

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

In the Matter of:)	
)	OAH No. 15-0383-MDS
G X)	Agency No.
_____)	

DECISION

I. Introduction

The issue in this case is whether G X remains eligible for Medicaid Home and Community-Based Waiver services (waiver services). The Division of Senior and Disabilities Services (Division) conducted an assessment on December 11, 2014 and subsequently determined that Ms. X is no longer eligible to receive waiver services.¹

This decision concludes that Ms. X does not currently require skilled or intermediate level nursing care as defined by the Division's regulations and/or its Consumer Assessment Tool (CAT). However, this decision further concludes that Ms. X requires a greater level of physical assistance with her activities of daily living (ADLs) than was determined by the Division. Specifically, the preponderance of the evidence indicates that Ms. X still requires extensive assistance with transfers, locomotion, and toilet use. Because Ms. X requires extensive assistance with these three ADLs, she remains eligible to receive waiver services under the CAT's scoring matrix, even in the absence of any need for professional nursing services. Accordingly, the Division's termination of Ms. X's waiver services is reversed.

II. Facts

A. Ms. X's Medical Diagnoses and Relevant Medical History

Ms. X is an 82-year-old woman who lives in a single family home with two other adults and two minor children.² She is five feet, two inches tall and weighs about 150 pounds.³ Her medical diagnoses include acute cystitis, anemia, anisocoria, arthritis, atherosclerosis/coronary artery disease, atrial flutter, bradycardia, chronic anticoagulation, chronic pain, chronic kidney disease (stage III, moderate), degenerative disk disease, depressive disorder, diastolic heart failure, dysphagia, gastroesophageal reflux disease (GERD), gastrointestinal bleeds, heart valve replacement, hypertension, kyphoscoliosis, left shoulder pain, left-side weakness, lumbago/low

¹ Exs. D, E.
² Ex. E3.
³ Exs. E11, E25.

back pain, restless leg syndrome, spinal stenosis, and urinary incontinence.⁴ She takes 12 - 16 different medications each day.⁵

Ms. X uses a variety of assistive devices for ambulation/locomotion.⁶ She has a cane, a four-wheeled walker, a wheelchair, and a power chair.

Ms. X is at high risk for falls.⁷ She fell at least three times, during the current assessment period, while in the bathroom.⁸ On one occasion she fell, hit her head on the toilet, and had to be taken to the hospital.

Ms. X was hospitalized from June 2 - June 6, 2014 due to aspirational pneumonia.⁹ Ms. X was hospitalized again from July 15 - July 16, 2014 for pneumonia, nausea, and vomiting. Ms. X was hospitalized a third time in late January 2015 due to pneumonia.¹⁰ Most recently, Ms. X was hospitalized for pneumonia from May 29 - June 3, 2015.¹¹ In a discharge summary at the end of this hospitalization, N O, M.D., one of Ms. X's treating physicians, wrote that Ms. X "is quite frail and complicated medically" and that "she needs significant outpatient assistance to avoid institutionalization."¹²

On December 26, 2014 P D T, M.D., one of Ms. X's treating physicians, completed and signed a "Level of Care Verification Request" form (sent to her by the Division) concerning Ms. X.¹³ In response to the question, "At this time, would you admit this patient to a skilled nursing facility?" Dr. T answered, "No; no skilled nursing needs at this time." In response to the question, "At this time, does this patient have intermediate nursing needs?" Dr. T again answered, "No; no intermediate nursing needs at this time."

However, in a letter dated April 23, 2015, Dr. T stated in relevant part:¹⁴

Ms. X's overall level of physical functioning is dependent on the use of PCA care. She requires assistance with personal hygiene, bathing, meal preparation, grocery shopping, errands, escort to medical appointments, toileting, and light chores. With [her] conditions, she is unable to live independently Ms. X is

⁴ Ex. E5; Ex. 2 pp. 3 - 5; Ex. 2 p. 15.

⁵ Ex. E22.

⁶ Ex. 1 p. 51.

⁷ All factual findings in this paragraph are based on Ex. 2 p. 1 and U R's hearing testimony.

⁸ Ex. 1 p. 49.

⁹ All factual findings in this paragraph are based on Ex. 2 p. 1 and U R's hearing testimony.

