

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

In the Matter of: )  
 )  
 K L ) OAH No. 14-2080-MDS  
 ) Agency No.

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**DECISION**

**I. Introduction**

K L applied for services under the Medicaid Home and Community-Based Waiver Services (Choice Waiver) program administered by the Division of Senior and Disability Services.<sup>1</sup> The division assessed Ms. L's physical, emotional and cognitive functional abilities<sup>2</sup> and determined that she was ineligible on the ground that she did not need skilled or intermediate nursing care.<sup>3</sup> Ms. L filed an appeal.<sup>4</sup>

The assigned administrative law judge conducted a telephonic hearing. Ms. L was represented by her daughter and power of attorney, L J. Tammy Smith represented the division. N Z, Ms. L's care coordinator, participated. Ms. J testified, as did Amanda McCrary, a registered nurse who conducted the assessment.

Ms. L established, by a preponderance of the evidence, that she requires extensive assistance for transfers, locomotion, and toileting. Therefore, the division's decision to deny her application is reversed.

**II. Facts**

K L is 75 years old.<sup>5</sup> Ms. L's primary diagnosis is paralysis agitans (Parkinson's disease),<sup>6</sup> and she has a secondary diagnosis of diabetes.<sup>7</sup> She also has congestive heart failure, with resulting moderately severe lower extremity (excess fluid retention in body tissues).<sup>8</sup>

*1. Bed Mobility*

Ms. L sleeps in a standard bed.<sup>9</sup> Ms. L is able, with difficulty, to roll over in bed by herself.<sup>10</sup>

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<sup>1</sup> See AS 47.07.045.

<sup>2</sup> See 7 AAC 130.213(a).

<sup>3</sup> Ex. D, p. 1. See 7 AAC 130.205(a)(4); -.215(4)(A); 7 AAC 140.510-515.

<sup>4</sup> 7 AAC 130.219(f).

<sup>5</sup> Ex. E, p. 3.

<sup>6</sup> Ex. E, pp. 3, 23. See Dorland's Illustrated Medical Dictionary (27<sup>th</sup> ed. 1988) at 1224.

<sup>7</sup> Ex. E, p. 3.

<sup>8</sup> Ex. 2; Ex. 4, p. 1. See Dorland's, p. 530.

<sup>9</sup> See Ex. E, p. 29.

<sup>10</sup> Ex. E, p. 8.

## 2. *Transfer*

Ms. L does not have a lift chair.<sup>11</sup> She generally can transfer on and off a couch, using a rocking motion to stand, but she sometimes needs help to stand.<sup>12</sup> She does not sit with a controlled motion, but rather falls backward into a seated position.<sup>13</sup> She has fallen while attempting to transfer.<sup>14</sup> At a medical examination on October 1, she needed assistance to get onto an examination table, and was very hesitant with foot placement.<sup>15</sup>

## 3. *Locomotion*

Ms. L can move about her residence, sometime with and sometimes without a walker,<sup>16</sup> but not safely, as she is unsteady on her feet, subject to stutter steps, not always able to start or stop her movement, and prone to frequent falls.<sup>17</sup> She had multiple falls in the year prior to the assessment,<sup>18</sup> and has fallen with increased frequency in recent months.<sup>19</sup> Outside the home she uses a wheelchair.<sup>20</sup>

## 4. *Eating*

Ms. L has sufficient range of motion and gross and fine motor skills to feed herself using regular eating utensils.<sup>21</sup> She has had some difficulty swallowing, but not to the point of choking.<sup>22</sup>

## 5. *Toilet Use*

Ms. L is frequently incontinent. She sometimes transfers on and off a toilet independently with difficulty, but sometimes needs physical assistance.<sup>23</sup> She needs grab bars,

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<sup>11</sup> Ex. E, p. 29.

<sup>12</sup> Ex. E, pp. 6, 8; L. J Testimony.

<sup>13</sup> L. J Testimony.

<sup>14</sup> L. J Testimony.

<sup>15</sup> Ex. 4, p. 1.

<sup>16</sup> See Ex. E, p. 9.

<sup>17</sup> Ex. 2, p. 1 (Dr. C, 12/2/2014); Ex. E, p. 25; A. . See also 6/9/2014 Clinical note (“Chief complaint is that she can barely walk”; “Pt not steady on feet safety issue”). See generally, L. J Testimony.

