

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

In the Matter of:)
)
 C S) OAH No. 15-0438-MDS
) Agency No.

DECISION

I. Introduction

The issue in this case is whether Mr. C S remains eligible for Medicaid Home and Community-Based Waiver services (waiver services). To be eligible, an applicant must generally demonstrate that he or she requires either skilled nursing care, intermediate level nursing care, or extensive assistance with at least three designated ("shaded") activities of daily living (ADLs).¹ The Division of Senior and Disabilities Services (DSDS or Division) conducted an assessment on November 25, 2014 and determined that Mr. S does not currently require skilled nursing care, intermediate level nursing care, or extensive assistance with three or more "shaded" activities of daily living.² The Division notified Mr. S of its determination on March 11, 2015.³ Mr. S contests the Division's determination.⁴

This decision concludes that although Mr. S has physical impairments, and although these impairments limit his ability to function independently, he did not require skilled or intermediate level nursing care from the time the Division conducted its assessment, through the date it notified Mr. S of its determination.⁵ This decision further concludes that, although Mr. S *now* requires a greater level of physical assistance with his ADLs than indicated by his 2014 assessment, he did not require enough assistance with his ADLs, from the time the Division conducted its assessment through the date it notified Mr. S of its determination, to qualify for waiver services on that basis. The preponderance of the evidence indicates that, during the period at issue (November 25, 2014 - March 11, 2015), Mr. S had the ability to

¹ See 7 AAC 130.205, 7 AAC 130.215, 7 AAC 140.510, 7 AAC 140.515, and the scoring page of the Consumer Assessment Tool (CAT).

² Exs. D, E.

³ Ex. D.

⁴ Ex. C.

⁵ That is the time frame at issue in this case.

function in a home setting without the need for wavier services. The Division's termination of Mr. S's waiver services is therefore affirmed.⁶

II. Facts

A. *Mr. S's Current Diagnoses and Relevant Medical History*

Mr. S is a 64-year-old man⁷ who currently lives in an assisted living facility (ALF).⁸ At the time of his assessment on November 25, 2014, he was living in a hotel / rooming house.⁹ His medical diagnoses include anemia, arthritis, bipolar I disorder (mixed, moderate), coronary atherosclerosis, diabetes mellitus (type 2 with insulin use), gastroesophageal reflux disease (GERD), hyperlipidemia, hypertension, hypothyroidism, obesity, paraproteinemia, neoplasm of ureter (benign), and secondary Parkinsonism.¹⁰ His past medical history is notable for seizures and three suicide attempts over the last 15 years.¹¹

On October 10, 2014 the administrator of the ALF in which Mr. S was then living filed a "Critical Incident Report" with the Division.¹² The report indicated that, earlier that day, Mr. S had attempted to choke one of his caregivers. Mr. S immediately left the ALF following this incident. The ALF administrator terminated the ALF's contract with Mr. S and filed a missing person report with the police.

On March 20, 2015 Mr. S (a veteran) was medevacked from a No Name facility to a hospital emergency department (ED) based on statements he had made which indicated suicidal ideation.¹³ He complained to the ED physician that he had been having flashes of anger which had caused him to hit people without warning.¹⁴ While he was in the ED he was fixated on hitting one of the ED staff members. During the prior week he had hit a woman while waiting at a bus stop. Before that, he had lost his housing because he had hit his landlord, and he also had a history of beating his wife.

⁶ The testimony at hearing indicates that, following the Division's issuance of its waiver termination notice on March 11, 2015, Mr. S's condition deteriorated significantly. Nothing in this decision prevents Mr. S from reapplying for waiver services at any time. As a Division representative stated at hearing, the submission of a new application for waiver services would allow the Division to consider Mr. S's *current* medical condition, which might well re-qualify Mr. S for waiver services.

⁷ Ex. 1 p. 19; Ex. E p. 1.

⁸ C S's hearing testimony; T R's hearing testimony.

⁹ Ex. E1.

¹⁰ Ex. 1 p. 21; Ex. 1 p. 26; Ex. E p. 3.

¹¹ Ex. 1 p. 26.

¹² All factual findings in this paragraph are based on Exs. F40 - F44 unless otherwise stated.

¹³ All factual findings in this paragraph are based on Ex. 1 p. 26 unless otherwise stated.

