

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

In the Matter of)
)
 S E)
_____)

OAH No. 15-0768-MDS
Division No.

DECISION

I. Introduction

S E applied for Medicaid Home and Community-Based Waiver (“Waiver”) services. The Division of Senior and Disabilities Services (Division) denied his application. Mr. E requested a hearing.¹

Mr. E’s hearing was held on September 10, 2015. Mr. E was represented by Laura Matter and Carlos Bailey. Leah Farzin represented the Division.

Mr. E has a very complicated health history. He had multiple hospitalizations before he was assessed on May 7, 2015. He ended up being hospitalized after his assessment. His post-hospitalization care needs were complicated by his fracture of his left wrist, which did not occur until after the Division’s June 8, 2015 denial letter. Because eligibility is determined, at the latest, as of the date of the Division’s denial, Mr. E’s post-denial care needs were not a factor taken into account. As a result, the totality of the evidence demonstrates that Mr. E did not prove, by a preponderance of the evidence, that he qualified for Medicaid Waiver services. The Division’s denial of his application is upheld.

II. Background Facts

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

Mr. E is 74 years old, and has severe end-stage oxygen-dependent chronic obstructive pulmonary disease (COPD). His diagnoses include asthma, chronic airway obstruction, obstructive chronic bronchitis, atrial fibrillation, fatigue and malaise, stage II kidney disease, and aseptic necrosis of the head and neck of his femur.²

Marianne Sullivan is a registered nurse who works for the Division. She assessed Mr. E on May 7, 2015 to determine if he was eligible for Waiver services. The 2015 assessment found that Mr. E did not qualify for Waiver services. The assessment did not show that he required

¹ Ex. C.

² Ex. E, p. 3; Ex. 9, p. 1.

extensive assistance with any of the five scored activities of daily living (ADLS) of bed mobility, locomotion, transfers, eating, and toileting, or that he had any scorable nursing needs, therapies, or experienced cognitive impairment or behavioral issues.³ The Division notified Mr. E that his Waiver application was denied on June 8, 2015.

Mr. E was hospitalized several times before his assessment: from March 1 to March 11, 2015 due to an exacerbation of his COPD; from March 15 to March 23, 2015 for abdominal pain; and, from March 24 to April 20, 2015 for pneumonia. He fell on April 27, 2015 and hurt his right wrist.⁴ He returned to the hospital on May 17, 2015. His admitting documents state that he had fallen the day before; a friend helped him up and into bed. When he woke up the next day, he had severe knee pain and was unable to walk. The admitting documents also state that he used a walker, had bilateral lower extremity atrophy, and that his knee pain was likely due to the fall.⁵ He was discharged from the hospital, on June 16, to an assisted living home (ALH), where he fell the very next day and fractured his left wrist. He spent 10 days in the hospital, after which he returned to the ALH. The June 17 admission documents state that he does use a walker at baseline.⁶

A home health nurse, not a Division employee or agent, visited Mr. E on April 22, which was just two days after he was released from the hospital on April 20. She assessed his physical functionality in his home. Her assessment found that while Mr. E was at risk for falls, he was able to toilet independently (transferring, managing his hygiene, and clothing), that he was able to transfer with minimal assistance or using a device, and that he was able to walk alone on a level surface using an assistive device.⁷ A June 29, 2015 physical therapy evaluation indicated Mr. E required moderate assistance with transfers and locomotion, and was completely dependent for toileting. He had a non-removable splint on his left hand and his forearm was wrapped in an Ace wrap.⁸ A subsequent physical therapy evaluation, conducted on August 31, 2015, indicated that Mr. E required standby assistance with transfers, and contact guard assistance with locomotion and toileting. At that time, he was wearing a brace on his left wrist.⁹

³ Ex. E, pp. 15 – 19.

⁴ Ex. 9; Ex. E, p. 5.

⁵ Ex. 8.

⁶ Ex. 3.

⁷ Ex. 13, p. 11 – 12.

⁸ Ex. 1, pp. 15 – 16, 18, 21.

⁹ Ex. G, pp. 9 – 12.

