

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

In the Matter of )  
 )  
 J L ) OAH No. 14-2271-MDS  
 ) Division No.  
\_\_\_\_\_)

**DECISION**

**I. Introduction**

J L applied for Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (Division) denied his application.<sup>1</sup> Mr. L requested a hearing.<sup>2</sup>

Mr. L’s hearing was held on February 18, 2015. Present with Mr. L were Service Coordinator D Z, E G, and Mr. L’s son-in-law Q U. Angela Ybarra represented the Division.

Mr. L has significant physical impairments. However, his impairments do not rise to the level necessary to qualify him for Waiver services. As a result, the denial of his application for Waiver services is upheld.

**II. Facts<sup>3</sup>**

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

Mr. L is 74 years old and weighs roughly 370 pounds. Throughout 2014 and at the time of the hearing, he lived in a duplex next door to his daughter and son-in-law, Q U. His documented medical diagnoses include coronary atherosclerosis, hypertension, hyperlipidemia, chest pain, osteoarthritis in his legs and chronic airway obstruction/COPD.<sup>4</sup> Walking any distance has become increasingly difficult and leaves Mr. L extremely short of breath and in pain.

Angela Hanley, RN, assessed Mr. L to determine his eligibility for Waiver services on June 25, 2014. Her conclusions regarding Mr. L’s physical and mental function are documented on the Consumer Assessment Tool (CAT). She found Mr. L to be cognitively well-oriented. His occasional need for direction or reminders and his minimal difficulty remembering and using information resulted in a total cognitive score of 2.<sup>5</sup> Mr. L did not display any behavior issues

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<sup>1</sup> Ex. D.

<sup>2</sup> Ex. C.

<sup>3</sup> These facts are based upon Ex. E, Ex. G, and the testimonies of J L, Q U, D Z and E G.

<sup>4</sup> Ex. E, pp. 5, 23; Ex. G, pp. 2-7.

<sup>5</sup> Ex. E, p. 1.

such as wandering, being verbally or physically abusive, or socially inappropriate behavior.<sup>6</sup> He did not require professional nursing services, therapy from a qualified therapist, or special treatments or therapies.<sup>7</sup>

With regard to the five activities of daily living (ADLs) that determine Waiver eligibility, Mr. L's total self-performance score on the assessment was 0, indicating that Mr. L is independent or requires oversight help only 1 or 2 times per week for those activities.<sup>8</sup> The five ADLs are bed mobility, transfers, locomotion (walking), eating and toileting.<sup>9</sup>

Mr. L disagreed with the assessment's conclusions about his physical care needs. His primary concerns focused on his risk of falling and being unable to get back up, as well as his need for additional assistance with household chores, cooking and self-care, such as bathing and shaving.<sup>10</sup> Mr. L cannot stand for long or walk very far before his weakened legs, chest pain and shortness of breath require him to sit and rest. He often takes nitroglycerin for pain and uses a nebulizer to walk even 15-20 feet to his kitchen or bathroom. He was recently placed on oxygen to help with the severe shortness of breath he experiences during exertion.<sup>11</sup> While moving from place to place within the house, he uses a four-prong cane, or sometimes a walker, and he frequently must rest on strategically-placed stools. He shuffles his feet, has an unsteady gait, and can experience balance problems while standing.

It is difficult for Mr. L to rise out of chairs like his recliner, and he sweats and shakes with the effort of standing up. Due to his discomfort and fear of falling, he now spends most of his waking hours in his chair. When he moves from a sitting to a standing position from his recliner, Mr. L can rock himself to the edge and then stand while steadying himself using his four-prong cane. He also may rely on other furniture or a person to steady his balance when he first stands up. Mr. L cannot independently return his reclining chair to an upright position if it fully

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<sup>6</sup> Ex. E, p. 2, 19.

<sup>7</sup> Ex. E, pp. 7, 15-17. Ms. Z indicated at the hearing that physical therapy had been recommended for Mr. L, but his leg pain had precluded him from pursuing that recommendation.

<sup>8</sup> Ex. E, p. 20.

<sup>9</sup> Ex. E, p. 20 (shaded areas).

<sup>10</sup> Mr. L submitted medical records including his doctor's written recommendation for more help at home with cooking, cleaning, shaving, dressing and personal care due to his reduced capacity. Ex. G, p.2.

