

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

In the Matter of: )  
 )  
 O P ) OAH No. 14-1543-MDS  
 ) Agency Case No.  
\_\_\_\_\_ )

**POST-REMAND DECISION**

**I. Introduction**

The issue in this case is whether O P remains eligible for Medicaid Home and Community-Based Waiver services (waiver services). The Division of Senior and Disabilities Services (Division) conducted an assessment on February 25, 2014 and subsequently determined that Ms. P no longer requires a nursing facility level of care (NFLOC), and is therefore no longer eligible to receive waiver services.<sup>1</sup>

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

**II. Facts**

**A. Ms. P's Medical Diagnoses and Reports from Medical Providers**

Ms. P is a 52-year-old woman who lives with a house-mate in a travel trailer situated in a mobile home park.<sup>3</sup> She receives about \$710.00 per month in Supplemental Security Income (income based on disability) from the Social Security Administration (SSA).<sup>4</sup> K H is Ms. P's protective payee for the SSI payments, and uses the money to pay for Ms. P's food, space rent, and other living expenses.<sup>5</sup>

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<sup>1</sup> Exs. D, E.

<sup>2</sup> Should Ms. P's condition worsen, she may reapply for waiver services at any time.

<sup>3</sup> Exs. E1, F1.

<sup>4</sup> Ex. 6.

<sup>5</sup> Ex. 8.

Ms. P is five feet, three inches tall and weighs about 178 pounds.<sup>6</sup> Her medical diagnoses are closed fracture of the skull with brief loss of consciousness,<sup>7</sup> convulsions n.e.c., cryptogenic epilepsy, abnormal involuntary movements n.e.c., headaches, asthma, emphysema / chronic obstructive pulmonary disease (COPD), diabetes mellitus type II, hyperlipidemia, hypertension, acquired hypothyroidism, cervical spinal stenosis, cervical disk degeneration, lumbar and lumbosacral disk degeneration, thoracic or lumbosacral neuritis or radiculitis, brachial neuritis or radiculitis (inflammation of the nerves that control your shoulder, arm, and hand), mononeuritis of unspecified site, restless leg syndrome, osteoarthritis of the lower leg, osteoporosis, and chronic generalized pain due to trauma.<sup>8</sup>

Ms. P has had a number of surgeries to correct various problems, including removal of metal from her left leg in 1983, placement of a plate in her left upper arm in 1986, right ankle reconstruction in 1990, total left knee replacement in 2005, right knee cap replacement in 2006, a ruptured appendix in 2008, and hernia repair in 2009.<sup>9</sup> Ms. P uses a cane for ambulation when she goes to medical appointments.<sup>10</sup>

On March 14, 2014 the Division sent a form titled "Level of Care Verification Request" to E J, PA-C, one of Ms. P's healthcare providers.<sup>11</sup> In response to the question, "[a]t this time, would you admit this patient to a skilled nursing facility?" Ms. J answered "no." In response to the question, "[a]t this time, does this patient have intermediate nursing needs?" Ms. J again answered "no." Ms. J signed the form; the form was also countersigned by M G, M.D.

Q K. Q, M.D. is a neurologist who has treated Ms. P for epilepsy and migraine headaches.<sup>12</sup> Notes from an examination Dr. Q conducted on July 14, 2014 state that he increased Ms. P's dosage of her anti-seizure medication (Depakote) on April 23, 2014 and that she had been doing "very well" since that time. The exam notes also state that Ms. P had two breakthrough seizures during this period, but that each of these occurred when she failed to take her Depakote as directed. The notes further indicate that Ms. P's headaches were "well-controlled" at that time, that Ms. P was pleased with the treatment, and that she was getting out of the house more and was able to enjoy time with her grandchildren.

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<sup>6</sup> Ex. E9.

<sup>7</sup> The skull fracture or traumatic brain injury is believed to be the cause of Ms. P's seizures, migraines, imbalance, and memory loss (Ex. 1).

<sup>8</sup> Ex. E3; Ex. H2.

<sup>9</sup> Ex. H2.

<sup>10</sup> Exs. H, I.

<sup>11</sup> All factual findings in this paragraph are based on Exs. F33 - F35 unless otherwise stated.

<sup>12</sup> All factual findings in this paragraph are based on Ex. H unless otherwise stated.

Exam notes from Dr. Q's clinic dated October 9, 2014 state that, since her last appointment on July 14, 2014, Ms. P had three breakthrough seizures, each lasting two or three minutes each.<sup>13</sup> As before, the seizures occurred only when Ms. P missed taking her medication. The notes further state that Ms. P reported that her seizure control was excellent at that time, and that her headaches were also well controlled.

On October 16, 2014 Ms. P and her care coordinator were having a discussion with DSDS personnel, outside the presence of the administrative law judge, just prior to the start of the first hearing scheduled in this case.<sup>14</sup> Ms. P became angry, after which she had what may have been an absence seizure.<sup>15</sup> Paramedics were called. After the paramedics arrived and performed their assessment, Ms. P was taken to the hospital at her request.

