

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

In the Matter of )  
 )  
 M F ) OAH No. 15-0772-MDS  
 ) Division No.

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**DECISION**

**I. Introduction**

M F applied for Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (Division) denied her application.<sup>1</sup> Ms. F requested a hearing.<sup>2</sup>

Ms. F’s hearing was held on July 22, 2015. Ms. F participated. Ms. F’s husband, S F, and her daughter-in-law, L F, testified on her behalf. Her care coordinator, K X, testified on her behalf. Victoria Cobo represented the Division. Marianne Sullivan, R. N., testified on behalf of the Division.

Ms. F is undeniably in poor and declining health. However, as of the date of the Division’s denial notice – May 23, 2015, she did not have professional nursing needs and her physical functionality, while impaired, was not severe enough to qualify for the Waiver program. As a result, the Division’s decision denying Ms. F’s application for Waiver services is affirmed.

**II. Background Facts**

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

Ms. F is 72 years old. Her medical conditions include adult failure to thrive, hypoxemia, myalgia and myotitis, congestive heart failure, and coronary atherosclerosis. She is on oxygen and takes blood thinners. She has edema of the lower extremities.<sup>3</sup> Until a year ago, she was receiving hospice care. She left hospice care so that she could have a pacemaker implanted.<sup>4</sup> She has had a substantial recent weight loss. She weighed 200 lbs. in October 2014.<sup>5</sup> Her medical records show that she weighed 129 lbs. as of March 30, 2015 and 108 lbs. as of July 8, 2015.<sup>6</sup> She resides with her husband, who is wheelchair bound, and is himself in poor health.<sup>7</sup>

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<sup>1</sup> Division Ex. D.  
<sup>2</sup> Division Ex. C.  
<sup>3</sup> Ex. E, pp. 3, 5.  
<sup>4</sup> Mr. F’s testimony.  
<sup>5</sup> Ex. E, p. 11.  
<sup>6</sup> Ex. 1, pp. 6, 12 (Ms. F’s documents faxed on July 20, 2015).  
<sup>7</sup> Ex. E, p. 3; Mr. F’s testimony.

Ms. F was assessed on May 1, 2015 to determine if she was eligible for Waiver services. That assessment found that she was not eligible because she was independent with her bed mobility, transfers, locomotion, eating, and toileting.<sup>8</sup> The assessment did not show any other nursing needs, therapies, cognitive impairment or behavioral issues.<sup>9</sup> The Division notified Ms. F on May 23, 2015 that her application was denied.<sup>10</sup>

### 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.”<sup>11</sup> The nursing facility level of care<sup>12</sup> requirement is determined by an assessment which is documented by the CAT.<sup>13</sup> The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,<sup>14</sup> and whether an applicant has impaired cognition or displays problem behaviors.<sup>15</sup> 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.<sup>16</sup>

The CAT also records the degree of assistance an applicant requires for activities of daily living (ADL), 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 (walking or movement when using a device such as a cane, walker, or wheelchair) within the home, eating, and toilet use, which includes transferring on and off the toilet and personal hygiene care.<sup>17</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 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).<sup>18</sup>

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<sup>8</sup> Ex. E, pp. 8 – 9, 11, 31.

<sup>9</sup> Ex. E, pp. 15 – 19.

<sup>10</sup> Ex. D.

<sup>11</sup> 7 AAC 130.205(d)(4).

<sup>12</sup> See 7 AAC 130.205(d)(4); 7 AAC 130.215.

<sup>13</sup> 7 AAC 130.215(4).

<sup>14</sup> Ex. E, pp. 15 – 17.

<sup>15</sup> Ex. E, pp. 18 – 19.

<sup>16</sup> Ex. E, p. 31.

<sup>17</sup> Ex. E, p. 20, 31.

<sup>18</sup> Ex. E, p. 31.

A person can also receive points for combinations of required professional 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.<sup>19</sup>

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.<sup>20</sup> The relevant date for purposes of assessing the state of the facts is, in general, the date of the agency's decision under review.<sup>21</sup>

***B. Eligibility***

Ms. F is an applicant for Waiver services. Applicants have the burden of proof by a preponderance of the evidence.<sup>22</sup> It is undisputed that Ms. F does not have substantially impaired cognition, does not have any behavioral issues, and is not receiving any therapies from a qualified therapist, nor is she receiving any specialized treatments. However, there are factual issues regarding whether Ms. F received professional nursing services and the degree of assistance that she required for the five specified activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting). Each of these is addressed below.

