

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

In the Matter of: )  
 )  
 B J ) OAH No. 15-1050-MDS  
 ) Agency Case No.  
\_\_\_\_\_ )

**DECISION**

**I. Introduction**

The issue in this case is whether Mr. B J is eligible for Medicaid Home and Community-Based Waiver services (waiver services). To be eligible, an applicant must generally demonstrate that he or she requires either skilled nursing care, intermediate nursing care, or extensive assistance with at least three designated activities of daily living (ADLs).<sup>1</sup> The Division of Senior and Disabilities Services (DSDS or Division) conducted an assessment on May 15, 2015 and subsequently determined that Mr. J does not currently require skilled nursing care, intermediate nursing care, or extensive assistance with three or more "shaded" activities of daily living.<sup>2</sup> The Division found that Mr. J has significant cognitive and behavioral problems, but found that his functional limitations were not severe enough, when combined with these cognitive and behavioral problems using the Consumer Assessment Tool's (CAT's) scoring matrix, to qualify Mr. J to receive waiver services.<sup>3</sup>

This decision concludes that Mr. J does not currently require skilled or intermediate nursing care as defined by the Division's regulations. However, the preponderance of the evidence indicates that Mr. J qualifies for waiver services, based on the Consumer Assessment Tool's scoring matrix, due to the extent of his cognitive and behavioral problems and his need for limited assistance with locomotion. Accordingly, the Division erred in denying Mr. J's application for waiver services. The Division's decision denying Mr. J's waiver services application is therefore reversed.

**II. Facts**

**A. Mr. J's Current Diagnoses and Relevant Medical History**

Mr. J is a 58-year-old man<sup>4</sup> who currently lives with his sister, her husband, and his sister's granddaughter in their two-story private residence.<sup>5</sup> Mr. J's diagnoses are major

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<sup>1</sup> See 7 AAC 130.205, 7 AAC 130.215, 7 AAC 140.510, 7 AAC 140.515, and the scoring page of the Consumer Assessment Tool (CAT). These five ADLs, known as the "shaded" ADLs, are body mobility, transfers, locomotion, eating, and toilet use.

<sup>2</sup> Exs. D, E.

<sup>3</sup> Exs. E16 - E19; E31 - E32.

<sup>4</sup> Ex. E p. 1.

neurocognitive disorder (with behavioral disturbance) due to traumatic brain injury, aphasia, asthma, chronic back pain, depression, diminished hearing, headaches, hypertension, hypoglycemia, insomnia, involuntary movements, osteoporosis, and other unspecified mental disorders.<sup>6</sup> He takes at least seven different prescription medications each day.<sup>7</sup>

Mr. J's brain injuries resulted from two separate occurrences.<sup>8</sup> In 2006 Mr. J was stung by a bee, had an allergic reaction, and went into anaphylactic shock, which caused an anoxic brain injury. Eight years later, in July 2014, Mr. J was kicked in the head by a horse, fracturing his skull in several places and causing the second brain injury.<sup>9</sup> These TBIs, with their resulting cognitive and behavioral problems, are the medical problems that affect Mr. J the most.<sup>10</sup>

At some time during 2014 Mr. J's wife became overwhelmed by his care needs, and on September 24, 2014 he was involuntarily committed to a psychiatric hospital in Montana.<sup>11</sup> A neuropsychological assessment was performed on Mr. J on October 1, 2014, a week after he was admitted to the hospital.<sup>12</sup> The neuropsychological assessment found that Mr. J was not fully oriented as to time or place, and is profoundly impaired with regard to immediate auditory attention, visual motor attention, phonemic fluency, verbal abstract reasoning, mental processing speed, and most aspects of memory.<sup>13</sup> Overall, it was found that, while Mr. J behaved well while being treated at the Montana hospital, he had "experienced profound decompensation" since his second TBI in July 2014; his short-term prognosis for recovery is guarded; and he will require long-term care with supportive and structured housing and mood-stabilizing medications.<sup>14</sup>

Within the last year or so Mr. J's sister, M N, got him released from the Montana hospital and moved him to Alaska.<sup>15</sup> Since then, Mr. J has lived with his sister's family; his

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<sup>5</sup> Ex. E p. 1; M N's hearing testimony. Because Ms. N's husband's job requires that he work out-of-town for three weeks each month, Ms. N is usually the only adult available to care for Mr. J. *Id.*

<sup>6</sup> Ex. E p. 3; Ex. 2 pp. 2, 20, 25, 27.