<sup>18</sup> See Ex. E, p. 5 (“Last fall was September 14, stumbled this morning. Has scraped elbow from falling.”) (9/29/2014 assessment); Ex. 4, p. 1 (“fell at home...and abraded elbow”) (10/1/2014 report; medical visit); Ex. 3, p. 2 (10/16/2014 report; L. J). The latter report appears to refer to a fall in August. See Ex. 7, p. 2 (“In August her daughter found her mother naked on the floor, in her own urine.”).

<sup>19</sup> See Ex. 7 (10/20/2014 Critical Incident Report, fall 10/18/2014) (“this was approximately her ninth fall in six month[s].”); Ex. 6 (11/6/2014 Critical Incident Report, fall 11/4/2014, “Within the last three month[s] Janet had at least 5 falls.”); Ex. 5 (12/11/14 Critical Incident Report, falls 12/8, 12/9, 12/10); Ex. 10 (12/22/2014 report, 12/17/2014 fall).

<sup>20</sup> Ex. E, p. 28.

<sup>21</sup> See Ex. E, p. 11.

<sup>22</sup> Ex. E, p. 11.

<sup>23</sup> See *supra*, notes 13, 14.

but does not have them (a towel rack tore out of the wall when she used it as a grab bar).<sup>24</sup> In 2013, she fell while transferring of the toilet, fell into her bathtub, and injured her coccyx and head.<sup>25</sup> Due to her swollen legs, limited range of motion in her right arm, and tremors, she typically needs assistance to put on and remove incontinence undergarments.<sup>26</sup>

#### 6. *Cognition*

Ms. L has long and short term memory problems,<sup>27</sup> and she cannot remember or use information and requires continual verbal reminders.<sup>28</sup> She is often confused.<sup>29</sup> She makes poor decisions regarding tasks of daily life and requires cueing and supervision,<sup>30</sup> and in particular is unable to independently maintain her medication regime.<sup>31</sup> She can be disoriented when in the community, and she is able only to carry on simple conversations.<sup>32</sup>

#### 7. *Behavior*

Ms. L is not always aware of her own need for assistance, but she accepts assistance when provided. She is not demanding, disruptive or aggressive.<sup>33</sup>

### **III. Discussion**

The purpose of the Choice Waiver program is to offer individuals the choice to receive home and community-based services as an alternative to institutional care.<sup>34</sup> An adult age 65 or older is eligible to receive home and community-based services under the program if he or she requires the level of care that is normally provided in a nursing facility.<sup>35</sup> Services available under program include residential supported-living services provided in an assisted living home.<sup>36</sup>

The division determines whether an applicant requires nursing facility level of care (either skilled nursing care or intermediate care) for purposes of the Choice Waiver program based on the results of the Consumer Assessment Tool (CAT) (2009 rev.).<sup>37</sup> The CAT is a form

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<sup>24</sup> See Ex. E, pp. 11, 29.

<sup>25</sup> No Name Medical Associates note (Jul 8, 2013).

<sup>26</sup> See Ex. E, pp. 6 (“Limited ROM in R arm”), 10 (“Tremor in hands, more pronounced in L hand.”), 11; Ex. 4, p. 1 (“worsening left-sided tremor”) (10/1/2014) (Dr. C).

<sup>27</sup> Ex. E, pp. 6, 18.

<sup>28</sup> Ex. E, pp. 1.

<sup>29</sup> See e.g., Ex. E, p. 6.

<sup>30</sup> Ex. E, p.18; Ex. 3, p. 1. See generally L. J Testimony.

<sup>31</sup> See Ex. 3, p. 1

<sup>32</sup> Ex. E, pp. 1, 24.

<sup>33</sup> Ex. E, pp. 2. 19.

<sup>34</sup> 7 AAC 130.200.

<sup>35</sup> AS 47.07.045(a); 7 AAC 130.205(d)(3).

<sup>36</sup> 7 AAC 130.220(b)(3), -.255

<sup>37</sup> 7 AAC 130.215(4); 7 AAC 160.900(d)(6). See 7 AAC 140.510, -.515.

created by the Department of Health and Social Services to evaluate an individual's functional ability.<sup>38</sup>

One section of the CAT covers the individual's physical abilities with respect to specified self-care tasks (activities of daily living),<sup>39</sup> such as getting in and out of bed, moving about, dressing, eating, bathing, using a toilet, and grooming.<sup>40</sup> Other sections of the CAT cover the individual's cognition and behavior.<sup>41</sup> An individual may be found to need nursing facility level of care services, using the CAT, based on the individual's scores for five specific activities of daily living: bed mobility, transfers, locomotion, eating, and toilet use.<sup>42</sup> An individual may also be found to need nursing facility level of care services based on the individual's scores for cognition and behavior, either alone or in conjunction with their scores for the specified activities of daily living.<sup>43</sup>

An applicant for waiver services bears the burden of proof to establish eligibility.

