

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

In the Matter of )  
 )  
 N H ) OAH No. 15-0606-MDS  
 ) Division No.

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**DECISION**

**I. Introduction**

N H applied for Medicaid Home and Community-Based Waiver program (Waiver) services. He was initially assessed on April 7, 2015, and the Division of Senior and Disabilities Services (Division) denied his application on May 15, 2015.<sup>1</sup> Mr. H requested a hearing.<sup>2</sup>

Mr. H's hearing took place on August 13, 2015. He represented himself, with assistance from his Care Coordinator N K and No Name Services case manager E X. Victoria Cobo represented the Division. Angela Hanley, R.N, testified for the Division.

Mr. H experiences physical health challenges as well as significant cognitive impairment and behavioral deficits. However, Mr. H has not shown that his condition required a nursing facility level of care at the time of his assessment. As a result, the denial of his application for Waiver services is upheld. Because Mr. H's health care needs appear to have changed markedly since the time of his assessment in April and May 2015, he was encouraged at the hearing to provide the Division with additional information regarding his current health status and needs.

**II. Facts<sup>3</sup>**

N H is 53 years old. His documented medical diagnoses include HIV infection, hemochromatosis, post-traumatic stress disorder (PTSD), chronic pain, dementia, schizoaffective disorder and antisocial personality traits.<sup>4</sup> He experiences notable cognitive impairment, and he has a history of problem behaviors that have made it difficult for him to remain in a stable, long-term living arrangement.

Mr. H lives in an assisted living facility. His current residence is his third assisted living home placement this year. He was asked to leave the two other facilities because of anger control problems, and he is working to overcome similar concerns so that he can remain in his current placement.

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<sup>1</sup> Ex. D.

<sup>2</sup> Ex. C.

<sup>3</sup> These facts are based upon Division Ex. E (Assessment), Claimant Ex. 1 (Neuropsychological assessment from Dr. M J, Ph.D., signed July 14, 2015), and the testimonies of N H, N K, E X and Angela Hanley, R.N.

<sup>4</sup> Ex. E at 3; Ex. 1 at 2.

Mr. H is verbally abusive on a regular basis, and people around him sometimes feel threatened by his behavior. His tolerance for frustration is low, and this can interfere with his ability to communicate and to understand others. His memory is poor, and he easily becomes confused or disoriented. He often gets lost when he walks outdoors. When this happens, he eventually realizes that his surroundings have become unfamiliar, and he is able to retrace his route until he again recognizes landmarks and can re-orient himself. Recent neuropsychological testing indicates that Mr. H's memory and intellectual function are in the extremely low range.<sup>5</sup>

Mr. H takes a number of medications, including pain control medications, and he requires some oversight and reminders to manage his medications properly. He also needs assistance with matters such as filling prescriptions and keeping appointments. At the time of the assessment and the hearing, he made his own decisions regarding health care, finances and daily life, and he appeared competent to do so.<sup>6</sup>

Mr. H was assessed for Waiver eligibility on April 7, 2015, by Angela Hanley, R.N. Ms. Hanley's conclusions regarding Mr. H's physical and mental function are documented on the Consumer Assessment Tool (CAT).

The assessment concludes that Mr. H does not require professional nursing services, therapy from a qualified therapist, or special treatments and therapies. It recognizes Mr. H's problem behaviors, noting that he wanders and is verbally abusive one to three days per week, and his verbal abuse is not easily altered.<sup>7</sup> The supplemental screening tool for behavior adds that Mr. H sleeps noticeably more or less than normal. He regularly wanders, but he is not combative about returning. His attitudes, disturbances and emotional states create consistent difficulties, but they are modifiable to manageable levels. He is frequently disruptive or aggressive, or extremely agitated or anxious. He frequently has difficulty understanding his self-care needs, but he will cooperate when given direction or explanation. This resulted in a total behavior score of 12 out of a possible 20.<sup>8</sup>

Mr. H's cognitive assessment reflects short-term memory problems. On the date of the assessment, he did not know the current season and could not recall three items in a five-minute time span. However, he knew the location of his room, where he was, and names or faces of

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<sup>5</sup> Ex. 1.

<sup>6</sup> Some evidence at the hearing raised questions whether Mr. H would benefit from decision-making assistance, for instance from a legal guardian or someone with a limited power of attorney, and he was advised to investigate such options if his health continues to deteriorate.

<sup>7</sup> Ex. E at 17.

