

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

In the Matter of)	
)	
L C)	OAH No. 15-0595-MDS
_____)	Division No.

DECISION

I. Introduction

L C applied for Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (Division) initially assessed Ms. C for program eligibility on April 21, 2015. It denied her application on May 7, 2015,¹ and Ms. C requested a hearing.²

Ms. C’s hearing was held on June 26, 2015. Ms. C represented herself and testified on her own behalf. Victoria Cobo represented the Division. Angela Hanley testified for the Division.

Ms. C experiences significant physical impairments, and she requires support and oversight to manage her health care needs. However, her health care needs do not require the nursing facility level of care that is necessary to qualify for Waiver services. As a result, the denial of her application for Waiver services is upheld.

II. Facts³

The following facts were established by a preponderance of the evidence.

Ms. C is 58 years old and currently resides at an assisted living facility. Her medical diagnoses include malnutrition following complications from gastric bypass surgery, peripheral neuropathy, chronic pain from arthritis, and bi-polar disorder. She has sciatica and slipped discs in her back as well as significant cartilage damage in her knees. Ms. C wears braces to support her knees. She also reported having anxiety issues and PTSD.⁴ Ms. C’s joint issues and chronic pain cause balance problems, and she uses a walker to get from place to place.

Angela Hanley, RN, assessed Ms. C to determine her eligibility for Waiver services on April 21, 2015. Her conclusions regarding Ms. C’s physical and mental function are

¹ Ex. D.

² Ex. C.

³ These facts are based upon Ex. C (appeal request letter from L C, dated May 18, 2015), Ex. E (assessment), Ex. 1 (letter from Dr. J T dated June 19, 2015), and the testimonies of L C and Angela Hanley.

⁴ Ex. E, p. 3; Ex. C, p. 2.

documented on the Consumer Assessment Tool (CAT). She found Ms. C to be cognitively well-oriented.⁵ She noted that Ms. C has some memory problems and may require direction or reminders from others one to three times per day. She also noted that Ms. C has minor speech or word-finding difficulty. This resulted in a total cognitive score of 2.⁶ The assessment further indicates that Ms. C does not display significant behavior problems; she sometimes resists care, but her behavior is easily altered.⁷ She does not require professional nursing services, therapy from a qualified therapist, or special treatments or therapies.⁸

The five activities of daily living that are assessed to determine Waiver eligibility are bed mobility, transfers, locomotion (walking), eating, and toileting.⁹ On the CAT, Ms. C's self-performance ratings for bed mobility, locomotion, and toilet use were 0, indicating that she is independent or requires oversight help only 1 or 2 times per week for these activities. Her self-performance ratings for eating and transfers were 1, meaning that she requires supervision for those ADLs.¹⁰ She also requires set-up help for transfers (support code 1), because she needs to have her walker nearby to steady her when she stands up.

Ms. C disagrees with the assessment's conclusion about her Waiver eligibility. Her primary concerns focus on her need for assistance managing her many different medications, preparing nutritious meals and monitoring her food intake, and completing housekeeping tasks. She is also concerned about falling. In support of her position, she submitted her doctor's written recommendation that she receive help managing her food intake, her general health care, and the needs of maintaining her home.¹¹

Using her walker, Ms. C is able to get around on her own. The walker also steadies her when she rises from a seated position or gets out of bed. She is able to do these things on her own as long as the walker is available for balance. At times, especially in the morning, her balance is unsteady and she feels she is at risk of falling. Her knee occasionally gives out and causes her to fall. When this happens, Ms. C needs someone to help pull her back up to

⁵ Ex. E, pp. 4, 16.

⁶ Ex. E, p. 32.

⁷ Ex. E, p. 17.

⁸ Ex. E, pp. 13-15.

⁹ Ex. E, p. 18 (shaded areas).

¹⁰ Ex. E, p. 18. For purposes of the CAT, supervision means that oversight, encouragement or cueing are provided more than three times a week, or supervision plus nonweight-bearing assistance is provided 1-2 times per week.

