

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

In the Matter of:)	
)	OAH No. 15-0823-MDS
U J)	Agency No.
_____)	

DECISION

I. Introduction

The issue in this case is whether Ms. U J is currently eligible to participate in the Medicaid Home and Community-Based Waiver Services Program (waiver services program). Based on the applicable regulations, an applicant is eligible to receive waiver services if he or she requires either skilled nursing care, intermediate-level nursing care, or extensive assistance with three or more designated ("shaded") activities of daily living (ADLs). The Division of Senior and Disabilities Services (DSDS or Division) conducted an assessment on May 29, 2015 and subsequently determined that Ms. J does not require skilled or intermediate-level nursing care, and does not require extensive assistance with three or more shaded ADLs.¹

This decision concludes that Ms. J had no nursing needs during the time period at issue in this case.² Also, although Ms. J requires a somewhat greater level of physical assistance with some of her ADLs than was indicated in her assessment, at present she requires extensive assistance with only two "shaded" ADLs. Under the Division's regulations, an applicant or recipient must require extensive assistance with three or more shaded ADLs in order to qualify for waiver services on that basis. As a result, Ms. J is not presently eligible to participate in the waiver services program.³ The Division's decision denying Ms. J's application for participation in the waiver services program is therefore affirmed.

¹ Exhibit D.

² This case concerns Ms. J's condition during the period beginning a week prior to her latest assessment (May 22, 2015), and ending on the date the Division issued its determination letter (June 17, 2015).

³ This was a close case. The testimony at hearing indicated that Ms. J's sores were *almost* bad enough to qualify her for waiver services. Similarly, Ms. J already requires extensive assistance with two "shaded" ADLs; were she to require extensive assistance with one more "shaded" ADL, she would qualify for waiver services. Further, the testimony at hearing indicated that Ms. J's condition has deteriorated within the six weeks prior to the hearing. Should Ms. J's condition continue to decline in the future, she may wish to re-apply for waiver services. Normally, under 7 AAC 130.211(a), the Division will only pay for and review one waiver services application screening within any 365-day period. However, under 7 AAC 130.213(d), the Division must perform a new assessment sooner if the applicant can demonstrate that a new assessment is necessary due to a material change related to the health, safety, and welfare of the applicant.

II. Facts

A. Ms. J's Medical Diagnoses and Care Needs⁴

Ms. J is a 63-year-old woman who, at the time of the assessment, lived alone in a private residence.⁵ Ms. J's medical diagnoses include anxiety, asthma, athropathy (arthritis), bone and cartilage disorder (unspecified), cardiomyopathy, carotid artery disease, closed fractures of the forearm, upper arm, astragalus, and trimalleolar, coronary artery disease, depressive disorder, diabetes mellitus (type II, uncontrolled, with neurological and renal manifestations), diverticulitis of the colon, dyspnea, fatigue, history of cerebral infarction, history of ventricular tachycardia, hypertension, hypoxemia, incontinence, morbid obesity, neurogenic bladder, osteopenia, peripheral circulatory disorders, peripheral neuropathy, sleep disorder, and vertigo.⁶ She takes over 20 prescription medications.⁷

Ms. J weighed about 254 pounds at the time of the assessment.⁸ In March 2011 Ms. J fell and fractured her left proximal humerus (a bone in her left shoulder).⁹ On October 5, 2013 she fell and broke her right ankle.¹⁰ She underwent surgery to repair the break on October 24, 2013, spent four days in the hospital, and recuperated at an assisted living facility (ALF) for a period of time after that.¹¹ In January 2015 Ms. J fell again and broke her right leg and right arm; following this she lived at Providence Alaska's extended care facility during her recovery period.¹² After being discharged from the extended care facility, she fell again in March 2015, fractured her left arm, and required an emergency room visit.¹³ She began going to physical therapy following this incident.¹⁴ Her diabetes, and an amputated left toe, appear to contribute to her instability and falls.¹⁵

⁴ Ms. J submitted approximately 250 pages of medical records in this case. All of those records were reviewed and considered during the preparation of this decision.

⁵ Exhibit E3.

⁶ Exhibit E5; Exhibit 2 pp. 23, 25, and 29; Exhibit 3 pp. 30, 31, 38.

