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

In the Matter of:	)	
	)	OAH No. 15-0904-MDS
D Q G	)	Agency No.
________________________________	)	

DECISION

I. Introduction

The issue in this case is whether D Q G is currently eligible to participate in the Medicaid Home and Community-Based Waiver Services Program (waiver services program). Based on 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).

D Q G has been participating in the Medicaid waiver services program. The Division of Senior and Disability Services (Division or SDS) re-evaluated him for continued participation on February 17, 2015, and on May 28, 2015 notified him that he was no longer eligible.[1] Mr. G appealed SDS' determination.[2] A hearing was held on October 1, 2015. Mr. G represented himself with the assistance of his care coordinator, K T N. His personal care assistant, X J, testified on his behalf. SDS was represented by Laura Baldwin. The nurse who conducted Mr. G's assessment, Paula Ray, testified on behalf of SDS.

This decision concludes that Mr. G had no nursing needs during the time period at issue in this case.[3] Also, although Mr. G's cognitive and behavioral problems appear to be worse than indicated in the assessment, those problems, in conjunction with Mr. G's level of need for assistance with ADLs, are not currently severe enough to qualify Mr. G for waiver services. As a result, Mr. G is not presently eligible to participate in the waiver services program.[4] The Division's decision terminating Mr. G's participation in the waiver services program is therefore affirmed.

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[1] Ex. D.

[2] Ex. C.

[3] This case concerns Mr. G's condition during the period beginning a week prior to his latest assessment of February 17, 2015, and ending on the date the Division issued its determination letter (May 28, 2015).

[4] This was a close case. The testimony at hearing indicated that Mr. G's cognitive and behavioral issues, in conjunction with the level of his need for assistance with the five shaded ADLs, were *almost* bad enough to qualify him for waiver services. Further, the testimony at hearing indicated that Mr. G's condition may have deteriorated within the four months between the Division's determination and the hearing. Should Mr. G's condition continue to decline in the future, he may wish to re-apply for waiver services. Normally, under 7 AAC 130.211(a), the Division

II. Facts

Mr. G is 70 years old, and he has been diagnosed with multiple medical conditions that limit his ability to function independently.[5] In 2013, he qualified for the waiver services program because he exhibited behavioral problems and needed assistance with three of his ADLs.[6] At that time, Mr. G scored 14 points on the Division's Supplemental Screening Tool (SST) for behavioral issues, which score is sufficiently high to count towards waiver eligibility.[7] At that time, Mr. G also required limited or extensive assistance with bed mobility, transfers, and toilet use.[8]

III. Discussion

A. Applicable Burden of Proof and Standard of Review

Pursuant to applicable state and federal regulations, the Division bears the burden of proof in this case.[9] The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.[10] In this case, evidence was presented at hearing that was not available to the Division's reviewers. The administrative law judge may independently weigh the evidence and reach a different conclusion than did the Division's staff and/or Qualis Health, even if the original decision is factually supported and has a reasonable basis in law.

B. Relevant Medicaid Waiver Services Statutes and Regulations

States participating in the Medicaid program must provide certain mandatory services under the state's medical assistance plan.[11] States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program[12]

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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 applicant's health, safety, and welfare.

5 Ex. E.

6 Ex. F36.

7 Ex. F23; Paula Ray's hearing testimony.

8 Ex. F24.

9 42 CFR § 435.930, 7 AAC 49.135.

10 *See* 42 CFR 431.244; *Albert S. v. Dept. of Health and Mental Hygiene*, 891 A.2d 402 (2006); *Maryland Dept. of Health and Mental Hygiene v. Brown*, 935 A.2d 1128 (Md. App. 2007); *In re Parker*, 969 A.2d 322 (N.H. 2009); *Murphy v. Curtis*, 930 N.E.2d 1228 (Ind. App. 2010).

11 *See* 42 USC §§ 1396a(a)(10)(A); 1396d(a)(1) - (5), 1396a(a)(17), and 1396a(a)(21); *see also* 42 CFR 440.210 & 440.220.