<sup>8</sup> Ex. E at 33.

people he sees regularly.<sup>9</sup> His decision-making skills regarding the tasks of daily life were rated “modified independence,” meaning he has some difficulty in new situations only.<sup>10</sup> The supplemental screening tool for cognition notes that he has difficulty remembering and using information. He requires direction and reminding from others four or more times per day, and he cannot follow written instructions. He is periodically confused during the day. He gets lost when walking, even in his neighborhood, and he has some difficulty with speech or word-finding. This resulted in a total cognitive score of 8 out of a possible 16.<sup>11</sup>

Five activities of daily living (ADLs) are assessed as part of the Waiver eligibility process: bed mobility, transfers, locomotion (walking), eating and toileting.<sup>12</sup> The CAT summarized Mr. H’s physical assistance needs and concluded that he is capable of managing all of them independently (self-performance code 0, support code 0).<sup>13</sup>

Mr. H disagrees with the assessment’s conclusions about his physical assistance needs, particularly when those needs are viewed together with his cognitive and behavioral limitations.

### **III. Discussion**

#### ***A. Method for Assessing Eligibility***

The Alaska Medicaid program provides Waiver services to older adults or adults with physical disabilities who require “a level of care provided in a nursing facility.”<sup>14</sup> The purpose of these services is to offer eligible individuals a choice to receive home and community-based waiver services as an alternative to institutional care.<sup>15</sup>

The nursing facility level of care requirement is determined in part by an assessment documented in the CAT.<sup>16</sup> The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments, and whether an applicant has impaired cognition or displays problem behaviors.<sup>17</sup> Each of the assessed items is coded and contributes to a final numerical score. For instance, if an individual required five days or more of therapies (physical,

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<sup>9</sup> Ex. E at 4, 16.

<sup>10</sup> Ex. E at 16.

<sup>11</sup> Ex. E at 32.

<sup>12</sup> Ex. E at 18 (shaded areas).

<sup>13</sup> *Id.*

<sup>14</sup> 7 AAC 130.205(d)(2), (d)(4).

<sup>15</sup> 7 AAC 130.200.

<sup>16</sup> *See* 7 AAC 130.213; 7 AAC 130.215(2), (4).

<sup>17</sup> Ex. E at 13-17, 32-33.

speech/language, occupation, or respiratory therapy) per week, he or she would receive a score of 3.<sup>18</sup>

The CAT also records the degree of assistance an applicant requires for activities of daily living, which include five specific categories: bed mobility (moving within a bed), transfers (i.e., moving from the bed to a chair or a couch, etc.), locomotion within the home (walking or movement when using a device such as a cane, walker, or wheelchair), eating, and toilet use, which includes transferring on and off the toilet and personal hygiene care.<sup>19</sup>

If a person has a self-performance code of 2 (limited assistance) or 3 (extensive assistance), 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.<sup>20</sup>

A person also can 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.<sup>21</sup>

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 at least 3 (extensive assistance) and a support code of 2 for three or more of the five specified activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting).<sup>22</sup> 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.<sup>23</sup>

### ***B. Burden of Proof***

Mr. H seeks Waiver services and bears the burden to prove by a preponderance of the evidence that he satisfies the eligibility requirements.<sup>24</sup> He can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs.<sup>25</sup>

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<sup>18</sup> Ex. E at 29 (NF.1).

<sup>19</sup> Ex. E at 18 (shaded areas).

<sup>20</sup> "Limited assistance" means the person is highly involved in the activity, and he or she received physical help in the guided maneuvering of limbs, or other nonweight-bearing assistance three or more times during the last seven days, or weight-bearing assistance one or two times during the last seven days. "Extensive assistance" 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. See Ex. E at 18.

<sup>21</sup> Ex. E at 29 (NF.2 – NF.6).

<sup>22</sup> Ex. E at 29 (NF.1e).

<sup>23</sup> Ex. E at 29 (NF.7).

<sup>24</sup> 7 AAC 49.135.

<sup>25</sup> 2 AAC 64.290(a)(2).

**C. Eligibility**

The parties agreed that Mr. H does not require any of the professional nursing services, special treatments or other therapies that are reviewed in CAT Sections A and B.<sup>26</sup> His monthly blood draw to monitor his hemochromatosis is not sufficient, so Mr. H does not meet the requirements for automatic Waiver eligibility based on nursing needs, treatments and therapies.

**Activities of Daily Living**

The next test for automatic Waiver eligibility requires a showing that Mr. H needs extensive assistance (self-performance code 3) from one person for three or more of his five ADLs.<sup>27</sup> However, at the time of his assessment, which covered the time period from April 7 to May 15, 2015, Mr. H was functionally able to manage the five specified activities of daily living without assistance.

