

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

In the Matter of)	
)	
T J)	OAH No. 15-0093-MDS
_____)	Division No.

DECISION

I. Introduction

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

Mr. J's hearing took place on March 26, 2015. He was represented by his guardian and brother, K J. Care Coordinator B C also participated on Mr. J's behalf. Gena O'Neal represented the Division. Jan Bragwell, R.N, testified for the Division.

T J has significant physical impairments as well as cognitive and behavioral issues related to his paranoid schizophrenia. However, Mr. J has not shown that his condition requires the nursing facility level of care that is required for Waiver eligibility. As a result, the denial of his application for Waiver services is upheld.

II. Facts³

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

T J's documented medical diagnoses include paranoid schizophrenia, end stage emphysema/COPD, leg pain, peripheral neuropathy in his foot, and incontinence.⁴ Since his diagnosis with schizophrenia, he has lived primarily with family members. In June 2014, he spent three weeks at the Alaska Psychiatric Institute (API) to assess his physical health and to address mental health issues in light of Mr. J's refusal to cooperate with medical care providers. While at API, Mr. J became the subject of a court order requiring monthly injections for his schizophrenia. He lived with family following his discharge from API and moved into an assisted living home on October 4, 2014. He was assessed for Waiver eligibility four days later,

¹ Ex. D.

² Ex. C.

³ These facts are based upon Ex. E, Ex. 1, and the testimonies of K J and Jan Bragwell.

⁴ Ex. E, pp. 5, 23; Ex. 1.

on October 8th, by Moli Atanoa, RN. Ms. Atanoa’s conclusions regarding Mr. J’s physical and mental function are documented on the Consumer Assessment Tool (CAT).

The assessment concludes that Mr. J does not require professional nursing services, therapy from a qualified therapist, or special treatments and therapies. Mr. J does receive a monthly injection for schizophrenia, however.⁵

Mr. J displays a number of problem behaviors. He is verbally abusive and resists care 1 to 3 days per week; however, the assessment indicates that his behaviors are easily altered.⁶ The supplemental screening tool for behavior adds that that Mr. J sleeps noticeably more or less than normal. His attitudes, disturbances and emotional states create consistent difficulties, but they are modifiable to manageable levels. He is disruptive or aggressive 1 to 3 times a week, or is sometimes extremely agitated or anxious, even after proper treatment. He does not understand his needs for self-care and would not cooperate even if given direction or explanation. This resulted in a total behavior score of 9 out of a possible 20.⁷

Mr. J’s cognitive assessment reflects short-term memory problems and indicates that he did not respond accurately to questions about the current season of the year or the names and faces of care providers. His decision-making skills regarding the tasks of daily life were rated “modified independence,” meaning he has some difficulty in new situations only.⁸

Five activities of daily living (ADLs) are assessed as part of the Waiver eligibility process: bed mobility, transfers, locomotion (walking), eating and toileting.⁹ The CAT summarized Mr. J’s physical assistance needs and concluded that he is capable of managing all of them either independently or with supervision.¹⁰ It rated Mr. J as independent in the area of eating (self-performance score 0, support score 0). For toilet use, he scored as independent, but he required some setup help (self-performance score 0, support score 1). In the areas of bed mobility, transfers and locomotion, the assessment identified him as needing supervision and setup help only (self-performance score 1, support score 1).¹¹ Mr. J disagrees with the assessment’s

⁵ Ex. 1, p. 2.

⁶ Ex. E, p. 19.

⁷ Ex. E, p. 2.

⁸ Ex. E, p. 18.

⁹ Ex. E, p. 20 (shaded areas).

¹⁰ Ex. E, p. 31. Supervision includes oversight, encouragement or cueing 3 or more times per week, or supervision plus nonweight-bearing physical assistance 1-2 times per week. Ex. E, pp 8-9, 12.

¹¹ Ex. E, p. 20.

conclusions about his physical assistance needs, particularly when those needs are viewed together with the cognitive and behavioral limitations of his schizophrenia.