¹⁴ All factual findings in this paragraph are based on Ex. 1 p. 26 unless otherwise stated.

The ED physician did not feel it was safe to discharge Mr. S home, and recommended that Mr. S be admitted to No Name Institute (No Name) for further evaluation and therapy.¹⁵ Mr. S agreed with this and was voluntarily admitted to No Name.

While at No Name Mr. S was interviewed at length and his medications were adjusted.¹⁶ He was released from No Name on March 25, 2015. At the time of his discharge, No Name's staff felt that Mr. S had the capacity for self-care, and he was cleared to return to work without restrictions. Mr. S's discharge instructions were to continue taking his medications, follow-up with his outpatient psychiatric care provider, and undergo lab work as recommended by the outpatient care provider.

At hearing, Mr. S credibly testified in relevant part as follows:

1. He served in the U.S. Army in the No Name corps and as a mechanic. After that, he worked for No Name airlines. However, in the late 1980s he became unable to work.
2. He was first diagnosed with diabetes in about 2005. He was first diagnosed with Parkinson's disease in 2013.
3. When he was first admitted to the waiver program in April 2013, his Parkinson's symptoms were bad, and he had a significant infection. He was then treated by the No Name, and his symptoms improved to the point where the shaking had almost disappeared. However, his symptoms began getting worse again in April 2015.
4. One day in April 2015 he got out of bed, but then collapsed to the floor. His caretaker, T R, called 911. At the No Name hospital it was subsequently determined that he had serious blood and nasal infections. He was treated with antibiotics and the infections slowly resolved.
5. He is currently undergoing physical therapy once per week. He does not currently receive care from a nurse.
6. On his bad days, he can still transfer, without assistance, by putting his hands on his dresser and pushing himself up with both hands. He can eat and drink independently. He can use the toilet by himself, but one of the ALF staff waits outside in case he has problems.
7. His medical condition has been deteriorating in the months just prior to the hearing (since about April 2015).

At hearing, T R credibly testified in relevant part as follows:

1. She is a caregiver and office manager with No Name ALF.

¹⁵ All factual findings in this paragraph are based on Ex. 1 p. 29 unless otherwise stated.

¹⁶ All factual findings in this paragraph are based on Ex. 1 pp. 23 - 25 unless otherwise stated.

2. Mr. S first arrived at her ALF in early April 2015. His condition has deteriorated significantly in the four months since he arrived there, and his functional abilities have decreased.

3. Mr. S's Parkinson's-related shaking has gotten worse in the last four months. She believes that any infection makes the shaking worse.

At hearing, neither Mr. S or Ms. R asserted that the Division's assessment findings were incorrect as of the date they were made. Instead, their testimony emphasized that Mr. S's condition has deteriorated significantly, and his care needs have increased, in the months since the Division issued the determination notice at issue in this case.

B. Mr. S's Care Needs and Functional Abilities as Determined by the CAT

Mr. S has received Medicaid Home and Community-Based Waiver services since 2013.¹⁷ Mr. S was originally assessed as to his eligibility for waiver services on April 4, 2013 by N N, R.N.¹⁸ 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.¹⁹ Based on the 2013 assessment, the Division found that Mr. S required the following levels of assistance with his ADLs:²⁰ body mobility - supervision and curing (CAT score 1/5); 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 - extensive assistance (CAT score 3/2); and bathing - extensive assistance (CAT score 3/2). Based on the 2013 assessment, the Division found Mr. S eligible for waiver services due to his need for extensive assistance with three of the five "shaded" ADLs.²¹

The assessment at issue in this case was performed on November 25, 2014 by Denise Kichura, R.N. of DSDS.²² In completing the CAT, Ms. Kichura reported that Mr. S has the following functional abilities and limitations relevant to this case:²³

¹⁷ Ex. F.

¹⁸ Ex. F.

¹⁹ Ex. F.

²⁰ All factual findings in this paragraph are based on Exs. F6 - F12 unless otherwise stated.

²¹ Ex. D2; Scott Chow, R.N.'s hearing testimony.

²² Ex. E. Ms. Kichura was not available at hearing to testify in support of her assessment.

²³ Exs. E1 - E31.

Functional Assessment:²⁴ Ms. Kichura reported that Mr. S is able to touch his hands together over his head and behind his back, touch his feet while sitting, and place his hands across his chest and stand up. Ms. Kichura also wrote that Mr. S has a strong grip with both hands.