Both during his assessment and in his testimony at the hearing, Mr. H stated that he can eat and drink independently. Eating includes how a person eats and drinks regardless of skill.<sup>28</sup> It does not include food preparation. Mr. H often must remove his false teeth when he eats, and he does not tolerate hot foods well, but the evidence is that he can eat and drink on his own. He may require some assistance to cut his food before he eats.

Mr. H's testimony regarding his toileting skills also mirrored the assessment's summary. Toileting refers to how a person uses the toilet room, transfers on/off the toilet, cleanses, changes pads, and adjusts clothes.<sup>29</sup> Assistance needs for bathing or showering are not included. During the assessment, Mr. H stated that he manages all of his toileting needs without assistance. He also testified at the hearing that he gets on and off the toilet without help, and he manages his toilet hygiene and self-care on his own. This is consistent with the assessing nurse's observations of his abilities.

Mr. H testified that, in recent months, he has needed more help with bathing because he has difficulty with his legs as he gets in and out of the shower. His need for assistance in this area has increased since the assessment. However, bathing needs are not one of the ADLs used to determine Waiver eligibility, nor is bathing included as part of the toilet use ADL, so this information does not change the conclusion that Mr. H is independent with his toileting ADL.

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<sup>26</sup> See Ex. E at 13-15.

<sup>27</sup> Ex. E at 29 (NF.1e).

<sup>28</sup> Ex. E at 9.

<sup>29</sup> *Id.*

Mr. H's statements regarding bed mobility, both at the time of the assessment and during the hearing, also support a finding of independence. Bed mobility refers to how someone moves to and from a lying position, turns side to side, and positions his body while in bed.<sup>30</sup> He testified that he has a hard time finding a comfortable sleeping position, and he often experiences leg and shoulder pain as he lies in bed. However, he adjusts his position as needed, and no one helps him with this. This is consistent with the assessing nurse's observations about his ability to reposition.

Transferring refers to how a person moves between surfaces, including to and from his bed, chair, or wheelchair, or to a standing position, but it excludes transfers to/from the toilet or bath.<sup>31</sup> Mr. H stated during his assessment that he gets in and out of bed and chairs on his own. The assessing nurse observed him independently transfer from sitting in a chair to a standing position. He pushed the chair back and used his arms to push himself up. He then sat back down using a table for support. The evidence supports the assessment's conclusions for this ADL.

The same is true for Mr. H's locomotion ADL. Locomotion assesses how a person moves between locations in his room and other areas on the same floor.<sup>32</sup> Mr. H does not use any assistive devices to move from place to place within his assisted living home. The assessment's summary and Mr. H's testimony at the hearing both indicate that, at the time of the assessment, he was able to move around within his home without assistance.

In the months following his assessment, Mr. H testified that he has been experiencing new balance problems, and he is falling more often. As a result, he believes he currently requires more supervision and some hands-on assistance to move around his residence. He also would like to have a cane to help steady his balance. Ms. K testified that this is new information, and these concerns have become an issue only very recently.

At the time of the assessment, the evidence supports the finding that Mr. H managed all of the five specified ADLs independently. Mr. X testified that he has worked with Mr. H since October 2014, and in his opinion, the assessment accurately summarized Mr. H's needs for assistance, as well as his cognitive and behavioral deficits. Both Ms. K and Mr. X testified that their primary concern is that Mr. H's condition is rapidly changing, and his needs have grown noticeably since the assessment. Whereas Mr. H once was able to walk reasonably well without

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<sup>30</sup> Ex. E at 6.

<sup>31</sup> *Id.*

<sup>32</sup> Ex. E at 7.

assistance, he now is experiencing balance problems, and he reports falling more often. He seems to get lost more often. His speech and thought process are slower. In addition, his pain and difficulty with his legs means he requires more assistance with bathing and dressing.

As explained during the hearing, the Waiver eligibility process examines an applicant's abilities and needs for assistance with the specified ADLs at a given point in time. In this case, the assessment spanned the time period from early April to mid-May, 2015. As a result, the administrative review process is limited to Mr. H's abilities and needs as of that time. *See In re T C*, OAH Case No. 13-0204-MDS (Commissioner of Health and Social Services 2013), page 7 (finding that the decision under review in the Fair Hearing process is defined by the date of the Division's denial letter).<sup>33</sup>

Because of the testimony suggesting that Mr. H's health is worsening, Mr. H was advised during the hearing to remain in communication with the Division, so that it can respond to his evolving needs through a possible reassessment or other supportive action.

