

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

In the Matter of:)
)
 S L) OAH No. 15-0566-MDS
) Agency No.
_____)

DECISION

I. Introduction

S L applied for Medicaid Home and Community-Based Waiver (Waiver) benefits. He was assessed by the Division of Senior and Disabilities Services (Division) to determine his eligibility for Waiver benefits. The Division notified him on March 18, 2015 that his application was denied. Mr. L appealed the denial.

Mr. L's hearing was held on July 13, 2015. He was represented by attorney Goriune Dudukgian of the Alaska Legal Services Corporation. K N, the owner of the assisted living home where Mr. L resides, testified on his behalf. Leah Farzin, with the Office of the Attorney General, represented the Division. Marianne Sullivan, R.N., and Angela Hanley, R.N., nurse-assessors for the Division, testified on its behalf.

After a review of the evidence, the Division's denial of Mr. L's application for Waiver services is reversed.

II. Background Facts

Mr. L is 63 years old.¹ He has been living in his current assisted living home since August of 2014.² He is blind and schizophrenic. He has epilepsy, which has been successfully controlled with seizure medication. Mr. L also has a large ventral hernia. He was hospitalized in January 2015, due to colitis.³

Mr. L applied for Waiver benefits. Angela Hanley, a Division nurse, made a visit to assess Mr. L's eligibility for Waiver benefits on March 2, 2015. She recorded the assessment visit in the Consumer Assessment Tool (CAT). Her findings resulted in a denial of Mr. L's application.⁴ In general, Ms. Hanley found that Mr. L was not cognitively impaired, did not have any behavioral issues, did not require any specialized nursing services, and did not receive any specialized therapies or treatments. She found that he required extensive assistance with two of the scored activities of daily living, specifically locomotion and toileting. With regard to

¹ Ex. E, p. 1.
² Ms. N's testimony.
³ Ex. E, p. 3.
⁴ Ex. D.

transfers, Mr. L told Ms. Hanley, at the assessment visits, that his caregivers had to “pull him up to a standing position” and that they would occasionally also need to use a gait belt.⁵ Ms. Hanley observed Mr. L perform one transfer, which consisted of the assisted living home staff placing a walker in front of him, placing his hands on the walker, holding onto his arm, while he “pulled himself up to a standing position”; she also saw him sit down on his walker. Based upon her observations, Ms. Hanley determined that Mr. L required limited, not extensive assistance, with transfers.⁶ Mr. L’s application was denied because he did not require a minimum of extensive assistance with three or more of the scored activities of daily living (body mobility, transfers, locomotion, eating, or toileting).⁷

Ms. N is the owner of the assisted living home where Mr. L lives. She also lives in the home and helps to care for Mr. L. Ms. N described Mr. L’s transfer needs as always involving weight-bearing support. While she spent some time attempting to quantify the degree of support provided, her testimony was clear that Mr. L requires active weight-bearing support on a daily basis, including occasional two person assistance because she is not strong enough to lift him entirely by herself.⁸

III. Discussion

In this case, in which a citizen is applying for benefits, the citizen has the burden of proof by a preponderance of the evidence.⁹

1. Overview

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 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

⁵ Ex. E, p. 6.

⁶ Ms. Hanley’s testimony; Ex. E, p. 6.

⁷ Ms. Hanley’s and Ms. Sullivan’s testimony; Ex. E, pp. 6, 29.

⁸ Ms. N’s testimony.

⁹ 7 AAC 49.135.

¹⁰ 7 AAC 130.205(d)(1)(B) and (d)(2).

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).

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 bases Waiver eligibility upon the coding provided for five specified activities of daily living (ADLs): body mobility, transfers, locomotion, toileting, and eating. The CAT numerical coding system has two components. The first component is the *self-performance code*. These codes rate how capable a person is of performing each particular ADL. The possible codes are: **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance¹⁷); **3** (the person requires extensive assistance¹⁸); and **4** (the person is totally dependent¹⁹). There are also codes which are not used in calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).²⁰

The second component of the CAT scoring system is the *support code*. These codes rate the degree of assistance that a person requires for a particular ADL. The possible codes 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). Again, there are additional codes which are not used to arrive at a service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).²¹

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

¹⁴ Ex. E, pp. 12 - 15.

¹⁵ Ex. E, pp. 16 - 17.

¹⁶ Ex. E, p. 29.

¹⁷ Pursuant to 7 AAC 125.020(a)(1), limited assistance with an ADL “means a recipient, who is highly involved in the activity, receives direct physical help from another individual in the form of guided maneuvering of limbs, including help with weight-bearing when needed.”

¹⁸ Pursuant to 7 AAC 125.020(a)(2), extensive assistance with an ADL “means that the recipient is able to perform part of the activity, but periodically requires direct physical help from another individual for weight-bearing support or full performance of the activity.”

¹⁹ Pursuant to 7 AAC 125.020(a)(3), dependent as to an ADL, or dependent as to an IADL, “means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity.”