Physical Therapy:²⁵ Ms. Kichura reported that Mr. S is not currently receiving speech or language therapy, respiratory therapy, physical therapy, or occupational therapy. Ms. Kichura also reported that Mr. S does not currently have any prescriptions for walking, range of motion, foot care, or other care requiring hands-on assistance.

Bed / Body Mobility:²⁶ Ms. Kichura reported that Mr. S told her that he can reposition himself independently while in bed. Ms. Kichura reported that she observed Mr. S reposition himself in a bed, without assistance, during the assessment (scored 0/0).

Transfers:²⁷ Ms. Kichura reported she was told by Mr. S that he can stand up, by himself, without using any assistive devices. Ms. Kichura reported that she observed Mr. S stand up and sit down several times at the assessment without using assistive devices (scored 0/0).

Locomotion:²⁸ Ms. Kichura reported she was told by Mr. S that (1) he can walk from room to room independently; (2) he takes daily walks of up to one mile; (3) he can walk up a flight of stairs, while carrying a bag of groceries, without assistance; and (4) he can do his grocery shopping on foot, without using one of the store's motorized carts. Ms. Kichura reported that she observed Mr. S walk approximately two blocks, and walk up a flight of stairs, independently and without any assistive devices (scored 0/0).

Dressing:²⁹ Ms. Kichura reported she was told by Mr. S that he is able to dress himself each day without assistance. Ms. Kichura reported that she observed Mr. S take off his socks and put them back on again, put on his hat, and put on and zip-up his coat, without any assistance (scored 0/0).

Eating:³⁰ Ms. Kichura reported she was told by Mr. S that he prepares his own meals, and that he can eat and drink independently. Ms. Kichura reported observing that Mr. S has the range of motion and fine motor skills necessary to eat and drink independently (scored 0/0).

Toileting:³¹ Ms. Kichura reported she was told by Mr. S that he can perform all toileting functions himself, without any assistance, and that he no longer needs to use the incontinence

²⁴ Ex. E4.

²⁵ Ex. E5.

²⁶ Ex. E6.

²⁷ Ex. E6.

²⁸ Exs. E4, E7.

²⁹ Ex. E8.

³⁰ Ex. E9.

products he was using in 2013. Ms. Kichura reported observing that Mr. S is able to walk and transfer independently, has a good range of motion, and has good fine motor skills, and should therefore be independent with toilet use (scored 0/0).

Personal Hygiene:³² Ms. Kichura reported Mr. S told her that (1) he can wash his hands and face, brush his teeth, and trim his beard without assistance, but (2) when he wants his beard to be trimmed really well, he takes a bus to a barber shop / hair salon and has it done for him. Ms. Kichura wrote that Mr. S appeared to have the range of motion, coordination, and dexterity necessary to perform his personal hygiene tasks independently (scored 0/0).

Bathing:³³ Ms. Kichura reported he was told by Mr. S that he can take showers independently, and that he has not had to use / sit down on a shower chair for months. Ms. Kichura reported that she observed that Mr. S's ability to walk and transfer independently, and his good range of motion, should allow him to bathe independently (scored 0/0).

Medications:³⁴ Ms. Kichura found Mr. S does not need assistance with medications.

Professional Nursing Services:³⁵ Ms. Kichura found that Mr. S has no current need for professional nursing services. Specifically, Ms. Kichura found that Mr. S is currently receiving no injections, intravenous feedings, feedings via nasogastric, gastrostomy, or jejunostomy tubes, suctioning or tracheotomy care, treatments for open lesions, ulcers, burns, or surgical sites, and is not receiving oxygen for a new medical problem / condition. Ms. Kichura further found that Mr. S does not currently have any unstable medical conditions, and specifically, that he does not use a catheter or ventilator / respirator, is not comatose, and does not have an uncontrolled seizure disorder. In addition, Ms. Kichura found that Mr. S does not receive speech, respiratory, physical, or occupational therapy, and that he does not require professional nursing assessment, observation, and/or management at least once per month.³⁶

Special Treatments and Therapies:³⁷ Ms. Kichura found that Mr. S 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.

³¹ Ex. E9.

³² Ex. E10.

³³ Ex. E11.

³⁴ Ex. E12.

³⁵ Exs. E13 - E14.