<sup>11</sup> Ex. G, pp. 2, 7.

reclines, and he has needed significant physical assistance on the two or three occasions that has happened.<sup>12</sup>

Mr. L has fallen twice over the past year and needed physical help getting up. Around February 2014, he fell out of bed in the early morning and pounded on the floor until his son-in-law awoke and came to help him. The other time, several months prior to hearing, his legs gave out as he stood up from a stool. Mr. L crawled to a telephone and called the police to come help him back up. Mr. L feels his legs are not reliable and could give out on him while he is standing up or walking.

Mr. L experiences some incontinence when he can't get to the bathroom in time, and such episodes may be increasing. In the bathroom, he can get himself on and off the toilet if he uses the grab bars that are installed there. He is otherwise capable of caring for all aspects of his toileting needs. The assessment noted that he needs extensive one-person physical help with transfers in and out of the bathtub for safety when he bathes, however.<sup>13</sup>

Mr. L cannot stand long enough to cook for himself, but he is able to microwave prepared foods. He does not need any assistance eating or drinking.

Mr. L's daughter and son-in-law check in on him daily and help as needed, but they are not always available. When he visits, Mr. U typically does not provide weight-bearing physical assistance with locomotion, transfers or toileting. He stands by in case more help is needed, or may offer guidance or other light assistance. On several occasions over the last year, however, Mr. U has exerted significant effort to help Mr. L up after a fall or to get out of his stuck recliner. Mr. L receives limited help weekly from a personal care assistant, who mostly cleans and cooks for him. When she directly assists him, she takes his arm to help him remain balanced, but she does not pull him. Once he is steady, he usually walks unassisted using his four prong cane and holding on to doorknobs or other furniture for stability.

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<sup>12</sup> Mr. U expended significant physical effort to pull Mr. L up once when the recliner got stuck in a reclined position. The police were called to help him up on a different occasion when the recliner could not be returned upright.

<sup>13</sup> Ex. E, p. 13; Ex. F, p.2.

### III. Discussion

#### A. Method for Assessing Eligibility

The Alaska Medicaid program provides Waiver services to adults with physical disabilities who require “a level of care provided in a nursing facility.”<sup>14</sup> The purpose of these services is “to offer a choice between home and community-based waiver services and institutional care.”<sup>15</sup>

The nursing facility level of care<sup>16</sup> requirement is determined in part by an assessment which is documented by the CAT.<sup>17</sup> The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,<sup>18</sup> and whether an applicant has impaired cognition or displays problem behaviors.<sup>19</sup> Each of the assessed items is coded and contributes to a final numerical score. For instance, if an individual required 5 days or more of therapies (physical, speech/language, occupation, or respiratory therapy) per week, he or she would receive a score of 3.<sup>20</sup>

The CAT also records the degree of assistance an applicant requires for activities of daily living, which include five specific categories: bed mobility (moving within a bed), transfers (i.e., moving from the bed to a chair or a couch, etc.), locomotion within the home (walking or movement when using a device such as a cane, walker, or wheelchair), eating, and toilet use, which includes transferring on and off the toilet and personal hygiene care.<sup>21</sup>

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

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<sup>14</sup> 7 AAC 130.205(d)(1)(B) and (d)(2).

<sup>15</sup> 7 AAC 130.200.

<sup>16</sup> See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

<sup>17</sup> 7 AAC 130.230(b)(2)(B).

<sup>18</sup> Ex. E, pp. 15-17.

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

<sup>20</sup> Ex. E, p. 31.

<sup>21</sup> Ex. E, p. 20.

A person can also receive points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive behaviors, etc.), and required assistance with the five specified activities of daily living.<sup>22</sup>

In order for a person who only has physical assistance needs to score as eligible for Waiver services on the CAT, he or she would need a self-performance code of 3 (extensive assistance) or 4 (total dependence) and a support code of 2 or 3 for three or more of the five specified activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting).<sup>23</sup>

The results of the assessment portion of the CAT are then scored. If an applicant's score is a 3 or higher, the applicant is medically eligible for Waiver services.<sup>24</sup>

***B. Burden of Proof***

In this case, Mr. L seeks Waiver eligibility and bears the burden to prove by a preponderance of the evidence that he satisfies eligibility requirements.<sup>25</sup> He can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs.<sup>26</sup>

***C. Eligibility***

There is no dispute that Mr. L does not require professional nursing services, therapy from a qualified therapist, specialized treatment, or other therapies.<sup>27</sup> There is no dispute about any needs for professional nursing intervention to manage cognition or behavioral problems, nor is there any assertion that Mr. L is totally dependent (self-performance code of 4) for any of the five ADLs assessed on the CAT for Waiver eligibility. As a result, the only way Mr. L could qualify for Waiver services is if he requires extensive one person physical assistance (self-performance code of 3, support code of 2) with three or more of the five ADLs.<sup>28</sup>

The evidence is that he is independent in the area of eating. This ADL refers to how a person eats and drinks, not including food preparation or cooking.<sup>29</sup> Mr. L's ability to care for himself in this area is not in question.