<sup>7</sup> Ex. 2 p. 5.

<sup>8</sup> All factual findings in this paragraph are based on Ex. 2 p. 2 unless otherwise stated.

<sup>9</sup> Ex. 2 pp. 14, 15, 18. The first brain injury is not technically a "traumatic" brain injury. However, for ease of reference, both brain injuries will be cumulatively referred to as "TBIs."

<sup>10</sup> M N's hearing testimony.

<sup>11</sup> Ex. 2 pp. 3, 13, 24.

<sup>12</sup> The neuropsychological assessment is in the record at Ex. 2, pp. 13 - 41.

<sup>13</sup> Ex. 2 pp. 17, 18.

<sup>14</sup> Ex. 2 pp. 24, 25.

<sup>15</sup> M N's hearing testimony.

sister has been appointed as his guardian and conservator, and she manages Mr. J's finances and other personal business for him.<sup>16</sup>

According to Mr. J's sister and his daughter, Mr. J suffered profound personality changes following the second TBI.<sup>17</sup> As a result of his TBIs, Mr. J has problems with anger management, anxiety, cognition, mood, and sleep.<sup>18</sup> At times he is verbally and physically abusive to family members.<sup>19</sup>

A letter concerning Mr. J, written by C L. O, D.O. and dated May 19, 2015, states in relevant part as follows:<sup>20</sup>

Mr. J has been under my care for continued management of the sequelae from sustaining both an anoxic and traumatic brain injury. He has significant reduction in function and in the ability to perform activities of daily living secondary to his significant cognitive and behavioral deficits after his injury. He is unable to live without supervision and requires continued care. He would benefit from assisted living as he is unable to care for himself and will require continued supportive care. It is very common that brain injury survivors can have fair motor functioning . . . but due to severe cognitive deficits they are unable to perform activities of daily living and usually require care with personal management . . . .

On July 8, 2015 Mr. J's care coordinator filed an Adult Protective Services Intake Report concerning events which had occurred, involving Mr. J, earlier that day. The report is illustrative of Mr. J's behavior, and states in relevant part as follows:<sup>21</sup>

B has behavior problems which keep M and her granddaughter locked up in their rooms or out of the house in order to stay clear from him. They don't feel safe in their own home with his behaviors . . . . M (sister and legal guardian) picked B up from Facility X in City Y and was going to take him to Anchorage to pick up his belongings, which had come in on the barge from Montana. When B saw that M had brought her 2-year-old granddaughter with her for the outing he became very frustrated. He had to ride in the [small] back seat of the truck because the car seat couldn't safely be put back there. His agitation grew as they progressed into City Z and B began hitting the back of the seat [in which] the baby seat was strapped . . . and started trying to get out of the truck while it was going down the road. M was driving and trying to keep B from kicking the seat [in which] the baby [was strapped] and from trying to get out of the moving truck. She didn't want to stop because she didn't want B to get out of the truck in his state of mind because he has no regard for his own safety and she was afraid that he would get killed in

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<sup>16</sup> M N's hearing testimony.

<sup>17</sup> Ex. 2-18; M N's hearing testimony.

<sup>18</sup> Ex. 2 pp. 9, 10.

<sup>19</sup> Ex. 2 p. 20.

<sup>20</sup> Ex. 1 p. 6; Ex. 2 p. 12.

<sup>21</sup> Ex. 1 pp. 4 - 5. Ms. N also testified regarding these occurrences at hearing.