¹⁰ Ex. 2 p. 14.

¹¹ Ex. 1 p. 5. Just prior to her hospital admission Ms. X had fallen while trying to use the bathroom, hit her chest against the bathroom sink, and fractured a rib (Ex. 1 pp. 15, 26).

¹² Ex. 1 P. 25.

¹³ All factual findings in this paragraph are based on Exs. F32 - F36 unless otherwise stated.

¹⁴ All factual findings in this paragraph are based on Ex. 2 p. 5. Paragraph beaks in the original letter have been omitted for brevity.

dependent on others for most of her activities of daily living. In my opinion, Ms. X would greatly benefit from having Medicaid waiver continued to decrease the high risk of de-compensation without such assistance

E F is Ms. X's granddaughter.¹⁵ She has a doctoral degree in pharmacy, and is a board-certified pharmacotherapy specialist. Ms. X has lived with Ms. F, her husband, and their two minor children since March 2013, when Ms. X was released from No Name Hospice. Ms. F monitors Ms. X's blood-thinning medication on a weekly basis, and works with Ms. X's cardiologist to adjust her medications. She picks up Ms. X's medication refills and prepares weekly "medisets." She prepares dinner for Ms. X each day, and prepares all her meals on the weekends. She also does Ms. X's shopping for her.

Ms. F and her husband are both employed full-time outside the home, and are often out of the house for ten or more hours per day.¹⁶ Ms. X receives some PCA services during the day while the Fs are at work.¹⁷ However, it is still difficult for the Fs to manage their time between work, caring for their children, and caring for Ms. X. Ms. F does not believe it is safe to leave Ms. X alone, and this makes traveling and vacationing difficult for her family.

At hearing, Q K testified in relevant part as follows:

1. Ms. X is her mother. Her mother has cognitive problems. She can't always remember meaningful acquaintances.
2. She has problems remembering and using information. She needs reminders during the day; how many times per day is unknown. She can't remember when to take her medications.
3. She is periodically confused.
4. She doesn't get lost; she is oriented and knows where she is.
5. She has some difficulty communicating, but is able to make her needs known.
6. She sleeps a lot, but she does not have sleep disturbances.
7. She does not wander.
8. She is sad, and cries a lot, but she does not have any behavioral issues.
9. She is not a danger to herself or others.
10. She has some difficulty understanding her daily needs, and will not eat unless reminded. However, she will cooperate once given instructions/directions.
11. Ms. X does not need to be repositioned while in bed.

¹⁵ All factual findings in this paragraph are based on Ex. 2 p. 21 unless otherwise stated.

¹⁶ All factual findings in this paragraph are based on Ex. 2 p. 21 unless otherwise stated.

¹⁷ Ex. 1 p. 21; Q K's hearing testimony. Ms. R testified that Ms. X currently receives 21 hours per week of PCA services.

12. She can barely get out of bed. To transfer, Ms. X requires weight-bearing assistance about 90% of the time.

13. Ms. X lives on one level of her daughter's home. She spends most of her time in bed. She cannot go up the stairs. Her feet sometimes go numb, and she can barely walk. She has kyphosis and is always bent at the waist. She uses her walker to move the five steps between her bed and the bathroom. Her PCA holds onto the back of Ms. X's pants when she uses her walker. Ms. K supports Ms. X by holding her underneath her arms when she uses her walker.

14. Ms. X can feed herself, but "she chokes on everything she eats," so she needs someone to watch her/supervise her while eating.

15. Ms. X had bowel surgery three to four years ago (circa 2011 - 2012). Since that surgery, she has basically been incontinent. She has chronically loose stools. She needs someone to clean her up after toileting when she has loose stools or diarrhea. She receives PCA assistance with toileting during the daytime, but she is somehow able to use the toilet by herself at night.

16. Ms. X receives about 21 hours of PCA services per week.

17. Ms. X's functional abilities have not gotten better during the current assessment period; rather, they have gotten worse.

At hearing, U R testified in relevant part as follows:¹⁸

1. She has been Ms. X's care coordinator for approximately five years.
2. Ms. X has not gotten any stronger during the assessment period. Rather, Ms. X has become more dependent on her service providers during this period.