⁷ Exhibit 2 pp. 3 - 4. The ankle was broken so badly that it is basically irreparable (Exhibit 4 pp. 13 - 14). The ankle break has also contributed to edema in Ms. J's right foot and ankle, and to muscle atrophy in her lower right leg. *Id.*

⁸ Exhibits E11, E25.

⁹ Exhibit 4 pp. 24, 25, 44 - 53.

¹⁰ Exhibit 2 p. 20; Exhibit 3 pp. 21, 48.

¹¹ Exhibit 3 p. 23; Exhibit 4 pp. 20, 21, and 54 - 64.

¹² Exhibit 2 p. 31; Exhibit 3 p. 42. During the same fall in January 2015, Ms. J also fractured a weight-bearing portion of her medial femoral condyle (where the femur meets the knee), and tore the medial meniscus in her knee (Exhibit 4 pp. 33 - 36).

¹³ Exhibit 2 p. 31; Exhibit 4 pp. 5, 23.

¹⁴ Exhibit 3 p. 8.

¹⁵ Exhibit 3 pp. 30, 31.

Ms. J has degenerative arthritis of the right knee, a frozen shoulder, and lifting her arms hurts.¹⁶ She cannot raise her shoulders past 90 degrees flexion or adduction. She began using a walker in January 2014, but using her walker also makes her shoulders and arms hurt. Ms. J also lacks sensation in at least one foot, which makes using a walker difficult. She also wears a knee immobilizer due to a knee injury.¹⁷ For these reasons, she began using a wheelchair for some locomotion in May 2014. Ms. J also has frequent abdominal pain with vomiting and diarrhea. In June 2015 Ms. J attempted to commit suicide by taking a large number of prescription pain-killers.¹⁸

K N, M.D. is one of Ms. J's primary treating physicians.¹⁹ A letter from Dr. N, dated August 5, 2015, states in relevant part as follows:

U J has been under my medical care for 8 years She has disabilities due to her diabetes which has been poorly controlled and requires frequent medical visits. In addition, she has profound anxiety. Also her mobility is restricted due to her weight and osteoarthritis.

With frequent visits and social support (housing, PCAs) she can live independently. But if she loses her support, she has high risk of admission to a nursing facility.

Ms. J provided documentation of her attendance at physical therapy sessions on July 2, July 27, August 5, August 7, and August 10, 2015.²⁰ However, all of these physical therapy sessions occurred after the Division issued its notice denying Ms. J's application for waiver services on June 17, 2015.²¹

B. Testimony Concerning Ms. J's Functional Abilities and Nursing Needs

At hearing, O S credibly testified in relevant part as follows:

1. She is Ms. J's niece and roommate. She has lived with Ms. J since early August 1, 2015.²² She provides support for Ms. J when her PCA is not available, so she is familiar with Ms. J's functional abilities.
2. Ms. J has had both her ankles replaced. She has also had a toe amputated, and has toenail problems, which are problematic due to her diabetes, which is not well-controlled.

¹⁶ All factual findings in this paragraph are based on Exhibit 2 pp. 31, 36, and 39, Exhibit 3 pp. 13, 16, 19; Exhibit 4 pp. 24 - 32; Exhibit 5 p. 34.

¹⁷ Exhibit 4 p. 8.

¹⁸ Exhibit 2 p. 31; Exhibit 5 p. 34.

¹⁹ All factual findings in this paragraph are based on Exhibit 1 unless otherwise stated.

²⁰ All factual findings in this paragraph are based on Exhibit 5, pp. 53 - 54 and Exhibit 6, pp. 1 - 25.

²¹ Exhibit D.

²² Based on this date, it appears that Ms. S began living with Ms. J about six weeks after the Division issued its denial notice in this case.

3. Ms. J has major problems with diarrhea and incontinence, and currently has sores on her buttocks and legs (related to her incontinence), as well as sores on her abdomen. Ms. S must apply oil or cream to Ms. J's body to help prevent the sores.
4. Ms. J cannot walk very far using her walker because she gets out of breath.

