Waiver services.²¹

B. Burden of Proof

Ms. T seeks Waiver services and bears the burden to prove by a preponderance of the evidence that she satisfies the eligibility requirements.²² She can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs.²³

C. Eligibility

The only issue in this case is whether Ms. T qualifies for Waiver services because she needs extensive one person assistance with three of the five activities of daily living.²⁴ The assessment already rates her as requiring extensive one person assistance with transfers and toileting (self-performance score 3, support score 2). The only ADL score she disputes is the bed mobility determination. She has not challenged the assessment's conclusions regarding locomotion or eating.

Bed mobility refers to how someone moves to and from a lying position, turns side to side, and positions her body while in bed.²⁵ At the assessment, Ms. T told the assessing nurse that she is able to reposition herself from side to side using her hospital bed and side rails. She also said that no one helps move her legs, and she denied having any bed sores. The assessor observed Ms. T reposition herself using an over-bed trapeze and a side rail, but did not see her move her legs.²⁶ Ms. T's guardian was not available to attend the assessment but gave her consent to proceed. No one from the nursing facility provided information about Ms. T's bed mobility skills or needs for assistance during the assessment.

At the time of hearing, Ms. N had observed and cared for Ms. T's needs since her admission to the assisted living home on August 1, 2014. She testified that Ms. T has

²⁰ 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.

²¹ Ex. E, p. 31 (NF.7).

²² 7 AAC 49.135.

²³ 2 AAC 64.290(a)(2).

²⁴ Ms. T does not argue that she should have received Waiver eligibility points for any nursing services or special treatments and therapies. Although she uses a catheter, she does not receive a point for nursing services because her catheter is changed once every three weeks, and her doctor had not prescribed skilled nursing care for any Stage 3 or 4 decubitus ulcers during the relevant time period. To the extent Ms. T received physical therapy, it was not required at least 3 times per week, so that also does not qualify for a Waiver eligibility point. See Ex. E, p. 31 NF.2. Ms. T does not challenge the assessment of her cognitive impairments or problem behaviors.

²⁵ Ex. E, p. 8.

²⁶ Ex. E, p. 8.

consistently required daily weight-bearing assistance to go from a lying to a sitting position, to turn from side to side in bed, and to move her legs out of bed as she prepares to transfer to her wheelchair. She reported that Ms. T spends at least 16 hours per day in bed, and she gets in and out of bed about three times per day. To get from a lying to a sitting position in bed, a staff member pulls her up by her hands and then pulls her legs to the side of the bed so she is ready to transfer. Although the hospital bed can be raised to assist Ms. T, she still needs someone to physically pull her to a sitting position, and she needs someone to help move her legs. According to Ms. N, Ms. T never sits up in bed without weight-bearing assistance from one person. She tries, but she is not strong enough and she is not successful.

Ms. N also discussed Ms. T's propensity for pressure sores on her backside. Staff help Ms. T turn in bed every two hours so that an existing sore will not progress to a more serious ulcer. Her existing pressure sore is uncomfortable, and she does not lie on her back for long. Ms. N stated that Ms. T tries to turn herself in bed, but she cannot manage it without hands-on staff help.

Both Ms. N and E L testified that Ms. T's memory and judgment are impaired. She often comes across well, appearing focused and engaged. Despite her appropriate demeanor, however, she frequently provides incorrect or unreliable information. Ms. T's medical records also reflect a history of delusional thinking and impaired judgment.²⁷

The Division argues that, at the time of the assessment, Ms. T had good upper body strength and dexterity, and she was independently managing her bed mobility tasks using her hospital bed, side rails and over-bed trapeze.²⁸ Ms. T's statements about her ability were consistent with the assessor's observations. Additionally, the Division points to a physical therapist's July 2014 note, in which the therapist states that Ms. T will need an over-bed trapeze at the assisted living home "to assist with her bed mobility and maintain her current level of independence."²⁹ Though Ms. T's bed at the assisted living home did not yet have a trapeze as of the hearing date, the Division argues that she could be independent with bed mobility once it is installed.

²⁷ See e.g., Ex. 1, pp. 7-27, 45-49.

²⁸ After the assessment, Ms. Hanley also reviewed Ms. T's medical records and saw nothing that changed the outcome of the assessment. Testimony of Angela Hanley.

²⁹ Ex. 1, p. 98 of 99.

To resolve the discrepancy between the parties' views of Ms. T's bed mobility needs, it is helpful to look more closely at a couple factual determinations. First, whether Ms. T's statements regarding her independence with bed mobility during the assessment were accurate. While it is possible that they were, there is little information in the record to validate them other than the assessor's limited observations. At the same time, the substantial evidence about Ms. T's impaired memory and judgment raises reasonable questions about her reliability. In contrast to Ms. T's statements about her independence, Ms. N credibly testified that Ms. T requires weight-bearing support for a variety of bed mobility tasks numerous times every day. Even if Ms. N overstates Ms. T's need by stating that assistance is needed every time Ms. T sits up, she has provided sufficient evidence to conclude that Ms. T requires daily weight-bearing support with some aspect of bed mobility, whether in moving from lying to sitting, in positioning her legs, or in rolling from one side to the other.

Ms. N's experience with Ms. T's bed mobility skills has come at a time when there is no trapeze over her bed, and this also is a factor in assessing Ms. T's self-performance ability. An over-bed trapeze will undoubtedly be an important tool to help Ms. T more independently move from a lying to a sitting position. However, there is sufficient evidence in the record to reasonably conclude that Ms. T more likely than not still requires weight-bearing support from one person at least three times a week to properly position her legs in bed and to help her turn from side to side.³⁰

Ms. T's medical records are not necessarily inconsistent with this conclusion. The physical therapist's note from July 2014 is ambiguous and can be interpreted in two ways: that Ms. T requires a trapeze to maintain her existing full independence with bed mobility skills, as the Division argues; or, that a trapeze is needed simply so that Ms. T does not lose any further functionality with her bed mobility skills. The second interpretation implicitly recognizes that Ms. T was not fully independent with bed mobility, but the trapeze would help her retain whatever ability she had.³¹

The assessing nurse's credibility and substantial expertise in making Waiver eligibility assessments weighs in the Division's favor. However, a necessary limitation of the assessment

³⁰ It is not necessary to determine whether Ms. T had an open decubitus ulcer or simply a pressure sore at the time the Division notified her that she was not eligible for Waiver services. She required regular weight-bearing assistance to turn from side to side in bed regardless of the diagnosis.

³¹ Ex. 3.

process is that the time spent with the applicant is relatively brief, and the nurse may not be able to personally observe the applicant perform the full range of tasks within each ADL, as occurred in this case. Ms. N has an extensive history working specifically with Ms. T, and her testimony is sufficient to satisfy the claimant's burden of proof in this case.

Ms. T has established that she more likely than not requires extensive one person assistance (self-performance score 3, support score 2) with bed mobility. As a result, she is eligible for Waiver services based on her need for extensive assistance with three of the five ADLs.

IV. Conclusion

Ms. T has established by a preponderance of the evidence that her physical care needs qualify her for Medicaid Waiver services. The Division's decision to deny her application is reversed.

DATED this 9th 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 24th day of June, 2015.

By: *Signed*

Name: Kathryn A. Swiderski
Title: Administrative Law Judge

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