12 The program is called a "waiver" program because certain statutory Medicaid requirements are waived by the Secretary of Health and Human Services. *See* 42 U.S.C. § 1396n(c). Before a state receives federal funding for the program, the state must sign a waiver agreement with the United States Department of Health and Human Services. *Id.* The agreement waives certain eligibility and income requirements. *Id.*

("waiver services").[13] Congress created the waiver services program in 1981 to allow states to offer long-term care, not otherwise available through the states' Medicaid programs, to serve eligible individuals in their own homes and communities instead of in nursing facilities.[14] Alaska participates in the waiver services program.[15]

There are three basic ways in which an applicant or recipient can qualify for waiver services. First, an individual is eligible for waiver services if he or she requires the level of care specified in 7 AAC 130.205. For older adults and adults with disabilities (such as Mr. G), 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.[16] Intermediate care, a lower level of care than skilled care, is defined by 7 AAC 140.510 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 . . . .
>
> (c) Intermediate care may include occupational, physical, or speech-language therapy provided by an aide or orderly under the supervision of licensed nursing personnel or a licensed occupational, physical, or speech-language therapist.

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[13] *See* 42 USC § 1396a(a)(10)(A).

[14] *See* 42 USC § 1396n(c)(1); 42 CFR §§ 435.217; 42 CFR §§441.300 - 310. Federal Medicaid regulation 42 CFR § 440.180, titled "Home or Community-Based Services," provides in relevant part:

> (a) Description and requirements for services. "Home or community-based services" means services, not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of Part 441, subpart G of this chapter . . . .
>
> (b) Included services. Home or community-based services may include the following services . . . (1) Case management services. (2) Homemaker services. (3) Home health aide services. (4) Personal care services. (5) Adult day health services. (6) Habilitation services. (7) Respite care services. (8) Day treatment . . . . (9) Other services requested by the agency and approved by CMS *as cost effective and necessary to avoid institutionalization*. [Emphasis added].

[15] AS 47.07.045, the Alaska statute that authorizes Medicaid Waiver Services, states in relevant part: Home and community-based services. (a) The department may provide home and community-based services under a waiver in accordance with 42 USC 1396 – 1396p (Title XIX Social Security Act), this chapter, and regulations adopted under this chapter, if the department has received approval from the federal government and the department has appropriations allocated for the purpose. To supplement the standards in (b) of this section, the department shall establish in regulation additional standards for eligibility and payment . . . .

[16] 7 AAC 130.215.

The Division is required to incorporate the results of the Consumer Assessment Tool (CAT) in determining whether an applicant requires intermediate or skilled nursing care.[17]

The second way an individual may qualify for waiver services is by showing that the individual's requirements for physical assistance with his or her activities of daily living (ADLs) are sufficiently high.[18] Under the CAT, an individual can qualify for waiver services by demonstrating a need for extensive assistance with at least three out of five designated ADLs, known as "shaded" ADLs, even without demonstrating a need for professional nursing care.[19] An individual may also qualify for waiver services by having a certain minimum level of nursing needs, combined with a certain minimum need for physical assistance with ADLs.[20]

Before a recipient's waiver services may be terminated, the Division must conduct an annual assessment to "determine whether the recipient continues to meet the [applicable] standards . . . ."[21] To remove a recipient from the program, the assessment must find:

> that the recipient's condition has materially improved since the previous assessment; for purposes of this paragraph, "materially improved" means that a recipient who has previously qualified for . . . an older Alaskan or adult with a physical disability [waiver], no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for waiver services. [22]

Finally, in an order issued in 2014 in the class action[23] case *Krone et. al. v. State of Alaska, Department of Health and Social Services et. al.*, Case No. 3AN-05-10283CI, an Anchorage Superior Court judge held that, "in order to determine if a recipient is 'materially improved,' for purposes of AS 47.07.045(3)(C), the State must compare the results of the current assessment with those of the most recent assessment that concluded that the recipient was eligible for the Waiver program;" that "[t]he State may not conclude that a recipient is no longer eligible based only on the results of the current assessment;"[24] that "[t]he State may not base its annual determination of whether a recipient is 'materially

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17 7 AAC 130.215.

18 Ex. E31.

19 Ex. E31.

20 Ex. E31.

21 AS 47.07.045(b)(1).

22 AS 47.07.045(b)(3).

23 Although a Superior Court decision generally does not constitute binding precedent for the Office of Administrative Hearings (except in the particular case being appealed), a class action like the *Krone* case is binding in all cases involving class members, one of whom is Mr. G.