On November 3, 2014 the DSDS hearing representative assigned to Ms. P's case happened to meet Ms. P at the food court of a local shopping mall.<sup>16</sup> Ms. P was unaccompanied and was walking slowly using a cane in her left hand and gripping a shopping cart with her right hand. Ms. P placed an order, placed the order in her cart, pushed her cart to a nearby table, and sat down at the table to eat. Ms. P greeted the hearing representative and advised that her medications had been changed recently.

Ms. P had another appointment with Dr. Q on January 5, 2015.<sup>17</sup> The exam notes from that appointment state that Ms. P reported that she had run out of Depakote about one month prior to that date, and that since then she had been having "staring spells" two to three times per day, and had also had one breakthrough seizure lasting about four minutes. Ms. P's Depakote prescription was refilled, and she was told to contact the doctor's office if her prescription was not timely refilled. Also on that date Dr. Q prepared a letter which states in part:<sup>18</sup>

Ms. P has a history of epilepsy which has been difficult to treat. The seizures were not under control in February of 2014. I saw her in my clinic today and they are still not under control. We are continuing to adjust her medications accordingly.

At hearing, Ms. P testified in relevant part as follows:<sup>19</sup>

1. She has uncontrolled seizures, and she cannot predict when they will occur.

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<sup>13</sup> All factual findings in this paragraph are based on Exs. I1 through I5 unless otherwise stated.

<sup>14</sup> All factual findings in this paragraph are based on Ex. G and Ex. 7 unless otherwise stated.

<sup>15</sup> The notes taken by the Division personnel who were present indicate that they were skeptical as to whether Ms. P's seizure was real.

<sup>16</sup> All factual findings in this paragraph are based on Exs. G1, G4, and Victoria Cobo's hearing testimony.

<sup>17</sup> All factual findings in this paragraph are based on Exs. I6 through I12 unless otherwise stated.

<sup>18</sup> Ex. 5.

<sup>19</sup> All factual finding in this paragraph are based on Ms. P's hearing testimony and Ex. 4.

2. She is at high risk for falls due to her seizures and balance problems.
3. She needs reminders and assistance due to memory problems.

***B. The Division's Findings From its 2012 and 2014 Assessments***

Ms. P has received Medicaid Home and Community-Based Waiver services since 2011 or before.<sup>20</sup> Ms. P was previously assessed as to her eligibility for waiver services on September 27, 2012.<sup>21</sup> Then, as now, the Division used the Consumer Assessment Tool or "CAT," a system for scoring a person's need for nursing assistance and physical assistance (described in detail in Part III of this decision) to record and score the assessment. Based on her 2012 assessment, the Division found that Ms. P required the following levels of assistance with her ADLs:<sup>22</sup> body mobility - required only supervision and set-up assistance (CAT score 1/1); transfers - required limited physical assistance (CAT score 2/2, frequency 4/7); locomotion - required only supervision and set-up assistance (CAT score 1/1); dressing - required limited one-person physical assistance (CAT score 2/2, frequency 2/7); eating - was independent, requiring only set-up assistance (CAT score 0/1); toilet use - required limited one-person physical assistance (CAT score 2/2, frequency 6/7); personal hygiene - required limited one-person physical assistance (CAT score 2/2, frequency 1/7); and bathing - required limited one-person physical assistance (CAT score 2/2, frequency 1/7).

The assessment which resulted in the filing of the present case was performed on February 25, 2014 by nurse-assessor Sam Cornell, R.N. of DSDS.<sup>23</sup> In completing the CAT, Mr. Cornell reported that Ms. P has the following care needs and the following abilities and limitations:<sup>24</sup>

Significant Problems Since Last Assessment:<sup>25</sup> Mr. Cornell reported that Ms. P (1) had two emergency room (ER) visits within the last year due to falls; (2) had "some" seizure activity; and (3) wore a transcutaneous electrical nerve stimulation (TENS) unit at times.

Functional Assessment:<sup>26</sup> Mr. Cornell reported that Ms. P is able to touch her hands behind her back and touch the floor while sitting, and has a strong grip in both hands, but cannot touch her hands over her head, and cannot place her hands across her chest and stand up. Mr. Cornell also wrote that Ms. P reported having shoulder pain due to an old injury.

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<sup>20</sup> Ex. F.

<sup>21</sup> Ex. F.

<sup>22</sup> All factual findings in this paragraph are based on Exs. F6 - F19 unless otherwise stated.

<sup>23</sup> Ex. E.

<sup>24</sup> Ex. E1 - E31.

<sup>25</sup> Ex. E5.

<sup>26</sup> Ex. E6.

Physical Therapy:<sup>27</sup> Mr. Cornell reported that Ms. P is currently receiving physical therapy two days per week, and had prescriptions for range of motion exercises, walking for exercise, and foot care (each for 60 minutes per day, five days per week).

Bed / Body Mobility:<sup>28</sup> Mr. Cornell reported that Ms. P told him (1) that she has a hard time turning in bed due to pain, but can do it; (2) that she moves in bed by pushing off a wall or objects by the bed, or by pulling on her friend; and (3) that she has no skin breakdown or wounds. Mr. Cornell reported that he observed Ms. P (1) turn side-to-side in bed; and (2) sit up in bed by pulling on her friend (scored 0/1; frequency 0/0).