traffic. She called me at 3:03 PM on my cell phone because I have been able to talk with B over the phone and calm him down from stressful situations in the past. We spoke over speakerphone and B was escalating his bad behaviors and screaming and I could hear him hitting the seat and the baby screaming. B couldn't get out of the truck because the front passenger door had to [be opened first] in order for him to escape. I then advised M to pull over and call 911 which she was reluctant to do so I then advised her to drive straight to my office since she was only a few miles away by then. I called 911 at 3:13 PM and requested assistance from police in my office parking lot. Everyone arrived within minutes of each other not long after that . . . . Everyone spoke to the police and B calmed down. The City Z police officer advised B that if he acted out again like that and M had to call 911 again for his behaviors, B would go to jail. He voiced that he understood that and that he wouldn't act out anymore. M was very shaken by the ordeal and decided not to go into Anchorage to finish their errand and wanted to go home. I followed M who transported B in the backseat of the truck for an hour going north on the No Name Highway and B stayed quiet in the back the entire way. A follow-up call was made and M reported that things were still settling. B is upset that he didn't get to go to Anchorage and get his things and blames it on the baby. She said that it was very hard to get him to take his night meds and that his mood is very dark still at 8:45 PM. She and the baby have to lock themselves in her bedroom because she doesn't feel safe in her own home "when he gets like this" . . . . B gets suspicious about taking his medications and will hide them and not take them even though M does everything she can to make sure that he is taking them. He will hide them under his tongue because M will make him show her an open mouth to make sure that he swallowed them. He will then deposit them in plants under the couch or anywhere he thinks you won't find them. B admits that he hasn't taken the "vitamin pills" which are actually his mood stabilizers. He is very inconsistent with medication compliance . . . . B requires constant supervision especially when he is around small children or animals. He is triggered by loud noises (animals and children) and tends to get secretly violent towards them. For example, he will pick up the dog, if it's barking too much, and squeeze it very tight because he doesn't think that anyone will notice it. He will not come out and kick the dog [but] he will secretly hurt it. Same thing with the baby, he will pinch and poke when he thinks he can get away with it. B requires trained staff to monitor his medications and behaviors.

Mr. J has tremors, and he sometimes trips while walking.<sup>22</sup> One of the places where Mr. J trips is the step-down/step-up to a sunken living room at Ms. N's home. Ms. N must provide hands-on assistance for Mr. J several times per week when he transits the living room and when he goes up or down the stairs in her home.

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<sup>22</sup> All factual findings in this paragraph are based on Ex. 1 p. 22 and M N's hearing testimony.

**B. Mr. J's Care Needs and Functional Abilities According to the CAT**

The assessment at issue in this case was performed on May 15, 2014 by Marianne Sullivan, R.N. of DSDS.<sup>23</sup> Ms. Sullivan used the Consumer Assessment Tool or "CAT" (a system for scoring the need for nursing assistance and physical assistance that is described in detail in Part III) to record the results of the assessment.<sup>24</sup> In completing the CAT, Ms. Sullivan reported that Mr. J has the following abilities and limitations relevant to this case:<sup>25</sup>

Functional Assessment:<sup>26</sup> Ms. Sullivan reported that Mr. J was able to touch his hands over his head and behind his back, and touch his feet while sitting, but was unable to place his hands across his chest and stand up. Ms. Sullivan also wrote that Mr. J had a strong grip with both hands, and that the range of motion in his upper extremities is within normal limits.

Physical Therapy:<sup>27</sup> Ms. Sullivan reported that Mr. J is not currently receiving speech or language therapy, respiratory therapy, physical therapy, or occupational therapy. Ms. Sullivan also reported that Mr. J does not currently have any prescriptions for walking, range of motion, foot care, or other care requiring hands-on assistance.

Bed/Body Mobility:<sup>28</sup> Ms. Sullivan reported that Mr. J told him that he can turn side-to-side while in bed. Ms. Sullivan reported that she observed Mr. J transfer to and from a chair, without assistance, during the assessment (scored 0/0).

Transfers:<sup>29</sup> Ms. Sullivan reported she was told by Mr. J that he does not need any help with transfers. Ms. Sullivan reported that she observed Mr. J transfer on and off a kitchen chair and a couch several times, independently, during the assessment (scored 1/0).

Locomotion:<sup>30</sup> Ms. Sullivan reported (1) she was told by Mr. J that he does not need any help with walking; and (2) she was told by Ms. N that he must be supervised due to his cognitive and behavioral issues. Ms. Sullivan reported that she observed Mr. J walk from the kitchen to the living room several times without assistive devices, and walk up and down the stairs holding onto the hand rails (scored 1/5).

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<sup>23</sup> Ex. E.

<sup>24</sup> Ex. E.

<sup>25</sup> Ex. E.

<sup>26</sup> Ex. E p. 4.

<sup>27</sup> Ex. E p. 5.