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

Ms. X has received Medicaid Home and Community-Based Waiver services since 2012 or before.¹⁹ Ms. X was previously assessed as to her eligibility for waiver services on April 10, 2013 by Michelle Moore, R.N.²⁰ 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.²¹

Based on her 2013 assessment, the Division found that Ms. X required the following levels of assistance with her ADLs:²² 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 -

¹⁸ See also Ex. 2.

¹⁹ Ex. F12.

²⁰ Ex. F.

²¹ Ex. F.

²² All factual findings in this paragraph are based on Exs. F6 - F12 unless otherwise stated.

limited assistance (CAT score 2/2); and bathing - extensive assistance (CAT score 3/2). Based on the assessment, Ms. Moore concluded that Ms. X was eligible for waiver services based on her need for extensive assistance with four out of five of the "shaded" ADLs.²³

The assessment which resulted in the filing of the present case was performed on December 11, 2014 by nurse-assessor Naomi Schlup, R.N. of DSDS.²⁴ In completing the CAT, Ms. Schlup reported that Ms. X has the following care needs, abilities, and limitations:²⁵

Significant Problems Since Last Assessment:²⁶ Ms. Schlup reported that, during the past year, (1) Ms. X had been hospitalized three times for pneumonia; (2) she had visited the emergency room (ER) for the flu, a urinary tract infection, and a fall; (3) she had fallen several times; and (4) she had no critical incident reports since her prior assessment.

Functional Assessment:²⁷ Ms. Schlup reported that Ms. X is unable to touch her hands over her head, cannot place her hands across her chest and stand up, and cannot touch her feet while seated, but can touch her hands together behind her back, and has a strong grip in both hands. Ms. Schlup also wrote that Ms. X reported that she has long-standing left shoulder pain, she is unable to raise her left arm above her head, and that, when bending at her waist, she can still only reach just below her knees.

Physical Therapy:²⁸ Ms. Schlup reported that Ms. X was not, at that time, receiving occupational therapy, physical therapy, respiratory therapy, or speech/language therapy, and had no current prescription for range of motion exercises, walking for exercise, or foot care.

Bed/Body Mobility:²⁹ Ms. Schlup reported that Ms. X told her that she is not bed-bound or confined to a wheelchair, and that she can reposition herself. Ms. Schlup reported that she observed Ms. X reposition herself several times during the assessment (scored 0/0).

Transfers:³⁰ Ms. Schlup reported she was told by Ms. X that (1) she can stand up and sit down, on a bed or chair, independently; (2) she uses a wheeled walker for balance when transferring; and (3) a family member usually stays close by in case she requires assistance. Ms.

²³ Ex. F29; Sam Cornell's hearing testimony. In 2013 Ms. X was also receiving visits from a registered nurse, three times per week, to conduct venipunctures to monitor the effectiveness of Ms. X's blood anticoagulation medications. (Exs. D2, D4). Because venipunctures are an indicator of skilled or intermediate nursing care, Ms. X arguably also qualified for waiver services in 2013 based on a need for nursing services.

²⁴ Ex. E.

²⁵ Ex. E.

²⁶ Ex. E5.

²⁷ Ex. E6.

²⁸ Ex. E7.

²⁹ Ex. E8.

³⁰ Ex. E8.

Schlup reported that she observed Ms. X stand up from sitting on a couch, by herself, using her wheeled walker, and that her PCA stood by but did not physically assist her (scored 1/1).

Locomotion:³¹ Ms. Schlup reported she was told by Ms. X that she is able to walk within her home and outside using her wheeled walker, but that her PCA or a family member stays close by in case she requires assistance. Ms. Schlup reported that she observed Ms. X walk from her living room, to her bathroom, to her bedroom, and then back to her living room, using her wheeled walker, without physical assistance, and that her gait was slow but steady (scored 1/1).

Dressing:³² Ms. Schlup reported she was told by Ms. X that she can put her pants on by herself, but requires assistance pulling her shirts over her head due to her left shoulder injury, and also needs assistance to put on her socks and shoes. Ms. Schlup reported that she observed that Ms. X has a limited range of motion in her left arm due to her shoulder injury, and that she was barely able to reach past her knees at the time of the assessment (scored 2/2).

