

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

In the Matter of:)	
)	OAH No. 15-1053-MDS
K D)	Agency No.
_____)	

DECISION

I. Introduction

The issue in this case is whether K D is currently eligible to participate in the Medicaid Home and Community-Based Waiver Services program (waiver services program). Based on the applicable regulations, an applicant is eligible to receive waiver services if he or she requires either skilled nursing care, intermediate-level nursing care, or extensive assistance with three or more designated (“shaded”) activities of daily living (ADLs). The Division of Senior and Disabilities Services (DSDS or Division) conducted an assessment on March 20, 2015 and determined that Ms. D does not currently require skilled or intermediate-level nursing care, and does not require extensive assistance with three or more shaded ADLs.¹

This decision concludes that Ms. D had no nursing needs during the time period at issue in this case.² Also, although Ms. D requires a somewhat greater level of physical assistance with some of her ADLs than was indicated in her assessment, at present she requires extensive assistance with only two “shaded” ADLs. Under the Division’s regulations, an applicant or recipient must require extensive assistance with three or more shaded ADLs in order to qualify for waiver services on that basis. As a result, Ms. D is not presently eligible to participate in the waiver services program.³ Although Ms. D clearly requires Medicaid *Personal Care Assistant (PCA) services*, the evidence in this case indicates that Ms. D has the ability to function in a home setting without the need for *waiver services*. The Division’s decision terminating Ms. D’s waiver services is therefore affirmed.

¹ Exhibit D.

² This case concerns Ms. D’s condition during the period beginning a week prior to her latest assessment (March 20, 2015), and ending on the date the Division issued its determination letter (July 13, 2015).

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

II. Facts

A. *Ms. D's Medical Condition per her Medical Records and Plan of Care*⁴

Ms. D is a 56-year-old woman who, at the time of the assessment, lived with one adult roommate in a one story apartment.⁵ She had a stroke in 2013⁶ and has been mostly bedbound for the past two years.⁷ Ms. D's medical diagnoses include acute and chronic respiratory failure, asthma, cerebral artery occlusion, cerebrovascular disease, late effects of cerebrovascular accident (CVA), chronic obstructive pulmonary disease, depression, diabetes mellitus (type II), dysarthria, dysphagia, failure to thrive, gastroesophageal reflux disease (GERD), left-side hemiplegia, hyperlipidemia, hypertension, loss of sensory perception, severe muscle deconditioning, oxygen dependence, symbolic dysfunction NEC, urinary incontinence, and wheelchair dependence.⁸ She takes at least eight prescription medications.⁹ Her apartment is poorly equipped to handle her current level of disability.¹⁰

On July 7, 2015 a Plan of Care renewal application was submitted to the Division on Ms. D's behalf.¹¹ The renewal application states in relevant part as follows:¹²

Client's health hasn't changed much over the last year. She spends much of her time in bed, she has [left] side paralysis and limited grip strength. She is unable to walk and uses a wheelchair. She is on oxygen 24 hours per day. She receives sponge baths and [is] fearful to get into her bath tub to shower even with provided grab bars. Client has no emergency room visits, hospitalizations, or surgeries over the year. She has had no treatments and limited doctor appointments. She has remained stable. [She] very rarely goes to the doctor as she needs an escort to help with pushing her wheelchair while she pushes her oxygen tank in front of her She continues to enjoy spending most of her time in bed. Client shows signs of depression at times and sleeping odd hours. Client is encouraged to do daily care and tasks but refuses

. . .

[Ms. D] resides in a single level, two-bedroom home with her significant other S. She has a total of four adult children. She has two daughters in Anchorage [and] appears to have an estranged relationship with disruptive behavior. Her two sons reside out of state. [Ms. D] describes a somewhat

⁴ Ms. D submitted approximately 220 pages of medical records in this case. All of those records were reviewed and considered during the preparation of this decision.

⁵ Exhibit E3.

⁶ Ex. 20 p. 15.

⁷ Ex. 20 p. 25.

⁸ Exhibit E5; Exhibit 1; Exhibit 18 pp. 2 - 3; Exhibit 20 p. 7.

⁹ Exhibit E22.

¹⁰ Ex. 18 p. 5.

