

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

In the Matter of:)
)
 K H) OAH No. 14-1684-MDS
) Agency Case No.
_____)

DECISION

I. Introduction

The issue in this case is whether Mr. K H remains eligible for Medicaid Home and Community-Based Waiver Services (waiver services). To do so, he must demonstrate that he requires either skilled or intermediate level nursing care, or extensive assistance with at least three designated activities of daily living (ADLs). The Division of Senior and Disabilities Services (DSDS or Division) conducted an assessment on February 5, 2014 and subsequently determined that Mr. H no longer requires skilled nursing care, intermediate level nursing care, or extensive assistance with three or more "shaded" activities of daily living (ADLs).¹ DSDS notified Mr. H of its determination on July 22, 2014.² Mr. H requested a hearing to contest the Division's determination on August 16, 2014.³

This decision concludes that Mr. H does not currently require either skilled or intermediate level nursing care, or extensive assistance with three or more "shaded" ADLs. Accordingly, Mr. H is no longer eligible for waiver services. The Division's decision terminating Mr. H's waiver services is therefore affirmed.

II. Facts

A. Mr. H's Current Medical Diagnoses

Mr. H is an 85-year-old man who lives in a single family home which he shares with his wife, an adult child, and another relative.⁴ His diagnoses include asthma, occlusion of a cerebral artery, prior cerebral infarction (CVA or stroke), coronary atherosclerosis, peripheral vascular disease, diabetes with neurological manifestations, intervertebral disc degeneration, osteoarthritis, gastrointestinal hemorrhage, and essential hypertension.⁵

¹ Exs. D, E.
² Ex. D.
³ Ex. C.
⁴ Ex. E p. 3.
⁵ Ex. E p. 5.

B. Mr. H's Care Needs and Functional Abilities as Determined by the CAT

The assessment which resulted in the filing of this case was performed on February 5, 2014 by Margaret Rogers, R.N. of DSDS.⁶ Ms. Rogers used the Consumer Assessment Tool or "CAT," a system for scoring the need for nursing assistance and physical assistance which is described in detail in Part III of this decision, to record the results of the assessment.⁷ In completing the CAT, Ms. Rogers reported that Mr. H has the following functional abilities and limitations:⁸

Functional Assessment:⁹ Ms. Rogers reported that Mr. H was able to touch his hands over his head and behind his back, and that he had a strong grip with each hand, but that he was unable to place his hands across his chest and stand up, or touch his feet while sitting.

Physical Therapy:¹⁰ Ms. Rogers reported that Mr. H is not currently receiving physical therapy, speech or language therapy, occupational therapy, or respiratory therapy. Ms. Rogers also reported that Mr. H does not currently have any prescriptions for walking for exercise, range of motion exercises, or foot care.

Bed / Body Mobility:¹¹ Ms. Rogers reported that Mr. H's daughter and PCA told her that Mr. H is able to reposition himself in his chair without assistance. Ms. Rogers reported that she observed Mr. H reposition himself on a sofa without assistance (scored 0/0).

Transfers:¹² Ms. Rogers reported she was told by Mr. H's daughter and PCA that Mr. H requires assistance moving from a sitting position to a standing position a few times each day. Ms. Rogers reported that she observed Mr. H's PCA help him to stand up and transfer from a chair to his walker (scored 2/2).

Locomotion:¹³ Ms. Rogers reported she was told by Mr. H's daughter and PCA that Mr. H is unsteady while walking and requires assistance to move within his home. Ms. Rogers reported that she observed Mr. H walking in his home, using a wheeled walker, with a slow, unsteady gait. Mr. H received a CAT score of 2/2 for single-floor locomotion, a self-performance score of three for multi-level locomotion, and a self-performance score of two for locomotion to medical appointments.

⁶ Ex. E.
⁷ Ex. E.
⁸ Ex. E pp. 1 - 31.
⁹ Ex. E p. 6.
¹⁰ Ex. E p. 7.
¹¹ Ex. E p. 8.
¹² Ex. E p. 8.
¹³ Ex. E p. 9.