A. Scores

An individual's ability to perform the five specified of activities of daily living may be scored zero (independent), one (supervision), two (limited physical assistance), three (extensive physical assistance), or four (dependent).<sup>44</sup> The level of assistance is defined by regulation and is also addressed in the CAT, for scoring purposes. As defined by regulation, a person who needs weight bearing assistance may be considered to require limited assistance or extensive assistance.<sup>45</sup> For scoring purposes, the two levels are distinguished depending on the frequency

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<sup>38</sup> See generally, <http://dhss.alaska.gov/dsds/Documents/docs/cat-pcatOnlineFlyer.pdf> (accessed June 19, 2013). In addition to being used in assessments for eligibility for the Choice Waiver program, the CAT is used in determining eligibility for personal care attendant (PCA) services under other programs. *Id.*

<sup>39</sup> The term "activities of daily living" is not defined for purposes of the Choice Waiver program. The CAT is utilized for both the Choice Waiver program and the provision of personal care assistance under another Medicaid program. For purposes of personal care services provided by a personal care attendant, specific types of activities are described as activities of daily living. See 7 AAC 125.030(b)(1)-(8). The CAT's descriptions of the activities to be scored is not in all cases identical to the regulatory definitions.

<sup>40</sup> See Ex. E, pp. 8-13, 21-22. See also Ex. E, p. 6 ("Functional assessment").

<sup>41</sup> Ex. E, pp. 1-2, 18-20. See also, Ex. E, p. 6 ("Cognition").

<sup>42</sup> Ex. E, p. 32 (NF 1e).

<sup>43</sup> See Ex. E, p. 32 (NF 2-7).

<sup>44</sup> Ex. E, pp. 8, 9, 11.

<sup>45</sup> See 7 AAC 125.020(a)(1) ("help with weight-bearing when needed"); 7 AAC 125.020(a)(2) ("periodically requires direct physical help from another individual for weight-bearing support"). The difference is a matter of degree. See *In Re E.C.*, OAH No. 13-0438-MDS, at 13-14 (Commissioner of Health and Social Services 2014); *In Re V.H.*, OAH No. 12-0559-MDS, 9 (Commissioner of Health and Social Services 2012).

of the need for weight-bearing assistance: if weight bearing assistance is needed three or more times a week, the assistance is scored as extensive assistance.<sup>46</sup>

For cognition and behavior, scores from zero to three may be provided, based on the presence of specified cognitive markers or problem behaviors.<sup>47</sup>

1. *Bed Mobility*

Ms. L was scored as independent with this activity.<sup>48</sup> She did not report an inability to reposition herself in bed or to sit up.<sup>49</sup> She has not established a need physical assistance with this activity.

2. *Transfer*

Ms. L was scored as requiring limited assistance with this activity. Ms. J testified Ms. L does not lower herself into a seat in a controlled manner, and that she falls backward. A person who transfers in that fashion requires weight bearing assistance in order to safely transfer from a standing to a seated position: “falling backward” is falling, not transferring, and indicates a need for weight bearing assistance while transferring to a seated position. Moreover, Ms. L reported that she sometimes needs “help” to stand, which suggests an occasional need for weight bearing assistance to stand. On balance, the preponderance of the evidence is that Ms. L requires weight bearing assistance for transfers at least three times a week, which constitutes extensive assistance for purposes of the CAT.

3. *Locomotion*

Ms. L can move about her residence, and does not always use a walker,<sup>50</sup> but she cannot do so safely, even with a walker, due to the effects of her Parkinson’s disease.<sup>51</sup> She had multiple falls in the year prior to the assessment,<sup>52</sup> and she has fallen with increased frequency in recent months.<sup>53</sup> Outside the home she uses a wheelchair.<sup>54</sup>

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<sup>46</sup> Ex. E, p. 6. See, e.g., In Re F.V., OAH No. 13-1306/0781-MDS, at 10 (Commissioner of Health and Social Services 2013).

