

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

In the Matter of)	
)	
O M)	OAH No. 15-0683-MDS
<hr style="width:40%; margin-left:0"/>)	Division No.

DECISION

I. Introduction

O M applied for Medicaid Home and Community-Based Waiver program (Waiver) services. The Division of Senior and Disabilities Services (Division) initially assessed Ms. M for program eligibility on April 14, 2015. It denied her application on May 8, 2015.¹ Ms. M requested a hearing.²

Ms. M’s hearing was held on July 30, 2015. Ms. M represented herself. She was assisted by her Care Coordinator, Q L, and assisted living facility staff member, L X. Ms. M testified on her own behalf. Mr. L, Mr. X and K C also testified on Ms. M’s behalf. Victoria Cobo represented the Division.³

Ms. M experiences a number of physical impairments and some cognitive deficits. She requires support and oversight to manage certain 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 affirmed.

II. Facts⁴

Ms. M is 81 years old and currently resides in an assisted living facility. Her medical diagnoses include diabetes mellitus, hypertension, peripheral vascular disease, chronic kidney disease, neuropathy, depression and mild/moderate dementia. She frequently experiences urinary and bowel incontinence. She has a pressure ulcer on her ankle that is in the process of healing. Ms. M uses a walker or wheelchair to get from place to place.

On April 14, 2015, nurse Margaret Rogers, RN, assessed Ms. M to determine her eligibility for Waiver services. Ms. Rogers’ conclusions regarding Ms. M’s physical and mental function are documented on the Consumer Assessment Tool (CAT). She found that Ms. M has

¹ Ex. D.

² Ex. C.

³ The record remained open until August 10, 2015, to allow the Division time to submit written comments from the nurse-assessor, in lieu of her testimony at the hearing. The Division did not supplement the record during this time. The extension also provided Ms. M time to submit additional documentation regarding her health care needs.

⁴ These facts are based upon Division Ex. E (Assessment), Claimant Exs. 1-2 (Assisted Living Plan and Letter from Dr. W D dated August 4, 2015), and the testimonies of Q L, L X, K C and O M.

both short-term and long-term memory problems. However, on the day of the assessment, Ms. M knew where she was, the location of her room, and the names or faces of people she sees regularly. She could draw a clock and properly place the numbers and hands, and she could recall three items after five minutes.⁵ Her cognitive skills for daily decision-making were rated “modified independent,” meaning she has some difficulty in new situations only.⁶ Her total cognitive score was 0, meaning that she was able to remember people and events, could use information properly, was reasonably well-oriented, and was able to communicate normally.⁷ The assessment notes that Ms. M does not exhibit behavior problems.⁸ It also concludes that she does not require professional nursing services, therapy from a qualified therapist, or special treatments or therapies.⁹

The five activities of daily living that are assessed to determine Waiver eligibility are bed mobility, transfers, locomotion (walking), eating, and toileting.¹⁰ On the CAT, Ms. M’s self-performance ratings for bed mobility, eating and transfers were 0, indicating that she is independent or requires oversight help only one or two times per week for these activities. Her self-performance ratings for toilet use and locomotion were 2, meaning that she requires limited assistance.¹¹

Ms. M disagrees with the assessment’s conclusion about her Waiver eligibility. Her primary concerns focus on her need for assistance managing her medications, her finances and her diet. She also expressed concern for proper skin care, particularly for the pressure sore that is healing on her left foot, and for her high risk of falling.

Using her walker, Ms. M is able to get around on her own. She moves slowly, but she can move from room to room, get in and out of chairs or her bed, and get to and from the bathroom. She is unsteady and at risk of falls, so standby assistance is regularly provided as she walks or transfers. She broke her left ankle in 2014 and had three screws removed in January 2014. The wound became infected, and at the time of the assessment, she was receiving home nurse visits twice per week for wound care.

⁵ Ex. E at 6.

⁶ Ex. E at 18.

⁷ Ex. E at 1.

⁸ Ex. E at 2, 19.

⁹ Ex. E at 15-17.