<sup>28</sup> Ex. E p. 6.

<sup>29</sup> Ex. E p. 6.

<sup>30</sup> Ex. E p. 7.

Eating:<sup>31</sup> Ms. Sullivan reported (1) she was told by Mr. J that he can eat independently and has no chewing or swallowing problems; and (2) she was told by Ms. N that he is resistant to taking his medications and must be supervised to make sure he swallows his pills. Ms. Sullivan reported that she observed Mr. J drink water from a mason jar and swallow without difficulty (scored 0/0).

Toileting:<sup>32</sup> Ms. Sullivan reported (1) she was told by Mr. J that he is able to use the toilet independently; and (2) she was told by Ms. N that Mr. J cannot properly perform his post-toileting hygiene (scored 1/5).

Medication:<sup>33</sup> Ms. Sullivan found that Mr. J requires assistance taking his medications three times per day, seven days per week.

Professional Nursing Services:<sup>34</sup> Ms. Sullivan found that Mr. J has no current need for professional nursing services. Specifically, Ms. Sullivan found that Mr. J is currently receiving no injections, intravenous feedings, feedings via nasogastric, gastrostomy, or jejunostomy tubes, suctioning or tracheotomy care, treatments for open lesions, ulcers, burns, or surgical sites, and is not receiving oxygen for a new medical problem/condition. Ms. Sullivan further found that Mr. J does not currently have any unstable medical conditions, and specifically, that he does not use a catheter or ventilator/respirator, is not comatose, and does not have an uncontrolled seizure disorder. In addition, Ms. Sullivan found that Mr. J does not receive speech, respiratory, physical, or occupational therapy, and that he does not require professional nursing assessment, observation, and/or management at least once per month.<sup>35</sup>

Special Treatments and Therapies:<sup>36</sup> Ms. Sullivan found that Mr. J does not receive medications via tube, does not require tracheostomy care, does not use a urinary catheter, and does not require venipuncture, injections, barrier dressings for ulcers, chest physical therapy by a registered nurse, or oxygen therapy performed by a nurse to treat an unstable chronic condition. Finally, Ms. Sullivan found that Mr. J does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.

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<sup>31</sup> Ex. E p. 9.

<sup>32</sup> Ex. E p. 9.

<sup>33</sup> Ex. E p. 12.

<sup>34</sup> Ex. E pp. 13 - 14.

<sup>35</sup> Ex. E p. 14.

<sup>36</sup> Ex. E p. 15.

Cognition:<sup>37</sup> Ms. Sullivan found that Mr. J has problems with his long-term and short-term memory. She found that Mr. J is generally able to recall the location of his own room, but not names, faces, the current season, or where he is. She rated Mr. J's cognitive skills as being moderately impaired, and concluded that he has no cognitive problems requiring professional nursing assessment, observation, or management three days per week, or even once per month.

Ms. Sullivan did, however, find that Mr. J's cognitive problems are significant enough to require use of the Division's Supplemental Screening Tool (SST) for cognitive issues.<sup>38</sup> Ms. Sullivan's findings on the SST were:

1. That Mr. J cannot recall entire events, or the names of close friends and relatives, without prompting (score of 2).
2. That Mr. J cannot remember or use information, and requires continual verbal reminders from others (score of 4).
3. That Mr. J is almost always confused (score of 3).
4. That Mr. J gets lost or would get lost walking in his neighborhood (score of 2).
5. That Mr. J is able to carry out only simple conversations (score of 2).

Based on the above, Mr. J received an overall score of 13 on the cognitive SST.

Behavioral Problems:<sup>39</sup> Ms. Sullivan found that Mr. J wanders on a daily basis, is verbally abusive on a daily basis, is physically abusive on a daily basis, does not engage in socially inappropriate or disruptive behavior, and resists care on a daily basis. Based on this, Ms. Sullivan concluded that Mr. J does not need professional nursing assessment, observation, or management on a weekly or monthly basis due to behavioral problems.