Mr. H has not established eligibility for Waiver services based solely on his need for assistance with his ADLs, because he does not require extensive one-person assistance with three or more of the five ADLs.

#### Cognitive and Behavioral Issues

Although Mr. H is not automatically eligible based on his need for assistance with his ADLs, the CAT also looks to whether an applicant's impaired cognition or problem behaviors, in conjunction with a need for hands-on physical assistance with some of the five ADLs, require a nursing facility level of care.<sup>34</sup> In this case, at the time of his assessment Mr. H did not require hands-on physical assistance (limited assistance or higher) with any of the five ADLs. As a result, he cannot qualify for Waiver services, even if he also could establish such acute cognitive or behavioral problems as to credit him with one eligibility point in each area. This is discussed in more detail below.

The evidence in the record supports the assessment's conclusions regarding Mr. H's cognitive challenges. The only information brought forward to challenge its conclusions on cognition relates to Mr. H's cognitive skills for daily decision-making. The assessment rated him as "modified independence," noting that he has some difficulty in new situations only. Ms. K has worked with Mr. H for a year. Her testimony indicated that he may be more accurately

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<sup>33</sup> OAH cases are available online at <http://doa.alaska.gov/oah/Decisions/index.html>.

<sup>34</sup> Ex. E at 29 (NF.3-NF.6).

rated “moderately impaired,” since his decision-making is poor even in familiar situations, and he requires reminders or supervision. Mr. H’s testimony and the information in his neuropsychological assessment also support that conclusion.

The evidence in the record also supports the assessment’s conclusions regarding Mr. H’s significant problem behaviors. Based on the testimony of Mr. H, Ms. K and Mr. X, two relatively minor adjustments are warranted. First, Mr. H wanders more often than one to three times per week. Second, he is verbally abusive either daily or almost daily.<sup>35</sup>

These adjustments in Mr. H’s cognitive and behavioral scoring do not change the outcome of his case, however. This is true for several reasons. First, the standard is high for an applicant to record a Waiver eligibility point based on either cognitive impairment or behavioral problems. While Mr. H’s cognitive impairment is substantial, at the time of the assessment he was adequately aware and well-oriented, such that he did not meet the threshold that could result in an eligibility point based on cognitive deficits.<sup>36</sup> His behaviors did satisfy one of the criteria for a point based on problem behaviors.<sup>37</sup>

However, Mr. H does not require professional nursing assessment, observation or management to manage his cognitive patterns or his behaviors.<sup>38</sup> In addition, and perhaps more importantly, at the time of the assessment, he did not require hands-on physical assistance (limited assistance or higher) to accomplish any of the five ADLs that are assessed for Waiver eligibility.<sup>39</sup> This means that, even if he had scored an eligibility point based on his problem behaviors and/or his cognitive deficits, he cannot record a total of three points, as is needed for eligibility.

#### **IV. Conclusion**

There is no dispute that Mr. H faces serious health challenges, and he displays significant cognitive impairment and behavior problems. At the time of his assessment in April and May 2015, the evidence is that his health care needs were adequately met by the supervision and care typically offered at an assisted living facility.<sup>40</sup> The question for Waiver eligibility, however, is

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<sup>35</sup> See Scoring at Ex. E, p. 17.

<sup>36</sup> See Ex. E at 29 (NF.3b and NF.3d, referring to Mr. H’s memory and recall ability, noted at Ex. E, pages 16 and 32).

<sup>37</sup> See Ex. E at 29 (NF.4a).

<sup>38</sup> See Ex. E at 29 (NF.3d and NF.4b).

<sup>39</sup> See Ex. E at 29 (NF.3d, NF.4b, and NF.5).

<sup>40</sup> Mr. H’s neuropsychological assessor similarly concluded that he “needs the services of assisted living as his reduced cognitive functioning makes it nearly impossible for the client to take his medications on time, make meals, keep appointments, or manage his bills and daily life.” Ex. 1 at 11.



whether Mr. H's physical health care needs, in conjunction with his cognitive or behavioral condition, require a nursing home level of care. He did not establish this level of need. He is encouraged to communicate with the Division about more recent changes in his health and health care needs.

The Division's decision to deny his application is affirmed.

DATED this 18th day of August, 2015.

*Signed*  
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Kathryn A. Swiderski  
Administrative Law Judge

## **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 2nd day of September, 2015.

By: *Signed*  
\_\_\_\_\_  
Name: Kathryn A. Swiderski  
Title: Administrative Law Judge

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