

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

In the Matter of:)
)
K P. D) OAH No. 15-0309-MDS
) Agency Case No.

DECISION

I. Introduction

The issue in this case is whether K D remains eligible for Medicaid Home and Community-Based Waiver services (waiver services). The Division of Senior and Disabilities Services (Division) conducted an assessment on November 4, 2014 and subsequently determined that Ms. D no longer requires a nursing facility level of care (NFLOC), and is therefore no longer eligible to receive waiver services.¹

This decision concludes that although Ms. D 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, although Ms. D 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. The preponderance of the evidence indicates that Ms. D needs PCA services, but has the ability to function in a home setting without the need for wavier services. As a result, Ms. D is not presently eligible to receive waiver services. The Division's termination of Ms. D's waiver services is therefore affirmed.²

II. Facts

A. Ms. D's Medical Diagnoses and Reports from Medical Providers

Ms. D is a 51-year-old woman who lives in a single-level apartment or condominium.³ She lives with one child under 18 years of age.⁴ She is five feet, seven inches tall and weighs about 256 pounds.⁵ Her medical diagnoses are anemia, back pain (thoracic, chronic), B-vitamin and D-vitamin deficiencies, chest pain, chronic kidney disease (hypertensive, stage V), candidiasis of the skin and nails, diabetes mellitus, diabetic polyneuropathy, dysthymic disorder,

¹ Exs. D, E.

² Should Ms. D's medical condition or functional abilities worsen, she may reapply for waiver services at any time.

³ Ex. E3.

⁴ Ex. E3.

⁵ Exs. E12 and E25.

gout, gallstone pancreatitis, hyperparathyroidism of renal origin, hypertension, lumbago, morbid obesity, obstructive sleep apnea, osteoporosis, proteinuria, renal failure, schizoaffective disorder, and urinary incontinence.⁶ She takes 10 - 15 different medications each day.⁷

Ms. D has trouble sleeping and a lack of energy during the day.⁸ She has mood swings and feels depressed. She suffers from chest pain, joint pain, and heartburn/acid reflux. Sometimes the chest pain radiates down her right arm, and at times she has severe shortness of breath and/or pain with breathing. She sometimes also has nausea, and at times has numbness or tingling in her limbs, dizziness/vertigo, and poor balance. She also bruises easily.

Ms. D was previously on dialysis, but ceased those treatments in 2012.⁹ She has a fistula, and is going to have a "loop recorder" implanted in her chest to help with the diagnosis and monitoring of her heart problems. She is a likely candidate for a kidney transplant, and has also been recommended for back surgery to repair a ruptured intervertebral disk.¹⁰

An undated letter from T C-M, ANP states in relevant part as follows:¹¹

K D requires the use of her PCA full time to aid her with [her] current medical conditions She is also at risk to fall and has actually fallen several times at home. For her safety at home she should have a PCA to aid her from falling. If [Ms. D] was to fall at home and fracture her pelvis or femur there is a high likelihood the shock from the incident would commit her to end-stage renal disease and she would require dialysis again.

Her anemia of chronic kidney disease warrants frequent medical visits every two weeks for injections and evaluation. She requires assistance in getting to her appointments and [with] preparations for her appointments. She is on multiple medications and requires assistance with them.

On December 10, 2014 the Division sent a form titled "Level of Care Verification Request" to S E, ANP, CNN-NP, one of Ms. D's healthcare providers at the No Name Clinic.¹² In response to the question, "At this time, would you admit this patient to a skilled nursing facility?" Ms. E answered "no." In response to the question, "At this time, does this patient have intermediate nursing needs?" Ms. E again answered "no."

⁶ Ex. E5, Ex. 5, Exs. F45 - F47, Ex. 6 p. 3, and Ex. 7 pp. 3-4.

⁷ Ex. 7 p. 3,

⁸ All factual findings in this paragraph are based on Ex. 7 pp. 4-9 unless otherwise stated.

⁹ All factual findings in this paragraph are based on Ex. 2 p. 3 and Ms. D's hearing testimony unless otherwise stated.

¹⁰ Ex. 4 pp. 1-4.

¹¹ All factual findings in this paragraph are based on Ex. 1.

¹² All factual findings in this paragraph are based on Exs. F32 - F35 unless otherwise stated.