At hearing, Ms. J credibly testified in relevant part as follows:

1. Dr. N is her primary care provider. She goes to see Dr. N about once every two weeks. During these visits, Dr. N checks Ms. J's sores, among other things. Dr. N has not yet prescribed nursing care for Ms. J's pressure sores. However, the sores have been getting worse recently.
2. Her PCA must often place a hand on her, while she is using her walker, in order to balance her.
3. She agrees with the Division's assessment finding that she requires extensive physical assistance with transfers and toilet use.
4. She does not really know whether she has any nursing needs.

C. *Relevant Procedural History*

At some time prior to May 29, 2015 Ms. J's Care Coordinator submitted an application to the Division for Ms. J's participation in the waiver services program.²³ On May 29, 2015 an assessor employed by the Division conducted an in-person assessment using the Division's Consumer Assessment Tool or "CAT,"²⁴ described in detail in Section III, below. The assessor found that Ms. J requires neither a nursing facility level of care, nor extensive assistance with three or more "shaded" ADLs, and therefore concluded that Ms. J is not currently eligible for the waiver services program.²⁵

On June 17, 2015 the Division mailed a notice to Ms. J advising her that it had denied her application for waiver services.²⁶ On June 23, 2015 Ms. J's representative requested a hearing to contest the Division's denial of Ms. J's waiver services application.²⁷

Ms. J's hearing was held on September 14, 2015. Ms. J participated in the hearing by phone and testified on her own behalf. D F, the recipient's sister and power of attorney holder, participated in the hearing by phone, represented Ms. J, and testified on her behalf. Ms. J's housemate, O S, also participated by phone and testified for Ms. J.

The Division was represented by Medical Assistance Administrator Laura Baldwin, who participated by phone. Peter Ndenderoh, a Health Program Manager employed by the

²³ Exhibit E. The exact date of the submittal of Ms. J's application is not at issue in this case.

²⁴ Exhibits E1 - E33.

²⁵ Exhibits D, E31 - E32.

²⁶ Exhibit D.

²⁷ Exhibit C.

Division, participated in the hearing by phone and testified on the Division's behalf. The record was held open through October 5, 2015 for post-hearing filings; the record then closed.

III. Discussion

A. Relevant Alaska Medicaid Statutes and Regulations

Alaska's Medicaid Waiver Services Program provides eligible Alaskans with a choice between home and community-based care and institutional care.²⁸ An applicant who otherwise satisfies the eligibility criteria is eligible for waiver services if he or she requires the level of care specified in 7 AAC 130.230(b).²⁹ For adults such as Ms. J, that level of care must be either "intermediate care" as defined by 7 AAC 140.510, or "skilled care" as defined by 7 AAC 140.515.³⁰ Intermediate-level care is a lower standard of nursing care than skilled-level care and is thus the easier of the two standards for an applicant to meet. Medicaid regulation 7 AAC 140.510 defines "Intermediate Care Facility Services" in relevant part as follows:

- (a) The department will pay an intermediate care facility for providing the services described in (b) and (c) of this section if those services are (1) needed to treat a stable condition; (2) ordered by and under the direction of a physician, except as provided in (c) of this section; and (3) provided to a recipient who does not require the level of care provided by a skilled nursing facility.
- (b) Intermediate nursing services are the observation, assessment, and treatment of a recipient with a long-term illness or disability whose condition is relatively stable and where the emphasis is on maintenance rather than rehabilitation, or care for a recipient nearing recovery and discharge whose condition is relatively stable but who continues to require professional medical or nursing supervision.

Thus, in order to qualify for an intermediate level of care under 7 AAC 140.510, the applicant must, among other things, require professional medical or nursing supervision.

B. The Consumer Assessment Tool (CAT)

Pursuant to Alaska Medicaid regulation 7 AAC 130.230(b)(2)(B), level of care determinations for waiver services applicants seeking services under the "adults with physical disabilities" or "older adults" categories must incorporate the results of the Consumer Assessment Tool (CAT). The CAT is adopted into regulation by 7 AAC 160.900(d)(6).

²⁸ 7 AAC 130.200.

²⁹ 7 AAC 130.205(d)(2).

³⁰ 7 AAC 130.230(b)(2).