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.”¹² The purpose of these services is “to offer a choice between home and community-based waiver services and institutional care.”¹³

The nursing facility level of care¹⁴ requirement is determined in part by an assessment which is documented by the CAT.¹⁵ The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,¹⁶ and whether an applicant has impaired cognition or displays problem behaviors.¹⁷ 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 3.¹⁸

The CAT also records the degree of assistance an applicant requires for activities of daily living, which include five specific categories: bed mobility (moving within a bed), transfers (i.e., moving from the bed to a chair or a couch, etc.), locomotion (walking or movement when using a device such as a cane, walker, or wheelchair) within the home, eating, and toilet use (which includes transferring on and off the toilet and personal hygiene care).¹⁹

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

¹² 7 AAC 130.205(d)(1)(B) and (d)(2).

¹³ 7 AAC 130.200.

¹⁴ See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

¹⁵ 7 AAC 130.230(b)(2)(B).

¹⁶ Ex. E, pp. 15-17.

¹⁷ Ex. E, pp. 18-19.

¹⁸ Ex. E, p. 31.

¹⁹ Ex. E, p. 20.

(physical assistance from two or more persons), that person receives points toward his or her total eligibility score on the CAT.

A person also can receive points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive behaviors, etc.), and required assistance with the five specified activities of daily living.²⁰

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).²¹

The results of the assessment portion of the CAT are then scored.²² If an applicant's score is a 3 or higher, the applicant is medically eligible for Waiver services.²³

B. Burden of Proof

Mr. J seeks Waiver services and bears the burden to prove by a preponderance of the evidence that he satisfies the eligibility requirements.²⁴ He can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs.²⁵

C. Eligibility

The first test for Waiver qualification that is relevant to this case requires a showing that T J needs extensive assistance (self-performance score of 3) or is completely dependent (self-performance score of 4) on others for three or more of the five ADLs.²⁶

A second way T J could qualify for Waiver services is if his cognitive skills for daily decision-making are rated “moderately impaired,” *and* professional nursing intervention is required at least 3 days a week to manage his cognitive issues, *and* he requires limited one person physical assistance (self-performance score 2; support score 2) on two or more ADLs. Alternatively, he could qualify by showing that his daily decision-making skills are “moderately

²⁰ Ex. E, p. 31.

²¹ Ex. E, p. 31.

²² The various tests are abbreviated “NF.1, NF.2” and so on up to “NF.6.” Under NF.1, a person can qualify if any of the questions are answered “yes.” Under the other tests, the scores are aggregated for a total nursing and ADL needs score, at NF.7. Ex. E, p. 31.

²³ Ex. E, p. 31 (NF.7).

²⁴ 7 AAC 49.135.

²⁵ 2 AAC 64.290(a)(2).

²⁶ Ex. E, p. 31 (NF.1e). Mr. J does not qualify under any of the other NF.1 categories.

impaired,” *and* his cognitive disabilities are rated 13 or higher on the supplemental screening tool, *and* he requires limited one person physical assistance on two or more ADLs.²⁷

A third way T J could qualify is by showing that specific problem behaviors occur at least 4 days a week, *and* either that professional nursing is needed at least 3 times a week to manage the behavior, *or*, that his behaviors are rated 14 or higher on the supplemental screening tool. This third method also requires a showing that limited one person physical assistance is required for at least two ADLs.²⁸

Scoring for Mr. J’s Activities of Daily Living

Mr. J’s physical ability to feed himself is not in question. Eating includes how a person eats and drinks regardless of skill.²⁹ Mr. J does not have teeth, but the evidence is that he can eat and drink on his own. His appetite is poor, however, and his mental illness impedes awareness of his self-care needs. He requires consistent oversight, encouragement or cueing to eat regularly and to take his nutritional supplement. Therefore, his self-performance score for eating should be 1 (supervision), with a support score of 1 (set up help).

Bed mobility refers to how someone moves to and from a lying position, turns side to side, and positions his body while in bed.³⁰ The nurse-assessor observed Mr. J position himself in bed without assistance, albeit slowly, and concluded that Mr. J manages this activity with supervision and set up help only (self-performance score 1, support score 1). K J testified that his brother had been asking for physical assistance to sit up in bed. K J explained that, at the time of the assessment, his brother would not allow the assisted living home staff to help him even if he needed it, because he had only lived there 4 days. His schizophrenia makes it difficult for him to have new people in his life, and he must build a relationship before trusting others and being willing to receive their help.³¹

For this reason, it is significant that Mr. J was requesting physical help to sit up in bed, as K J testified. This evidence is deemed more reliable than the assessment commentary for bed mobility because the assessing nurse did not observe Mr. J independently achieve every aspect of

²⁷ Ex. E, p. 31 (one point under NF.3, plus 2 points under NF.6).