Transfers:<sup>29</sup> Mr. Cornell reported he was told by Ms. P that she sometimes needs help with transfers due to back pain, ankle pain, and arthritic pain, and that she helps herself get up and down by pushing or pulling on furniture. Mr. Cornell reported he observed Ms. P transfer on and off her bed by pulling on her PCA and using him for support (scored 2/2, frequency 4/7).

Locomotion:<sup>30</sup> Mr. Cornell reported he was told by Ms. P that (1) she walks inside her home by leaning onto the walls or furniture, and/or by using a cane; (2) is able to walk better using her soft ankle brace; (3) has a gait belt but does not use it very often; and (4) uses a roller walker when leaving her home for shopping or appointments. Mr. Cornell reported that he observed that Ms. P's home is small, cluttered, and has limited walking space, but that he saw Ms. P walk using various objects for support (scored 1/1, frequency 0/0).

Dressing:<sup>31</sup> Mr. Cornell reported he was told by Ms. P that she requires assistance with dressing, lacing / wrapping her ankle brace, and putting on her TENS unit. Mr. Cornell reported that he observed that Ms. P had some functional limitations and was wearing a robe at the time of the assessment (scored 2/2, frequency 2/7).

Eating:<sup>32</sup> Mr. Cornell reported he was told by Ms. P that she can eat and drink on her own, that she can swallow oral medications and liquids without any problems, and that she does not wear dentures. Mr. Cornell reported that he observed Ms. P drink from a cup without difficulty (scored 0/1; frequency 0/0).

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<sup>27</sup> Ex. E7.

<sup>28</sup> Ex. E8.

<sup>29</sup> Ex. E8.

<sup>30</sup> Ex. E9.

<sup>31</sup> Ex. E10.

<sup>32</sup> Ex. E11.

Toileting:<sup>33</sup> Mr. Cornell reported he was told by Ms. P that (1) she has a porta-potty in her trailer and requires help getting on it and off it; (2) she also uses the toilet at the mobile home park's communal restroom and shower facility; and (3) she wears adult diapers in case of an accident. Mr. Cornell concluded that functional tests supported Ms. P's "ability to cleanse self with rarer assistance" (scored 2/2; frequency 6/7).

Personal Hygiene:<sup>34</sup> Mr. Cornell reported he was told by Ms. P that she can wash her face, but needs help with her hair because she cannot bring her hands up to her head. Mr. Cornell reported he observed that Ms. P's hair was neat at the assessment (scored 2/2; frequency 1/7).

Bathing:<sup>35</sup> Mr. Cornell reported he was told by Ms. P that she normally showers in the mobile home park's communal facility, but sometimes showers at her daughter / PCA's house; that she does not use a shower chair; and that she is able to wash the front of her body, but needs assistance washing the rear of her body and her hair. Mr. Cornell concluded that the functional tests indicated that Ms. P requires limited assistance with bathing (scored 2/2, frequency 1/7).

Professional Nursing Services:<sup>36</sup> Mr. Cornell found that Ms. P has no current need for professional nursing services. Specifically, Mr. Cornell found that Ms. P is currently receiving no injections or intravenous feedings, is not using any type of feeding tube, does not require nasopharyngeal suctioning or tracheotomy care, and is not receiving treatment for open lesions, ulcers, burns, or surgical sites.<sup>37</sup> Mr. Cornell further found that Ms. P 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.<sup>38</sup> In addition, Mr. Cornell found that Ms. P is receiving physical therapy two days per week, but does not receive speech, occupational, or respiratory therapy, and does not require professional nursing assessment, observation, and/or management at least once per month.<sup>39</sup> Mr. Cornell also found that Ms. P 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

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<sup>33</sup> Ex. E11.

<sup>34</sup> Ex. E12.

<sup>35</sup> Ex. E13.

<sup>36</sup> Exs. E15 - E17.

<sup>37</sup> Ex. E15.

<sup>38</sup> Ex. E16. This finding is extremely significant because, as discussed above, Ms. P qualified for waiver services in 2012 based solely on a then-uncontrolled seizure disorder.

<sup>39</sup> Ex. E16.

condition.<sup>40</sup> Finally, Mr. Cornell found that Ms. P does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.<sup>41</sup>

Cognition:<sup>42</sup> Mr. Cornell found that Ms. P has no short-term memory problem or long-term memory deficits. He also found that Ms. P is generally able to recall names and faces, where she is, the location of her room, and the current season. He rated Ms. P's cognitive status for daily decision-making as independent. Finally, Mr. Cornell determined that Ms. P's cognitive status does not require professional nursing assessment, observation, or management at least once per month.<sup>43</sup>

Behavioral Problems:<sup>44</sup> Mr. Cornell found that Ms. P does not wander, is not verbally abusive, is not physically abusive, does not engage in socially inappropriate or disruptive behavior, and does not resist care. Mr. Cornell also found that Ms. P does not need professional nursing assessment, observation, or management at least once per month due to any behavioral problems.<sup>45</sup>

Medication Management:<sup>46</sup> Mr. Cornell reported that Ms. P takes eleven different prescription medications on a daily basis; that she prepares and administers all of her own medications, and that she is compliant in taking her medications at least 80% of the time.