<sup>47</sup> Ex. E, pp. 18, 19.

<sup>48</sup> Ex. E, p. 8.

<sup>49</sup> See Ex. E, p. 8.

<sup>50</sup> See Ex. E, p. 9.

<sup>51</sup> Ex. 2, p. 1 (Dr. C, 12/2/2014); Ex. E, p. 25. See also 6/9/2014 Clinical note (“Chief complaint is that she can barely walk”; “Pt not steady on feet safety issue”).

<sup>52</sup> See Ex. E, p. 5 (“Last fall was September 14, stumbled this morning. Has scraped elbow from falling.”) (9/29/2014 assessment); Ex. 4, p. 1 (“fell at home...and abraded elbow”) (10/1/2014 report; medical visit); Ex. 3, p. 2 (10/16/2014 report; L. J). The latter report appears to refer to a fall in August. See Ex. 7, p. 2 (“In August her daughter found her mother naked on the floor, in her own urine.”).

<sup>53</sup> See Ex. 7 (10/20/2014 Critical Incident Report, fall 10/18/2014) (“this was approximately her ninth fall in six month[s].”); Ex. 6 (11/6/2014 Critical Incident Report, fall 11/4/2014, “Within the last three month[s] Janet had

Ms. L was scored as independent with locomotion. But the clear preponderance of the evidence is that although she can move about on her own, she cannot do so safely. Her falls occur not only when she transfers, but also while moving from one location to another. Even when using a walker, Ms. L has a high risk of falling. The risk of a fall may indicate a need for a balance assist or for weight bearing assistance, depending on the degree of the recipient's condition. In Ms. L's case, her problems are not merely balance-related, but involve a serious neurological condition that may cause her to lurch with force, and her general weakness limits her own ability to restrain herself. On balance, the preponderance of the evidence is that she needs weight-bearing physical assistance and least three times a week in order to safely move about her residence.

#### 4. *Eating*

Ms. L was scored as independent with this activity.<sup>55</sup> She did not establish that she needs physical assistance with this activity.<sup>56</sup>

#### 5. *Toilet Use*

Ms. L was scored as two (limited assistance) on this activity.<sup>57</sup> However, she is unable to don and remove briefs without physical assistance. Given that toileting involves transfers and locomotion, her history of a fall while toileting, and the absence of grab bars, she is properly scored as requiring extensive assistance, just as for transfers and locomotion.

#### 6. *Cognition*

An individual is given initial scores for cognition, supplemented by further scores if the individual meets a certain threshold on the initial scores.

##### a. *Initial Scores*

Initial scores are provided for memory, memory/recall ability, cognitive skills for daily decision-making, and professional nursing assessment, observation and management.<sup>58</sup>

Ms. L was scored as having short- and long-term memory problems. That score is correct. For memory/recall ability, she was scored as normally able to recall the current season, the location of her own room, and names and faces. There is no evidence to suggest that Ms. L

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at least 5 falls."); Ex. 5 (12/11/14 Critical Incident Report, falls 12/8, 12/9, 12/10); Ex. 10 (12/22/2014 report, 12/17/2014 fall).

<sup>54</sup> Ex. E, p. 28.

<sup>55</sup> Ex. E, p. 11.

<sup>56</sup> *See supra*, notes 20-21.

<sup>57</sup> Ex. E, p. 11.

<sup>58</sup> Ex. E, p. 18.

cannot normally recall the current season. There is no evidence that she wanders, or that she is unable to recall the names and faces of friends or relatives (without prompting). Ms. L has not shown she was scored incorrectly in the categories of “Memory” or “Memory/Recall Ability.”

Ms. L was scored at two, moderately impaired, in the category of “Cognitive Skills for Daily Decision-Making[.]” which the CAT describes as “mak[ing] decisions regarding tasks of daily life[.]”<sup>59</sup> The CAT describes moderately impaired for this category as “decisions poor, cues/supervision required[.]”<sup>60</sup> A score of three, severely impaired, is described as “never/rarely made decisions[.]”<sup>61</sup> Ms. L lives independently, and exercises her own judgment. She may make poor decisions, but she is not so impaired that she cannot make decisions at all, and she responds appropriately when directed by cues or supervision. She has not shown that she was scored improperly in this category.

As for nursing assessment, observation and management for her behavioral problems, the evidence establishes that Ms. L was correctly scored as not needing those services.