²⁸ Ex. E, p. 31 (one point under NF.4, plus 2 points under NF.6).

²⁹ Ex. E, p. 11.

³⁰ Ex. E, p. 8.

³¹ The assessment also notes that Mr. J “has not yet allowed staff to assist with ADLs, staff is working on developing a working relationship.” Ex. E, p. 8. Someone apparently told the assessing nurse that Mr. J independently manages bed mobility tasks, which is noted under “Consumer report” in the assessment. K J testified that he did not participate in the assessment, and it is not clear who offered this comment.

bed mobility; her observation is that she watched him position himself in his bed. K J did not indicate how often his brother needs weight-bearing assistance to sit up. At a minimum, the appropriate bed mobility score is that one-person limited assistance is involved (self-performance score 2, support score 2).³² Even if Mr. J requires extensive assistance (self-performance score 3), however, it does not change the outcome of his case.³³

Transferring refers to how a person moves between surfaces, including to and from his bed, chair, or wheelchair, or to a standing position, but excludes transfers to/from the toilet or bath. The assessor observed Mr. J stand up from a dining chair and steady himself with his walker before moving forward. His brother helped by setting up the walker. Mr. J then sat down on the bed and positioned himself without hands-on help, resulting in a self-performance score of 1 and a support score of 1.³⁴

K J testified that his brother manages transfers well most of the time. However, he needs physical assistance getting up from low chairs like recliners, as well as help making sure he doesn't fall into lower chairs when sitting down. He has a history of falls, many of which occurred during transfers. K J stated that his brother fell approximately 2-3 times in October and November, and he needs assistance when going from a sitting to a standing position. The CAT also documents Mr. J's history of falls, his unsteady gait and his balance problems when he is standing.³⁵

The evidence supports the conclusion that Mr. J requires limited assistance (self-performance score 2, support score 2) when transferring, since he likely needs nonweight-bearing assistance at least 3 times per week, or weight-bearing assistance 1-2 times per week, for those times he gets in and out of low seating or when he begins losing his balance and fall.³⁶

Locomotion assesses how a person moves between locations in his room and other areas on the same floor.³⁷ To move from place to place within the assisted living home, Mr. J uses a walker. He drags his left leg and moves slowly and weakly. When standing still, he stands on

³² Limited assistance includes physical help in the guided maneuvering of limbs or other nonweight-bearing physical assistance 3 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.

³³ Extensive assistance includes weight-bearing support 3 or more times per week. Ex. E, p. 8.

³⁴ Ex. E, p. 8.

³⁵ Ex. E, p. 25 (Section M).

³⁶ At hearing, K J also testified about his brother's need for weight-bearing physical assistance to move his legs when transferring in and out of a vehicle. Such transfers are not part of this ADL, however.

³⁷ Ex. E, p. 9.

his good leg. As a result, his balance is unsteady. He runs short of breath and tires easily, which makes him more prone to losing his balance. Because of his unsteadiness and his history of falls, he requires supervision. Because Mr. J did not present sufficient evidence to conclude that he requires hands-on physical assistance to get from place to place within his home, his locomotion score of 1/1 is appropriate. (Self-performance score 1, support score 1).

Toileting refers to how a person uses the toilet room, transfers on/off the toilet, cleanses, changes pads, and adjusts clothes.³⁸ Assistance needs for bathing or showering are not included. The assessment indicates that Mr. J independently manages his toileting needs, though he requires some set up assistance for support. It also states that his medical provider noted him as “Independent – Wears Depends, No assist.”³⁹

Mr. J experiences regular urinary incontinence. At his assessment, Mr. J stated that he manages his toileting on his own, and he is able to change his pads or adult diapers himself when he is incontinent. There is no evidence contradicting these conclusions, so the toileting score of 0/1 is appropriate.

T J has not established eligibility for Waiver service based solely on his need for assistance with his ADLs. He does not require extensive one person assistance with three or more of the five ADLs, so he is not eligible for Waiver services under NF.1 of the CAT.

Other Waiver Qualification Tests

Since he is not automatically eligible based on his need for assistance with the ADLs, the CAT next looks to an applicant’s need for professional nursing services, therapies, and special treatments, as well as whether an applicant’s impaired cognition or problem behaviors require a nursing facility level of care.⁴⁰ Because T J requires at least limited one person assistance with two or more ADLs, he could qualify for Waiver services if he also can establish such acute cognitive or behavioral problems under CAT sections NF.3 or NF.4 as to credit him with one point.⁴¹ He does not make this showing.

