

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

In the Matter of)
)
 L O)
_____)

OAH No. 15-0971-MDS
Division No.

DECISION

I. Introduction

L O applied for Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (Division) denied her application.¹ Ms. O requested a hearing.²

Ms. O’s hearing was held on October 8, 2015. Carlos Bailey represented Ms. O. Liz Smith represented the Division. Mary Tanaka, R. N., a nurse-assessor employed with the Division, N T, Ms. O’s daughter and PCA, and E R, Ms. O’s Medicaid Care Coordinator, all testified.

Ms. O experiences impaired mobility due to a combination of Charcot’s Syndrome and osteomyelitis. As a result, she requires extensive assistance with three of her scored activities of daily living (ADLs), locomotion, transfers, and toileting. This qualifies her for Waiver services. The Division’s decision denying Ms. O’s application for Waiver services is reversed.

II. Background Facts

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

Ms. O is 48 years old. She is diabetic, has stage 3 renal disease, and in addition to other health issues, experiences conditions known as Charcot’s Syndrome or Charcot Foot and osteomyelitis. Her feet, notably her left foot, are deformed and painful, and she is subject to foot infections. She has had recent severe infections which resulted in hospitalization; she is at risk for amputation. She is 6 feet tall and weighs 280 lbs.³

Ms. O was assessed at her daughter’s home on June 18, 2015 by the Division’s nurse-assessor. The nurse-assessor noted that Ms. O was wearing a “boot,” which is also described elsewhere as a “brace” for her Charcot’s Syndrome, and noticed that the boot was ill-fitting and causing a red spot on Ms. O’s leg. The nurse-assessor determined that Ms. O was capable of

¹ Division Ex. D.

² Division Ex. C.

³ Ex. E, pp. 3; Ms. Tanaka’s testimony; Ms. T’s testimony.

locomotion without assistance, after observing her operating a manual wheelchair without assistance. That wheelchair, however, was not Ms. O's: it was shared with her husband, who is himself in poor health. The nurse-assessor observed Ms. O requiring physical assistance for transfers and toileting and assessed her as requiring only limited assistance. The assessment did not show any professional nursing services, therapies, cognitive impairments, or behavioral issues. As a result, the assessment, as scored on the Consumer Assessment Tool (CAT), found that Ms. O was not eligible for Waiver services.⁴

At hearing, the Division agreed that Ms. O should have been scored as requiring extensive assistance with both transfers and toileting.⁵ However, this still did not make Ms. O eligible for Waiver services.

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.”⁶ The nursing facility level of care⁷ requirement is determined by an assessment which is documented by the CAT.⁸ The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,⁹ and whether an applicant has impaired cognition or displays problem behaviors.¹⁰ 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 3.¹¹

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.¹²

⁴ See Ex. E, generally; Ms. Tanaka's testimony; Ms. T's testimony.

⁵ Ms. Tanaka's testimony.

⁶ 7 AAC 130.205(d)(4).

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

⁸ 7 AAC 130.215(4).

⁹ Ex. E, pp. 15 - 17.

¹⁰ Ex. E, pp. 18 - 19.

¹¹ Ex. E, p. 31.

¹² Ex. E, p. 20, 31.

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).¹³

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.¹⁴

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.¹⁵ The relevant date for purposes of assessing the state of the facts is, in general, the date of the agency's decision under review.¹⁶

B. Eligibility

Ms. O is an applicant for Waiver services. Applicants have the burden of proof by a preponderance of the evidence.¹⁷ It is undisputed that Ms. O 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. In order to qualify for Waiver services, Ms. O would therefore require extensive or complete assistance in at least three of the five scored ADLs. The Division agreed, at hearing, that Ms. O requires extensive assistance in two of those ADLs: transfers and toileting. Ms. O maintains that she also requires extensive assistance with locomotion.¹⁸

Ms. O's Charcot foot means that she should not be placing any weight on her foot, even when using her boot.¹⁹ The nurse-assessor found that she was able to locomote without assistance based upon her use of a wheelchair. However, Ms. O did not have her own

¹³ Ex. E, p. 31.

¹⁴ Ex. E, p. 31.

¹⁵ Ex. E, p. 31.

¹⁶ 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>).

¹⁷ 7 AAC 49.135.

¹⁸ The nurse-assessor found that Ms. O was independent with both bed mobility and eating. Ex. E, pp. 6, 9. Ms. O does not disagree with those findings and it is therefore not necessary to discuss either of those ADLs.

¹⁹ The nurse-assessor testified about the dangers of Ms. O placing weight upon her foot. She cautioned Ms. O, during the assessment, about placing weight upon her foot, and noted that the "boot" was ill-fitting and rubbing Ms. O. See Recording, 1:00 – 1:10.

wheelchair and shared one with her husband, who uses it most of the time.²⁰ Ms. T testified that Ms. O needed weight-bearing assistance with locomotion three times per day because the wheelchair was not always available for her use. Although Ms. T was not the most credible witness, given her apparent inability to answer questions as posed to her, and what appeared to be exaggerated testimony, the combination of her testimony and the fact that the wheelchair was shared established that Ms. O could not always use the wheelchair. The occasional inability to use the wheelchair means that Ms. O would have to then locomote without it, an activity for which she requires weight-bearing assistance. In order to qualify as receiving extensive assistance with locomotion, she only has to receive weight-bearing assistance with it three times or more per week.²¹ Even discounting Ms. T's testimony as to frequency, Ms. O has established that it is more likely true than not true that she requires weight-bearing assistance with locomotion three or more times weekly. As a result, she requires extensive assistance with locomotion.

IV. Conclusion

Ms. O requires extensive assistance with three activities of daily living: transfers, locomotion, and toileting. As a result, she is eligible for Waiver services. The Division's decision to deny her application for Waiver services is reversed.

DATED this 30th day of October, 2015.

Signed _____
Lawrence A. Pederson
Administrative Law Judge

²⁰ Ms. T's testimony.

²¹ See Exhibit E, p. 7.

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 13th day of November, 2015.

By: Signed
Name: Andrew M. Lebo
Title: Administrative Law Judge

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