³⁶ Ex. E14.

³⁷ Ex. E15.

Finally, Ms. Kichura found that Mr. S does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.

Cognition:³⁸ Ms. Kichura found that Mr. S has no long-term or short-term memory problems, and that Mr. S is generally able to recall names, faces, the location of his own room, the current season, or his current location. She rated Mr. S as being independent in making everyday decisions, and found that he has no cognitive problems requiring professional nursing assessment, observation, or management three days per week, or even once per month.

Behavioral Problems:³⁹ Ms. Kichura found that Mr. S does not wander, is not verbally abusive, is not physically abusive, does not engage in socially inappropriate or disruptive behavior, and does not resist care.⁴⁰ Based on this, Ms. Kichura concluded that Mr. S does not need professional nursing assessment, observation, or management due to behavioral problems.

Medication Management:⁴¹ Ms. Kichura reported that Mr. S is currently taking ten different medications and supplements on a daily basis; that he self-prepares and self-administers his medications; and that he is always compliant in taking his medications.

Communication:⁴² Ms. Kichura found that Mr. S can usually make himself understood by others, and can usually understand what others are saying.

Balance:⁴³ Ms. Kichura found that Mr. S had fallen in the 180 days prior to the assessment, but that he generally had no balance problems.

Mood:⁴⁴ Ms. Kichura found that Mr. S is easily annoyed or has persistent anger at himself or others, but that he has no other mood problems.

Based on the foregoing CAT scores, Ms. Kichura found that Mr. S does not currently require skilled level or intermediate level nursing care, and does not otherwise qualify for waiver services based on cognitive or behavioral problems or his level of need for assistance with ADLs.⁴⁵

On December 9, 2014 the Division sent a "Level of Care Verification Request" form to Dr. K L, M.D., one of Mr. S's two primary treating physicians.⁴⁶ In response to the question, "[a]t this time, would you admit this patient to a skilled nursing facility?", Dr. L answered "[n]o when last

³⁸ Ex. E16.

³⁹ Ex. E17.

⁴⁰ Note that the assessment occurred about four months prior to Mr. S's voluntary commitment to No Name on March 20, 2015.

⁴¹ Ex. E20.

⁴² Ex. E22.

⁴³ Ex. E23.

⁴⁴ Ex. E25.

⁴⁵ Exs. E29, E30.

⁴⁶ All factual findings in this paragraph are based on Exs. F32 and F33 unless otherwise stated.

seen 5 months ago [he] had no such needs." In response to the question, "[a]t this time, does this patient have intermediate nursing needs?", Dr. L answered "[y]es med management for insulin and all other oral medication; needs psychiatric f/u as patient is lost to f/u." The form was signed and returned to the Division on December 10, 2014.

On February 18, 2015 a different registered nurse reviewed nurse-assessor Kichura's waiver services eligibility decision.⁴⁷ This nurse-supervisor agreed that Mr. S is not currently eligible to participate in the waiver services program.⁴⁸

On February 24, 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 independent contractor Qualis Health.⁴⁹ Qualis also concurred with the nurse-assessor's determination that Mr. S had materially improved and no longer required a nursing home facility level of care.⁵⁰

C. Relevant Procedural History

On March 11, 2015 the Division mailed a notice to Mr. S advising that he was not currently eligible for waiver services, and that his waiver services would end in 30 days.⁵¹ On April 10, 2015 Mr. S requested a hearing to contest the Division's decision.⁵²

Mr. S's hearing was held on July 30, 2015. Mr. S participated in the hearing by phone, represented himself, and testified on his own behalf. T R, a caregiver at Mr. S's assisted living facility, testified by phone on Mr. S's behalf. Victoria Cobo participated by phone and represented the Division. Scott Chow, R.N., a registered nurse employed by the Division, participated in the hearing by phone and testified for the Division. The hearing was concluded, and the record closed, on July 30, 2015.

III. Discussion

A. Applicable Burden of Proof, Standard of Proof, and Standard of Review

Pursuant to applicable state and federal regulations, the Division bears the burden of proof in this case.⁵³ The applicable standard of proof is the "preponderance of the evidence" standard.⁵⁴

⁴⁷ Ex. F35.

⁴⁸ Ex. F35.

⁴⁹ Exs.G1 - G7.

⁵⁰ Ex. G7.

⁵¹ Ex. D1.

