

Mr. E works with a number of specialist medical providers to manage his end-stage liver disease while awaiting a possible liver transplant. His primary medical diagnosis is chronic hepatitis C with cirrhosis of the liver. He experiences numerous severe complications due to his liver disease, including ongoing thrombocytopenia, esophageal varices, hepatic encephalopathy, hypertension, ascites with lower extremity edema, numbness in his left hand due to compromised nerves, and flares of jaundice. He has a history of spontaneous bacterial peritonitis. His hepatic encephalopathy sometimes results in debilitating impacts to his cognitive processes and memory function. At these times, which occur unpredictably and suddenly, Mr. E can become easily confused. To help manage his continuous fluid retention problems, Mr. E's doctor installed a liver stent. Mr. E takes diuretics and a medication called Lactulose to reduce the chronically high ammonia levels in his system. The medications cause side effects including diarrhea and bowel incontinence. They also result in voluminous urination. Mr. E's edema causes him tremendous pain when his legs are swollen, but his pain medication can compromise the effectiveness of other medicines, so he must manage those interactions.

Mr. E has a history of frequent emergency room visits. His emergency visits dropped significantly after January 2015, however, when problems with his liver stent were resolved. His improved living conditions also may have helped reduce his need for regular emergency care.

Mr. E is able to move from place to place on his own without assistive devices, though he would like to have a cane. He steadies himself using walls or other supports. He often does not walk comfortably, and his gait at times may resemble a hobble or a waddle. He is at risk of falling at these times.

Mary Tanaka, RN, assessed Mr. E to determine his eligibility for Waiver services on February 20, 2015. Her conclusions regarding Mr. E's physical and mental function are documented on the Consumer Assessment Tool (CAT). On February 20, she found Mr. E to be cognitively well-oriented, giving him a total cognitive score of 0.⁴ She noted some long term memory problems and difficulty with decision-making in new situations. She further noted some behavior problems, including unusual sleep patterns or insomnia, and behavioral demands that may limit Mr. E's type of living arrangement and companions. She concluded that Mr. E has difficulty understanding his own care needs one to three times per week, but he cooperates when given direction or explanation.⁵ This resulted in a total behavioral score of 3.⁶ The assessment

⁴ Exh. E, pp. 1, 6, 18.

⁵ Exh. E, p. 3.

also noted that Mr. E does not require any professional nursing services, therapy from a qualified therapist, or special treatments or therapies.⁷

The five activities of daily living (“ADLs”) that are assessed to determine Waiver eligibility are bed mobility, transfers, locomotion within the home (walking), eating, and toileting.⁸ Mr. E’s self-performance ratings for bed mobility, locomotion, transfers and eating were 0, indicating that he is independent or requires oversight help only 1 or 2 times per week for these activities. His self-performance rating for toilet use was 1, meaning that he requires supervision.⁹ He also requires set-up help for toilet use (support code 1). These scores are all insufficient to assist in qualifying Mr. E for Waiver eligibility.

Mr. E disagrees with the assessment’s conclusion that he does not qualify for Waiver services. While he has worked hard to retain as much independence as possible, he argues that he sometimes requires oversight or physical assistance. He also argues that his hepatic encephalopathy affects his cognition and judgment, such that he cannot reliably and consistently care for his needs or perform all activities of daily living without assistance.

Mr. E has good days and bad days. On good days, he is able to manage all of the five activities of daily living on his own. On bad days, which occur one to three times per week, his edema may swell his legs to twice their normal size, and he experiences significant pain. At those times, he has trouble getting out of bed, and moving around is difficult. He is more likely to fall and may require assistance to get up. When he experiences episodes of hepatic encephalopathy, which can come on quickly and unpredictably, he can become confused and unable to care for himself properly. In addition, Mr. E requires help to manage his medications and stay on his medication schedule.

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.”¹⁰ The purpose of these

⁶ Exh. E, p. 2.

⁷ Exh. E, pp. 15-17.

⁸ Exh. E, p. 20 (these are the so-called “shaded” ADLs).

⁹ Exh. E, p. 20. For purposes of the CAT, supervision means that oversight, encouragement or cueing are provided more than three times a week, or supervision plus nonweight-bearing assistance is provided 1-2 times per week.

¹⁰ 7 AAC 130.205(d)(1)(B) and (d)(2).

services is “to offer a choice between home and community-based waiver services and institutional care.”¹¹

The nursing facility level of care¹² requirement is determined in part by an assessment which is documented by the CAT.¹³ The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,¹⁴ and whether an applicant has impaired cognition or displays problem behaviors.¹⁵ 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 3.¹⁶

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 related personal hygiene care.¹⁷

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 waiver eligibility score on the CAT.

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 ADLs.¹⁸

In order for a person who only has physical assistance needs to score as eligible for Waiver services on the CAT, he would need a self-performance code of 3 (extensive assistance)

¹¹ 7 AAC 130.200.

¹² See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

¹³ 7 AAC 130.230(b)(2)(B).

¹⁴ Exh. E, pp. 15-17.

¹⁵ Exh. E, pp. 18-19.

¹⁶ Exh. E, p. 31 (NF.1).

¹⁷ Exh. E, p. 20 (shaded areas).

¹⁸ Exh. E, p. 31 (NF.2 – NF.6).