Eating:³³ Ms. Schlup reported she was told by Ms. X that (1) she can eat and drink on her own; and (2) she is able to swallow oral medications with water. Ms. Schlup reported that she observed that Ms. X has a strong grip in both hands, and that she is able to bring her hands up to her face (scored 0/1).

Toileting:³⁴ Ms. Schlup reported she was told by Ms. X that (1) she wears incontinence products, but can change them by herself; (2) she can transfer on and off the toilet, and clean herself after toilet use, without assistance, but that (3) her PCA or a family member remains close by in case she needs help. Ms. Schlup reported she observed that Ms. X is able to stand up, walk, and sit down without assistance, that she is able to reach behind her back, and that she has strong bilateral hand grips (scored 1/1).

Personal Hygiene:³⁵ Ms. Schlup reported she was told by Ms. X that (1) she can brush her teeth, wash and dry her face, and comb her hair without hands-on assistance. Ms. Schlup reported she observed that Ms. X is able to raise her right arm above her head, and that she has strong bilateral hand grips (scored 0/0).

Bathing:³⁶ Ms. Schlup reported she was told by Ms. X that (1) she requires no assistance to transfer in and out of the shower, and (2) she is able to wash herself without hands-on

³¹ Ex. E9.

³² Ex. E10.

³³ Ex. E11.

³⁴ Ex. E11.

³⁵ Ex. E12.

³⁶ Ex. E13.

assistance, but (3) her PCA remains close by in case she needs anything. Ms. Schlup reported she observed that Ms. X can walk and transfer independently, and that her right arm's range of motion should be sufficient to allow her to bathe herself (scored 1/1).

Professional Nursing Services:³⁷ Ms. Schlup found that Ms. X has no current need for professional nursing services. Specifically, Ms. Schlup found that Ms. X 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.³⁸ Ms. Schlup further found that Ms. X 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.³⁹ In addition, Ms. Schlup found that Ms. X is not receiving physical therapy, speech therapy, occupational therapy, or respiratory therapy,⁴⁰ and does not require professional nursing assessment, observation, and/or management at least once per month.⁴¹ Ms. Schlup also found that Ms. X 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.⁴² Finally, Ms. Schlup found that Ms. X does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.⁴³

Cognition:⁴⁴ Ms. Schlup found that Ms. X has no short-term or long-term memory problems; that Ms. X is generally able to recall names and faces, where she is, the location of her room, and the current season; that Ms. X has the cognitive ability to be independent with daily decision-making; and that Ms. X's cognitive status does not require professional nursing assessment, observation, or management at least once per month.⁴⁵

³⁷ Exs. E15 - E17.

³⁸ Ex. E15.

³⁹ Ex. E16.

⁴⁰ As of August 2015 Ms. X was attending physical therapy two times per week, and was also undergoing speech therapy (Ex. 2 p. 1; U R's hearing testimony). However, there is no evidence that Ms. X was receiving these therapies any time from the week of the assessment through the date of the waiver termination notice.

⁴¹ Ex. E16.

⁴² Ex. E17.

⁴³ Ex. E17.

⁴⁴ Ex. E18.

⁴⁵ Ex. E18. Ms. Schlup did, however, complete the Division's supplemental screening tool (SST) for cognitive difficulties for Ms. X (Ex. E1). Ms. X received a total score of zero points on the cognitive SST.

Behavioral Problems:⁴⁶ Ms. Schlup found that Ms. X does not wander, is not verbally or physically abusive, does not engage in socially inappropriate or disruptive behavior, and does not resist care. Ms. Schlup also found that Ms. X does not need professional nursing assessment, observation, or management at least once per month due to any behavioral problems.⁴⁷

Medication Management:⁴⁸ Ms. Schlup reported that Ms. X does not prepare, but can self-administer, her own medications, and she is always compliant in taking her medications.

Communication:⁴⁹ Ms. Schlup found that Ms. X's vision is impaired, making it necessary for her to wear glasses, and that she has a slight hearing impairment, but that she has no difficulty speaking, understanding others, and making herself understood.

Mood:⁵⁰ Ms. Schlup found that Ms. X has no depression, anxiety, or sleep issues.