Communication:<sup>47</sup> Mr. Cornell found that Ms. P has no difficulty or minimal difficulty seeing, hearing, speaking, understanding others, and making herself understood.

Mood:<sup>48</sup> Mr. Cornell found that Ms. P has no depression, anxiety, or sleep issues.

Based on the foregoing CAT scores, Mr. Cornell found that Ms. P does not currently require skilled level or intermediate level nursing care, and does not otherwise qualify for waiver services based on cognitive issues, behavioral issues, and/or her level of need for assistance with her activities of daily living (ADLs).<sup>49</sup> On June 2, 2014 a second registered nurse reviewed the nurse-assessor's waiver eligibility decision.<sup>50</sup> The nurse-supervisor agreed that Ms. P is not currently eligible to participate in the waiver services program.<sup>51</sup> Finally, on June 18, 2014 the nurse-

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<sup>40</sup> Ex. E17.

<sup>41</sup> Ex. E17.

<sup>42</sup> Ex. E18.

<sup>43</sup> Mr. Cornell did, however, complete the Division's supplemental screening tool (SST) for cognitive difficulties for Ms. P (Ex. E1). Ms. P received a total score of zero points on the cognitive SST.

<sup>44</sup> Ex. E19.

<sup>45</sup> Mr. Cornell did, however, complete the Division's supplemental screening tool (SST) for behavioral problems for Ms. P (Ex. E2). Ms. P received a total score of zero points on the behavioral SST.

<sup>46</sup> Ex. E22.

<sup>47</sup> Ex. E24.

<sup>48</sup> Ex. E27.

<sup>49</sup> Exs. E31, E32.

<sup>50</sup> Exs. F37 - F43.

<sup>51</sup> Exs. F37 - F43.

assessor's eligibility decision underwent a second-level review by a registered nurse and/or licensed physician employed by the Division's independent contractor Qualis Health.<sup>52</sup> Qualis Health also concurred with the nurse-assessor's determination that Ms. P had "materially improved" and no longer required a nursing home facility level of care.<sup>53</sup>

**C. Relevant Procedural History**

On August 12, 2014 the Division mailed a notice to Ms. P advising her that she was no longer eligible for waiver services, and that her waiver services would be terminated in thirty days.<sup>54</sup> On August 20, 2014 Ms. P requested a hearing to contest the Division's determination.<sup>55</sup> Ms. P's hearing was originally scheduled for October 16, 2014, but Ms. P appeared to have a seizure during pre-hearing negotiations with Division personnel, and was transported from the hearing room to a hospital by emergency medical technicians (EMTs). Ms. P's hearing was then rescheduled to November 25, 2014, but on that date Ms. P requested, and was granted, a continuance.

Ms. P's hearing was held on January 12, 2015.<sup>56</sup> Ms. P attended the hearing, represented herself, and testified on her own behalf. Ms. P's friend, PCA, and power-of-attorney holder, K H, attended the hearing and testified for Ms. P. Ms. P's care coordinator, D F, participated in the hearing by phone and testified for Ms. P. Victoria Cobo represented the Division and also testified briefly. Sam Cornell, R.N. (the nurse who conducted the 2014 assessment), and David Chadwick, attended the hearing and testified on behalf of the Division. Following the hearing the record was left open for post-hearing filings through January 20, 2015, after which time the record closed.

On April 22, 2015 the undersigned issued the original proposed decision in this case. The Division filed a Proposal for Action (PFA) on May 5, 2015. As a result of the Division's filing of its PFA, the proposed decision was forwarded to the designee of the Commissioner of Health and Social Services for review on May 6, 2015. On June 8, 2015 the Commissioner's designee remanded the case with instructions to issue a revised decision on the merits of the case.

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<sup>52</sup> Exs. D2 - D4.

<sup>53</sup> Exs. D2 - D4.

<sup>54</sup> Ex. D1.

<sup>55</sup> Ex. C.

<sup>56</sup> The hearing in this case was consolidated with a hearing involving Ms. P's Medicaid Personal Care Assistant (PCA) services (OAH Case No. 14-1819-MDS). A proposed decision concerning Ms. P's PCA services was issued separately on May 22, 2015.



### III. Discussion

#### A. *Applicable Burden of Proof and Standard of Review*

Pursuant to applicable state and federal regulations, the Division bears the burden of proof in this case.<sup>57</sup> The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.<sup>58</sup> In this case, evidence was presented at hearing that was not available to the Division's reviewers. The administrative law judge may independently weigh the evidence and reach a different conclusion than did the Division's staff and/or Qualis Health, even if the original decision is factually supported and has a reasonable basis in law.

#### B. *Relevant Medicaid Waiver Services Statutes and Regulations*

States participating in the Medicaid program must provide certain mandatory services under the state's medical assistance plan.<sup>59</sup> States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program<sup>60</sup> ("waiver services").<sup>61</sup> Congress created the waiver services program in 1981 to allow states to offer long-term care, not otherwise available through the states' Medicaid programs, to serve eligible individuals in their own homes and communities instead of in nursing facilities.<sup>62</sup> Alaska participates in the waiver services program.<sup>63</sup>

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<sup>57</sup> 42 CFR § 435.930, 7 AAC 49.135.