Dressing:¹⁴ Ms. Rogers reported she was told by Mr. H's daughter and PCA that Mr. H requires assistance dressing his upper and lower body, using buttons and zippers, and straightening his clothes (scored 2/2).

Eating:¹⁵ Ms. Rogers reported she was told by Mr. H's daughter and PCA that he cannot prepare his own food, but that, once his food is prepared and served, he is able to eat and drink without assistance (scored 0/1).

Toileting:¹⁶ Ms. Rogers reported she was told by Mr. H's daughter and PCA that Mr. H is continent of bowel and bladder, can transfer on and off the toilet independently, and is able to clean himself independently (scored 0/0).

Personal Hygiene:¹⁷ Ms. Rogers reported Mr. H's daughter and PCA told her that Mr. H requires assistance with skin care and nail care, but that he can perform all other personal hygiene tasks without assistance (scored 2/2).

Bathing:¹⁸ Ms. Rogers reported she was told by Mr. H's daughter and PCA that Mr. H needs setup assistance with bathing, and help transferring into and out of the shower / bathtub, but that he is otherwise able to take a Filipino-style "tabo bath" by himself (scored 2/2).

Professional Nursing Services:¹⁹ Ms. Rogers found that Mr. H has no current need for professional nursing services. Specifically, Ms. Rogers found that Mr. H 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 surgical sites, and is not receiving oxygen for a new medical problem / condition.²⁰ Ms. Rogers further found that Mr. H does not currently have any unstable medical conditions, and specifically, that he does not use a catheter or ventilator / respirator, is not comatose, and does not have an uncontrolled seizure disorder.²¹ In addition, Ms. Rogers found that Mr. H does not receive speech, occupational, respiratory, or physical therapy, and that he does not require professional nursing assessment, observation, and/or management at least once per month.²² Ms. Rogers also found that Mr. H does not receive medications via tube, does not require tracheostomy care, does not use a urinary

¹⁴ Ex. E p. 10.

¹⁵ Ex. E p. 11.

¹⁶ Ex. E p. 11.

¹⁷ Ex. E p. 12.

¹⁸ Ex. E p. 13.

¹⁹ Ex. E pp. 15 - 17.

²⁰ Ex. E p. 15.

²¹ Ex. E p. 16.

²² Ex. E p. 16.

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.²³ Finally, Ms. Rogers found that Mr. H does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.²⁴

Cognition:²⁵ Ms. Rogers found that Mr. H has short-term memory problems, but no long-term memory problems. She also found that Mr. H is generally able to recall names and faces, where he is, the location of his room, and the current season. She rated Mr. H as being mostly independent in making decisions in everyday matters, having difficulty only in new situations. She concluded that Mr. H has no cognitive problems requiring professional nursing assessment, observation, or management three days per week, or even once per month.

Behavioral Problems:²⁶ Ms. Rogers found that Mr. H does not wander, is not verbally or physically abusive, does not engage in socially inappropriate or disruptive behavior, and does not resist care. Ms. Rogers also found that Mr. H does not need professional nursing assessment, observation, or management due to any behavioral problems.

Medication Management:²⁷ Ms. Rogers reported that Mr. H does not prepare his own medications, but does self-administer his own medications, and that Mr. H is always compliant in taking his medications.

Senses:²⁸ Ms. Rogers found that Mr. H has minimally impaired hearing and uses a hearing aid, and has impaired vision and wears glasses, but that he has no difficulty in verbal communication with others.

Balance:²⁹ Ms. Rogers found that Mr. H has balance problems when standing, but that he had not fallen in the 180 days prior to the assessment.

Mood:³⁰ Ms. Rogers found that Mr. H exhibited no indication of depression or anxiety, and does not suffer from insomnia.

Based on the foregoing CAT scores, Ms. Rogers found that Mr. H does not currently require skilled level or intermediate level nursing care, and does not otherwise qualify for waiver services based on a need for extensive assistance with his activities of daily living (ADLs).³¹

²³ Ex. E p. 17.

²⁴ Ex. E p. 17.

²⁵ Ex. E p. 18.

²⁶ Ex. E p. 19.