At hearing, Ms. D testified in relevant part as follows:

1. She was previously undergoing dialysis, but ceased dialysis about two or three years ago. At the time of her assessment on February 18, 2013, she had only been off dialysis for about three or four months.
2. She is going to have a "loop recorder" surgically implanted in her chest to help diagnose her heart problems.
3. She believes she requires extensive assistance with body mobility, transfers, and toileting.

B. The Division's Findings from its 2013 and 2014 Assessments

Ms. D has received Medicaid Home and Community-Based Waiver services since 2012 or before.¹³ Ms. D was previously assessed as to her eligibility for waiver services on February 18, 2013 by Leanne McGahan, R.N.¹⁴ 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.¹⁵ Based on her 2013 assessment, the Division found that Ms. D required the following levels of assistance with her ADLs:¹⁶ body mobility - extensive assistance (CAT score 3/2); transfers - extensive assistance (CAT score 3/2); locomotion - extensive assistance (CAT score 3/2); dressing - extensive assistance (CAT score 3/2); eating - independent, requiring only set-up assistance (CAT score 0/1); toilet use - extensive assistance (CAT score 3/2); personal hygiene - limited assistance (CAT score 2/2); and bathing - extensive assistance (CAT score 3/2). Based on the assessment, Ms. McGahan concluded that Ms. D was eligible for waiver services based on her need for extensive assistance with four of the "shaded" ADLs.¹⁷

The assessment which resulted in the filing of the present case was performed on November 4, 2014 by nurse-assessor Robert Gamel, R.N. of DSDS.¹⁸ In completing the CAT, Mr. Gamel reported that Ms. D has the following care needs, abilities, and limitations:¹⁹

Significant Problems Since Last Assessment:²⁰ Mr. Gamel reported (1) that Ms. D had about six falls, one emergency room (ER) visit, no hospitalizations, and no critical incident

¹³ Ex. F.

¹⁴ Ex. F.

¹⁵ Ex. F.

¹⁶ All factual findings in this paragraph are based on Exs. F6 - F12 unless otherwise stated.

¹⁷ Ex. F30; Jan Bragwell's hearing testimony.

¹⁸ Ex. E.

¹⁹ Ex. E.

²⁰ Ex. E5.

reports since her prior assessment; and (2) that she recently experienced shortness of breath and arm pain.

Functional Assessment:²¹ Mr. Gamel reported that Ms. D is unable to touch her hands over her head or behind her back, cannot place her hands across her chest and stand up, and cannot touch the floor while seated, but has a strong grip in both hands. Mr. Gamel also wrote that Ms. D reported that she must take medications for her elbow and shoulder pain.

Physical Therapy:²² Mr. Gamel reported that Ms. D is not currently receiving occupational therapy, physical therapy, respiratory therapy, or speech/language therapy, and has no current prescription for range of motion exercises, walking for exercise, or foot care.

Bed/Body Mobility:²³ Mr. Gamel reported that Ms. D told him (1) that she has no bed sores; (2) that she can lie down, turn over, and reposition herself in bed as needed without help; (3) that her PCA is only available during the day; and (4) that she usually gets out of bed once each night to use the bathroom. Mr. Gamel reported that he observed Ms. D has a standard bed and mattress, and that he saw her lie down on her bed and roll onto her left side (scored 0/0).

Transfers:²⁴ Mr. Gamel reported he was told by Ms. D that (1) she can usually transfer independently by using her straight cane to push off with and/or using her wheeled walker to pull herself up; but (2) she occasionally requires assistance to stand up after sitting in a chair. Mr. Gamel reported that he observed Ms. D stand up from sitting in a chair in her living room by holding her walker for support and pushing up with her cane (scored 1/1).

Locomotion:²⁵ Mr. Gamel reported he was told by Ms. D that she uses a cane and/or a seated walker to move around within her home, but occasionally needs help from her PCA for stability and to push her wheelchair. Mr. Gamel reported that he observed Ms. D walk a short distance with her cane and self-propel a short distance in her walker, but he concluded that Ms. D's hallway was too cluttered to allow her to navigate the hallway independently when she is alone (scored 1/1).