¹¹ All factual findings in this paragraph are based on Exhibits 8 and 11 unless otherwise stated.

¹² Exhibit 8 pp. 7, 10; Exhibit 11 pp. 7, 10.

conflicted and chaotic relationship with her children [Ms. D] requires assistance with most all ADLs and IADLs. She remains in bed with the exception of medical appointments [Ms. D] watches television, up late in the evening often sleeping in [until] late in the day She enjoys watching TV and enjoys the company of her PCA and respite worker [Ms. D is encouraged] to get out of her home but she prefers not to and stated [that she is] perfectly content staying home and in her bed.

Ms. D was hospitalized for 15 days during July - August 2015 due to acute respiratory failure and exacerbation of her COPD.¹³ Following her release from the hospital she began physical therapy. The therapist's notes from Ms. D's physical therapy session of October 7, 2015 state in relevant part as follows:¹⁴

Continual oxygen; unable to manage portable device; weakness and fatigue; confined to bed/chair Client able to complete rolling L and R for lower body dressing and hygiene, able to bridge partially for pulling up undergarments. Able to come sit on [end of bed] with use of bedrails and cues for technique Worked with client on bed mobility and sitting Client with potential to be up more and participate more in transfers

The notes from an assessment conducted on October 25, 2015 by a registered nurse from No Name state in relevant part as follows:¹⁵

Grooming utensils must be placed within reach before able to complete grooming activities Someone must help the patient put on upper body clothing Patient depends entirely upon another person to dress lower body Unable to participate effectively in bathing and is bathed totally by another person . . . is totally dependent in toileting Patient depends entirely upon another person to maintain toileting hygiene Unable to transfer self and is unable to bear weight or pivot when transferred by another person Chair fast; unable to ambulate and is UNABLE to wheel self [emphasis in original] Able to feed self independently but requires (a) meal set-up; or (b) intermittent assistance or supervision from another person; or (c) a liquid, pureed, or ground meat diet

The therapist's notes from Ms. D's physical therapy session of October 27, 2015 state in relevant part as follows:¹⁶

Bed mobility: sit to supine - independent; supine to sit - independent; roll to left - independent; roll to right - independent; feet up - independent; feet down - independent Client stays in bed and does not transfer into [wheelchair] except for medically necessary [appointments]. Client capable to transferring to [wheelchair] with min to mod assist but chooses to stay in bed Client able to stand today with min assist of PT and 2nd person for

¹³ Exhibit 18 p. 3.

¹⁴ All factual findings in this paragraph are based on Exhibit 20, pp. 1 - 2 (formatting modified for brevity).

¹⁵ All factual findings in this paragraph are based on Exhibit 20, pp. 12 - 13 (formatting modified for brevity).

¹⁶ All factual findings in this paragraph are based on Exhibit 20, pp. 17 - 18 (formatting modified for brevity).

support with use of walker and air cast on L ankle Completed sit to stand X 3 with min assist of 2 with walker and gait belt as well as air cast L ankle. Client tolerated standing for about [two minutes] and was able to take several small steps

Finally, the therapist's notes from Ms. D's physical therapy session of November 4, 2015 indicate that Ms. D currently uses incontinence briefs and a bedpan for toileting, but that she is willing to use a bedside commode "once [her] legs get stronger."¹⁷

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

At hearing, T C credibly testified in relevant part as follows:

1. She agrees that, during the time period in question, Ms. D did not have any skilled or intermediate nursing needs.
2. She also agrees that, during the time period in question, Ms. D did not have any cognitive or behavioral problems severe enough to allow Ms. D to qualify for waiver services on that basis.
3. The assessment findings which Ms. D disputes are her scores on the five "shaded" ADLs.

At hearing, K D credibly testified in relevant part as follows:

1. She agrees that she is independent as to body mobility.
2. When transferring, her PCA must provide her with weight-bearing assistance using a gait belt.
3. She can generally only use her manual wheelchair in her home because her home is so small. She cannot move her manual wheelchair herself using her arms. Instead, she must have someone else push the wheelchair for her from behind.
4. She can eat and drink independently.
5. She does not use the toilet in the bathroom because her wheelchair will not fit into the bathroom. Instead, she uses a bed pan. Her caregiver must perform all the functions associated with use of the bed pan, except that Ms. D is able to clean herself afterward.