Ms. Sullivan did, however, find that Mr. J's behavioral problems were bad enough to require use of the Division's behavioral SST.<sup>40</sup> Ms. Sullivan's findings on the behavioral SST were:

1. That Mr. J's current sleep patterns involve nightmares and restless, disturbed sleep (score of 3).
2. That Mr. J wanders, but that his wandering does not jeopardize his health or safety (score of 2).
3. That Mr. J's attitudes, disturbances, and emotional states create consistent difficulties, but can be modified to manageable levels (score of 3).
4. That Mr. J is disruptive, aggressive, extremely agitated, or extremely anxious at least four times per week, and that professional judgment is required to determine when to administer his prescribed medications (score of 3).

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<sup>37</sup> Ex. E p. 16.

<sup>38</sup> Ex. E. p. 17.

<sup>39</sup> Ex. E p. 18.

<sup>40</sup> Ex. E. p. 19.

5. That Mr. J does not understand those needs that must be met for his self-care, and will not cooperate even though given an explanation or directions (score of 3).

Based on the above, Mr. J received an overall score of 14 on the behavioral SST.

Medication Management:<sup>41</sup> Ms. Sullivan reported that Mr. J is currently taking ten different prescription medications; that he does not prepare, but does self-administer, his medications; and that he is rarely if ever compliant in taking his medications.

Balance:<sup>42</sup> Ms. Sullivan found that Mr. J had fallen in the 180 days prior to the assessment, and that his activities are limited because he or his caretaker is fearful that he will fall.

Based on the foregoing CAT scores, Ms. Sullivan found that Mr. J does not currently require skilled or intermediate nursing care, and does not otherwise qualify for waiver services based on cognitive or behavioral problems or his level of need for assistance with ADLs.<sup>43</sup>

***C. Relevant Procedural History***

The assessment which resulted in the filing of this case was performed on May 15, 2015 by Marianne Sullivan, R.N. of DSDS.<sup>44</sup> Based on that assessment, Ms. Sullivan concluded that Mr. J is not currently eligible for participation in the waiver services program.<sup>45</sup> Accordingly, on June 18, 2015 the Division mailed a notice to Mr. J's guardian stating that Mr. J is not currently eligible for waiver services and that his waiver application had been denied.<sup>46</sup>

On July 9, 2015 Mr. J's guardian requested a hearing to contest the Division's decision.<sup>47</sup> Mr. J's hearing was held on September 29, 2015. Mr. J did not participate in the hearing, but was represented by his sister and legal guardian, M N, who participated by phone and testified on his behalf. G X also participated in the hearing by phone and assisted in representing Mr. J.

The Division was represented by Laura Baldwin. Marianne Sullivan, R.N., a registered nurse employed by the Division, participated in the hearing by phone and testified

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<sup>41</sup> Ex. E p. 22.

<sup>42</sup> Ex. E p. 25.

<sup>43</sup> Ex. E pp. 31, 32.

<sup>44</sup> Ex. E.

<sup>45</sup> Ex. E pp. 31 - 32; Ex. D.

<sup>46</sup> Ex. D.

<sup>47</sup> Ex. C.



for DSDS. The hearing was concluded, and the record closed, on September 29, 2015.<sup>48</sup>

### III. Discussion

#### A. *Applicable Burden of Proof, Standard of Proof, and Standard of Review*

Pursuant to applicable state and federal regulations, Mr. J, as applicant, bears the burden of proof in this case.<sup>49</sup> The applicable standard of proof is the "preponderance of the evidence" standard.<sup>50</sup> This standard is met when the evidence, taken as a whole, shows that the fact sought to be proved is more probable than not or more likely than not.<sup>51</sup>

The standard of review in a Medicaid "Fair Hearing" proceeding is *de novo* review.<sup>52</sup> 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, even if the original decision is factually supported and has a reasonable basis in law.

#### B. *Relevant Medicaid Waiver Services Statutes and Regulations*

The Medicaid program has a number of coverage categories. One of those categories is the Home and Community-Based Waiver Services program<sup>53</sup> ("waiver services"). 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.<sup>54</sup> Alaska participates in the waiver services program.<sup>55</sup>

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<sup>48</sup> A three-page letter from Ms. N was received by the Office of Administrative Hearings (OAH) on November 2, 2015. Because the letter was received after the hearing record closed, it was not considered in the preparation of this decision.

<sup>49</sup> 42 CFR § 435.930, 7 AAC 49.135.

<sup>50</sup> 7 AAC 49.135.

<sup>51</sup> *Black's Law Dictionary* at page 1064 (West Publishing, Fifth Edition, 1979).