24 *Krone* order dated October 1, 2014 at page 6.

improved' solely upon the scoring obtained from the CAT;" and that "[t]he State must consider all reasonably available information relevant to that determination."

C. The Consumer Assessment Tool (CAT)

Under state 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 Department's Consumer Assessment Tool (CAT), which is adopted by regulation at 7 AAC 160.900(d)(6). The CAT covers both the recipient's need for nursing services, as well as the recipient's ability to perform his or her activities of daily living (ADLs). The ADLs scored by the CAT are body mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room, between levels, and to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, and bathing.[25]

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 ADL.[26] 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).[27]

Supervision (scored as a one) is defined as oversight, encouragement, or cueing three or more times a week, with physical assistance no more than two times a week.[28] Limited Assistance (scored as a two) is defined as requiring direct physical help or guidance from another individual three or more times a week, with weight-bearing support no more than two times a week.[29] Extensive Assistance (scored as a three) is defined as requiring direct physical help with weight-bearing support at least three times a week, or full assistance

[25] The CAT also scores the recipient's ability to perform Instrumental Activities of Daily Living (IADLs). However, although IADL scores are important for determining the recipient's eligibility for Medicaid Personal Care Assistant (PCA) services, the recipient's IADL scores are not considered in determining eligibility for waiver services.

[26] 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."

[27] *See*, for example, Ex. E8.

[28] Ex. E.

[29] 7 AAC 125.020(a)(1); Ex. E.

without any involvement from the recipient, at least three times a week, but not all of the time.[30] Total Dependence (scored as a four) means the recipient has to rely entirely on the caretaker to perform the activity.[31] Weight-bearing assistance means supporting more than a minimal amount of weight. It does not require that the assistant bear most of the recipient's weight, but requires only that the recipient be unable to perform the task without the weight-bearing assistance.[32]

The second component of the CAT scoring system for ADLs is the *support score*. These scores rate the degree of assistance that a person requires in order to perform a particular ADL. The relevant scores are **0** (no setup or physical help required); **1** (only setup help required); **2** (one person physical assist required); and **3** (two or more person physical assist required).

D. Does Mr. G Require Intermediate or Skilled Nursing Care?

As discussed above, there are several ways in which a waiver services applicant or recipient can qualify for (or remain qualified for) waiver services. The first way is to demonstrate a need for either skilled nursing care or intermediate level nursing care.[33] Because skilled care is a higher level of care than intermediate care, the minimum level of nursing care for which Mr. G must demonstrate a need, in order to remain eligible for waiver services on that basis, is intermediate care.

The intermediate care regulation (7 AAC 140.510) has three subsections (see text of regulation quoted in Section III(B), above). Mr. G clearly satisfies *some* of the criteria stated in the regulation. For example, Mr. G has a long-term illness or disability. His condition is relatively stable, and his treatments emphasize maintenance of his condition rather than rehabilitation. However, one of the mandatory requirements, under 7 AAC 140.510(a) and (c), is that the recipient *either* require services ordered by and under the direction of a physician, *or* be receiving occupational, physical, or speech-language therapy, provided by an aide or orderly, under the supervision of licensed nursing personnel or a licensed occupational, physical, or speech-language therapist. There is no evidence in the record indicating that Mr. G requires services ordered by and under the direction of a

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[30] 7 AAC 125.020(a)(2); Ex. E.
[31] 7 AAC 125.020(a)(3); Ex. E. Bathing and the IADLs have their own assistance level definitions.
[32] *In re K T-Q*, OAH No. 13-0271-MDS (Commissioner of Health and Social Services 2013), page 4, available at http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130271.pdf.
[33] 7 AAC 140.510, 7 AAC 140.515.

physician.[34] Further, there is no evidence that Mr. G was receiving therapy at any time from the week of the assessment through the date of the Division's termination letter, which is the period at issue in this case.