At hearing, Mary Tanaka, R.N. credibly testified in relevant part as follows:

1. The form filled out by Ms. D's doctor states that she has no skilled nursing needs, but the form lists "home oxygen therapy" as an intermediate nursing need. Home oxygen use is a nursing need according to the Division's intermediate care regulation. However, the CAT narrows the scope of the intermediate care regulation by providing that oxygen use constitutes an intermediate nursing need only if it occurs within the first 30 days after the start of a "new condition" (Exhibit E15). Ms. D has been using oxygen longer than 30 days and has no new conditions. Accordingly, under the CAT, Ms.

¹⁷ All factual findings in this paragraph are based on Exhibit 20, p. 29 (formatting modified for brevity).

D's long-term oxygen use does not constitute an intermediate nursing need.

2. Ms. D has no skilled or intermediate nursing needs.
3. Ms. D has some cognitive and behavioral issues, but they are not severe enough to score points on the CAT's scoring matrix.
4. Ms. D needs some assistance with her ADLs, but she does not require extensive assistance with any three "shaded" ADLs.
5. Based on events occurring after the Division's decision to terminate Ms. D's waiver services, Ms. Tanaka believes that, were Ms. D to reapply for waiver services based on her current condition and therapies, she would probably re-qualify for waiver services.

C. Relevant Procedural History

Ms. D was first found eligible for participation in the waiver services program in 2013, based on an assessment conducted on October 11, 2013.¹⁸ On March 24, 2015 Mary Tanaka, R.N., a nurse-assessor employed by the Division, conducted a reassessment of Ms. D's waiver services eligibility using the Division's Consumer Assessment Tool or "CAT,"¹⁹ a document described in detail in Section III, below. The assessor found that Ms. D currently requires neither a nursing facility level of care, nor extensive assistance with three or more "shaded" ADLs, and therefore concluded that Ms. D is not currently eligible for the waiver services program.²⁰

On April 27, 2015 the Division sent a form titled "Level of Care Verification Request" to N T, M.D., one of Ms. D's treating physicians.²¹ In response to the question, "At this time, would you admit this patient to a skilled nursing facility?" Dr. T answered "no." In response to the question, "At this time, does this patient have intermediate nursing needs?" Dr. T responded that Ms. D requires home oxygen therapy.

On May 5, 2015, a different registered nurse reviewed nurse-assessor Tanaka's waiver services eligibility decision.²² The nurse-supervisor agreed that Ms. D is not currently eligible to participate in the waiver services program.²³

Finally, the nurse-assessor's eligibility decision underwent a second-level review by a registered nurse and/or licensed physician employed by the Division's independent contractor

¹⁸ Exhibit F.

¹⁹ Exhibits E1 - E33.

²⁰ Exhibits D, E31 - E32.

²¹ All factual findings in this paragraph are based on Exhibits F33 - F35 unless otherwise stated.

²² Exhibits F42 - F45.

²³ Exhibit F45.

Qualis Health.²⁴ Qualis also concurred with the nurse-assessor’s determination that Ms. D has “materially improved” and no longer requires a nursing facility level of care.²⁵

On June 17, 2015 the Division mailed a notice to Ms. D advising her that it had denied her application for waiver services.²⁶ On August 10, 2015 Ms. D’s representative requested a hearing to contest the Division’s termination of Ms. D’s waiver services.²⁷

Ms. D’s hearings were held on November 5, 2015 and November 13, 2015. Ms. D participated in the hearing by phone, represented herself, and testified on her own behalf. T C, Ms. D’s care coordinator, participated in the hearing by phone and testified on Ms. D’s behalf. The Division was represented by Medical Assistance Administrator Laura Baldwin, who participated by phone. Mary Tanaka, R.N. participated in the hearing by phone and testified on the Division’s behalf. The record closed at the end of the hearing.

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.²⁸ The standard of review in a Medicaid “Fair Hearing” proceeding, as to both the law and the facts, is *de novo* review.²⁹ In this case, evidence was presented at hearing that was not available to the Division’s reviewers. The administrative law judge (ALJ) 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 Alaska Medicaid Statutes and Regulations*

States participating in the Medicaid program must provide certain mandatory services under the state’s medical assistance plan.³⁰ States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program³¹ (“waiver services”).³² Congress created the waiver services program in

²⁴ Exhibits D2, G.