²⁷ Ex. E p. 22.

²⁸ Ex. E p. 24.

²⁹ Ex. E p. 25.

³⁰ Ex. E p. 27.

C. Relevant Procedural History

Mr. H was originally found eligible for waiver services in 2012 or before.³² The assessment which resulted in the filing of this case was performed on February 5, 2014 by Margaret Rogers, R.N. of DSDS.³³ Based on that assessment, Ms. Rogers concluded that Mr. H is no longer eligible for participation in the waiver services program.³⁴ Accordingly, on July 22, 2014 the Division mailed a notice to Mr. H advising that he was no longer eligible for waiver services, and that his waiver services would be terminated after thirty days.³⁵ On August 16, 2014 Mr. H requested a hearing to contest the Division's decision.³⁶

Mr. H's hearing was held on November 10, 2014. Mr. H did not participate. Mr. H's son, J H, acted as his father's agent using a power of attorney, participated in the hearing by phone, represented his father, and testified on his father's behalf.

The Division was represented by Tammy Smith, who participated in the hearing by phone. Margaret Rogers, R.N., a nurse employed by the Division, participated in the hearing by phone and testified on behalf of the Division. The record closed at the end of the hearing.

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.³⁷ The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.³⁸ Under this standard of review, the administrative law judge may independently weigh the evidence and reach a different conclusion than did the Division's staff, 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.³⁹ States may also, at their option, provide certain additional

³¹ Ex. E pp. 31, 32.

³² Ex. D p. 1.

³³ Ex. E.

³⁴ Ex E pp. 31 - 32; Ex. D.

³⁵ Ex. D.

³⁶ Ex. C p. 2.

³⁷ 42 CFR § 435.930, 7 AAC 49.135.

³⁸ 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).

³⁹ 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.

services, one of which is the Home and Community-Based Waiver Services program⁴⁰ (“waiver services”).⁴¹ 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.⁴²

Alaska participates in the waiver services program.⁴³ Alaska's program pays for specified individual services for recipients.⁴⁴ The Division must approve each specific service as part of a recipient's Plan of Care (POC).⁴⁵ Services must be “of sufficient amount, duration, and scope to prevent institutionalization.”⁴⁶ A recipient's plan of care is subject to review on an annual basis.⁴⁷

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 Mr. H), that level of care must be either “intermediate care” as defined by 7 AAC 140.510, or “skilled care” as defined by 7 AAC 140.515.⁴⁸ 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,

⁴⁰ 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.*

⁴¹ *See* 42 USC § 1396a(a)(10)(A).

⁴² *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].

⁴³ 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

⁴⁴ 7 AAC 130.240 - 7 AAC 130.305.

⁴⁵ 7 AAC 130.209, 7 AAC 130.217.

⁴⁶ 7 AAC 130.217(b).

⁴⁷ 7 AAC 130.213.

⁴⁸ 7 AAC 130.215.

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.⁴⁹

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.⁵⁰ 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.⁵¹

Finally, under the CAT, an individual may 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.⁵²

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 . . ."⁵³ To remove a recipient from the program, the assessment must find:

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.^[54]

⁴⁹ 7 AAC 130.215.

⁵⁰ See the CAT at p. 29 (Ex. E p. 31).

⁵¹ Ex. E p. 31.

⁵² Ex. E p. 31.

⁵³ AS 47.07.045(b)(1).

⁵⁴ AS 47.07.045(b)(3).

Thus, based on AS 47.07.045's statutory definition of "materially improved" (above), the Division must show that the recipient no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement.⁵⁵

An assessment finding that a recipient's condition has materially improved must, pursuant to AS 47.07.045(b)(2), be reviewed by "an independent qualified health care professional under contract with the department." "Independent qualified health care professional" is defined, for purposes of those waiver categories which are not based on mental retardation or developmental disability, as "a registered nurse licensed under AS 08.68 who is qualified to assess" recipients of the waiver category at issue.⁵⁶

C. The Consumer Assessment Tool (CAT)

Under state Medicaid regulation 7 AAC 130.215, 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 activities of daily living (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.