<sup>58</sup> See 42 CFR 431.244; *Albert S. v. Dept. of Health and Mental Hygiene*, 891 A.2d 402 (2006); *Maryland Dept. of Health and Mental Hygiene v. Brown*, 935 A.2d 1128 (Md. App. 2007); *In re Parker*, 969 A.2d 322 (N.H. 2009); *Murphy v. Curtis*, 930 N.E.2d 1228 (Ind. App. 2010).

<sup>59</sup> See 42 USC §§ 1396a(a)(10)(A); 1396d(a)(1) - (5), 1396a(a)(17), and 1396a(a)(21); see also 42 CFR 440.210 & 440.220.

<sup>60</sup> The program is called a "waiver" program because certain statutory Medicaid requirements are waived by the Secretary of Health and Human Services. See 42 U.S.C. § 1396n(c). Before a state receives federal funding for the program, the state must sign a waiver agreement with the United States Department of Health and Human Services. *Id.* The agreement waives certain eligibility and income requirements. *Id.*

<sup>61</sup> See 42 USC § 1396a(a)(10)(A).

<sup>62</sup> See 42 USC § 1396n(c)(1); 42 CFR §§ 435.217; 42 CFR §§ 441.300 - 310. Federal Medicaid regulation 42 CFR § 440.180, titled "Home or Community-Based Services," provides in relevant part:

(a) Description and requirements for services. "Home or community-based services" means services, not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of Part 441, subpart G of this chapter . . .

(b) Included services. Home or community-based services may include the following services . . . (1) Case management services. (2) Homemaker services. (3) Home health aide services. (4) Personal care services. (5) Adult day health services. (6) Habilitation services. (7) Respite care services. (8) Day treatment . . . (9) Other services requested by the agency and approved by CMS *as cost effective and necessary to avoid institutionalization*. [Emphasis added].

<sup>63</sup> AS 47.07.045, the Alaska statute that authorizes Medicaid Waiver Services, states in relevant part: Home and community-based services. (a) The department may provide home and community-based services under a waiver in accordance with 42 USC 1396 – 1396p (Title XIX Social Security Act), this chapter, and regulations adopted under this chapter, if the department has received approval from the federal government and the department has appropriations allocated for the purpose. To supplement the standards in (b) of this section, the department shall establish in regulation additional standards for eligibility and payment . . .

There are three basic ways in which an applicant or recipient can qualify for waiver services. First, an individual is eligible for waiver services if he or she requires the level of care specified in 7 AAC 130.205. For older adults and adults with disabilities (such as Ms. P), 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.<sup>64</sup> Intermediate care, a lower level of care than skilled care, is defined by 7 AAC 140.510 in relevant part as follows:

(a) The department will pay an intermediate care facility for providing the services described in (b) and (c) of this section if those services are (1) needed to treat a stable condition; (2) ordered by and under the direction of a physician, except as provided in (c) of this section; and (3) provided to a recipient who does not require the level of care provided by a skilled nursing facility.

(b) Intermediate nursing services are the observation, assessment, and treatment of a recipient with a long-term illness or disability whose condition is relatively stable and where the emphasis is on maintenance rather than rehabilitation . . . .

(c) Intermediate care may include occupational, physical, or speech-language therapy provided by an aide or orderly under the supervision of licensed nursing personnel or a licensed occupational, physical, or speech-language therapist.

The Division is required to incorporate the results of the Consumer Assessment Tool (CAT) in determining whether an applicant requires intermediate or skilled nursing care.<sup>65</sup>

The second way an individual may qualify for waiver services is by showing that the individual's requirements for physical assistance with his or her activities of daily living (ADLs) are sufficiently high.<sup>66</sup> Under the CAT, an individual can qualify for waiver services by demonstrating a need for extensive assistance with at least three designated ADLs, known as "shaded" ADLs, even without demonstrating a need for professional nursing care.<sup>67</sup> An individual may also qualify for waiver services by having a certain minimum level of nursing needs, *combined with* a certain minimum level of need for physical assistance with ADLs.<sup>68</sup>

Before a recipient's waiver services may be terminated, the Division must conduct an annual assessment to “determine whether the recipient continues to meet the [applicable] standards . . . .”<sup>69</sup> To remove a recipient from the program, the assessment must find:

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<sup>64</sup> 7 AAC 130.215.

<sup>65</sup> 7 AAC 130.215.

<sup>66</sup> Ex. E31.

<sup>67</sup> Ex. E31.

<sup>68</sup> Ex. E31.