The CAT numerical scoring system has two components. The first component is the *self-performance score*. These scores rate how capable a person is of performing a particular activity of daily living (ADL).³¹ The possible scores are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance); **3** (the person requires extensive assistance); and **4** (the person is totally dependent). There are also codes that are not treated as numerical scores for purposes of calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).³²

The second component of the CAT scoring system is the *support score*. These scores rate the degree of assistance that a person requires for a particular ADL. The possible scores are **0** (no setup or physical help required); **1** (setup help required); **2** (one person physical assist required); **3** (two or more person physical assist required). Again, there are additional codes that do not add to the service level: **5** (cueing required); and **8** (activity did not occur during the past week).³³

The ADLs scored by the CAT are body mobility, transfers, locomotion, dressing, eating, toilet use, personal hygiene, and bathing. However, the only ADLs that are considered in determining eligibility for the waiver services program are the five so-called "shaded" ADLs, which are body mobility, transfers, locomotion, eating, and toilet use.

C. Does Ms. J Require Skilled or Intermediate Nursing Care?

A person can qualify for the waiver services program if he or she requires skilled-level nursing services as defined by 7 AAC 140.515, or intermediate level-nursing services as defined by 7 AAC 140.510. Peter Ndenderoh, the assessor who performed Ms. J's assessment, testified at hearing that Ms. J had no skilled or intermediate-level nursing needs at the time of the assessment. Ms. J and her witnesses likewise failed to identify, at hearing, any nursing needs which Ms. J might have had at the time of the assessment.

Ms. J and Ms. S both credibly testified that Ms. J intermittently has sores on her legs, bottom, and abdomen, and that lately those sores have been getting worse. If those sores had been present at the time of the assessment, and had Ms. J been receiving wound care for

³¹ According to the federal Medicaid statutes, the term "activities of daily living" includes tasks such as eating, toileting, grooming, dressing, bathing, and transferring. *See* 42 USC § 1396n(k)(6)(A). In Alaska, pursuant to AS § 47.33.990(1), "activities of daily living" means "walking, eating, dressing, bathing, toileting, and transfer between a bed and a chair."

³² *See*, for example, Exhibits E8 - E13.

³³ *See*, for example, Exhibit E8.

them seven days per week, Ms. J would have qualified for waiver services on that basis.³⁴ However, Dr. N did not mention any current need for nursing care for the pressure sores in her letter of August 5, 2015, and neither Ms. J nor Ms. S testified as to any nursing care provided due to the sores during the period from May to June 2015. Accordingly, Ms. J does not currently qualify for waiver services based on her sores.³⁵

In summary, the preponderance of the evidence indicates that Ms. J had no skilled or intermediate-level nursing needs during the period at issue in this case. Because Ms. J does not require professional nursing supervision, she does not satisfy the intermediate-level of care criteria as stated in 7 AAC 140.510. However, this does not end the inquiry because, under the CAT, an applicant can qualify for waiver services, even without requiring professional nursing supervision, if the applicant's CAT scores in other areas are sufficiently high.

D. Does Ms. J Qualify for Waiver Services Based on her CAT Scores?

The Consumer Assessment Tool's nursing facility level of care scoring summary is located at page 29 of the CAT.³⁶ As indicated by that scoring summary, there are numerous scoring combinations through which one may qualify for waiver services. Some of these combinations (discussed below) allow a person to meet the Nursing Facility Level of Care (NFLOC), without demonstrating a need for professional nursing services. The CAT divides these possible combinations into six different areas, designated "NF1" through "NF6."

1. NF1

There are five different ways to meet NFLOC under NF1. The first way (under NF1(a)) is to require nursing services seven days per week. Ms. J did not assert that she satisfies NF1(a), and the record indicates that she does not. The second way (under NF1(b)) is to require use of a ventilator or respirator at least three days per week. Ms. J did not assert that she satisfies NF1(b), and the record indicates that she does not. The third way (under NF1(c)) is to require care due to uncontrolled seizures at least once per week. Ms. J did not assert that she satisfies NF1(c), and the record indicates that she does not. The

³⁴ See the CAT at Exhibits E15 and E31.

³⁵ In the future, should Ms. J's sores get worse such that they require frequent nursing care, Ms. J may re-qualify for waiver services on that basis.