¹¹ Ms. C's doctor noted her past problems with malnutrition, which caused significant decline in her functional ability. At one point, Ms. C's severe malnutrition led to complete collapse and paralysis. *See* Ex. 1.

standing, as she cannot get up on her own. Her last fall was approximately two months ago, in April 2015.

Ms. C has trouble sleeping and is often up at night. She sleeps in a hospital bed that includes side bars. With the bars, she is able to reposition herself without help. She does not require assistance to turn from side to side or otherwise manage herself in her bed.

At one time, Ms. C needed assistance eating because she experienced some paralysis as a result of malnourishment. She had emergency surgery in January to resolve a blockage, and she no longer needs any physical assistance to eat or drink.

Ms. C experiences some incontinence when she can't get to the bathroom in time. In the bathroom, she can get herself on and off the toilet, which has a seat-riser that elevates the seat height. She cannot push herself up off a regular-height toilet. She is otherwise capable of caring for all aspects of her toileting needs, including self-care after incontinence episodes.

III. Discussion

A. Method for Assessing Eligibility

The Alaska Medicaid program provides Waiver services to adults with physical disabilities who require “a level of care provided in a nursing facility.”¹² The purpose of these services is “to offer a choice between home and community-based waiver services and institutional care.”¹³

The nursing facility level of care¹⁴ requirement is determined in part by an assessment which is documented by the CAT.¹⁵ The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,¹⁶ and whether an applicant has impaired cognition or displays problem behaviors.¹⁷ 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 3.¹⁸

The CAT also records the degree of assistance an applicant requires for activities of daily living, which include five specific categories: bed mobility (moving within a bed), transfers (i.e., moving from the bed to a chair or a couch, etc.), locomotion within the home (walking or

¹² 7 AAC 130.205(d)(1)(B) and (d)(2).

¹³ 7 AAC 130.200.

¹⁴ See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

¹⁵ 7 AAC 130.230(b)(2)(B).

¹⁶ Ex. E, pp. 13-15.

¹⁷ Ex. E, pp. 16-17.

¹⁸ Ex. E, p. 29 (NF.1).

movement when using a device such as a cane, walker, or wheelchair), eating, and toilet use, which includes transferring on and off the toilet and personal hygiene care.¹⁹

If a person has a self-performance code of 2 (limited assistance, which consists of non-weight bearing physical assistance three or more times during the last seven days, or limited assistance plus weight-bearing assistance one or two times during the last seven days) or 3 (extensive assistance, which consists of weight-bearing support three or more times during the past seven days, or the caregiver provides complete performance of the activity during a portion of the past seven days), plus a support code of 2 (physical assistance from one person) or 3 (physical assistance from two or more persons), that person receives points toward his or her total eligibility score on the CAT.

A person can also receive points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive behaviors, etc.), and required assistance with the five specified activities of daily living.²⁰

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 activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting).²¹

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.²²

B. Burden of Proof

In this case, Ms. C seeks Waiver eligibility and bears the burden to prove by a preponderance of the evidence that she satisfies eligibility requirements.²³ She can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs.²⁴

C. Eligibility

The parties agree that Ms. C does not require professional nursing services, therapy from a qualified therapist, specialized treatment, or other therapies. She does not need professional

¹⁹ Ex. E, p. 18 (shaded areas).

²⁰ Ex. E, p. 29 (NF.2 – NF.6).

²¹ Ex. E, p. 29 (NF.1e).

²² Ex. E, p. 29 (NF.7).

²³ 7 AAC 49.135.