³⁸ Ex. E, p. 11.

³⁹ Ex. E, p. 11.

⁴⁰ Ex. E, pp. 15-19, 31.

⁴¹ Mr. J does not gain a point towards eligibility under NF.2, the nursing services score, since he does not need professional level nursing services at least 3 days a week or special treatments or therapies that would qualify him. His monthly injection for schizophrenia does not result in a point at NF.2c. Similarly, the professional wound care he receives for his foot problems does not qualify for a nursing score point since he receives that care once every 2 months. Between visits to his provider, unskilled wound care is adequate.

At NF.3, the CAT looks to whether Mr. J should receive a point because of his cognitive impairments. Mr. J clearly has significant cognitive deficits, particularly with regard to his ability to recognize his own needs for self-care. The assessment concluded that his cognitive skills for daily decision-making are “modified independent,” meaning he has some difficulty in new situations only. The evidence indicates that Mr. J’s condition requires consistent cueing or supervision, however, because he otherwise makes poor decisions, for example by refusing to take medication, to eat, or to manage his hygiene.⁴² His cognitive score for daily decision-making therefore should have been rated “moderately impaired,” meaning that his decision-making is poor, and he requires cues or supervision.

Despite the above, Mr. J does not score a point under NF.3 of the CAT. There is no evidence that Mr. J is globally confused or spatially disoriented, for instance, such that he easily loses his bearings in his community, his neighborhood or his residence. As a result, he could not score 13 or more on the cognitive supplemental screening tool. Even though Mr. J has some memory problems and significantly impaired decision-making skills, his disability is not extensive enough to qualify for a point under NF.3.⁴³

At NF.4, the CAT assesses whether Mr. J should receive a point towards Waiver eligibility because of his problem behaviors.⁴⁴ He does not qualify here, however, because there is no showing that Mr. J exhibits specified problem behaviors at least 4 days a week (wandering, being verbally or physically abusive, or displaying particular socially inappropriate or disruptive behaviors).⁴⁵ Of the specified behaviors, the assessment notes that Mr. J was verbally abusive 1-3 times a week, but his behavior was easily altered and did not require professional nursing intervention. There is no evidence in the record to justify a different conclusion.⁴⁶ While Mr. J clearly exhibits a number of behavioral challenges, they are not considered severe enough for an additional point on the CAT.

⁴² Mr. J’s medical and psychiatric providers wrote that he “has severe cognitive deficits, delusional thought patterns, intrusive thought content and vegetative symptomology characteristic of chronic schizophrenia. His insight is fully impaired into the severity of his mental and physical health and subsequent needs, such as bathing, eating, medication management or socialization needs.” Ex. 1, p. 4.

⁴³ See Ex. E, p. 1, 31.

⁴⁴ Ex. E, p. 31.

⁴⁵ Ex. E, p. 19, 31.

⁴⁶ In addition, Mr. J has not shown that professional nursing assessment or management is required at least 3 days a week to manage or modify his behaviors, as is necessary under NF.4b, or that his behavior supports a score of 14 or higher on the behavior supplemental screening tool.

The evidence is that Mr. J's chronic health conditions are controlled, and continuous unskilled assessment and management can adequately meet his health care needs.⁴⁷ There is no dispute that Mr. J has benefitted from the services and continuing oversight at his current placement. The question for Waiver eligibility, however, is whether Mr. J's physical health care needs, in conjunction with his cognitive or behavioral condition, require a nursing home level of care.

IV. Conclusion

T J did not present information establishing that his physical care needs are sufficiently acute to qualify him for Medicaid Waiver services. The Division's decision to deny his application is upheld.

DATED this 9th day of June, 2015.

Signed _____

Kathryn A. Swiderski
Administrative Law Judge

Adoption

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

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

DATED this 23rd day of June, 2015.

By: *Signed* _____

Name: Kathryn A. Swiderski

Title: Administrative Law Judge

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

⁴⁷ His medical provider seems to agree with this assessment, writing that "a suitable placement for T J would be in an assisted living facility where they can monitor his care and needs 24 hours a day." Ex. 1, p.6.