³⁶ Exhibit E31.

fourth way (under NF1(d)) is to receive some form of therapy at least five days per week. Ms. J did not assert that she satisfies NF1(d), and the record indicates that she does not.

The fifth/last way to meet NFLOC under NF1, under NF1(e), is to score a three (extensive assistance required) or a four (completely dependent) in the self-performance portion of *three or more* of the "shaded" ADLs listed at page 18 of the CAT.³⁷ The "shaded" ADLs are body / bed mobility, transfers, locomotion, eating, and toilet use. Ms. J's level of need for assistance with the five "shaded" ADLs is analyzed below.

a. Body/Bed Mobility

For purposes of waiver services eligibility, body/bed mobility is defined as how a person moves to and from a lying position, turns side to side, and positions his or her body while in bed.³⁸ In order to receive a self-performance score of three (extensive assistance) with regard to bed/body mobility, a person must require either weight-bearing support three or more times per week, or full caregiver performance of the activity part of the time.³⁹

Mr. Ndenderoh reported in his assessment that Ms. J told him that she sleeps in a hospital-type bed and is able to turn and reposition herself independently.⁴⁰ Mr. Ndenderoh also reported in his assessment that he observed Ms. J reposition herself while seated in a recliner. Based on this information, Mr. Ndenderoh found Ms. J to be independent with body mobility (CAT score 0/0). Ms. J did not contest this finding at hearing, and my review of the record supports the Division's finding on this point. Accordingly, the preponderance of the evidence indicates that Ms. J is independent with regard to bed/body mobility (CAT score 0/0).

b. Transfers

For purposes of waiver services eligibility, a transfer is defined as how a person moves between surfaces (with the exception of the toilet and bathtub or shower, which are handled as separate ADLs).⁴¹ In order to receive a self-performance score of three (extensive assistance) with regard to transfers, a person must require either weight-bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁴² Mr. Ndenderoh reported in his assessment that Ms. J requires extensive assistance with

³⁷ Exhibit E20.

³⁸ Exhibit E8.

³⁹ Exhibit E8.

⁴⁰ All factual findings in this paragraph are based on Exhibit E8 unless otherwise stated.

⁴¹ Exhibit E8.

⁴² Exhibit E8.

transfers,⁴³ and Ms. J did not contest this finding at hearing. Accordingly, the preponderance of the evidence indicates that Ms. J requires extensive assistance with transfers (CAT score 3/2).

c. Locomotion

For purposes of waiver services eligibility, locomotion is defined as how a person moves between locations in his or her room and other areas on the same floor/level.⁴⁴ In order to receive a self-performance score of three (extensive assistance) with regard to locomotion, a person must require either weight-bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁴⁵

Mr. Ndenderoh reported in his assessment that Ms. J requires only supervision and set-up help to move around inside her home using her walker (CAT score 1/1).⁴⁶ However, during the assessment, Ms. J reported that her PCA provides non-weight-bearing assistance, when she uses her walker, in an effort to avoid falls. Similarly, at hearing, Ms. J credibly testified that her PCA must often place a hand on her, while she is using her walker, in order to balance her. Accordingly, the preponderance of the evidence indicates that Ms. J requires limited assistance with locomotion (CAT score 2/2). There is no evidence of weight-bearing assistance at this time.

d. Eating

For purposes of waiver services eligibility, eating is defined as how a "person eats or drinks regardless of skill."⁴⁷ In order to receive a self-performance score of three (extensive assistance) with regard to eating, a person must require either weight-bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁴⁸

Mr. Ndenderoh reported in his assessment that Ms. J told him that she can eat and drink "on her own" without assistance.⁴⁹ Mr. Ndenderoh also reported that he observed Ms. J bring her hands up to her face (CAT score 0/0). Ms. J did not dispute this finding at hearing, and the Division's finding on this point is consistent with Ms. J's medical records. Accordingly, the preponderance of the evidence indicates that, at the time of the assessment, Ms. J could eat and drink independently (CAT score 0/0).

⁴³ Exhibit E8.

⁴⁴ Exhibit E9.

⁴⁵ Exhibit E9.