Dressing:²⁶ Mr. Gamel reported he was told by Ms. D that (1) she requires assistance dressing her lower body; (2) her granddaughter helps her put on her socks and pull her pant legs up past her feet; but that (3) once she has her socks on and her pants started, she can stand up,

²¹ Ex. E6.
²² Ex. E7.
²³ Ex. E8.
²⁴ Ex. E8.
²⁵ Ex. E9.
²⁶ Ex. E10.

pull up her pants, and adjust and secure her clothing. Mr. Gamel reported that (1) he observed Ms. D was appropriately dressed at the time of the assessment; and (2) Ms. D has sufficient range of motion to pick up a bottle from the floor, and to bring her hands to her head (scored 1/1).

Eating:²⁷ Mr. Gamel reported he was told by Ms. D that (1) she needs someone to prepare and serve her meals, but that (2) once a meal is placed before her, she can eat and drink on her own; and (3) she is able to swallow oral medications with water. Mr. Gamel reported that he observed Ms. D (1) unscrew the cap from a bottle of tea, drink from the bottle, and then replace the cap using her right hand; and that (2) he did not observe any swallowing problems (scored 0/1).

Toileting:²⁸ Mr. Gamel reported he was told by Ms. D that (1) she has urinary incontinence, and uses incontinence products to deal with that problem; (2) she occasionally needs help to stand up after sitting on the toilet, and with cleaning herself after toilet use; and (3) she has recently moved and has requested a raised toilet seat and a toilet frame/bar. Mr. Gamel reported he observed Ms. D stand up from a living room chair and from a seated walker (scored 1/1).

Personal Hygiene:²⁹ Mr. Gamel reported he was told by Ms. D that (1) while sitting in front of the bathroom sink in her walker, she can brush her teeth, wash and dry her face and hands, and apply makeup and deodorant; and (2) a family member usually helps her with her hair. Mr. Gamel reported he observed that Ms. D was neatly groomed at the time of the assessment, and that she appeared to have the flexibility and range of motion necessary to perform her personal hygiene tasks (scored 0/1).

Bathing:³⁰ Mr. Gamel reported he was told by Ms. D that (1) she requires assistance to transfer in and out of the shower; (2) she is then able to sit in her shower chair and wash her face and upper body; but (3) her PCA must wash her lower body and other hard-to-reach areas. Mr. Gamel reported he observed that Ms. D was neatly groomed at the time of the assessment, and that she appeared to have the flexibility and range of motion necessary to bathe herself with only limited assistance (scored 2/2).

²⁷ Ex. E11.

²⁸ Ex. E11.

²⁹ Ex. E12.

³⁰ Ex. E13.

Professional Nursing Services:³¹ Mr. Gamel found that Ms. D has no current need for professional nursing services. Specifically, Mr. Gamel found that Ms. D is currently receiving no injections or intravenous feedings, is not using any type of feeding tube, does not require nasopharyngeal suctioning or tracheotomy care, is not receiving treatment for open lesions, ulcers, burns, or surgical sites, and has not begun using oxygen within the last 30 days.³² Mr. Gamel further found that Ms. D 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.³³ In addition, Mr. Gamel found that Ms. D is not receiving physical therapy, speech therapy, occupational therapy, or respiratory therapy, and does not require professional nursing assessment, observation, and/or management at least once per month.³⁴ Mr. Gamel also found that Ms. D 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 condition.³⁵ Finally, Mr. Gamel found that Ms. D does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.³⁶

Cognition:³⁷ Mr. Gamel found that Ms. D has no short-term or long-term memory problems; that Ms. D is generally able to recall names and faces, where she is, the location of her room, and the current season; that Ms. D has the cognitive ability to be independent with daily decision-making; and that Ms. D's cognitive status does not require professional nursing assessment, observation, or management at least once per month.³⁸

Behavioral Problems:³⁹ Mr. Gamel found that Ms. D can be verbally abusive, but that she does not wander, is not physically abusive, does not engage in socially inappropriate or disruptive behavior, and does not resist care. Mr. Gamel also found that Ms. D does not need

³¹ Exs. E15 - E17.

³² Ex. E15.

³³ Ex. E16.

³⁴ Ex. E16.

³⁵ Ex. E17.

³⁶ Ex. E17.

³⁷ Ex. E18.