²⁵ Exhibits D2, G7.

²⁶ Exhibit D.

²⁷ Exhibit C.

²⁸ 42 CFR § 435.930, 7 AAC 49.135.

²⁹ 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).

³⁰ See 42 USC §§ 1396a(a)(10)(A), 1396d(a)(1) - (5), 1396a(a)(17), and 1396a(a)(21); 42 CFR § 440.210; 42 CFR § 440.220.

³¹ 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

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.³³ Alaska participates in the waiver services program.³⁴

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 Ms. D), that level of care must be either "intermediate care" as defined by 7 AAC 140.510, or "skilled care" as defined by 7 AAC 140.515.³⁵ 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
- (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 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.*

³² See 42 USC § 1396a(a)(10)(A).

³³ 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].

³⁴ 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

³⁵ 7 AAC 130.215.

The Division is required to incorporate the results of the CAT in determining whether an applicant requires intermediate or skilled nursing care.³⁶

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.³⁷ Under the CAT, an individual can qualify for waiver services by demonstrating a need for extensive assistance with at least three of the five ADLs used in waiver eligibility determinations, known as "shaded" ADLs.³⁸ An individual may also qualify for waiver services by having a certain minimum level of nursing needs, and/or a certain level of cognitive or behavioral problems, *combined with* a certain minimum level of need for physical assistance with ADLs.³⁹

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 . . ." ⁴⁰ 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. ^[41]

Finally, in an order issued in October 2014 in the class action 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;" ⁴² that "[t]he State may not base its annual determination of whether a recipient is 'materially improved' solely upon the scoring obtained from the CAT;" and that "[t]he State must consider all reasonably available information relevant to that determination."

³⁶ 7 AAC 130.215.

³⁷ Exhibit E31.

³⁸ Exhibit E31.

³⁹ Exhibit E31.

⁴⁰ AS 47.07.045(b)(1).

⁴¹ AS 47.07.045(b)(3).

⁴² *Krone* order dated October 1, 2014 at page 6.

C. The Consumer Assessment Tool (CAT)

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

The CAT numerical scoring system has two components. The first component is the *self-performance score*. These scores rate how capable a person is of performing a particular activity of daily living (ADL).⁴³ 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).⁴⁴

The second component of the CAT scoring system is the *support score*. These scores rate the degree of assistance that a person requires for a particular ADL. The possible scores are **0** (no setup or physical help required); **1** (setup help required); **2** (one person physical assist required); **3** (two or more person physical assist required). Again, there are additional codes that do not add to the service level: **5** (cueing required); and **8** (activity did not occur during the past week).⁴⁵

The ADLs scored by the CAT are body mobility, transfers, locomotion, dressing, eating, toilet use, personal hygiene, and bathing.⁴⁶ However, the only ADLs that are considered in determining eligibility for the waiver services program are the five so-called “shaded” ADLs, which are body mobility, transfers, locomotion, eating, and toilet use.⁴⁷

D. Does Ms. D Require Skilled or Intermediate Nursing Care?

A person qualifies for waiver services if he or she requires skilled nursing services as defined by 7 AAC 140.515, or intermediate nursing services as defined by 7 AAC 140.510. Mary Tanaka, R.N., the assessor who performed Ms. D’s assessment, testified at hearing

⁴³ 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.”

⁴⁴ *See*, for example, Exhibits E8 - E13.

⁴⁵ *See*, for example, Exhibit E8.

⁴⁶ Exhibits E8 - E14.

⁴⁷ Exhibit E20.

that Ms. D had no skilled or intermediate-level nursing needs at the time of the assessment. Ms. D and her witnesses likewise failed to identify, at hearing, any nursing needs which Ms. D might have had at the time of the assessment.

The form completed by Ms. D's doctor states that she has no skilled nursing needs, but the form lists "home oxygen therapy" as an intermediate nursing need. Home oxygen use is a nursing need according to the Division's intermediate care regulation. However, the CAT narrows the scope of the intermediate care regulation by providing that oxygen use constitutes an intermediate nursing need only if it occurs within the first 30 days after the start of a "new condition."⁴⁸ Ms. Tanaka testified that Ms. D has been using oxygen longer than 30 days and has no new conditions; this testimony was not disputed by Ms. D. Accordingly, under the CAT, Ms. D's long-term oxygen use does not constitute an intermediate nursing need.