⁴⁶ All factual findings in this paragraph are based on Exhibit E9 unless otherwise stated.

⁴⁷ Exhibit E11.

⁴⁸ Exhibit E11.

⁴⁹ All factual findings in this paragraph are based on Exhibit E11 unless otherwise stated.

e. Toilet Use

For purposes of waiver services eligibility, toilet use is defined as how a "person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, cleanses, changes pads, manages ostomy or catheter, adjusts clothes."⁵⁰ To receive a self-performance score of three (extensive assistance) as to toilet use, a person must receive either weight-bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁵¹

Mr. Ndenderoh reported in his assessment that Ms. J requires extensive assistance with toilet use (CAT score 3/2).⁵² Ms. J did not contest that finding at hearing. Accordingly, the preponderance of the evidence indicates that Ms. J requires extensive assistance with toilet use (CAT score 3/2).

f. Summary - Degree of Assistance Required with Shaded ADLs

In order to qualify for waiver services under NF1(e), a person must demonstrate either full dependence, or a need for extensive assistance, *as to at least three* of the shaded ADLs. The preponderance of the evidence indicates that Ms. J requires extensive assistance with transfers and toileting, but not with bed mobility, locomotion, or eating. Because Ms. J does not require extensive assistance with three or more of the "shaded" ADLs, she does not qualify for waiver services on that basis.

2. NF2

An applicant cannot meet NFLOC under NF2 alone. However, under NF2 an applicant can obtain points towards qualifying for NFLOC which, when added to points obtained under other subsections of NF1 - NF6, can qualify the applicant for NFLOC. The first way (under NF2(a)) is to obtain a score of two or three with regard to injections and/or IV hookups, feeding tubes, tracheotomy care or nasopharyngeal suctioning, applying treatments or dressings, administering oxygen, observing, assessing, and managing unstable conditions, catheter management, and/or care required due to a comatose condition. The record does not show that Ms. J requires any of these services, so she gets no points under NF2(a).

The second way to obtain points (under NF2(b)) is to require speech therapy, respiratory therapy, physical therapy, and/or occupational therapy at least three days per

⁵⁰ Exhibit E11.

⁵¹ Exhibit E11.

⁵² All factual findings in this paragraph are based on Exhibit E11 unless otherwise stated.

week. Ms. J provided documentation of her attendance at physical therapy sessions on July 2, July 27, August 5, August 7, and August 10, 2015.⁵³ However, all of these physical therapy sessions occurred well after the Division issued its notice denying Ms. J's application for waiver services on June 17, 2015.⁵⁴ Because there is no evidence that Ms. J was receiving any of these therapies at the time of the assessment, she receives no points under NF2(b).

The third way to obtain points (under NF2(c)) is to require medications via tube, tracheotomy care, urinary catheter changes or irrigation, veni-puncture, or barrier dressings for ulcers, at least three days per week. Again, however, the record does not show that Ms. J requires any of these procedures, so she gets no points under NF2(c).

The fourth/last way to obtain points (under NF2(d)) is to require chemotherapy, radiation therapy, hemodialysis, and/or peritoneal dialysis, at least three days per week. Again, however, the record does not show that Ms. J requires any of these treatments, so she gets no points under NF2(d).

3. NF3

An applicant cannot meet NFLOC under NF3 alone. However, under NF3 an applicant can obtain points towards qualifying for NFLOC which, when added to points obtained under other subsections of NF1 - NF6, can qualify the applicant for NFLOC. The first way (under NF3(a)) is to have short-term memory problems. The record shows that Ms. J has no memory problems, so Ms. J received no points in this category.⁵⁵

The second way to obtain points (under NF3(b)) is to be generally unable to recall names and faces, the season of the year, where you are, and the location of your room. Ms. J was able to recall these items of information during the assessment, and so she received no points in this category.⁵⁶

The third way to obtain points (under NF3(c)) is to be moderately or severely impaired in one's cognitive skills for daily decision-making. The Division found that Ms. J is independent as to her cognitive skills for daily decision-making,⁵⁷ and she did not assert otherwise at hearing. Accordingly, Ms. J received no points under this subsection.