⁵² Ex. C1.

⁵³ 42 CFR § 435.930, 7 AAC 49.135.

⁵⁴ 7 AAC 49.135.

This standard is met when the evidence, taken as a whole, shows that the fact sought to be proved is more probable than not or more likely than not.⁵⁵

The standard of review in a Medicaid "Fair Hearing" proceeding is *de novo* review.⁵⁶ 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, even if the original decision is factually supported and has a reasonable basis in law.

B. Relevant Medicaid Waiver Services Statutes and Regulations

The Medicaid program has a number of coverage categories. One of those categories is the Home and Community-Based Waiver Services program⁵⁷ ("waiver services"). 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.⁵⁸ Alaska participates in the waiver services program.⁵⁹

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 Mr. S), that level of care must be either "intermediate care" as defined by 7 AAC 140.510, or "skilled

⁵⁵ *Black's Law Dictionary* at page 1064 (West Publishing, Fifth Edition, 1979).

⁵⁶ *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).

⁵⁷ 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.*

⁵⁸ *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].

⁵⁹ 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 . . .

care” as defined by 7 AAC 140.515.⁶⁰ 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 . . . 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.⁶¹

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.⁶² Under the CAT, an individual can qualify for waiver services by demonstrating a need for extensive assistance with at least three designated ADLs, even without demonstrating a need for skilled or intermediate level nursing care.⁶³

Finally, under the CAT, an individual may qualify for waiver services by having a certain minimum level of nursing needs or cognitive or behavioral problems, *combined with* a certain minimum level of need for physical assistance with ADLs.⁶⁴

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 . . .”⁶⁵ 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

⁶⁰ 7 AAC 130.215.

⁶¹ 7 AAC 130.215.

⁶² Ex. E29.

⁶³ Ex. E29.

⁶⁴ Ex. E29.

⁶⁵ AS 47.07.045(b)(1).

to demonstrate the ability to function in a home setting without the need for wavier services.^[66]

Finally, in an order issued in October 2014 in the class action⁶⁷ 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;"⁶⁸ 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 130.215, 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 activities of daily living (ADLs) coded or scored by the CAT are body mobility, transfers, locomotion, dressing, eating, toilet use, personal hygiene, and bathing.⁶⁹

The CAT numerical coding 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.⁷⁰ The self-performance scores relevant to eligibility 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).

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 to perform a particular ADL. The support

⁶⁶ AS 47.07.045(b)(3).

⁶⁷ 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 Mr. S.

⁶⁸ *Krone* order dated October 1, 2014 at page 6.

⁶⁹ Exs. E6 - E12.

⁷⁰ 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."

scores relevant to eligibility 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).

An individual can qualify for waiver services by scoring 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.⁷¹ The five "shaded" ADLs are bed / body mobility, transfers, locomotion, eating, and toilet use.⁷²

D. Does Mr. S Require Skilled or Intermediate Nursing Care?

Mr. S originally qualified for waiver services in April 2013 based on his need for extensive assistance with transfers, locomotion, and toilet use.⁷³ He was not found to have any nursing needs at that time.⁷⁴ At hearing, Mr. Chow testified that the 2014 assessment did not indicate any need for intermediate or skilled nursing care. Mr. S also testified that he was receiving no nursing care during the latest assessment period.

The only evidence in the record indicating that Mr. S might require nursing care is a statement by Dr. L, on the Division's "Level of Care Verification Request" form, stating that Mr. S requires "med management for insulin and all other oral medication," and "needs psychiatric f/u as patient is lost to f/u."⁷⁵ Dr. L's opinion on these issues is clearly supported by the record. However, the mere need for prescription medications, and the need for someone to make sure that a patient sees a doctor for follow-up outpatient care, do not constitute intermediate nursing care as defined by 7 AAC 140.510. Although the prescribing of medications must be done by a physician, it constitutes the providing of a substance (the drug) rather than the providing of a *service*, and is governed by a separate set of Medicaid regulations.⁷⁶ Similarly, making sure that a recipient gets to his doctor appointments and communicates with his physician is a service provided through the Medicaid Personal Care Assistant (PCA) program and does not require nursing oversight.⁷⁷ In summary, the needs identified by Dr. L do not, without more, demonstrate a need for intermediate-level nursing care as that term is defined by the Division's regulations or scored by the CAT.