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

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

The Consumer Assessment Tool's nursing facility level of care scoring summary is located at page 29 of the CAT.⁴⁹ As indicated by that scoring summary, there are numerous possible scoring combinations. Some of these combinations (discussed below) allow a person to qualify for waiver services without demonstrating a need for nursing services. The CAT divides these possible combinations into six different areas, designated "NF1" through "NF6."

1. NF1

There are five different ways to qualify for waiver services under NF1. The first way (under NF1(a)) is to require nursing services seven days per week. Ms. D did not assert that she satisfies NF1(a), and the record indicates that she does not. The second way (under NF1(b)) is to require use of a ventilator or respirator at least three days per week. Ms. D did

⁴⁸ Exhibit E15.

⁴⁹ Exhibit E31.

not assert that she satisfies NF1(b), and the record indicates that she does not. The third way (under NF1(c)) is to require care due to uncontrolled seizures at least once per week. Ms. D did not assert that she satisfies NF1(c), and the record indicates that she does not. The fourth way (under NF1(d)) is to receive some form of therapy at least five days per week. Ms. D did not assert that she satisfies NF1(d), and the record indicates that she does not.

The fifth/last way to qualify for waiver services 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.⁵⁰ The “shaded” ADLs are body/bed mobility, transfers, locomotion, eating, and toilet use. Ms. D’s level of need for assistance with the five “shaded” ADLs is analyzed below.

a. Body/Bed Mobility

For purposes of waiver services eligibility, body/bed mobility is defined as how a person moves to and from a lying position, turns side to side, and positions his or her body while in bed.⁵¹ In order to receive a self-performance score of three (extensive assistance) with regard to bed/body mobility, a person must require either weight-bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁵²

In 2013 the Division found that Ms. D required only supervision with body mobility (CAT score 1/0).⁵³ In 2015 Ms. Tanaka found that Ms. D is independent with body mobility (CAT score 0/0).⁵⁴ At hearing, Ms. D agreed that she is independent as to body mobility, and my review of the record supports the Division’s finding on this point. Accordingly, the preponderance of the evidence indicates that Ms. D is independent as to 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).⁵⁵ In order to receive a self-performance score of three (extensive assistance) with regard to transfers, a person must require either weight-bearing

⁵⁰ Exhibit E20.

⁵¹ Exhibit E8.

⁵² Exhibit E8.

⁵³ Exhibit F7.

⁵⁴ Exhibit E8.

⁵⁵ Exhibit E8.

support three or more times per week, or full caregiver performance of the activity part of the time.⁵⁶

In 2013 the Division found that Ms. D required extensive assistance with transfers (CAT score 3/2).⁵⁷ In 2015 Ms. Tanaka found that Ms. D requires only limited assistance with transfers (CAT score 2/2).⁵⁸ However, in 2015 another registered nurse reported that Ms. D is “unable to transfer self and is unable to bear weight or pivot when transferred by another person.”⁵⁹ Similarly, Ms. D testified at hearing that, when transferring, her PCA must provide her with weight-bearing assistance using a gait belt. Accordingly, the preponderance of the evidence indicates that Ms. D still requires extensive assistance with transfers (CAT score 3/2).

c. Locomotion

For purposes of waiver services eligibility, locomotion is defined as how a person moves between locations in his or her room and other areas on the same floor/level.⁶⁰ In order to receive a self-performance score of three (extensive assistance) with regard to locomotion, a person must require either weight-bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁶¹

In 2013 the Division found that Ms. D required extensive assistance, from two persons, for in-home locomotion (CAT score 3/3).⁶² In 2015 Ms. Tanaka found that Ms. D now requires only supervision and set-up help with transfers (CAT score 1/1).⁶³ However, in 2015 another registered nurse found that Ms. D is unable to ambulate and is unable to wheel herself in her wheelchair.⁶⁴ Similarly, Ms. D testified at hearing that she cannot move her manual wheelchair herself using her arms, and must instead have someone else push the wheelchair for her from behind. Accordingly, the preponderance of the evidence indicates that Ms. D still requires extensive assistance with locomotion (CAT score 3/2).