<sup>69</sup> AS 47.07.045(b)(1).

that the recipient's condition has materially improved since the previous assessment; for purposes of this paragraph, "materially improved" means that a recipient who has previously qualified for . . . an older Alaskan or adult with a physical disability [waiver], no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for wavier services.<sup>[70]</sup>

Finally, in an order issued recently in the class action<sup>71</sup> case *Krone et. al. v. State of Alaska, Department of Health and Social Services et. al.*, Case No. 3AN-05-10283CI, an Anchorage Superior Court judge held that, "in order to determine if a recipient is 'materially improved,' for purposes of AS 47.07.045(3)(C), the State must compare the results of the current assessment with those of the most recent assessment that concluded that the recipient was eligible for the Waiver program," and that "[t]he State may not conclude that a recipient is no longer eligible based only on the results of the current assessment."<sup>72</sup> The judge further held that "[t]he State may not base its annual determination of whether a recipient is 'materially improved' solely upon the scoring obtained from the CAT," and that "[t]he State must consider all reasonably available information relevant to that determination" (*Id.*).

**C. The Consumer Assessment Tool (CAT)**

Under state Medicaid regulation 7 AAC 130.230(b)(2)(B), level of care determinations for waiver services applicants seeking services under the "adults with physical disabilities" or "older adults" categories must incorporate the results of the Department's Consumer Assessment Tool (CAT), which is adopted by regulation at 7 AAC 160.900(d)(6). The CAT covers both the recipient's need for nursing services, as well as the recipient's ability to perform his or her activities of daily living (ADLs). The ADLs scored by the CAT are body mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room, between levels, and to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, and bathing.<sup>73</sup>

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<sup>70</sup> AS 47.07.045(b)(3).

<sup>71</sup> Although a Superior Court decision generally does not constitute binding precedent for the Office of Administrative Hearings (except in the particular case being appealed), a class action like the *Krone* case is binding in all cases involving class members, one of whom is Ms. P.

<sup>72</sup> *Krone* order dated October 1, 2014 at page 6.

<sup>73</sup> The CAT also scores the recipient's ability to perform Instrumental Activities of Daily Living (IADLs). However, although IADL scores are important for determining the recipient's eligibility for Medicaid Personal Care Assistant (PCA) services, the recipient's IADL scores are not considered in determining eligibility for waiver services.

The CAT numerical scoring system has two components. The first component is the *self-performance score*. These scores rate how capable a person is of performing a particular ADL.<sup>74</sup> The possible scores are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance); **3** (the person requires extensive assistance); and **4** (the person is totally dependent). There are also codes that are not treated as numerical scores for purposes of calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).<sup>75</sup>

The second component of the CAT scoring system for ADLs is the *support score*. These scores rate the degree of assistance that a person requires in order to perform a particular ADL. The relevant scores are **0** (no setup or physical help required); **1** (only setup help required); **2** (one person physical assist required); and **3** (two or more person physical assist required).

***D. Does Ms. P Require Intermediate or Skilled Nursing Care?***

As discussed above, there are several ways in which a waiver services applicant or recipient can qualify for (or remain qualified for) waiver services. The first way is to demonstrate a need for either skilled nursing care or intermediate level nursing care.<sup>76</sup> Because skilled care is a higher level of care than intermediate care, the minimum level of nursing care for which Ms. P must demonstrate a need, in order to remain eligible for waiver services on that basis, is intermediate care. Intermediate level nursing care is defined by 7 AAC 140.510 (quoted in Section III(A), above).

Ms. P asserts that she requires nursing services, and remains eligible for waiver services, based on her seizures. The Division's nurse-assessor acknowledged at hearing that Ms. P would remain eligible for waiver services were her seizure disorder uncontrolled, and were her seizures tonic/clonic or "grand mal" seizures rather than "absence seizures." The Division's nurse-assessor testified, however, that Ms. P's seizures *are* controlled, and that, even if they were not controlled, they would not create a need for nursing services because Ms. P's seizures are the less dangerous "absence seizure" type.

The issue of whether Ms. P's seizures present a need for nursing care requires a choice between the opinions of E J, PA-C and M G, M.D. (who opined that Ms. P currently has no

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<sup>74</sup> According to the federal Medicaid statutes, the term "activities of daily living" includes tasks such as eating, toileting, grooming, dressing, bathing, and transferring. See 42 USC § 1396n(k)(6)(A). In Alaska, pursuant to AS § 47.33.990(1), "activities of daily living" means "walking, eating, dressing, bathing, toileting, and transfer between a bed and a chair."

<sup>75</sup> See, for example, Ex. E8.

<sup>76</sup> 7 AAC 140.510, 7 AAC 140.515.

intermediate or skilled nursing needs<sup>77</sup>), and the opinion of Q K. Q, M.D., who opined that Ms. P's seizures are still uncontrolled.

Dr. Q's letter of January 5, 2015<sup>78</sup> states in relevant part that "Ms. P has a history of epilepsy which has been difficult to treat," that her "seizures were not under control in February of 2014," and that her seizures were "still not under control" as of January 2015. However, these statements contradict Dr. Q's notes from exams on July 14, 2014 and October 19, 2014, which state that Ms. P's seizures have been well-controlled, and that the few seizures which Ms. P experienced during the time period at issue were due to her failing to timely renew or pick-up her anti-seizure medication. Due to this contradiction, I find Dr. Q's letter of January 5, 2015 less persuasive than would otherwise be the case.