The CAT numerical coding 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.⁵⁷ The scores which generate points are **1** (person requires supervision); **2** (person requires limited assistance); **3** (person requires extensive assistance); and **4** (person is totally dependent).

The second component of the CAT scoring system for ADLs is the *support score*. These scores rate the degree of assistance which a person requires in order to perform a particular ADL.

⁵⁵ The statute does not require the Division to compare the recipient's most recent assessment to any prior assessment. However, if comparing the current assessment to a prior assessment helps the Division determine whether the recipient still has a functional limitation or cognitive impairment, the Division may make that comparison. In addition, prior assessments may contain admissible evidence that could be used to support or controvert the Division's current assessment.

⁵⁶ The statute does not impose any specific requirements as to the scope or nature of the third-party review. Accordingly, the statute does not require anything more than a "paper review." However, the *de novo* hearing process used here provides an opportunity for recipients to present additional information beyond that previously provided, and to challenge the reliability of the information provided to the third party reviewer.

⁵⁷ 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."

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).

An individual can qualify for waiver services by scoring 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.⁵⁸ The five "shaded" ADLs are bed / body mobility, transfers, locomotion, eating, and toilet use.⁵⁹

D. Does Mr. H Require Skilled or Intermediate Level Nursing Care?

The findings in the Division's assessment that Mr. H currently has no nursing needs, and Ms. Rogers's hearing testimony that Mr. H currently has no nursing needs, were consistent and credible. No testimony or other evidence was presented on Mr. H's behalf tending to show that he currently has any nursing needs. In fact, at hearing, Mr. H's representative stated that he did not contest the Division's determination that Mr. H currently requires no intermediate or skilled nursing care. Accordingly, Mr. H failed to demonstrate a need for nursing services as defined by 7 AAC 140.510 and the Consumer Assessment Tool. The final issue is whether Mr. H qualifies for waiver services based on his level of need for assistance with his activities of daily living (ADLs).

E. Does Mr. H Qualify for Waiver Services Based on a Need for Extensive Assistance with Three or More "Shaded" Activities of Daily Living?

The Consumer Assessment Tool's scoring summary is located at page 29 of the CAT.⁶⁰ 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 measured by the CAT. As discussed above, Mr. H does not currently qualify for waiver services on that basis. An alternative means by which one may demonstrate a need for a Nursing Facility Level of Care 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.⁶¹ The CAT scores which the

⁵⁸ Ex. E p. 20.

⁵⁹ Ex. E p. 20.

⁶⁰ Ex. E p. 31.

⁶¹ Ex. E p. 20.

Division assigned to Mr. H with regard to the five "shaded" ADLs are: bed mobility: 0/0; transfers: 2/2; locomotion: 2/2; eating: 0/1; and toilet use: 0/0.⁶²

The findings in the Division's assessment that Mr. H does not currently require extensive assistance with any ADL, and Ms. Rogers's hearing testimony that Mr. H does not currently require extensive assistance with any ADL, were consistent and credible. No testimony or other evidence was presented on Mr. H's behalf tending to show that he currently needs extensive assistance with any ADL. At hearing, Mr. H's representative stated that he did not contest the Division's determination that Mr. H does not currently require extensive assistance with any ADL. Accordingly, the preponderance of the evidence indicates that Mr. H does not require extensive assistance with any shaded ADL.

IV. Conclusion

The Division correctly determined that Mr. H does not currently require skilled or intermediate level nursing services as defined by its regulations. The Division also correctly determined that Mr. H does not qualify for waiver services, under the CAT, based on the level of his need for assistance with ADLs. Accordingly, the Division's decision that Mr. H is no longer eligible for the waiver services program is affirmed. Should Mr. H's condition deteriorate in the future, he may reapply for waiver services at that time. Finally, it is possible that, as a result of the termination of his waiver services, Mr. H may become eligible for additional Personal Care Assistant (PCA) services.

Dated this 13th day of November, 2014. *Signed* _____
Jay D. Durych
Administrative Law Judge

Adoption

The undersigned, by delegation from of the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 24th day of November, 2014.
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.]

⁶² Ex. E p. 14.