²⁴ 2 AAC 64.290(a)(2).

nursing intervention to manage cognitive or behavioral problems. As a result, the only way Ms. C could qualify for Waiver services is if she requires extensive one person physical assistance (self-performance code 3, support code 2), or a higher level of assistance, to perform three or more of the five ADLs that are assessed for Waiver eligibility.²⁵ Extensive assistance means she requires weight-bearing assistance at least three times a week to perform the ADL in question.²⁶

For purposes of the CAT, eating refers to how a person eats and drinks, not including food preparation or cooking.²⁷ Ms. C agreed that she is able to feed herself, and she does not need any physical assistance to eat or drink. The assessment notes that, because of the complications from her gastric bypass, Ms. C must eat small amounts every two hours. She requires supervision to assure that she is eating appropriate foods at the appropriate times. In light of this, the assessment correctly concludes that Ms. C needs supervision for her eating ADL (self-performance code 1, support code 0).

Bed mobility refers to how a person moves to and from a lying position, turns side to side, and positions her body while in bed.²⁸ The assessment indicates that Ms. C manages her bed mobility needs independently, and Ms. C confirmed that she does not need assistance to move around in her bed. Her side rails provide the support she needs to be able to turn over, to reposition herself, and to sit up on her own.

Under the CAT, toileting refers to use of the toilet, including transfers on/off, cleansing, changing pads and adjusting clothing.²⁹ Bathing or showering is not included. Ms. C testified that she manages toileting activities on her own, using a toilet with a seat-riser. The assessment also notes that she uses grab bars that are next to her toilet. Although she experiences regular incontinence, she is able to respond to these situations independently, and she manages all her toileting self-care. The assessment correctly concluded that Ms. C is independent with regard to toileting.

Locomotion pertains to how someone moves between locations in her room and to other areas on the same floor of her residence. The assessment indicates that Ms. C gets around independently, meaning that at most she requires help or oversight only 1 or 2 times per week.³⁰

²⁵ Ex. E, p. 29 (CAT Scoring).

²⁶ Ex. E, p. 18.

²⁷ Ex. E, p. 9.

²⁸ Ex. E, p. 6.

²⁹ Ex. E, p. 9.

³⁰ Ex. E, p. 7.

Ms. C has expressed reasonable concerns about her risk of falling. She does not fall often, but when she does, she requires weight-bearing physical assistance to get back up. She fell once in the week prior to her assessment, and she has not fallen again in the two months since that time. This information suggests that, on days she feels particularly unsteady, Ms. C may need supervision to prevent falls. At most, her need for weight-bearing assistance the week prior to the assessment could support a finding that Ms. C requires limited assistance for locomotion (self-performance code 2, support code 2).³¹

Transferring refers to how a person moves to and from a bed or chair to a standing position. The assessment concludes that Ms. C requires supervision and setup help (self-performance code 1, support code 1).³² This is based on Ms. C's stiffness in the morning, her balance problems, and her need to have her walker available to steady herself as she moves to and from a sitting or standing position. The evidence in the record supports the conclusion that Ms. C requires supervision and setup help for this activity. There is not enough evidence to conclude that she requires frequent hands-on assistance or occasional weight-bearing help to complete her transferring needs.

IV. Conclusion

Ms. C does not require extensive physical assistance (self-performance code 3) with three or more of the five activities of daily living that are assessed for Waiver eligibility. She clearly experiences significant chronic health challenges. However, the supervision and support offered by her assisted living facility adequately meet her health care needs. There is no dispute that Ms. C has benefitted from the oversight available at her assisted living placement. The question for Waiver eligibility, however, is whether her physical health care needs require a nursing home level of care. She did not meet her burden of proof on this issue, and the Division's decision to deny her application is upheld.

DATED this 30th day of June, 2015.

Signed

Kathryn A. Swiderski
Administrative Law Judge

³¹ Limited assistance includes receiving physical help in the guided maneuvering of limbs or other nonweight-bearing physical assistance three or more times per week, or it may include those actions plus weight-bearing assistance 1 or 2 times per week. Ex. E, p. 7.

³² Ex. E, p. 6.

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 14th day of July, 2015.

By: Signed
Name: Jeffrey A. Friedman
Title: Administrative Law Judge

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