In summary, the evidence in the record indicates that Ms. P does not currently require the types of services which indicate a need for intermediate level nursing care under 7 AAC 140.510. First, the Division's nurse-assessor, reviewing nurse, and independent contractor all agreed that Ms. P does not require nursing services.<sup>79</sup> More importantly, one of Ms. P's own physicians opined that Ms. P does not currently require nursing services.<sup>80</sup> Finally, my own independent review of the record likewise indicates that Ms. P currently has no nursing needs and that her seizure disorder is now controlled.

Accordingly, the Division correctly determined that Ms. P does not qualify for waiver services based on a need for skilled or intermediate level nursing care. The next issue is whether Ms. P qualifies for waiver services based on the extent of her need for assistance with activities of daily living (ADLs).

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

The Consumer Assessment Tool's scoring summary is located at page 29 of the CAT.<sup>81</sup> As indicated by that summary, there are several scoring combinations through which one may demonstrate a need for a Nursing Facility Level of Care (NFLOC) or otherwise qualify for waiver services. The first way, discussed immediately above, is to require skilled or intermediate level nursing care, as defined by the regulations and the CAT. However, under the CAT, an individual may also qualify for waiver services, even without demonstrating a

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<sup>77</sup> All factual findings in this paragraph are based on Exs. F33 - F35 unless otherwise stated.

<sup>78</sup> Ex. 5.

<sup>79</sup> See discussion at page 8, above.

<sup>80</sup> Exs. F33 - F35.

<sup>81</sup> Ex. E p. 31.

need for skilled or intermediate level nursing care, if the individual has serious cognitive or behavioral problems, and/or if his or her need for assistance with activities of daily living (ADLs) is sufficiently high.<sup>82</sup> The CAT divides the possible scoring combinations into six different areas, designated "NF1" through "NF6."

1. NF1

There are five different ways to meet NFLOC under NF1. The first way (under NF1(a)) is to require nursing services seven days per week. As discussed above, Ms. P does not receive or require nursing services. The second way (under NF1(b)) is to require use of a ventilator or respirator at least three days per week. As discussed above, Ms. P does not use a ventilator or respirator. The third way (under NF1(c)) is to require care due to uncontrolled seizures at least once per week. As discussed above, Ms. P does not currently require nursing care due to uncontrolled seizures at least once per week. The fourth way (under NF1(d)) is to receive some form of therapy from a qualified therapist at least five days per week. As discussed above, Ms. P was receiving physical therapy only two days per week at the time of her assessment.

The fifth and last way to meet NFLOC under NF1, under NF1(e), is to score a three (extensive assistance required) or a four (completely dependent) in the self-performance portion of three or more of the five "shaded" ADLs listed at page 18 of the CAT.<sup>83</sup> The CAT scores which the Division assigned to Ms. P with regard to the five "shaded" ADLs were: body mobility: 0/1; transfers: 2/2; locomotion: 1/1; eating: 0/1; and toilet use: 2/2.<sup>84</sup>

This waiver services case was consolidated for hearing with another Medicaid case involving Ms. P's Personal Care Assistant (PCA) services, (OAH Case No. 14-1400-MDS). The decision in that (PCA) case was issued on May 22, 2015. As discussed in that decision, I agreed with some, but not all, of the ADL scores assigned by the Division. The revised scores for Ms. P's "shaded" ADLs, contained in the PCA decision, are as follows: body mobility: 0/1; transfers: 2/2; locomotion: 1/1; eating: 0/1; and toilet use: 3/2. Accordingly, even with the higher ADL scores determined by the decision in the PCA case, Ms. P's scores on the five "shaded" ADLs are still not high enough to qualify for waiver services under NF1(e). In order to qualify for waiver services under NF1(e), a person must demonstrate either full dependence, or a need for extensive assistance, *as to at least three* of the shaded ADLs. Because Ms. P

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<sup>82</sup> Ex. E31.

<sup>83</sup> Ex. E20.

<sup>84</sup> Ex. E20.

does not require extensive assistance with three or more of the "shaded" ADLs, she does not qualify for waiver services under NF1(e).

2. NF2

An applicant cannot meet NFLOC under NF2 alone. However, under NF2 an applicant can obtain points towards qualifying for NFLOC which, when added to points obtained under *other* subsections of NF1 - NF6, can qualify the applicant for NFLOC. The first way (under NF2(a)) is to obtain a score of two or three with regard to needing injections and/or IV hookups, feeding tubes, tracheotomy care or nasopharyngeal suctioning, treatments or dressings, oxygen, requiring observation, assessment, and management of unstable conditions, catheter management, and/or care required due to a comatose condition. The record does not show that Ms. P requires any of these services, so she scores no points under NF2(a).

The second way to obtain points (under NF2(b)) is to require speech therapy, respiratory therapy, physical therapy, and/or occupational therapy at least three days per week. However, the record does not show that Ms. P requires any of these therapies at least *three* days per week, so she receives no points under NF2(b).

The third way to obtain points (under NF2(c)) is to require medications via tube, tracheotomy care, urinary catheter changes or irrigation, venipuncture, or barrier dressings for ulcers, at least three days per week. Again, the record does not show that Ms. P requires any of these procedures three or more days per week, so no points are awarded under NF2(c).