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).¹⁹

All of the results of the assessment portion of the CAT are scored. If an applicant's score is 3 or higher, the applicant is medically eligible for Waiver services.²⁰

B. Burden of Proof

In this case, Mr. E seeks Waiver eligibility and bears the burden to prove by a preponderance of the evidence that he satisfies the eligibility requirements.²¹ He can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs.²²

C. Eligibility

The parties agree that Mr. E does not require the professional nursing services, therapy from a qualified therapist, specialized treatment, or other therapies that are listed in CAT Sections A and B.²³ He does not need professional nursing intervention to manage behavioral problems. He also does not require professional nursing intervention to manage cognitive problems. He is usually well-oriented and able to remember and communicate his needs. However, his cognitive condition can rapidly deteriorate into confusion when his hepatic encephalopathy worsens. For this reason, he requires regular supervision and monitoring. However, Mr. E's periodic episodes with confusion do not result in a point on the CAT due to cognitive need.²⁴ The evidence is that he is usually cognitively capable and independent. His cognitive impairment is episodic and can be managed with supervision.

As a result, the only way Mr. E could qualify for Waiver services is if he requires extensive, one-person physical assistance (self-performance code 3, support code 2), or a higher level of assistance, to perform three or more of the five shaded ADLs that are assessed for

¹⁹ Exh. E, p. 31 (NF.1e).

²⁰ Exh. E, p. 31 (NF.7).

²¹ 7 AAC 49.135.

²² 2 AAC 64.290(a)(2).

²³ See Exh. E, p. 15-17. It is undisputed that Mr. E requires frequent communication with and oversight by his specialist doctors. The CAT, however, assesses whether he requires a nursing facility level of care, so it evaluates his need for ongoing professional nursing services rather than his periodic need for a physician's care.

²⁴ See Exh. E, p. 1, 18, 31.

Waiver eligibility.²⁵ Extensive assistance means he requires weight-bearing assistance at least three times a week to perform the ADL in question.²⁶

Bed mobility refers to how a person moves to and from a lying position, turns from side to side, and positions his body while in bed.²⁷ The assessment indicates that Mr. E manages his bed mobility needs independently. Mr. E confirmed at the hearing that no one helps him reposition in bed. He noted that he cannot lie in certain positions, for instance, on his side, because that position causes him pain. He usually lies on his back. However, he is able to move himself around or change position in bed as needed. There is not enough evidence to conclude that Mr. E is anything but independent with bed mobility needs (self-performance code 0, support code 0).

Transferring refers to how a person moves between surfaces, such as to and from a bed or chair to a standing position. The assessment concludes that Mr. E is independent with his transfers.²⁸ During the assessment, which took place on one of Mr. E's good days, Mr. E transferred on and off his bed without any help. He also got down on his hands and knees to stuff something under the door, to keep the cold out, and then returned to an upright position without any assistance.

Mr. E can get in and out of chairs without help. He testified that he frequently has trouble getting out of bed, however. His housemate is often available and tries to help him. Mr. E indicated that he typically refuses this assistance, because he wants to be as independent as possible. Mr. E also testified that, to protect his sense of dignity, he may have understated his assistance needs during the assessment. Even if this is true, there is not enough evidence in the record to conclude that Mr. E requires frequent weight-bearing physical help in order to transfer. His testimony about his friend's availability and occasional insistence on helping him get out of bed could support a finding of supervision or potentially even limited assistance, but this would not be sufficient to change the outcome in this case.

Locomotion pertains to how someone moves between locations in his room and to other areas on the same floor of his residence. The assessment indicates that Mr. E gets around independently, meaning that at most he requires help or oversight only 1 or 2 times per week.²⁹

²⁵ Exh. E, p. 31 (CAT scoring).

²⁶ Exh. E, p. 20.

²⁷ Exh. E, p. 8.

²⁸ Exh. E, p. 8.

²⁹ Exh. E, p. 9.

Mr. E indicated during the assessment that he can walk short distances on good days, but he sometimes had trouble walking the 30 feet to the trailer bathroom next door. He noted having poor balance and fatigue in the evenings. When he feels up to it, he takes the bus to get around town and is able to walk well enough to complete an errand. At the hearing, Mr. E expressed concerns about his risk of falling and noted that he has a history of falls. It is unclear how frequently Mr. E falls. However, this information suggests that, on days he feels unsteady, Mr. E requires supervision to prevent falls (self-performance code 1).

For purposes of the CAT, eating refers to how a person eats and drinks, and does not include food preparation or cooking.³⁰ Mr. E agreed that he is able to feed himself, and he does not need any physical assistance to eat or drink (self-performance code 0, support code 0).

Under the CAT, toileting refers to use of the toilet, including transfers on/off, cleansing, changing pads and adjusting clothing.³¹ Mr. E testified that he manages all his toileting activities and self-care on his own. Because his diuretics and Lactulose medication cause loose bowels and urinary urgency, the assessment coded him as requiring supervision and set-up help for toileting (self-performance code 1, support code 1). There is nothing in the record to suggest that Mr. E requires a higher level of assistance with this ADL.

Based on the foregoing discussion, Mr. E did not meet his burden of proving, by a preponderance of the evidence, that he requires extensive assistance with three of the five specified, “shaded” ADLs, for purposes of establishing eligibility for waiver services.

IV. Conclusion

Mr. E clearly experiences very serious health challenges that require ongoing medical attention. However, he has not established that he requires extensive physical assistance (self-performance code 3) with three or more of the five activities of daily living that are assessed for Waiver eligibility. The question for Waiver eligibility is whether his physical health require a nursing facility level of care. Mr. E did not meet his burden of proof on this issue, and the Division’s decision to deny his application is upheld.

DATED this 12th day of August, 2015.

Signed _____
Andrew M. Lebo
Administrative Law Judge

³⁰ Exh. E, p. 11.

³¹ Exh. E, p. 11; bathing or showering is not included and is a separate category of ADL.

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 28th day of August, 2015.

By: Signed _____
Name: Andrew M. Lebo
Title: Administrative Law Judge

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