⁵³ All factual findings in this paragraph are based on Exhibit 5, pp. 53 - 54 and Exhibit 6, pp. 1 - 25.

⁵⁴ Exhibit D.

⁵⁵ Exhibits E1, E18. Ms. J did not contest this finding at hearing.

⁵⁶ Exhibits E1, E18. Ms. J did not contest this finding at hearing.

⁵⁷ Exhibits E1, E18. Ms. J did not contest this finding at hearing.

The fourth/last way to obtain points (under NF3(d)) is to require *either* professional nursing care due to cognitive problems, *or both* (1) score at least a 2/2 as to any shaded ADL, *and* (2) score 13 or more on the Division's Supplemental Screening Tool (SST) for cognitive issues. The Division found that Ms. J does not require professional nursing care to manage her cognitive problems. This finding is supported by the record, and Ms. J did not assert otherwise. As discussed above, Ms. J received a score equal to or greater than 2/2 as to one or more shaded ADLs. However, Ms. J received a score of zero on the cognitive SST. Because Ms. J satisfied only one of the three elements of NF3(d), Ms. J receives no points under NF3(d).

Under NF3, an applicant must receive a score of one *on all four subsections* in order to receive a single "overall" point at the conclusion of NF3. Here, Ms. J received no points under subsections NF3(a), NF3(b), NF3(c), or NF3(d). Accordingly, Ms. J receives an overall score of zero on NF3.

4. NF4

An applicant cannot meet NFLOC under NF4 alone. However, under NF4 an applicant can obtain one point towards qualifying for NFLOC which, when added to points obtained under other subsections of NF1 - NF6, can qualify the applicant for NFLOC.

There are two subsections to NF4, and an applicant must qualify under both of these subsections in order to receive the one point available under NF4. Under NF4(a), an applicant must either wander, engage in socially inappropriate or disruptive behavior, be verbally abusive, or be physically abusive at least four days per week. The Division found that Ms. J engages in none of these behaviors, and Ms. J provided no evidence to the contrary.⁵⁸ Accordingly, Ms. J receives no points under NF4(a).

Under NF4(b), an applicant must *either* require professional nursing care as a result of problem behaviors, *or both* (1) score at least 2/2 as to any shaded ADL, *and* (2) score 14 or more on the portion of the Division's Supplemental Screening Tool (SST) dealing with problem behavior. In this case, the Division assigned Ms. J a score of one on the behavioral portion of the SST, and found that she does not require professional nursing care for any behavioral problems.⁵⁹ Ms. J did not assert otherwise.

⁵⁸ Exhibits E2, E19.

⁵⁹ Exhibits E2, E19.

As discussed above, Ms. J did receive a score of 2/2 or more as to one or more shaded ADLs. However, Ms. J did not score 14 points or more on the Division's SST for behavioral issues, and does not require professional nursing oversight due to behavioral issues. Accordingly, Ms. J receives no points under NF4(b), and in turn Ms. J receives no "overall" points under NF4.

5. NF5

At NF5, the scores from NF2, NF3, and NF4 are added together. If an applicant receives a score of one or more, then the analysis proceeds to NF6. In this case, Ms. J scored no "overall" points at NF1, NF2, NF3, or NF4, giving her a total score of zero at NF5. Accordingly, the analysis in this case does not proceed to NF6, and Ms. J is considered currently ineligible for waiver services based on her CAT scores.

IV. Conclusion

Ms. J had no nursing needs during the time period at issue in this case. She has no serious cognitive or behavioral issues. Although Ms. J requires a somewhat greater level of physical assistance with some of her ADLs than was indicated in her assessment, at present she requires extensive assistance with only two "shaded" ADLs. Under the Division's regulations, an applicant or recipient must require extensive assistance with three or more shaded ADLs in order to qualify for waiver services on that basis. As a result, Ms. J is not presently eligible to participate in the waiver services program. The Division's decision denying Ms. J's application for participation in the waiver services program is therefore affirmed.

DATED this 15th day of October, 2015.

Signed _____
Jay Durych
Administrative Law Judge

Adoption

The undersigned, by delegation from of 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 26th day of October, 2015.

By: Signed _____
Name: Jay D. Durych
Title: Administrative Law Judge, DOA/OAH

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