The Division's nurse-assessor, reviewing nurse, and independent contractor all agreed that Mr. G did not require nursing services during the period at issue. S S, M.D., one of Mr. G's primary health care providers, wrote on February 20, 2015 that Mr. G did not then require skilled nursing services.[35] With regard to intermediate-level nursing services, Dr. S wrote that Mr. G has an intermittent need for wound care, and needs to wear a special boot due to severe venous insufficiency in his legs.[36] However, the need to wear the special boot, by itself, does not create a need for intermediate-level nursing care under the Division's regulations. Wound care *is* an intermediate nursing need under the Division's regulations. However, Mr. G's need for wound care is *intermittent,* and he did not require wound care during the period at issue in this case. Accordingly, the record shows Mr. G had no nursing needs, as defined by the regulations, during the time period at issue in this case.

In summary, the preponderance of the evidence demonstrates that Mr. G does not currently require the types of services which indicate a need for intermediate-level nursing care under 7 AAC 140.510. Accordingly, the Division correctly determined that Mr. G does not qualify for waiver services based on a need for skilled or intermediate-level nursing care. The next issue is whether Mr. G qualifies for waiver services based on cognitive or behavioral problems, or his need for assistance with activities of daily living (ADLs).

E. Does Mr. G Qualify for Waiver Services Based on Cognitive or Behavioral Issues, or a Need for Assistance with Activities of Daily Living?

The Consumer Assessment Tool's scoring summary is located at page 29 of the CAT.[37] As indicated by that summary, there are several scoring combinations through which one may demonstrate a need for a nursing facility level of care (NFLOC) or otherwise qualify for waiver services. The first way, discussed immediately above, is to require skilled or intermediate-level nursing care, as defined by the regulations and the CAT. Mr. G does not qualify for waiver services based on a need for nursing care. However, under the CAT, an individual may also qualify for waiver services, even without

[34] Mr. G does receive *prescriptions* ordered by a physician. However, the intermediate care regulation requires that the recipient receive therapy or *services* prescribed by a physician.
[35] Ex. F39.
[36] Ex. F39.
[37] Ex. E31.

demonstrating a need for nursing care, if the individual has serious cognitive or behavioral problems, and/or if his or her need for assistance with activities of daily living (ADLs) is sufficiently high.[38] The CAT divides the possible scoring 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. As discussed above, Mr. G does not receive or require nursing services seven or more days per week. The second way (under NF1(b)) is to require use of a ventilator or respirator at least three days per week. Mr. G does not use a ventilator or respirator. The third way (under NF1(c)) is to require care due to uncontrolled seizures at least once per week. Mr. G does not currently require nursing care due to uncontrolled seizures at least once per week. The fourth way (under NF1(d)) is to receive some form of therapy from a qualified therapist at least five days per week. Mr. G was not receiving therapy from the time of his assessment through the date of the hearing.

The fifth and last way to meet NFLOC under NF1 (under NF1(e)0 is to score a three (extensive assistance required) or a four (completely dependent) in the self-performance portion of three or more of the five "shaded" ADLs listed at page 18 of the CAT.[39] Mr. G's level of need for assistance with the five "shaded" ADLs is discussed 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.[40] 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 three times or more during the week of the assessment.[41]

During her evaluation, Ms. Ray observed Mr. G repositioning himself in his chair (which he uses as his bed).[42] Mr. J testified that Mr. G could independently roll and shift his weight in

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38 Ex. E31.
39 Ex. E20.
40 Ex. E8.
41 Ex. E8.
42 Ex. E; Paula Ray's hearing testimony.

bed. Accordingly, the preponderance of the evidence indicates that Mr. G is independent with 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).[43] In order to receive a self-performance score of three (extensive assistance) for transfers, a person must require either weight-bearing support three or more times per week, or full caregiver performance of the activity three or more times during the week of the assessment.[44] During the evaluation, Mr. G told Ms. Ray that he could get up without physical assistance from others, and she observed him to do so with the use of his two-wheel walker.[45] Mr. G testified that sometimes he has a hard time getting up from a chair. He doesn't know why, but he just can't move. Mr. J testified that he helps Mr. G with transfers once or twice a week. This involves holding him for balance rather than any weight-bearing support.[46] Because Mr. J is usually only with Mr. G five days a week for seven hours each day, it is likely that Mr. G needs this assistance three times a week. Accordingly, the preponderance of the evidence indicates that Mr. G requires limited assistance with transfers (CAT score 2/2).