#### b. Supplemental Scores

Supplemental cognitive scores of zero to three or four are provided in each of five categories (memory for events, memory and use of information, global confusion, spatial orientation, and verbal communication).<sup>62</sup> The sum of the scores may be used, in conjunction with the scores for activities of daily living, to determine eligibility

In the category of memory for events, Ms. Foley was scored as zero, which the CAT states is appropriate for a person who can recall recent events and the names of acquaintances.<sup>63</sup> Ms. L did not show that she has memory issues with respect to events. As for memory and use of information, Ms. L as four, the highest possible score.

For global confusion, Ms. L was scored as zero, which the CAT describes as “[a]ppropriately responsive to environment.” The evidence indicates that Ms. L is frequently confused. The evidence is sufficient to support a score of two (“[p]eriodic confusion during daytime”) on this category. In the category of spatial orientation, Ms. L was scored as one (“[s]patial confusion when driving or riding in local community”).<sup>64</sup> A higher score is appropriate for persons who periodically become lost, either when navigating in the community,

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<sup>59</sup> Ex. E, p. 18.

<sup>60</sup> Ex. E, p. 18.

<sup>61</sup> Ex. E, p. 18.

<sup>62</sup> Ex. E, p. 1.

<sup>63</sup> Ex. E, p. 1.

<sup>64</sup> Ex. E, p. 1.

or within their home.<sup>65</sup> Ms. L did not establish that she periodically becomes lost while trying to find her way around her home or her community. For the last category, verbal communication, Ms. L was scored as a two, which is appropriate for persons who are “[a]ble to carry out only simple conversations.”<sup>66</sup> Ms. L did not establish that she is entitled to a higher score, which would only be appropriate if she were “[u]nable to speak coherently or make [her] needs known”).<sup>67</sup>

Ms. L’s combined score on all five categories is nine: four for memory and use of information, two for global confusion, one for spatial orientation, and two for verbal communication.

### 7. *Behavior*

An individual is given initial scores for behavior, supplemented by further scores if the individual meets a certain threshold on the initial scores.

#### a. *Initial Scores*

Initial scores are provided for wandering, verbal abuse, physical abuse, socially inappropriate or disruptive behavior, and resistance to care.<sup>68</sup> Ms. L did not establish that she exhibits any of those behaviors.

#### b. *Supplemental*

Supplemental scores of from zero to three, four or five are provided for sleep patterns, wandering, behavioral demands on others, danger to self and others, and awareness of needs/judgment.<sup>69</sup> The sum of the scores may be used, in conjunction with the scores for activities of daily living, to determine eligibility

Ms. L was scored for abnormal sleeping patterns, but none of the other categories. Arguably, given her frequent confusion and apparent inability or refusal to maintain her medication regime, she should have been provided a score of one or two in the category of awareness of needs/judgment. But she did not establish that her combined score should be any greater than three.

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<sup>65</sup> Ex. E, p. 1.

<sup>66</sup> Ex. E, p. 1.

<sup>67</sup> Ex. E, p. 1.

<sup>68</sup> Ex. E, p. 19.

<sup>69</sup> Ex. E, pp. 2, 20.



B. Eligibility

Once the CAT has been completed and the applicant has been properly scored for the various activities of daily living, the CAT provides a matrix that determines the person's eligibility for Choice Waiver services.<sup>70</sup> The matrix has seven sections, NF 1-NF 7. Eligibility is established under either section NF 1 or NF 7.

Persons are eligible under section NF 1 if they establish a need for regular professional nursing services<sup>71</sup> or if their scores on three of the five specified activities of daily living are three or higher.<sup>72</sup> As explained above, Ms. L requires extensive assistance with at least three of the five specified activities of daily living.<sup>73</sup> She is therefore eligible for Choice Waiver services under NF 1, and it is not necessary to address her eligibility under NF 2-NF 7.

**IV. Conclusion**

Ms. L established that she is eligible for Choice Waiver services. The division's decision is therefore reversed.

DATED March 23, 2015.

Signed

Andrew M. Hemenway  
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 6<sup>th</sup> day of May, 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.]

<sup>70</sup> Ex. E, p. 31.

<sup>71</sup> Ex. E, p. 31 (NF 1a-1d).

<sup>72</sup> Ex. E, p. 31 (NF 1e).

<sup>73</sup> *Supra*, pp. 5-6.