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<sup>22</sup> Ex. E, p. 31.

<sup>23</sup> Ex. E, p. 31.

<sup>24</sup> Ex. E, p. 31.

<sup>25</sup> 7 AAC 49.135.

<sup>26</sup> 2 AAC 64.290(a)(2).

<sup>27</sup> Mr. L's newly prescribed oxygen treatment addressed the shortness of breath he experienced from an existing condition rather than a new or recent one, so would not qualify for points on the professional nursing services page. See Ex. E, p. 15.

<sup>28</sup> Ex. E, p. 31 (CAT Scoring, NF.1- NF.7).

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

There was very little evidence regarding bed mobility. The assessment indicates that Mr. L manages this activity independently. Mr. L did not dispute this conclusion, except by referring to one episode in which he fell out of bed and could not get back up. This incident occurred approximately one year before the hearing. Because the assessment looks at recent self-performance abilities, this event does not change the conclusion that Mr. L is independent with regard to bed mobility.

For purposes of the CAT, toileting refers to use of the toilet, including transfers on/off, cleansing, changing pads and adjusting clothing.<sup>30</sup> Bathing or showering is not included, so Mr. L's undisputed need for bathing assistance is not considered in his CAT toileting score. Mr. L credibly testified that he manages toileting activities on his own, using his bathroom grab bars to assist with transfers to and from the toilet. Mr. U also testified that he did not go into the bathroom with Mr. L, but was on stand-by to assist if needed. At most, therefore, toileting could be given a self-performance score of 1 (Supervision – oversight provided more than 3 times per week, or supervision plus non-weight bearing physical assistance provided only 1 or 2 times per week).

The appropriate self-performance scores for transfers and locomotion are closer questions. The assessment indicates that Mr. L is independent, meaning that at most he requires help or oversight only 1 or 2 times per week. There are reasonable safety concerns about Mr. L's risk of falling due to his unsteadiness after rising from a chair or while walking. Mr. L provided sufficient information to conclude that he frequently requires either supervision or some physical assistance with transfers or locomotion, and the assessment's self-performance score of 0 (independent) understates his needs in these areas.

The evidence supports a conclusion that Mr. L's needs for physical assistance with transferring and locomotion should result in a self-performance score of either 1 (supervision)<sup>31</sup> or 2 (limited assistance).<sup>32</sup> With the exception of the few times over the last year that he has needed help up from his recliner or from a fall, Mr. L did not report the need for regular weight-

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<sup>30</sup> Ex. E, p. 11.

<sup>31</sup> Supervision includes oversight, encouragement or cueing 3 or more times a week, or supervision plus nonweight-bearing physical assistance 1-2 times per week. Ex. E, pp. 8-9.

<sup>32</sup> Limited assistance includes receiving physical help in the guided maneuvering of limbs or other nonweight-bearing physical assistance three or more times per week, or it may include those actions plus weight-bearing assistance 1 or 2 times per week. Ex. E, pp. 8-9.

bearing assistance, which would result in a self-performance score of 3 (extensive assistance).<sup>33</sup> In any case, it is not necessary to determine whether the appropriate self-performance scores for transfers and locomotion are 1, 2, or 3. Even if Mr. L established the need for extensive assistance with these activities, it would not be sufficient to qualify him for Waiver services given his relative independence with bed mobility, eating and toileting.

#### **IV. Conclusion**

Mr. L did not present sufficient evidence to conclude that he requires extensive one person physical assistance (self-performance score of 3) with three or more of the five activities of daily living that are assessed on the CAT for Waiver eligibility. Because he did not meet this burden of proof, he is not eligible for Waiver services. The Division's decision to deny his application is upheld.

DATED this 29th day of May, 2015.

*Signed* \_\_\_\_\_  
Kathryn A. Swiderski  
Administrative Law Judge

### **Adoption**

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

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

DATED this 12<sup>th</sup> day of June, 2015.

By: *Signed* \_\_\_\_\_  
Name: Kathryn A. Swiderski  
Title/Agency: Administrative Law Judge/OAH

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

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<sup>33</sup> Extensive assistance includes weight-bearing support at least 3 or more times a week. Ex. E, pp. 8-9.