III. Discussion

A. Method for Assessing Eligibility

The nursing facility level of care¹⁰ requirement is determined by an assessment which is documented by the Consumer Assessment Tool (CAT).¹¹ The assessment measures both an applicant's needs for nursing or other professional medical services, and his or her ability to function physically: it records an applicant's needs for professional nursing services, therapies, and special treatments,¹² whether an applicant has impaired cognition or displays problem behaviors,¹³ and the applicant's ability to perform specific measured activities of daily living (ADLs), and what type of assistance he or she needs, if any, with those activities.¹⁴ 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 3.¹⁵ Alternatively, if a person requires extensive physical assistance (self-performance code of 3) or is completely dependent (self-performance code of 4) with three or more of five specified ADLS (bed mobility, transfers, locomotion within the home, eating, and toileting), that person would also receive a score of 3.¹⁶

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 if they require either limited or extensive assistance with the five specified activities of daily living.¹⁷

The results of the assessment portion of the CAT are then scored. If an applicant's score is a 3 or higher, the applicant is medically eligible for Waiver services.¹⁸

B. Eligibility

An applicant for Waiver services has the burden of proof by a preponderance of the evidence.¹⁹ The relevant date for purposes of assessing the state of the facts is, in general, the

¹⁰ See 7 AAC 130.205(d)(4); 7 AAC 130.215.

¹¹ 7 AAC 130.215(4).

¹² Ex. E, pp. 15 – 17.

¹³ Ex. E, pp. 18 – 19.

¹⁴ Ex. E, pp. 8 – 9, 11, 20.

¹⁵ Ex. E, p. 31.

¹⁶ Ex. E, p. 20, 31.

¹⁷ Ex. E, p. 31.

¹⁸ Ex. E, p. 31.

¹⁹ 7 AAC 49.135.

date of the agency's decision under review.²⁰ Mr. E argued that he qualifies for Waiver services due to a need for nursing services, for physical therapy, and for extensive assistance with transfers, locomotion, and toileting. Each of these is addressed below.

1. Nursing Services

At the time of the assessment, Mr. E was having a home health nurse come to his home twice weekly.²¹ If Mr. E had been receiving professional nursing services three times a week, then he would have received one point towards his Waiver eligibility score.²² Because Mr. E was only receiving nursing services twice weekly, he does not receive that point.

2. Physical Therapy

Mr. E was receiving physical therapy twice weekly at the time of his assessment.²³ If Mr. E had been receiving physical therapy three or four times weekly, then he would have received one point towards his Waiver eligibility score.²⁴ Because he was receiving the physical therapy twice weekly, he does not receive that point.

Mr. E was then prescribed physical therapy three times per week, pursuant to a June 29, 2015 home health medical plan of care, which was signed by a physician on July 15, 2015.²⁵ If this had been in effect during the relevant time period from the assessment visit (May 7) through the Division's denial letter (June 8), this would have given him one point towards his Waiver eligibility score. However, because Mr. E was not receiving physical therapy three times weekly by the time of the Division's June 8, 2015 denial letter, he does not receive that point.

3. Combination of Nursing Services and Physical Therapy

Mr. E argued that he should receive a point toward his Waiver eligibility score because he was receiving two days of skilled nursing and two days of physical therapy at the time of his assessment. If he had been receiving nursing services between three to six times per week, then he would be eligible for one point. If he had been receiving therapies three or four days per week, then he would be eligible for one point. However, the scoring section of the CAT does not provide a scoring point for a combination of nursing services and therapies.²⁶

²⁰ See 7 AAC 49.170; *In re T.C.*, OAH No. 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013) (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf>).

²¹ Exs. 5, 12; Marianne. Sullivan's testimony.

²² Ex. E, p. 31, § NF. 2(a).

²³ Ex. E, p. 7.

²⁴ Ex. E, p. 31, § NF. 2(b).

²⁵ Ex. 1, p. 1; Ex. 11.

²⁶ Ex. E, p. 31, § NF. 2.

4. *ADLS (Transfers, Locomotion, Toileting).*

Mr. E's nursing and physical therapy needs do not qualify him to receive a scoring point towards his Waiver eligibility. Accordingly, his only path to Waiver eligibility is if he requires a minimum of extensive assistance with three or more of the scored ADLs (bed mobility, transfers, locomotion, eating, and toileting). Mr. E has argued that he requires extensive assistance with transfers, locomotion, and toileting.