<sup>52</sup> 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); *O v. Curtis*, 930 N.E.2d 1228 (Ind. App. 2010).

<sup>53</sup> 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.*

<sup>54</sup> 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

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. 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.<sup>56</sup> 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.

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.<sup>57</sup>

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.<sup>58</sup> Under the CAT, an individual can qualify for waiver services by demonstrating a need for extensive assistance with at least three designated ADLs, even without demonstrating a need for skilled or intermediate level nursing care.<sup>59</sup>

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<sup>55</sup> treatment . . . (9) Other services requested by the agency and approved by CMS *as cost effective and necessary to avoid institutionalization*. [Emphasis added].  
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 . . . .

<sup>56</sup> 7 AAC 130.215.  
<sup>57</sup> 7 AAC 130.215.  
<sup>58</sup> Ex. E p. 31.  
<sup>59</sup> Ex. E p. 31.

Finally, under the CAT, an individual may qualify for waiver services by having a certain minimum level of nursing needs or cognitive or behavioral problems, *combined with* a certain minimum level of need for physical assistance with ADLs.<sup>60</sup>

**C. The Consumer Assessment Tool (CAT)**

Under state Medicaid regulation 7 AAC 130.215, 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 activities of daily living (ADLs) coded or scored by the CAT are body mobility, transfers, locomotion (in room), locomotion (between levels), locomotion (to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, and bathing.<sup>61</sup>

The CAT 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.<sup>62</sup> The self-performance scores relevant to eligibility 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).

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 to perform a particular ADL. The support scores relevant to eligibility 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).

An individual can qualify for waiver services by scoring 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 20 of the CAT.<sup>63</sup> The five "shaded" ADLs are bed/body mobility, transfers, locomotion, eating, and toilet use.<sup>64</sup>

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<sup>60</sup> Ex. E p. 31.

<sup>61</sup> Exs. E6 - E11.

<sup>62</sup> 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."

<sup>63</sup> Ex. E p. 20.

<sup>64</sup> Ex. E p. 20.

***D. Does Mr. J Require Skilled or Intermediate Nursing Care?***

At hearing, Mr. J did not contest the Division's finding that he does not currently require intermediate or skilled nursing care, *per se*, as defined by the Division's regulations. The Division's assessment findings on this issue, and Ms. Sullivan's hearing testimony that Mr. J currently has no nursing needs *per se*, were credible. No testimony was presented tending to show that Mr. J currently has any nursing needs. Mr. J thus failed to show a need for nursing services as defined by 7 AAC 140.510. The next issue is whether Mr. J qualifies for waiver services based on his cognitive and behavioral problems and a need for assistance with his activities of daily living.

***E. Does Mr. J Qualify for Waiver Services Based on Cognitive Problems, Behavioral Problems, and/or a Need for Assistance with Activities of Daily Living?***

The Consumer Assessment Tool's scoring summary is located at page 31 of the CAT.<sup>65</sup> As indicated by that summary, there are several scoring combinations through which one may qualify for waiver services. The first way, discussed immediately above, is to require skilled or intermediate level nursing care, as defined by the Division's regulations and the CAT. As discussed above, Mr. J does not currently qualify for waiver services on that basis.

However, as indicated by the CAT's scoring summary page, there are several scoring combinations, involving factors such as cognitive and behavioral problems and the level of assistance which the person requires in order to perform their ADLs, through which one may qualify for waiver services even without demonstrating a need for professional nursing services. The CAT divides these 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. Mr. J did not assert that he satisfies NF1(a), and the record indicates that he does not.<sup>66</sup> The second way (under NF1(b)) is to require use of a ventilator or respirator at least three days per week. Mr. J did not assert that he satisfies NF1(b), and the record indicates that he does not.<sup>67</sup> The third way (under NF1(c)) is to require care due to uncontrolled seizures at least once per week.

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<sup>65</sup> Ex. E p. 31.

<sup>66</sup> Ex. E pages 13 - 15.

<sup>67</sup> Ex. E pages 13 - 15.