²⁰ Ex. E, p. 18.

²¹ Ex. E, p. 18.

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) with any of the five specified ADLs, that person receives points toward his or her total 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 any of the five specified ADLs.²²

In order for a person who only has physical assistance needs to score as eligible for Waiver services on the CAT, he or she would need a self-performance code of 3 (extensive assistance) or 4 (total dependence) and a support code of 2 or 3 for three or more of the five specified ADLs (bed mobility, transfers, locomotion within the home, eating, and toileting).²³

The results of the assessment portion of the CAT are then scored. If an applicant's score is 3 or higher, the applicant is medically eligible for Waiver services.²⁴

2. Eligibility Decision

The 2015 assessment found that Mr. L was not receiving any therapies (physical, speech, occupation, respiratory, or specialized treatments/therapies),²⁵ had no impaired cognition or behavioral issues, and was not receiving professional nursing services.²⁶ The record does not contain any evidence that contradicts those findings. Consequently, Mr. L's only path to continued eligibility for Waiver benefits is if he requires extensive physical assistance (self-performance code of 3) or is completely dependent (self-performance code of 4) in three or more of the qualifying ADLs of bed mobility, transfers, locomotion within the home, eating, and toileting.

The 2015 assessment found that Mr. L requires extensive assistance for two of the qualifying ADLs of locomotion and toileting.²⁷ Mr. L received a self-performance code of 2 in transfers. He argues that this transfer score is inconsistent with the overall report and believes he should have been given a self-performance code of 3 in transfers.

²² Ex. E, p. 29.

²³ *Id.*

²⁴ *Id.*

²⁵ Mr. L was scheduled to begin physical therapy, but refused the treatment.

²⁶ Ex. E, pp.13 - 17.

²⁷ Ex. E, pp. 7, 9.

a. Transfers

The nurse-assessor concluded that Mr. L required limited assistance (self-performance code of 2) for transfers. This conclusion was based upon her observation of Mr. L transferring from a chair to a walker during her assessment with minimal assistance. The staff member placed Mr. L's hands on the walker and held on to his arm as he pulled himself up to standing position.²⁸ The CAT recorded that Mr. L and the staff both reported that he needs help transferring and when he is not feeling well, they use the gait belt for extra support.²⁹ At hearing, the nurse-assessor supplemented the CAT by testifying that she had determined Mr. L's self-performance code through her observation that the staff's assistance during the transfer had likely been to "let him know they were there" or for "balance."³⁰ It was this observation, and not the reports from the consumer or the staff, which led Ms. Hanley to assign Mr. L a self-performance score of 2.³¹

Prior to Ms. Hanley's testimony, another nurse-assessor working for the division, Ms. Marianna Sullivan, testified that the role of the nurse-assessor was to determine only what the person was capable of, not the level of assistance he or she is accustomed to.³²

Ms. N's testimony, while mildly circuitous, credibly indicated Mr. L's reliance on the staff for weight-bearing support during transfers on a daily basis. Her testimony is corroborated by the frequent use of the gait belt, which is also consistent with weight-bearing assistance. It must be noted that Ms. N has been providing care for Mr. L since August 2014, whereas the Division's nurse assessor had never met Mr. L before the assessment, and that her average assessment takes approximately an hour.³³

As pointed out by Mr. L, his scores for bathing and for toileting³⁴ were, at least marginally, predicated on his need for weight-bearing assistance during those activities. Need for weight-bearing assistance in bathing and toileting does not affect the transfer score, but both scores consider weight-bearing assistance as a determining factor. The overall weight of the evidence, being Ms. N's testimony, the use of a gait belt, the fact that weight-bearing support is required for locomotion, and is a factor in bathing, and the assessor's very limited one-time

²⁸ Ex. E, p. 6.

²⁹ *Id.*

³⁰ Ms. Hanley's testimony.

³¹ Ms. Hanley's testimony.

³² Ms. Sullivan's testimony.

³³ Ms. N's testimony; Ms. Hanley's testimony.

³⁴ In both categories Mr. L received a self-performance score of 3. See Ex. E, pp. 11, 19.

observation of Mr. L, constitute persuasive evidence that Mr. L requires extensive assistance with transfers daily.

Consequently, Mr. L met his burden of proof on this point and demonstrated that it is more likely true than not true that he requires weight-bearing assistance at least three times a week (self-performance code of 3) for transfers.

IV. Conclusion

Mr. L requires extensive assistance with three of the scored ADLs: transfers, locomotion, and toileting. As a result, he qualifies for Medicaid Waiver benefits. The Division's decision denying his application is reversed.

DATED this 20th day of July, 2015.

Signed

Lawrence A. Pederson
Administrative Law Judge

Adoption

The undersigned, under the authority of AS 44.64.060(e)(1), adopts the foregoing 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 4th day of August, 2015.

By: *Signed*

Name: Lawrence A. Pederson
Title: Administrative Law Judge

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