Based on the foregoing CAT scores, Ms. Schlup found that Ms. X 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).⁵¹

On February 12, 2015 a different registered nurse reviewed Ms. Schlup's waiver services eligibility decision.⁵² The nurse-supervisor agreed that Ms. X is not currently eligible to participate in the waiver services program.⁵³

Finally, On March 16, 2015 the nurse-assessor's eligibility decision underwent a second-level review by a registered nurse and/or licensed physician employed by the Division's contractor Qualis Health.⁵⁴ Qualis also concurred with the nurse-assessor's determination that Ms. X had "materially improved" and no longer requires a nursing home facility level of care.⁵⁵

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⁴⁶ Ex. E19.

⁴⁷ Ex. E19. Ms. Schlup did, however, complete the Division's supplemental screening tool (SST) for behavioral problems for Ms. X (Ex. E2). Ms. X received a total score of zero points on the behavioral SST.

⁴⁸ Ex. E22.

⁴⁹ Ex. E24.

⁵⁰ Ex. E27.

⁵¹ Exs. E31, E32.

⁵² Exs. F38 - F45.

⁵³ Exs. F38 - F45.

⁵⁴ Exs.D2 - D4.

⁵⁵ Ex. D4.

C. Relevant Procedural History

On March 19, 2015 the Division notified Ms. X that she was no longer eligible for waiver services, and that her waiver services would be terminated in thirty days.⁵⁶ On March 30, 2015 Ms. X requested a hearing to contest the Division's determination.⁵⁷

Ms. X's hearing was rescheduled multiple times to accommodate the parties, but was ultimately held on August 4, 2015. Ms. X did not participate, but she was represented by her daughter and power-of-attorney holder, Q K, who participated by phone and testified on Ms. X's behalf. Ms. X's care coordinator, U R, also participated in the hearing by phone and testified for Ms. X. Victoria Cobo participated by phone and represented the Division. Sam Cornell, 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 Exhibits 2 and 3, 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.⁵⁸ The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.⁵⁹ 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.⁶⁰ States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program⁶¹

⁵⁶ Ex. D.

⁵⁷ Ex. C.

⁵⁸ 42 CFR § 435.930, 7 AAC 49.135.

⁵⁹ 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).

⁶⁰ 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.

⁶¹ 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

(“waiver services”).⁶² 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 eligible individuals in their own homes and communities instead of in nursing facilities.⁶³ Alaska participates in the waiver services program.⁶⁴

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. X), that level of care must be either “intermediate care” as defined by 7 AAC 140.510, or “skilled care” as defined by 7 AAC 140.515.⁶⁵ 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,^[66] 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

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.*

⁶² See 42 USC § 1396a(a)(10)(A).

⁶³ 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].

⁶⁴ 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

⁶⁵ 7 AAC 130.215.

⁶⁶ The term “physician” is not defined by the Alaska definitional regulation specifically applicable to the waiver services program (7 AAC 130.319), or by the Alaska definitional regulation which applies to Medicaid services in general (7 AAC 160.990). The term “physician” is, however, defined by federal Medicaid statute 42 USC § 1395x(r)(1); the federal definition does not include a doctor of pharmacy. The federal Medicaid regulation which defines the term “physician,” 42 CFR § 491.2, likewise does not define the term as including a doctor of pharmacy.

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.⁶⁷

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.⁶⁸ Under the CAT, an individual can qualify for waiver services by demonstrating a need for extensive assistance with at least three out of five designated ADLs, known as "shaded" ADLs, even without demonstrating a need for professional nursing care.⁶⁹ An individual may also qualify for waiver services by having a certain minimum level of nursing needs, combined with a certain minimum need for physical assistance with ADLs.⁷⁰

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”⁷¹ 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.^[72]

Finally, in an order issued in 2014 in the class action⁷³ 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

⁶⁷ 7 AAC 130.215.

⁶⁸ Ex. E31.

⁶⁹ Ex. E31.

⁷⁰ Ex. E31.

⁷¹ AS 47.07.045(b)(1).

⁷² AS 47.07.045(b)(3).

⁷³ 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. X.

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;"⁷⁴ 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."

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.⁷⁵

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.⁷⁶ 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).⁷⁷

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.

⁷⁴ *Krone* order dated October 1, 2014 at page 6.