Mr. J did not assert that he satisfies NF1(c), and the record indicates that he does not.<sup>68</sup> The fourth way (under NF1(d)) is to receive some form of therapy at least five days per week. Mr. J did not assert that he satisfies NF1(d), and the record indicates that he does not.<sup>69</sup>

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.<sup>70</sup> The "shaded" ADLs are bed mobility, transfers, locomotion, eating, and toilet use. The CAT scores which the Division assigned to Mr. J for the "shaded" ADLs are bed mobility: 0/0; transfers: 1/0; locomotion: 1/5; eating: 0/0; and toileting: 1/5.<sup>71</sup> While Mr. J asserts that he requires greater assistance with some of his ADLs than indicated by the Division's assessment, he does not assert that he requires extensive assistance, or that he is dependent, as to any ADL.<sup>72</sup>

In summary, Mr. J does not qualify for waiver services based on the criteria of NF(1)(a-e) of the CAT. It is now necessary to determine whether he qualifies under NF(2).

## 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 Mr. J requires any of these services,<sup>73</sup> so he 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

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<sup>68</sup> Ex. E pages 13 - 15.

<sup>69</sup> Ex. E pages 13 - 15.

<sup>70</sup> Ex. E page 31.

<sup>71</sup> Ex. E page 20.

<sup>72</sup> See Ms. N's and Ms. X's testimony and statements at hearing.

<sup>73</sup> Ex. E pages 13 - 15.

week. However, the record does not show that Mr. J requires any of these therapies,<sup>74</sup> 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. J requires any of these procedures,<sup>75</sup> 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. J requires any of these treatments,<sup>76</sup> 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 shows that Mr. J has short-term memory problems, and Mr. J received the maximum score (one) in this category.<sup>77</sup>

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 shows that Mr. J has problems with three out of four of those items, and Mr. J received the maximum score (one) in this category.<sup>78</sup>

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. J is moderately impaired as to his cognitive skills for daily decision-making. Accordingly, Mr. J received the maximum score (one) under this subsection.<sup>79</sup>

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

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<sup>74</sup> Ex. E pages 13 - 15.

<sup>75</sup> Ex. E pages 13 - 15.

<sup>76</sup> Ex. E pages 13 - 15.

<sup>77</sup> Ex. E pages 16, 31.

<sup>78</sup> Ex. E pages 16, 31.

<sup>79</sup> Ex. E pages 16, 31.

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. J does not require professional nursing observation, assessment, and management for his cognitive problems. Given Mr. J's involuntary commitment to a state mental hospital in the recent past, I am somewhat skeptical of this finding. However, the Division presented the testimony of a registered nurse on this issue, and Mr. J's witnesses did not have the medical credentials to effectively counter the nurse-assessor's testimony. Accordingly, the preponderance of the evidence in the record supports the Division's finding on this issue.

As to the second item, Mr. J asserted at hearing that he requires limited assistance with locomotion and toilet use (CAT scores of 2/2).

*a.      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.<sup>80</sup> In order to receive a self-performance score of two (limited assistance) for locomotion, a person must at minimum receive physical help in guided maneuvering of limbs, or other non-weightbearing assistance, three or more times during the week of the assessment.<sup>81</sup>

Ms. Sullivan found that Mr. J requires only supervision and cueing with locomotion (CAT score 1/5).<sup>82</sup> At hearing, however, Ms. N testified persuasively that Mr. J has tremors, (which is supported by the medical records), and that he sometimes trips while walking. She stated that one of the places where Mr. J trips is the step-down/step-up to a sunken living room in Ms. N's home. She testified that, to prevent falls, she must provide hands-on balancing assistance for Mr. J when he transits the living room and when he goes up or down the stairs in her home.

Under the CAT, a person cannot qualify for waiver services by requiring assistance with locomotion when going up or down stairs. However, in this case, Mr. J requires limited assistance when entering and exiting Ms. N's sunken living room. The single step involved in entering and exiting a sunken living room is not the same as going up or down a flight of multiple stairs (which would constitute multi-level locomotion). Rather, transiting

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<sup>80</sup> Ex. E p. 7.

<sup>81</sup> Ex. E p. 7.

<sup>82</sup> Ex. E p. 7.

a single step in a sunken living room is more akin to stepping over the raised threshold when going through a door, and constitutes single-level locomotion.