³⁸ Ex. E18. Mr. Gamel did, however, complete the Division's supplemental screening tool (SST) for cognitive difficulties for Ms. D (Ex. E1). Ms. D received a total score of zero points on the cognitive SST.

³⁹ Ex. E19.

professional nursing assessment, observation, or management at least once per month due to any behavioral problems.⁴⁰

Medication Management:⁴¹ Mr. Gamel reported that Ms. D takes 15 different prescription medications on a daily basis; that she cannot prepare, but can administer, her own medications; and that she is always compliant in taking her medications.

Communication:⁴² Mr. Gamel found that Ms. D's vision is impaired, making it necessary for her to wear glasses, but that she has no difficulty hearing, speaking, understanding others, and making herself understood.

Mood:⁴³ Mr. Gamel found that Ms. D has no depression, anxiety, or sleep issues.

Based on the foregoing CAT scores, Mr. Gamel found that Ms. D 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).⁴⁴

On January 5, 2015 a different registered nurse reviewed nurse-assessor Gamel's waiver services eligibility decision.⁴⁵ The nurse-supervisor agreed that Ms. D is not currently eligible to participate in the waiver services program.⁴⁶

Finally, the nurse-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.⁴⁷ Qualis also concurred with the nurse-assessor's determination that Ms. D had "materially improved" and no longer required a nursing home facility level of care.⁴⁸

C. Relevant Procedural History

On February 13, 2015 the Division notified Ms. D that she was no longer eligible for waiver services, and that her waiver services would be terminated in thirty days.⁴⁹ On March 11, 2015 Ms. D requested a hearing to contest the Division's determination.⁵⁰

⁴⁰ Ex. E19. Mr. Gamel did, however, complete the Division's supplemental screening tool (SST) for behavioral problems for Ms. D (Ex. E2). Ms. D received a total score of zero points on the behavioral SST.

⁴¹ Ex. E22.

⁴² Ex. E24.

⁴³ Ex. E27.

⁴⁴ Exs. E31, E32.

⁴⁵ Exs. F36 - F44.

⁴⁶ Ex. F43.

⁴⁷ Exs. G1 - G7.

⁴⁸ Ex. G7.

⁴⁹ Ex. D.

⁵⁰ Ex. C.

Ms. D's hearing was rescheduled multiple times to accommodate the parties, but was ultimately held on August 10, 2015. Ms. D participated in the hearing by phone, represented herself, and testified on her own behalf. Ms. D's daughter and PCA, F X, also participated by phone but did not testify. Ms. D's care coordinator, U G, participated in the hearing by phone and testified for Ms. D. Darcie Shaffer participated by phone and represented the Division. Jan Bragwell, R.N. participated in the hearing by phone and testified for the Division. The record closed on receipt of certain late-filed exhibits, which were marked as Exhibit F, later on the day 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.⁵¹ The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.⁵² 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.⁵³ States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program⁵⁴ ("waiver services").⁵⁵ 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

⁵¹ 42 CFR § 435.930, 7 AAC 49.135.

⁵² 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).

⁵³ 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.

⁵⁴ 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.*

⁵⁵ See 42 USC § 1396a(a)(10)(A).

eligible individuals in their own homes and communities instead of in nursing facilities.⁵⁶
Alaska participates in the waiver services program.⁵⁷

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. D), that level of care must be either “intermediate care” as defined by 7 AAC 140.510, or “skilled care” as defined by 7 AAC 140.515.⁵⁸ 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.⁵⁹

⁵⁶ 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].

⁵⁷ 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

⁵⁸ 7 AAC 130.215.

⁵⁹ 7 AAC 130.215.

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.⁶⁰ 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.⁶¹ 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.⁶²

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 . . .”⁶³ 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.^[64]

Finally, in an order issued recently in the class action⁶⁵ 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;" that "[t]he State may not conclude that a recipient is no longer eligible based only on the results of the current assessment;"⁶⁶ 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."

⁶⁰ Ex. E31.

⁶¹ Ex. E31.

⁶² Ex. E31.

⁶³ AS 47.07.045(b)(1).

⁶⁴ AS 47.07.045(b)(3).

⁶⁵ 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. D.

⁶⁶ *Krone* order dated October 1, 2014 at page 6.