*1. Professional Nursing Services*

Ms. F argued that she required professional nursing services for injections and for wound care. In order to qualify for Waiver services based solely on either of these, she would have to receive either of them seven days per week.<sup>23</sup> In order for her to receive points toward the three points necessary to qualify for Waiver services, she would need to receive the services between three to six days per week.<sup>24</sup> It is important to note that because an applicant's condition is measured as of the date of the Division's denial action, which was May 23, 2015, her condition as of that date controls, regardless of whether she had a decline in her health afterwards.

Ms. F takes a blood thinner (Lovenox), which is administered by a twice daily injection. In May, she was administering her own shots. Her husband now administers one of her shots daily. He has numerous medical appointments outside the home, so he is not at home to

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<sup>19</sup> Ex. E, p. 31.

<sup>20</sup> Ex. E, p. 31.

<sup>21</sup> 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>).

<sup>22</sup> 7 AAC 49.135.

<sup>23</sup> Ex. E, p. 31, § NF. 1(a).

<sup>24</sup> Ex. E, p. 31, § NF. 2(a).

administer both daily shots. Beginning in July, a home health nurse has been coming to the house to administer the other daily shot.<sup>25</sup> The nurse-assessor testified that Lovenox injections are not a professional nursing service.<sup>26</sup> Her testimony is amply corroborated by the fact that Ms. F was doing her own injections in May and her husband helps with them now. As a result, Ms. F cannot receive a point toward her Waiver services eligibility score based upon her Lovenox injection, regardless of the fact that a home health nurse is now helping to administer that injection.

Ms. F takes two medications (Lovenox and Warfarin) that can cause bruising. During the assessment, she had bruising on both upper arms.<sup>27</sup> Mr. F testified that his wife had a wound on her right arm, for which she was receiving wound care once or twice a week in May 2015. He further testified that she has continually had problems with her skin tearing on her arm, and had a Band-Aid on her arm as of the hearing. Ms. F's medical records, however, indicate that her skin had no rashes or lesions on March 30, 2015, July 8, 2015, or July 13, 2015.<sup>28</sup> It is therefore more likely true than not true that Ms. F did not have a wound requiring professional nursing services in May, and was not receiving any such services three to six times per week in May. Her skin condition consequently does not qualify her with a point toward her Waiver services eligibility score.

## 2. *Activities of Daily Living*

Because Ms. F does not have any points toward her eligibility score from professional nursing services, her only path to eligibility for Waiver services is if she requires extensive assistance (self-performance code 3) in the five specified activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting). The nurse-assessor found that Ms. F was independent with each of these activities as of the assessment.

Although Ms. F becomes very fatigued and short of breath upon exertion,<sup>29</sup> the evidence did not establish any need for body mobility assistance, locomotion assistance or eating assistance.<sup>30</sup> This leaves only two ADLs in dispute, transfers and toileting. Even if Ms. F was to be found to require extensive assistance with these two ADLs, it would be insufficient to qualify

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<sup>25</sup> Mr. F's testimony; L F's testimony.

<sup>26</sup> Ms. Sullivan's testimony.

<sup>27</sup> Ex. E, pp. 8, 22; Ms. Sullivan's testimony.

<sup>28</sup> Ex. 1, pp. 7, 12, 17.

<sup>29</sup> See L F's testimony regarding Ms. F's need to sit and rest while locomoting using her walker. Also see Ms. F's medical records regarding her oxygen level being at 80% following a very short walk from the lobby to the exam room on July 13, 2015. Ex. 1, p. 17.

<sup>30</sup> L F's testimony; K X's testimony.

her for Waiver services, since a qualifying score needs her to require extensive assistance with three of the scored ADLs. Regardless, the evidence on these two activities is in dispute. Ms. X testified that Ms. F was able to transfer independently at the time of the assessment. L F testified that Ms. F needed to be picked up for transferring three to four times a week in May, and needed to be picked up approximately twice per week for toileting in May. Given the difference in these testimonies, Ms. F has not shown that it is more likely true than not true that she required extensive assistance with either transfers or toileting.

Ms. F has therefore not shown that she requires extensive assistance with three of the five scored ADLs necessary to qualify her for Waiver services.

#### **IV. Conclusion**

Ms. F has the burden of proof in this case. She has not met it. The Division's decision to deny her application for Waiver services is upheld.

DATED this 28th day of August, 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 15th day of September, 2015.

By: *Signed* \_\_\_\_\_  
Name: Lawrence A. Pederson  
Title/Agency: Admin. Law Judge, DOA/OAH

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