a. Transfers

Transfers are defined as how a "person moves between surfaces," such as from a sitting to a standing position.²⁷ The assessor found Mr. E required limited assistance with transfers, meaning non-weight bearing physical assistance or weight-bearing assistance less than three times weekly, based upon her observation of Mr. E transferring, with physical assistance from his grandson, which consisted of the grandson placing the walker in front of Mr. E and placing his arm under Mr. E's arm and "guid[ing] him to [a] standing position."²⁸ This assessment actually found that Mr. E required more help with transfers than the home health nurse's April 22 assessment that found Mr. E required minimal assistance.²⁹

There is evidence which controverts the assessor's findings. Mr. E's caregivers at his ALH testified that he needs weight-bearing assistance with transfers. However, Mr. E's caregivers did not meet Mr. E until his placement at the ALH, and their testimony was clear that their experience with his care needs was based upon his broken left wrist, which limited his ability to perform his ADLs.³⁰ There was also a physical therapy evaluation from June 29, 2015, when Mr. E was wearing a splint and his arm was wrapped with an Ace bandage, which states that he required moderate assistance with transfers.³¹ This controverting information is based upon Mr. E's condition after a post-denial event, the fall and subsequent fracture of his left wrist on June 17, 2015. It should be noted that the August 31, 2015 physical therapy evaluation, conducted when Mr. E only had a wrist brace, found that he only required standby assistance with transfers.

Given the relative consistency of the home health nurse's April 22 assessment and the Division's May 7 assessment, and because the evidence that controverts these assessments'

²⁷ Ex. E, p. 8.

²⁸ Ex. E, p. 8; Marianne Sullivan's testimony.

²⁹ Ex. 13, p. 11.

³⁰ T D's testimony; B B's testimony.

³¹ Ex. 1, pp. 15 – 16.

findings is based upon a change in his condition that occurred after June 8, 2015, Mr. E has not met his burden of proof to establish that he required extensive assistance with transfers during the relevant time period.

b. Locomotion

Locomotion is the act of moving about in the home. It may involve the use of an assistive device such as a cane, walker, or a wheelchair.³² The assessor found that Mr. E only required supervision and setup help, based upon her observation of Mr. E walking using a walker, with the grandson standing by, but not providing hands-on assistance.³³ This assessment is consistent with the home health nurse's April 22 assessment that found Mr. E was able to walk alone on a level surface using an assistive device.³⁴

As with transfers, Mr. E's caregivers testified that he required weight-bearing assistance with locomotion. However, that was due to his not being able to fully utilize a walker because of his left wrist injury, which occurred after June 8, 2015. Again, the June 29 physical therapy evaluation found a need for moderate assistance, while the August 31 physical therapy evaluation found a need for contact guard assistance. In addition, Mr. E's June 17 hospital admission documents state that he uses a walker at baseline.³⁵ The totality of the evidence therefore demonstrates that Mr. E has not met his burden of proof to establish that he required extensive assistance with locomotion during the relevant time period.

c. Toileting

Toileting is a complex process that combines locomotion, transfers, dressing, and cleansing.³⁶ The assessor found that Mr. E was able to toilet with limited assistance. The toilet has extended grab bars/rails, and Mr. E told her that he needed help transferring on and off the toilet, although actual toileting was not observed.³⁷ The assessor's conclusion that he could transfer on and off the toilet without extensive assistance is consistent with her conclusion on non-toileting transfers, especially give the presence of the grab bars/rails to help him with the

³² Ex. E, p. 9.

³³ Ex. E, p. 9; Marianne Sullivan's testimony.

³⁴ Ex. 13, p. 11.

³⁵ Ex. 3.

³⁶ Ex. E, p. 11.

³⁷ Ex. E, p. 11; Marianne Sullivan's testimony.

transfer process. The home health nurse's April 22 assessment found Mr. E was independent with toileting.³⁸

Again the controverting evidence is based upon Mr. E's post-June 8 condition, being the caregiver testimony and the June 29 physical therapy evaluation. As a result, Mr. E has not met his burden of proof to establish that he required extensive assistance with toileting during the relevant time period.

IV. Conclusion

Mr. E's condition during the qualifying period did not meet the criteria necessary to qualify for Medicaid Waiver services. He did not have skilled nursing visits or physical therapy visits at the minimum frequency required to provide him with scoring points on the CAT. Nor did he require extensive assistance with his scored ADLs of transfers, locomotion, and toileting.

DATED this 28th day of September, 2015.

Signed

Lawrence A. Pederson
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 14th day of October, 2015.

By: *Signed*

Name: Andrew M. Lebo

Title: Administrative Law Judge

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

³⁸ Ex. 13, p. 11.