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.⁶⁷

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.⁶⁸ 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).⁶⁹

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. D 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.⁷⁰ Because skilled care is a higher level of care than intermediate care, the minimum level of

⁶⁷ 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.

⁶⁸ 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."

⁶⁹ See, for example, Ex. E8.

⁷⁰ 7 AAC 140.510, 7 AAC 140.515.

nursing care for which Ms. D must demonstrate a need, in order to remain eligible for waiver services on that basis, is intermediate care.

The intermediate care regulation (7 AAC 140.510) has three subsections (see text of regulation quoted in Section III(B), above). Ms. D clearly satisfies *some* of the criteria stated in the regulation. For example, Ms. D has a long-term illness or disability. Her condition is relatively stable, and her treatments emphasize maintenance of her condition rather than rehabilitation. However, one of the mandatory requirements, under 7 AAC 140.510(a) and (c), is that the recipient *either* require services ordered by and under the direction of a physician, *or* be receiving 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. There is no evidence in the record indicating that Ms. D satisfies either of these requirements.⁷¹

The Division's nurse-assessor, reviewing nurse, and independent contractor all agreed that Ms. D does not require nursing services. Perhaps even more importantly, one of Ms. D's own primary health care providers opined that Ms. D does not currently require any nursing services.⁷² Finally, my own independent review of the record likewise indicates that Ms. D currently has no nursing needs as defined by the applicable regulations.

In summary, the preponderance of the evidence demonstrates that Ms. D does not currently require the types of services which indicate a need for intermediate level nursing care under 7 AAC 140.510. Accordingly, the Division correctly determined that Ms. D does not qualify for waiver services based on a need for skilled or intermediate level nursing care. The next issue is whether Ms. D qualifies for waiver services based on the extent of her need for assistance with her ADLs.

E. Does Ms. D 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.⁷³ 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

⁷¹ Ms. D does receive *prescriptions* ordered by a physician. However, the intermediate care regulation requires that the recipient receive therapy or *services* prescribed by a physician.

⁷² Exs. F32 - F35.

⁷³ Ex. E31.

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 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.⁷⁴ The CAT divides the possible scoring combinations into six different areas, designated "NF1" through "NF6."

I. 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. D does not receive or require nursing services seven or more days per week. 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. D 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. D 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. D was not receiving any therapy from the time of her assessment through the date of the hearing.

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.⁷⁵ The CAT scores which the Division assigned to Ms. D with regard to the five "shaded" ADLs were: body mobility: 0/0; transfers: 1/1; locomotion: 1/1; eating: 0/1; and toilet use: 1/1.⁷⁶ I will proceed to determine the appropriate scores for the five "shaded" ADLs.

a. Body/Bed Mobility

For purposes of waiver services eligibility, body/bed mobility is defined as how a person moves to and from a lying position, turns side to side, and positions his or her body while in bed.⁷⁷ In order to receive a self-performance score of three (extensive assistance) with regard to bed/body mobility, a person must require either weight bearing support three or more times

⁷⁴ Ex. E31.

⁷⁵ Ex. E20.

⁷⁶ Ex. E20.

⁷⁷ Ex. E8.

per week, or full caregiver performance of the activity three times or more during the week of the assessment.⁷⁸

Ms. D's 2012 assessment found that Ms. D required limited assistance with body mobility (CAT score 2/2).⁷⁹ Ms. D's 2013 assessment found that Ms. D required extensive assistance with body mobility (CAT score 3/2). Ms. D's 2014 assessment found that Ms. D is independent with body mobility (CAT score 0/0). At hearing, Ms. D testified that she requires weight-bearing assistance with body mobility four to five times per week.

There was no persuasive evidence in the CAT or in the hearing testimony indicating why Ms. D's medical condition might have improved, since the last assessment, in such a way as to drastically change her bed mobility needs from extensive assistance to independence in only about 22 months. Accordingly, I find Ms. D's testimony on this point credible.