⁷⁵ 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.

⁷⁶ 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."

⁷⁷ *See*, for example, Ex. E8.

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. X 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.⁷⁸ Because skilled care is a higher level of care than intermediate care, the minimum level of nursing care for which Ms. X 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. X clearly satisfies *some* of the criteria stated in the regulation. For example, Ms. X 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. X requires services ordered by and under the direction of a physician.⁷⁹ And, although Ms. X was attending physical therapy twice per week as of August 2015, she was not receiving therapy at any time from the week of the assessment through the date of the Division's waiver termination letter, which is the time period at issue in this case.

The Division's nurse-assessor, reviewing nurse, and independent contractor all agreed that Ms. X did not require nursing services during the period at issue. Perhaps most importantly, Dr. T, one of Ms. X's own primary health care providers, opined on December 26, 2014 that Ms. X did not then require any nursing services.⁸⁰ Finally, my own independent review of the record likewise indicates that Ms. X currently has no nursing needs as defined by the applicable regulations.

⁷⁸ 7 AAC 140.510, 7 AAC 140.515.

⁷⁹ Ms. X does receive *prescriptions* ordered by a physician. However, the intermediate care regulation requires that the recipient receive therapy or *services* prescribed by a physician.

⁸⁰ Exs. F32 - F36.

In summary, the preponderance of the evidence demonstrates that Ms. X 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. X does not qualify for waiver services based on a need for skilled or intermediate level nursing care. The next issue is whether Ms. X qualifies for waiver services based on the extent of her need for assistance with activities of daily living (ADLs).

E. Does Ms. X 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.⁸¹ 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 require skilled or intermediate level nursing care, as defined by the regulations and the CAT. Ms. X does not qualify for waiver services based on a need for nursing care. However, under the CAT, an individual may also qualify for waiver services, even without demonstrating a need for 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.⁸² The CAT divides the possible scoring combinations into six different areas, designated "NF1" through "NF6."

1. 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. X 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. X 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. X 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. X was not receiving any therapy from the time of her assessment through the date of the hearing.

⁸¹ Ex. E31.

⁸² Ex. E31.

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.⁸³ Ms. X's level of need for assistance with the five "shaded" ADLs is discussed below.

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.⁸⁴ 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 per week, or full caregiver performance of the activity three times or more during the week of the assessment.⁸⁵

Ms. X's 2013 assessment found that Ms. X required extensive assistance with body mobility (CAT score 3/2).⁸⁶ Ms. X's 2014 assessment found that Ms. X is independent with body mobility (CAT score 0/0). At hearing, Ms. K agreed that Ms. X does not need assistance with repositioning while in bed. Accordingly, the preponderance of the evidence indicates that Ms. X is independent with 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).⁸⁷ In order to receive a self-performance score of three (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.⁸⁸

In 2013 the Division found that Ms. X required extensive assistance with transfers (CAT score 3/2).⁸⁹ In 2014 the Division found that Ms. X now requires only supervision and set-up help with transfers (CAT score 1/1). At hearing, Ms. K testified that Ms. X can barely get out of bed, and that Ms. X requires weight-bearing assistance with transfers about 90% of the time.

⁸³ Ex. E20.

⁸⁴ Ex. E8.

⁸⁵ Ex. E8.

⁸⁶ Ex. F6.

⁸⁷ Ex. E8.

⁸⁸ Ex. E8.

⁸⁹ Ex. F6.

Ms. Schlup's finding that Ms. X does not currently require physical assistance with transfers is not necessarily incredible. However, Ms. Schlup was not available to testify at hearing, so her findings were not subject to cross-examination. On the other hand, Ms. K testified at hearing, so her statements *were* subject to cross-examination. Further, Ms. K 's testimony (that Ms. X still needs extensive assistance with transfers) is supported by Ms. X's diagnoses of anemia, arthritis, chronic pain, degenerative disk disease, kyphoscoliosis, left shoulder pain, left-side weakness, lumbago/low back pain, and spinal stenosis; by the 2013 assessment; and by Ms. K's and Ms. R's testimony that Ms. X's functional abilities have not improved since 2013. Accordingly, the preponderance of the evidence indicates that Ms. X still requires extensive assistance with transfers (CAT score 3/2).