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.[47] In order to receive a self-performance score of three (extensive assistance) for locomotion, a person must require either weight-bearing support three or more times per week, or full caregiver performance three or more times during the week of the assessment.[48]

Mr. G testified that he is able to move around on the first floor of his home, using his walker, without physical assistance from anyone. This was confirmed by Mr. J. Accordingly, the preponderance of the evidence indicates that Mr. G is currently independent with single-level locomotion (CAT score 0/0).

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[43] Ex. E8.
[44] Ex. E8.
[45] Ex. E; Testimony of Ms. Ray.
[46] Testimony of Mr. J.
[47] Ex. E9.
[48] Ex. E9.

d. *Eating*

For purposes of waiver services eligibility, eating is defined as how a "person eats or drinks regardless of skill."[49] 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 three times per week.[50]

Mr. G testified that he is able to feed himself once his food has been prepared. This was confirmed by Mr. J, who said that Mr. G is messy when he eats, and can't open packages on his own, but can eat on his own once his meal has been prepared. Accordingly, the preponderance of the evidence indicates that Mr. G is independent with this ADL.

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."[51] In order to receive a self-performance score of three (extensive assistance) with regard to toilet use, a person must require either weight- bearing support three or more times per week, or full caregiver performance of the activity three or more times during the week of the assessment.[52] In this case, both Mr. G and Mr. J testified that Mr. G can complete his toileting by himself. Accordingly, the preponderance of the evidence indicates that Mr. G is independent with toileting (CAT score 0/0).

f. *Summary*

In summary, Mr. G did not require extensive assistance with three or more shaded ADLs during the period at issue in this case. Accordingly, Mr. G does not qualify for waiver services based on the criteria of NF1(a-e) of the CAT.

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 or 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

[49] Ex. E11.
[50] Ex. E11.
[51] Ex. E11.
[52] Ex. E11.

conditions, catheter management, and/or care required due to a comatose condition. The record does not show Mr. G needs any of these services, so Mr. G receives 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 week. The record does not show that Mr. G requires any of these therapies with the necessary frequency,[53] so he 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 Mr. G requires any of these procedures,[54] so he receives 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 Mr. G requires any of these treatments,[55] so he receives 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 to obtain a point (under NF3(a)) is to have short-term memory problems. The record indicates that Mr. G has short-term memory problems,[56] so Mr. G receives one point under NF3(a).

The second way to obtain a point (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. The record indicates that Mr. G was able to recall three out of four of those items at the time of the assessment, so Mr. G receives no points under NF3(b).[57]

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 Mr. G is only slightly impaired as to his cognitive skills for daily decision-making, and has

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[53] Exs. E13 - E15.
[54] Exs. E13 - E15.
[55] Exs. E13 - E15.
[56] Ex. E1; Paula Ray's hearing testimony.
[57] Exs. E18, E31.

difficulties only in new, unfamiliar situations. Accordingly, Mr. G receives no points under NF3(c).[58]

The fourth 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.

As to the first item, the Division found that Mr. G does not require professional nursing observation, assessment, and management for any cognitive problems, and this finding is supported by the record. Mr. G did score a 2/2 as to transfers. However, in order for Mr. G's cognitive problems to count towards waiver eligibility, he would also need to score at least 13 points on the Division's Supplemental Screening Tool (SST) for cognitive issues.[59]

The last issue under NF3(d) is thus whether Mr. G should receive a score of 13 or higher on the Division's SST for cognitive issues.[60] Ms. Ray found that Mr. G should receive a score of three on the SST for cognitive issues. Mr. G's representatives assert that the proper score should be 13 or above. The undersigned finds, based on the testimony of Ms. Ray, Mr. G, and Mr. J, that:

i. Mr. G is sometimes unable to recall the details or sequences of recent events, and is sometimes unable to remember the names of some close friends and relatives without prompting (score of 1);

ii. Mr. G has minimal difficulty remembering and using information, can follow simple written instructions, and requires direction and reminders from others one to three times per day (score of 1);

iii. Mr. G has periodic confusion during the daytime (score of 2);

iv. Mr. G gets lost, or would get lost, in his neighborhood (score of 2); and

v. Mr. G is able to carry out only simple conversations (score of 2).