However, the body mobility scoring analysis does not end there. The body mobility regulation, 7 AAC 125.030(b)(1), now defines the ADL of body mobility such that positioning or turning in a bed or chair is a covered activity *only if the applicant or recipient is nonambulatory*. The regulation governing locomotion, 7 AAC 125.030(b)(3), defines locomotion as including ambulation by means of a walker, cane, gait belt, braces, crutches, or a manual wheelchair. As discussed below in the section on locomotion, I find that Ms. D is capable of single-level locomotion by means of her cane and/or walker. Accordingly, under the Division's regulations, Ms. D is considered ambulatory for purposes of the regulation on body mobility. Because she is ambulatory, under the regulation, Ms. D is considered *not* to require assistance with bed/body mobility, even if she does. In other words, because Ms. D is ambulatory, the Division's regulations create an irrebuttable presumption that she does not require assistance with bed/body mobility. Accordingly, for CAT scoring purposes, Ms. D is considered independent with regard to bed/body mobility (CAT score 0/0).

b. Transfers

For purposes of waiver services eligibility, a transfer is defined as how a person moves between surfaces (with the exception of the toilet and bathtub or shower, which are handled as separate ADLs).⁸⁰ In order to receive a self-performance score of three

⁷⁸ Ex. E8.

⁷⁹ Ex. F12.

⁸⁰ Ex. E8.

(extensive assistance) for transfers, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity three or more times during the week of the assessment.⁸¹

In 2012 and 2013 Ms. D was found to require extensive assistance with transfers (CAT score 3/2).⁸² In 2014 Ms. D was found to require only supervision and set-up help with transfers (CAT score 1/1). At hearing, Ms. D testified that her PCA sometimes uses a gate belt for transfers, and that her PCA must sometimes help pull her up, indicating weight bearing assistance. Also, the letter from T C-M, ANP indicates that Ms. D requires some level of assistance with transfers to prevent falls. However, there is no persuasive evidence indicating that Ms. D requires weight-bearing assistance with transfers *frequently enough* to qualify as needing extensive assistance under the CAT. Accordingly, the preponderance of the evidence shows Ms. D requires assistance with transfers, but that the assistance rendered is generally not weight bearing assistance, and that the preponderance of the evidence therefore indicates that Ms. D currently requires only limited assistance with transfers (CAT score 2/2).

c. Locomotion

For purposes of waiver services eligibility, locomotion is defined as how a person moves between locations in his or her room and other areas on the same floor/level.⁸³ In order to receive a self-performance score of three (extensive assistance) for locomotion, a person must require either weight bearing support three or more times per week, or full caregiver performance three or more times during the week of the assessment.⁸⁴ In 2012 and 2013 Ms. D was found to require extensive assistance with locomotion (CAT score 3/2).⁸⁵ In 2014 Ms. D was found to require only supervision and set-up help with locomotion (CAT score 1/1).

Mr. Gamel reported that he observed Ms. D move independently for short distances using her cane and/or her seated walker. Ms. D testified at hearing that she can move around her home using her seated walker. While the evidence indicates that some areas of Ms. D's home may be too cluttered to use a walker, the evidence also indicates that Ms. D can navigate through those areas using her cane. And although Ms. D's testimony that she sometimes needs PCA assistance

⁸¹ Ex. E8.
⁸² Ex. F12.
⁸³ Ex. E9.
⁸⁴ Ex. E9.
⁸⁵ Ex. F12.

with locomotion is credible based on her medical diagnoses, the evidence fell short of demonstrating that Ms. D requires help with locomotion often enough to qualify for extensive assistance. Thus, the preponderance of the evidence indicates that Ms. D currently requires only limited with locomotion (CAT score 2/2).

d. Eating

For purposes of waiver services eligibility, eating is defined as how a "person eats or drinks regardless of skill."⁸⁶ In order to receive a self-performance score of three (extensive assistance) with regard to eating, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity three times per week.⁸⁷

In 2012 and 2013 Ms. D was found to require only set-up assistance with eating (CAT score 0/1).⁸⁸ In 2014 Ms. D was again found to require only set-up help with eating (CAT score 0/1). Ms. D did not provide any persuasive testimony to the contrary at hearing. Accordingly, the preponderance of the evidence indicates that Ms. D still requires only set-up assistance with eating (CAT score 0/1).

e. Toilet Use

For purposes of waiver services eligibility, toilet use is defined as how a "person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, cleanses, changes pads, manages ostomy or catheter, adjusts clothes."⁸⁹ In order to receive a self-performance score of three (extensive assistance) with regard to toilet use, a person must require either weight bearing support three or more times per week, or full caregiver performance of the activity three or more times during the week of the assessment.⁹⁰ In 2012 and 2013 Ms. D was found to require extensive assistance with toileting (CAT score 3/2). In 2014 Ms. D was found to require only supervision and set-up help with toilet use (CAT score 1/1).