¹⁰ Ex. E at 20 (shaded areas).

¹¹ Ex. E at 20. 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. *Id.*

Ms. M experiences frequent urinary and bowel incontinence. She wears adult undergarments designed for incontinence. She typically can get to the bathroom on her own, and once there, she can manage her hygiene and self-care independently. In the mornings, the facility staff may help change her undergarments in her bed, so that she does not have to get up and go to the bathroom.

Ms. M strives to maintain as much independence as possible, and she does as much for herself as she can. On good days, she can manage all of her five ADLs without assistance. On bad days, she needs supervision and support, and she may require some physical assistance. She often worries about her finances and her health, and this can interfere with her sleep. She may ask repetitive questions and display poor memory, particularly in the evenings.

At the hearing, Ms. M indicated her satisfaction with the support she receives at her assisted living home, and she expressed her desire to continue living there.

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.”¹² 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.¹³

The nursing facility level of care requirement is determined in part by an assessment documented in the CAT.¹⁴ 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.¹⁵ 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, speech/language, occupation, or respiratory therapy) per week, he or she would receive a score of 3.¹⁶

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)(2), (d)(4).

¹³ 7 AAC 130.200.

¹⁴ See 7 AAC 130.213; 7 AAC 130.215(2), (4).

¹⁵ Ex. E at 13-15, 18-19.

¹⁶ Ex. E at 31 (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.¹⁷

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.¹⁸

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.¹⁹

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).²⁰ 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.²¹

B. Burden of Proof

In this case, Ms. M seeks Waiver eligibility and bears the burden to prove by a preponderance of the evidence that she satisfies eligibility requirements.²² She can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs.²³

C. Eligibility

The evidence in the record indicates that Ms. M does not require the professional nursing services, therapy from a qualified therapist, specialized treatment, or other therapies that are addressed in CAT Sections A and B.²⁴ Ms. M was receiving professional nursing wound care for her left ankle twice weekly at the time of the assessment. This level of need is not sufficient to

¹⁷ Ex. E at 20 (shaded areas).

¹⁸ 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 20.

¹⁹ Ex. E at 31 (NF.2 – NF.6).

²⁰ Ex. E at 31 (NF.1e).

²¹ Ex. E at 31 (NF.7).

²² 7 AAC 49.135.

²³ 2 AAC 64.290(a)(2).

²⁴ Ex. E at 15-17.

record an eligibility point for required nursing services.²⁵ Ms. M's Assisted Living Plan, which guides her care at the assisted living facility, also does not indicate that Ms. M requires the kind of specialized nursing intervention that is contemplated by the Professional Nursing Services section of the CAT.²⁶

In addition, Ms. M does not require professional nursing intervention to manage cognitive or behavioral problems. While she displays some cognitive problems, the threshold required to record a point towards waiver eligibility based on cognitive impairment is high.²⁷ The evidence in the record supports the conclusion that Ms. M is able to function fairly well despite some cognitive deficits. At the time of her assessment, she presented as well-oriented and aware, and she capably communicated and responded to questions. She also participated appropriately in the telephonic hearing of this matter. Ms. M's doctor likewise found her to be alert, oriented, and aware during an August 2015 visit. He noted that Ms. M's cognitive function is currently stable, although she does display some executive function deficits.²⁸

Ms. M's need for assistance in managing her financial affairs and her medications is also not sufficient to record an eligibility point based on cognitive impairment. While she clearly experiences anxiety and mild dementia, her needs are adequately met by reminders and the supervision provided at her assisted living home.

As a result, the only way Ms. M 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.²⁹ Extensive assistance means she requires weight-bearing assistance at least three times a week to perform the ADL in question.³⁰ Ms. M's scoring for the five ADLs is addressed below.

For purposes of the CAT, eating refers to how a person eats and drinks, not including food preparation or cooking.³¹ The assessment notes that Ms. M agreed she can eat and drink

²⁵ See Ex. E at 31 (requiring professional nursing services for specified wound care at least three days a week to code a point under NF.2a). Even if she received wound care more often, it is not clear from the evidence whether Ms. M's pressure ulcer is at a stage that would be coded under the CAT's "Treatments/Dressings" section at Ex. E at 15.