In summary, the preponderance of the evidence indicates that Mr. S has no need for nursing services as defined by 7 AAC 140.510 and the Consumer Assessment Tool. The next

⁷¹ Ex. E29.

⁷² Ex. E18.

⁷³ Exs. F6 - F9.

⁷⁴ Ex. F29.

⁷⁵ Ex. F32.

⁷⁶ See the regulations governing prescription drugs and medical supplies at 7 AAC 120.100 - 7 AAC 120.140.

⁷⁷ See PCA regulations at 7 AAC 125.030(d)(9).

issue is whether Mr. S qualifies for waiver services based on cognitive or behavioral problems and/or a need for assistance with his activities of daily living.

E. Does Mr. S Qualify for Waiver Services Based on Cognitive Problems, Behavioral Problems, and/or a Need for Assistance with Activities of Daily Living?

The Consumer Assessment Tool's scoring summary is located at page 29 of the CAT.⁷⁸ As indicated by that summary, there are several scoring combinations through which one may qualify for waiver services. The first way, discussed immediately above, is to require skilled or intermediate level nursing care, as defined by the Division's regulations and the CAT. As discussed above, Mr. S does not currently qualify for waiver services on that basis. However, there are other scoring combinations which allow a person to qualify for waiver services *without* demonstrating a need for professional nursing care. The CAT divides these 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. Mr. S did not assert that he satisfies NF1(a), and the record indicates that he does not.⁷⁹ The second way (under NF1(b)) is to require use of a ventilator or respirator at least three days per week. Mr. S did not assert that he satisfies NF1(b), and the record indicates that he does not.⁸⁰ The third way (under NF1(c)) is to require care due to uncontrolled seizures at least once per week. Mr. S did not assert that he satisfies NF1(c), and the record indicates that he does not.⁸¹ The fourth way (under NF1(d)) is to receive some form of therapy at least five days per week. Mr. S did not assert that he satisfies NF1(d), and the record indicates that he does not.⁸²

The fifth/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 "shaded" ADLs listed at page 18 of the CAT.⁸³ The "shaded" ADLs are bed mobility, transfers, locomotion, eating, and toilet use.

⁷⁸ Ex. E29.

⁷⁹ Exs. E13 - E15.

⁸⁰ Exs. E13 - E15.

⁸¹ Exs. E13 - E15.

⁸² Exs. E13 - E15. In 2013 Mr. S was receiving therapy two days per week (Ex. F14). In 2014 Mr. S was receiving therapy one day per week (Mr. S's hearing testimony).

⁸³ Ex. E29.

The scores which the 2014 assessment assigned to Mr. S for the "shaded" ADLs are bed mobility: 0/0; transfers: 0/0; locomotion: 0/0; eating: 0/0; and toileting: 0/0.⁸⁴ While Mr. S and Ms. R testified convincingly that Mr. S *now* requires a greater level of assistance his ADLs than indicated by the Division's 2014 assessment, neither Mr. S nor Ms. R asserted that the Division's assessment findings were incorrect *as of the date they were made* (November 25, 2014). Rather, their testimony emphasized that Mr. S's condition had deteriorated significantly *since early April 2015*, about one month *after* the Division issued the determination notice at issue in this case.

In summary, Mr. S did not require extensive assistance with three or more shaded ADLs during the period at issue in this case. Accordingly, Mr. S does not qualify for waiver services based on the criteria of NF(1)(a-e) of the CAT.

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 injections and/or IV hookups, feeding tubes, tracheotomy care or nasopharyngeal suctioning, applying treatments or dressings, administering oxygen, observing, assessing, and managing unstable conditions, catheter management, and/or care required due to a comatose condition. The record does not show Mr. S needs any of these services, so Mr. S receives 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. The record does not show that Mr. S requires any of these therapies with the necessary frequency,⁸⁵ so he 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, veni-puncture, or barrier dressings for ulcers, at least three days per week. Again, however, the record does not show that Mr. S requires any of these procedures,⁸⁶ so he receives no points under NF2(c).

The fourth/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,

⁸⁴ Exs. E1, E18.

⁸⁵ Exs. E13 - E15.