At hearing, Ms. D testified that she requires weight-bearing assistance with toileting about 90% of the time. Although I found that Ms. D requires only limited assistance with non-toileting-related transfers, Ms. D's testimony that she requires more assistance with toileting is credible because (1) she has a standard-height toilet, which sits lower than a typical couch or chair; and (2) she has requested a raised toilet seat and toilet frame/bars. Accordingly, the

⁸⁶ Ex. E11.
⁸⁷ Ex. E11.
⁸⁸ Ex. F12.
⁸⁹ Ex. E11.
⁹⁰ Ex. E11.

preponderance of the evidence indicates that Ms. D generally requires extensive assistance with toileting (CAT score 3/2).

f. Summary - Degree of Assistance Required with Shaded ADLs

Independent review indicates that Ms. D requires a greater degree of assistance than was found by the Division with regard to the "shaded" ADLs of body mobility, transfers, locomotion, and toilet use. However, 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 I find that Ms. D currently requires extensive assistance with only one "shaded" ADL (toilet use), she does not meet NFLOC 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. D 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. D 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. The record does not show that Ms. D 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. D 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. D has no short-term memory problems, and she did not assert otherwise. Accordingly, Ms. D receives no points 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. Gamel found that Ms. D was able to recall all four of these items at the assessment, and Ms. D did not dispute this. Thus, Ms. D 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. Gamel found that Ms. D's cognitive skills for daily decision-making are basically unimpaired. Accordingly, Ms. D 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). The Division found that Ms. D does not require professional nursing care at least three days per week due to cognitive problems, and Ms. D provided no evidence to contradict this. Ms. D scored 2/2 or higher as to one or more shaded ADLs. However, Ms. D received a score of zero on the cognitive portion of the SST, and Ms. D did not contest that score at hearing. Accordingly, Ms. D 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. D received scores of zero on NF3(a), NF3(b), NF3(c), and NF3(d). Accordingly, Ms. D 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. Gamel found that Ms. D is verbally abusive one to three times per week, but does not wander, is not physically abusive, does not engage in socially inappropriate or disruptive behavior, and does not resist care. Ms. D did not contest these findings at hearing. Thus, the preponderance of the evidence indicates Ms. D 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. Gamel found that Ms. D 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. D did receive a score of 2/2 or better as to one or more "shaded" ADLs. However, Mr. Gamel gave Ms. D a score of zero on the behavioral portion of the SST,⁹¹ which is not a sufficiently high score on the SST to receive a point at NF4(b). Ms. D did not contest this finding at hearing. Accordingly, Ms. D receives no points under NF4(b).⁹²

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. D'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

Based on the Division's 2014 assessment, the opinion of one of her own health care professionals, and my own independent review of the record, Ms. D does not currently require either an intermediate or skilled level of care as defined under the relevant regulations and/or the Consumer Assessment Tool. Further, although Ms. D requires more

⁹¹ Ex. E2.

⁹² I find it possible that, as a result of her schizoaffective disorder, Ms. D should have been scored as high as eight on the behavioral portion of the SST. However, Ms. D would need to receive a score of 14 or more on the behavioral portion of the SST to receive points under NF4(b). Accordingly, although Ms. D may be entitled to a higher score on the behavioral portion of the SST than the Division gave her, a scoring error here would not have affected Ms. D's ultimate eligibility for waiver services.

assistance with her ADLs than was found by the Division, her level of need for assistance with ADLs is still not high enough to qualify her for waiver services on that basis. The preponderance of the evidence shows Ms. D needs PCA services, but has the ability to function in a home setting without the need for wavier services. Ms. D's condition has thus materially improved since her 2013 assessment, and she is not currently eligible for waiver services. The Division's decision terminating Ms. D's waiver services is therefore affirmed.

DATED this 3rd day of September, 2015.

Signed

Jay 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 14th day of September, 2015.

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.]