Based on the foregoing, the undersigned finds that Mr. G should receive a total score of eight on the SST for cognitive issues.

Under NF3, an applicant must receive a score of one *on all four subsections of NF3* in order to receive a single "overall" point at the conclusion of NF3. Here, even with the undersigned's rescoring as to transfers and cognitive abilities, Mr. G receives one point

58 Exs. E18, E31.

59 *See* Ex. E31.

60 Exs. E 17, E31.

under subsection NF3(a), but no points under subsections NF3(b), NF3(c), and/or NF3(d). Accordingly, Mr. G still receives an overall score of zero on section NF3 of the CAT.

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, be verbally abusive, be physically abusive, engage in socially inappropriate or disruptive behavior, or resist care, at least four days per week.[61] The Division found that Mr. G has none of these problem behaviors with the required frequency, and the record supports the Division's finding.[62] Accordingly, Mr. G gets no points under NF4(a).

To receive a point 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 behavioral portion of the Division's Supplemental Screening Tool (SST). As to the first item, the Division found that Mr. G does not require professional nursing observation, assessment, and management for his behavioral problems, and Mr. G did not contest that finding. Mr. G does assert, however, that he should have received a score of 2/2 as to at least one of the shaded ADLs, and that his score on the behavioral portion of the SST should have been 14 or greater.

As discussed under NF3, above, Mr. G has now received a score of 2/2 as to transfers, one of the shaded ADLs. Ms. Ray found that Mr. G should receive a score of zero on the SST for behavioral issues.[63] The undersigned finds, based on the testimony of Mr. G and Mr. J, that:

i. Mr. G is sometimes up for most or all of the night (score of 4);

ii. Mr. G does not wander (score of 0);

iii. Mr. G has emotional states and disturbances which create consistent difficulties, but that these can generally be modified to manageable levels (score of 3);

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61 Exs. E19, E31.

62 Exs. E19, E31.

63 Ex. E2.

iv. Mr. G is verbally disruptive or aggressive one to three times per week, or is extremely agitated or anxious, even after proper evaluation and treatment (score of 2);

v. Mr. G frequently has difficulty understanding the needs that must be met for his self-care, but will cooperate when given direction or explanation (score of 2).

Based on the foregoing, the undersigned finds that Mr. G should receive a total score of 11 points on the SST for behavioral issues. Under NF4, an applicant must receive a score of one *on both subsections of NF4* in order to receive a single "overall" point at the conclusion of NF4. Here, even with the rescoring of the assessment as to transfers and behavioral problems, Mr. G still receives zero points under each of subsections NF4(a) and NF4(b). Accordingly, Mr. G still receives an overall score of zero on section NF4.

5. <u>NF5</u>

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, Mr. G scored no "overall" points at NF1, NF2, NF3, or NF4, giving him a total score of zero at NF5. Accordingly, the analysis in this case does not proceed to NF6, and Mr. G is currently ineligible for waiver services based on his CAT scores.

IV. Conclusion

Based on the evidence presented, Mr. G needs Medicaid Personal Care Assistant (PCA) services. However, this case concerns only Mr. G's eligibility for the waiver services program. Based on the Division's 2013 and 2015 assessments, the opinion of one of Mr. G's own health care professionals, and my independent review of the record, Mr. G does not currently require either an intermediate or skilled level of care as defined under the relevant regulations and/or the Consumer Assessment Tool. Further, although Mr. G's cognitive and behavioral problems are more severe than indicated by the Division's assessment, and although Mr. G requires a bit more assistance with one of his ADLs than was found by the Division, the extent of his cognitive and behavioral problems, coupled with his level of need for assistance with ADLs, are still not high enough to qualify him for waiver services under the CAT's scoring matrix. The preponderance of the evidence indicates that, with PCA services, Mr. G has the ability to function in a home setting without the need for waiver

services. Mr. G's condition has thus materially improved since his 2013 assessment, and he is not currently eligible for waiver services. The Division's decision terminating Mr. G's waiver services is therefore affirmed.

DATED this 9th 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 21st 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.]