²⁶ See Ex. E at 15-16 (Section A).

²⁷ See Ex. E at 31 (NF.3).

²⁸ Claimant Ex. 2 (Dr. D letter).

²⁹ Ex. E at 31 (NF.1e).

³⁰ Ex. E at 20.

³¹ Ex. E at 11.

without assistance, and her appetite is good. Nothing at the hearing contradicted this conclusion, and the evidence supports Ms. M's rating as independent.

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.³² The assessment indicates that Ms. M manages her bed mobility needs independently. She reported during the assessment that she is able to reposition without assistance both in her bed and while sitting. The assessing nurse also observed her reposition in her bed without help. There is no evidence in the record suggesting that Ms. M is anything other than independent with bed mobility.

Transferring refers to how a person moves to and from a bed or chair to a standing position (excluding transfers to and from the toilet).³³ The assessment concludes that Ms. M is independent in this area. During the assessment, Ms. M reported that she uses her walker to help pull herself to a standing position without assistance, and Mr. X confirmed this. At the hearing, Mr. C, Mr. L, and Mr. X all indicated that Ms. M is able to get in and out of chairs on her own. However, they expressed concern because she is fragile and at risk of falling. For this reason, she requires supervision and monitoring. Ms. M's doctor also recommended that Ms. M receive some assistance when transferring because of her risk of falling.³⁴

The evidence in the record supports the conclusion that Ms. M is typically able to transfer without hands-on assistance. However, she requires supervision, which may include nonweight-bearing physical assistance one or two times per week. The evidence does not suggest that she requires regular weight-bearing physical help to complete her transferring needs.

For purposes of the CAT, toileting refers to use of the toilet, including transfers on/off, cleansing, changing pads and adjusting clothing.³⁵ Bathing or showering is not included. The assessment indicates that Ms. M requires limited assistance from one person to manage her toilet use needs. This is due to her regular incontinence and the assistance she receives cleansing herself and changing undergarments.

When Ms. M goes to the bathroom, the evidence is that she can transfer on and off the toilet without assistance. During the day, Ms. M is generally capable of managing all her toileting needs without assistance. At night and in the morning, staff typically help her with self-

³² Ex. E at 8.

³³ *Id.*

³⁴ Claimant Ex. 2 (Dr. D letter). Dr. D did not indicate that Ms. M requires weight-bearing assistance to transfer. His recommendation is consistent with the supervision assistance that Ms. M currently receives.

³⁵ Ex. E at 11.

care and undergarment changes. When staff assist Ms. M with her undergarments in bed, she actively participates in the process by rolling from side to side while someone helps with her clothing. This information supports the Division's conclusion that Ms. M requires limited physical assistance from one person for her toilet use ADL.

Locomotion pertains to how someone moves between locations in her room and to other areas on the same floor of her residence.³⁶ The assessment rates Ms. M as requiring limited assistance from one person to get around inside her residence. It notes that Ms. M uses either a walker or a wheelchair inside her home. She is monitored when moving about with the walker, and she receives limited assistance when she maneuvers using her wheelchair. The assessing nurse observed Ms. M use her walker to move across a room and return to her bed without assistance. She noted that Ms. M has a slow, limping gait.

The testimony during the hearing supported the assessment's conclusions regarding Ms. M's locomotion needs. There are reasonable concerns about Ms. M's risk of falling, and she requires regular supervision. She also may require limited hands-on assistance when maneuvering her wheelchair. However, she does not require frequent weight-bearing assistance to get from place to place within her home.

IV. Conclusion

Ms. M 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 health challenges and anxieties. However, the supervision and support offered by her assisted living facility adequately meet her health care needs. Ms. M benefits 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 affirmed.

DATED this 12th day of August, 2015.

Signed

Kathryn A. Swiderski
Administrative Law Judge

³⁶ Ex. E at 9.

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 27th day of August, 2015.

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

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