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.⁹⁰ 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.⁹¹ In 2013 the Division found that Ms. X required extensive assistance with locomotion (CAT score 3/2).⁹² In 2014 Ms. X was found to require only supervision and set-up help with locomotion (CAT score 1/1).

At hearing, Ms. K testified that Ms. X's feet sometimes go numb; that, when she uses her walker, her PCA holds onto the back of Ms. X's pants for support; and that, in the same situation, Ms. K must support Ms. X by holding her underneath her arms.

Ms. Schlup's finding that Ms. X does not currently require physical assistance with locomotion is not inherently incredible. However, as discussed above, Ms. Schlup was not available to testify at hearing, so her findings were not subject to cross-examination. On the other hand, Ms. K testified at hearing, so her statements were subject to cross-examination. Further, Ms. K 's testimony (that Ms. X still needs extensive assistance with locomotion) is supported by Ms. X's diagnoses of anemia, arthritis, chronic pain, degenerative disk disease, kyphoscoliosis, left shoulder pain, left-side weakness, lumbago/low back pain, and spinal stenosis; by the 2013 assessment; and by Ms. K's and Ms. R's testimony that Ms. X's functional

⁹⁰ Ex. E9.

⁹¹ Ex. E9.

⁹² Ex. F7.

abilities have not improved since 2013. The preponderance of the evidence thus indicates that Ms. X still needs extensive assistance with locomotion (CAT score 3/2).

d. Eating

For purposes of waiver services eligibility, eating is defined as how a "person eats or drinks regardless of skill."⁹³ 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.⁹⁴

In 2013 the Division found that Ms. X required only set-up assistance with eating (CAT score 0/1).⁹⁵ In 2014 the Division found that Ms. X still requires only set-up help with eating (CAT score 0/1).⁹⁶ At hearing, Ms. K testified that X can feed herself, but "chokes on everything she eats," and needs someone to watch her/supervise her while eating. Ms. K's testimony in this regard was credible based on Ms. X's diagnosis of dysphagia. Accordingly, the preponderance of the evidence indicates that Ms. X requires supervision and set-up assistance with eating (CAT score 1/1).

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."⁹⁷ 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.⁹⁸ In 2013 Ms. X was found to require extensive assistance with toileting (CAT score 3/2).⁹⁹ In 2014 Ms. X was found to require only supervision and set-up help with toilet use (CAT score 1/1).

At hearing, Ms. K testified that Ms. X had bowel surgery three to four years ago; that, since that surgery, she has basically been incontinent; that she has chronically loose stools and diarrhea. This was not disputed by the Division. Likewise, it is undisputed that, during the current assessment period, Ms. X fell at least three times while in the bathroom¹⁰⁰ and that, on

⁹³ Ex. E11.
⁹⁴ Ex. E11.
⁹⁵ Ex. F9.
⁹⁶ Ex. E11.
⁹⁷ Ex. E11.
⁹⁸ Ex. E11.
⁹⁹ Ex. F9.
¹⁰⁰ Ex. 1 p. 49.

one occasion she fell, hit her head on the toilet, and had to be taken to the hospital. This evidence demonstrates convincingly that Ms. X still generally requires weight-bearing assistance with toileting, and I so find (CAT score 3/2).

f. Summary - Degree of Assistance Required with Shaded ADLs

Independent review indicates that Ms. X requires a greater degree of assistance than was found by the Division with regard to the "shaded" ADLs of transfers, locomotion, and toilet use. Specifically, the preponderance of the evidence indicates that Ms. X still requires extensive assistance with these three shaded ADLs. Because Ms. X requires extensive assistance with regard to three or more of the "shaded" ADLs, she meets NFLOC under Section NF(1)(e) of the CAT. Ms. X therefore remains eligible for waiver services.

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. X does not currently require either skilled or intermediate-level nursing care as defined under the relevant regulations and/or the Consumer Assessment Tool. However, Ms. X remains eligible to receive waiver services because she requires extensive assistance with three of the five "shaded" ADLs scored by the Division's Consumer Assessment Tool. Accordingly, the Division's decision terminating Ms. X's waiver services is reversed.

DATED this 25th 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 6th day of October, 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.]