Ms. N's testimony that Mr. J needs limited assistance with locomotion is supported by Mr. J's diagnosis of involuntary movements. Accordingly, although it is a close factual issue, the preponderance of the evidence indicates that Mr. J needs limited assistance with single-level locomotion at least three times per week (CAT score 2/2).

*b. 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."<sup>83</sup> In order to receive a self-performance score of two (limited assistance) with regard to toilet use, a person must, at minimum, receive physical help in guided maneuvering of limbs, or other non-weightbearing assistance, three or more times during the week of the assessment.<sup>84</sup>

Ms. Sullivan found that that Mr. J requires only supervision and cueing with toileting (CAT score 1/5).<sup>85</sup> At hearing, Ms. N acknowledged that, although Mr. J does not clean himself adequately after toilet use, he is physically able to clean himself, but he is cognitively unable to do so. She also acknowledged that Mr. J will not let anyone help him with toileting. Accordingly, the preponderance of the evidence indicates that Mr. J does not currently require limited assistance with toilet use.

*c. Summary*

In summary, the 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. As discussed above, the evidence in the record does not show that Mr. J requires professional nursing care for his cognitive problems. However, the preponderance of the evidence *does* indicate that Mr. J requires limited assistance with locomotion (CAT score 2/2). Further, Mr. J received a score of 13 from the Division on cognitive portion of the SST.

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, with the

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<sup>83</sup> Ex. E p. 9.

<sup>84</sup> Ex. E p. 9.

<sup>85</sup> Ex. E p. 9.



rescoring as to locomotion, Mr. J now receives one point under each of subsections NF3(a), NF3(b), NF3(c), and NF3(d). Mr. J thus receives an overall score of one point 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.<sup>86</sup> The Division found that Mr. J is verbally abusive, and resists care, often enough to receive a point on this item.<sup>87</sup> Accordingly, Mr. J gets one point 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 Supplemental Screening Tool (SST).

As to the first item, the Division found that Mr. J does not require professional nursing observation, assessment, and management for his behavioral problems. Given Mr. J's involuntary commitment to a state mental hospital in the recent past, I am somewhat skeptical of this finding. However, the Division presented the testimony of a registered nurse on this issue, and Mr. J's witnesses did not have the medical credentials to effectively counter the nurse-assessor's testimony. Accordingly, the preponderance of the evidence in the record supports the Division's finding on this issue.

As to the second item, as discussed in the preceding section, the preponderance of the evidence indicates that Mr. J requires limited assistance with single-level locomotion at least three times per week (CAT score 2/2). Accordingly, Mr. J satisfies that criterion.

Finally, Mr. J received a score of 14 from the Division on the behavioral portion of the SST.<sup>88</sup>

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, with the rescoring

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<sup>86</sup> Ex. E pp. 19, 31.

<sup>87</sup> Ex. E pp. 19, 31.

<sup>88</sup> Ex. E p. 19.

as to locomotion, Mr. J now receives one point under each of subsections NF4(a) and NF4(b). Accordingly, Mr. J receives an overall score of one on NF4 of the CAT.

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, Mr. J received "overall" scores of one at NF3 and NF4, giving him a total score of two at NF5. Accordingly, the analysis in this case proceeds to NF6.

6. NF6

NF6 asks how many of the applicant's "shaded" ADLs were scored with self-performance scores and support scores of two or higher.<sup>89</sup> Because Mr. J's score for transfers was rescored to 2/2 (above), Mr. J now receives one point at NF6.

7. NF7

At NF7, the applicant's points from NF1 through NF6 are totaled. If the applicant's point total is three or more, the applicant qualifies for waiver services.<sup>90</sup> Mr. J has now received one point at NF3, one point at NF4, and one point at NF6, for a total of three points. Accordingly, Mr. J is eligible to receive waiver services based on his CAT scores.

**IV. Conclusion**

Mr. J is currently eligible to receive waiver services, under the Consumer Assessment Tool's scoring matrix, based on the extent of his cognitive problems, behavioral problems, and need for limited assistance with transfers. Accordingly, the Division's decision denying Mr. J's application for waiver services is reversed.

Dated this 5th day of November, 2015.

*Signed* \_\_\_\_\_  
Jay Durych  
Administrative Law Judge

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<sup>89</sup> Ex. E p. 31.

<sup>90</sup> Ex. E p. 31.

## 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 16th day of November, 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.]