The fourth and last way to obtain points (under NF2(d)) is to require chemotherapy, radiation therapy, hemodialysis, and/or peritoneal dialysis, at least three days per week. Again, the record does not show that Ms. P requires any of these treatments at least three days per week, so she receives no points under NF2(d).

3. NF3

An applicant cannot meet NFLOC under NF3 alone. However, under NF3 an applicant can obtain points towards qualifying for NFLOC which, when added to points obtained under *other* subsections of NF1 - NF6, can qualify the applicant for NFLOC. The first way (under NF3(a)) is to have short-term memory problems. The Division found that Ms. P has no short-term memory problems. I find, based on my observation of Ms. P at hearing, that Ms. P does have short-term memory problems, so she receives one point under NF3(a).

The second way to obtain points (under NF3(b)) is to be generally unable to recall names and faces, the season of the year, where you are, and the location of your room. Mr.

Cornell found that Ms. P is able to recall all four of these items, and Ms. P did not dispute this. Accordingly, Ms. P gets no points under NF3(b).

The third way to obtain points (under NF3(c)) is to be moderately or severely impaired in one's cognitive skills for daily decision-making. Mr. Cornell found that Ms. P's cognitive skills for daily decision-making are largely unimpaired, and Ms. P did not contest this at hearing. Accordingly, Ms. P receives no points under NF3(c).

The last way to obtain points (under NF3(d)) is to require *either* professional nursing care at least three days per week due to cognitive problems, *or both* (1) score at least a 2/2 as to any shaded ADL, *and* (2) score 13 or more on the cognitive portion of the Division's Supplemental Screening Tool (SST). Ms. P scored 2/2 or higher as to one or more shaded ADLs. However, she received a score of zero on the cognitive part of the SST, and she did not contest that score at hearing. Ms. P therefore 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. P received a score of one on NF3(a), and a score of zero on NF3(b), NF3(c), and NF3(d). Accordingly, Ms. P receives an "overall" score of zero on NF3.

#### 4. NF4

An applicant cannot meet NFLOC under NF4 alone. However, under NF4 an applicant can obtain one point towards qualifying for NFLOC which, when added to points obtained under other subsections of NF1 - NF6, can qualify the applicant for NFLOC.

There are two subsections to NF4, and an applicant must qualify under *both* of these subsections in order to receive the one point available under NF4. Under NF4(a), an applicant must either wander, engage in socially inappropriate or disruptive behavior, be verbally abusive, or be physically abusive, at least four days per week, to receive a point.

Mr. Cornell found that Ms. P does not wander, is not verbally abusive, is not physically abusive, does not engage in socially inappropriate or disruptive behavior, and does not resist care. Ms. P did not contest these findings at hearing. Accordingly, the preponderance of the evidence indicates that Ms. P should receive no points under NF4(a).

Under NF4(b), an applicant must *either* require professional nursing care *at least three days per week* as a result of problem behaviors, *or both* (1) score at least 2/2 as to any "shaded" ADL, *and* (2) score 14 or more on the behavioral portion of the Division's Supplemental Screening Tool (SST). Mr. Cornell found that Ms. P does not require or receive professional



nursing assessment, observation, or management of behavioral problems three or more days per week. This finding is supported by the record and was not challenged.

Ms. P did receive a score of 2/2 or better as to one or more "shaded" ADLs. However, Mr. Cornell gave Ms. P a score of zero on the behavioral portion of the SST,<sup>85</sup> which is not a sufficiently high score on the SST to receive a point at NF4(b). Ms. P did not contest this finding at hearing. Accordingly, Ms. P receives no points under NF4(b).

5. NF5

At NF5, the total scores from NF2, NF3, and NF4 are added together. If an applicant or recipient receives a score of one or more, then the analysis proceeds to NF6. In this case, however, Ms. P's overall score as to NF2, NF3, and NF4 is zero. Accordingly, in this case, the CAT's scoring analysis ends here and does not proceed to NF6 or NF7.

**IV. Conclusion**

Ms. P qualified for waiver services under the 2012 assessment based on an uncontrolled seizure disorder. However, the evidence in the record indicates that Ms. P's seizures are now controlled, which constitutes a material improvement of her condition. Based on the Division's 2012 and 2014 assessments, and the opinion of one of her own doctors, Ms. P does not currently require either an intermediate or skilled level of care as defined under the relevant regulations and the Consumer Assessment Tool. Further, although Ms. P requires more assistance with her ADLs than was found by the Division, her level of need for assistance with ADLs is not sufficient, under the regulations and the CAT, to qualify her for waiver services on that basis. Accordingly, the Division's decision that Ms. P is not currently eligible for the waiver services program is affirmed.

DATED this 23rd day of June, 2015.

*Signed*

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Jay D. Durych

Administrative Law Judge

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<sup>85</sup> Ex. E2.

## Adoption of Post-Remand Decision

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 10<sup>th</sup> day of July, 2015.

By: *Signed*  
Name: Jared C. Kosin, J.D., M.B.A.  
Title: Executive Director  
Agency: Office of Rate Review, DHSS

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