⁸⁶ Exs. E13 - E15.

however, the record does not show that Mr. S requires any of these treatments,⁸⁷ so he 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 to obtain a point (under NF3(a)) is to have short-term memory problems. The record indicates that Mr. S has no short-term memory problems, so Mr. S receives no points in this category.⁸⁸

The second way to obtain a point (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. The record indicates that Mr. S has no problem remembering those items, so Mr. S receives no points in this category.⁸⁹

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. The Division found that Mr. S is unimpaired as to his cognitive skills for daily decision-making. Accordingly, Mr. S receives no points under this subsection.⁹⁰

The fourth way to obtain points (under NF3(d)) is to require *either* professional nursing care 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 Division's Supplemental Screening Tool (SST) for cognitive issues.

As to the first item, the Division found that Mr. S does not require professional nursing observation, assessment, and management for any cognitive problems. Also, for those reasons, the Division did not complete the SST for cognitive issues. Mr. S did not contest the Division's findings regarding his cognition. Likewise, although Mr. S asserted at hearing that he *now* requires more assistance with his ADLs than the Division found at the time of the assessment, he did not assert that his ADL scores were incorrect at the time they were made, or at the time of the Division's issuance of its determination letter. Accordingly, Mr. S receives no points under NF3(d).

⁸⁷ Exs. E13 - E15.

⁸⁸ Exs. E16, E29.

⁸⁹ Exs. E16, E29.

⁹⁰ Exs. E17, E29.

Under NF3, an applicant must receive a score of one *on all four subsections of NF3* in order to receive a single "overall" point at the end of NF3. Mr. S received no points under any of the subsections, so Mr. S receives an overall score of zero at 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.⁹¹ The Division found that, at the time of the assessment, Mr. S had none of these behavioral problems.⁹²

Had the assessment period in this case extended through March 20, 2015, Mr. S might have been entitled to points under NF4(a) based on matters related to his admission to No Name on that date. However, the No Name admission occurred *after* the Division issued its waiver determination. Accordingly, the No Name admission cannot be considered in the present case.

There *was* another event which should have been considered by the Division. This was the incident of October 10, 2014 when Mr. S attempted to choke one of his caregivers. However, to receive points under NF4(a), the recipient must be physically abusive *at least four days per week*. Here, there is only evidence of a single instance of physical abuse. Thus, even considering the incident of October 10, 2014, Mr. S receives no points under NF4(a).

To receive a point under NF4(b), an applicant must *either* require professional nursing care 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). As to the first item, the Division found that, *as of the date of the 2014 assessment*, Mr. S did not require professional nursing observation, assessment, and management for his behavioral problems. Mr. S did not contest that finding, or the fact that the Division did not assign him a score on the behavioral portion of the SST. Likewise, although Mr. S asserted at hearing that he *now* requires more assistance with his ADLs than the Division found at the time

⁹¹ Exs. E17, E29.

⁹² Exs. E17, E29.

of the assessment, he did not assert that his ADL scores were incorrect at the time they were made, or at the time of the Division's issuance of its determination letter. Thus, Mr. S receives no points under NF4(b).

Under NF4, an applicant must receive a score of one *on both subsections of NF4* in order to receive a single "overall" point at the conclusion of NF4. Mr. S received no points under NF4(a) or NF4(b), so Mr. S receives an overall score of zero at NF4.

5. NF5

At NF5, the scores from NF2, NF3, and NF4 are added together. If an applicant receives a score of one or more, then the analysis proceeds to NF6. In this case, however, Mr. S received has a total score of zero at NF5. Accordingly, the analysis in this case does not proceed to NF6, and Mr. S is ineligible for waiver services based on his CAT scores.

IV. Conclusion

Mr. S did not require skilled or intermediate level nursing care from the time the Division conducted its assessment, through the date it notified Mr. S of its determination. Further, although Mr. S *now* requires a greater level of physical assistance with his ADLs than indicated by his 2014 assessment, he did not require enough assistance with his ADLs, from the time the Division conducted its assessment through the date it notified Mr. S of its determination, to qualify for waiver services on that basis. The preponderance of the evidence indicates that, during the period at issue (November 25, 2014 - March 11, 2015), Mr. S had the ability to function in a home setting without the need for wavier services. The Division's termination of Mr. S's waiver services is therefore affirmed.

Dated this 14th day of September, 2015.

Signed
Jay D. 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 23rd day of September, 2015.

By: Signed
Signature
Jay D. Durych
Name
Administrative Law Judge
Title

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