d. Eating

For purposes of waiver services eligibility, eating is defined as how a “person eats or drinks regardless of skill.”⁶⁵ In order to receive a self-performance score of three (extensive

⁵⁶ Exhibit E8.
⁵⁷ Exhibit F7.
⁵⁸ Exhibit E8.
⁵⁹ Exhibit 20, pp. 12 - 13.
⁶⁰ Exhibit E9.
⁶¹ Exhibit E9.
⁶² Exhibit F8.
⁶³ Exhibit E9.
⁶⁴ Exhibit 20, pp. 12 - 13.
⁶⁵ Exhibit E11.

assistance) with regard to eating, a person must require either weight-bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁶⁶

In 2013 the Division found that Ms. D required only set-up help with eating (CAT score 0/1).⁶⁷ In 2015 Ms. Tanaka found that Ms. D is independent with eating (CAT score 0/0).⁶⁸ At hearing, Ms. D agreed that she can eat and drink independently, and my review of the record supports the Division's finding on this point. Accordingly, the preponderance of the evidence indicates that Ms. D is independent as to eating (CAT score 0/0).

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."⁶⁹ To receive a self-performance score of three (extensive assistance) as to toilet use, a person must receive either weight-bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁷⁰

In 2013 the Division found that Ms. D required extensive assistance with toilet use (CAT score 3/2).⁷¹ In 2015 Ms. Tanaka found that Ms. D now requires only limited assistance with toilet use (CAT score 2/2).⁷²

Whether Ms. D currently requires limited assistance or (instead) extensive assistance with toilet use is a close question. In 2015 a registered nurse not employed by the Division wrote that Ms. D "is totally dependent in toileting" and "depends entirely upon another person to maintain toileting hygiene."⁷³ However, Ms. D testified at hearing that she does not use the toilet in the bathroom, but uses a bed pan instead, and that her caregiver must perform all the functions associated with use of the bed pan, *except that Ms. D is able to clean herself afterward.*

Were Ms. D's caregiver assisting with all aspects of toileting, including post-toileting hygiene, Ms. D would qualify as requiring extensive assistance. However, Ms. D herself testified that she always performs her post-toileting hygiene herself. That being the case, the

⁶⁶ Exhibit E11.

⁶⁷ Exhibit F10.

⁶⁸ Exhibit E11.

⁶⁹ Exhibit E11.

⁷⁰ Exhibit E11.

⁷¹ Exhibit F10.

⁷² Exhibit E11.

⁷³ Exhibit 20, pp. 12 - 13.

preponderance of the evidence indicates that Ms. D currently requires only limited assistance with toilet use (CAT score 2/2).

f. Summary - Degree of Assistance Required with Shaded ADLs

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

2. NF2

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

The second way to obtain points (under NF2(b)) is to require speech therapy, respiratory therapy, physical therapy, and/or occupational therapy at least three days per week. Ms. D provided documentation of her attendance at physical therapy sessions from September 29, 2015 into November 2015.⁷⁴ However, all of these physical therapy sessions occurred well after the Division issued its notice terminating Ms. D’s waiver services on July 13, 2015.⁷⁵ Because there is no evidence that Ms. D was receiving any of these therapies at the time of the assessment, she receives no points under NF2(b).

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

⁷⁴ Exhibits 19, 20.

⁷⁵ Exhibit D.

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

3. NF3

An applicant cannot qualify for waiver services under NF3 alone. However, under NF3 an applicant can obtain points towards qualifying for waiver services which, when added to points obtained under other subsections of NF1 - NF6, can qualify the applicant for waiver services. The first way (under NF3(a)) is to have short-term memory problems. In 2013 the Division found that Ms. D had no memory problems and only mild cognitive problems.⁷⁶ In 2015 the Division found that Ms. D has no memory problems or cognitive problems.⁷⁷ Independent review of the record shows that Ms. D has no significant memory problems, so Ms. D receives no points in this category.⁷⁸

The second way to obtain points (under NF3(b)) is to be generally unable to recall names and faces, the season of the year, where you are, and the location of your room. Ms. D was generally able to recall these items of information during the assessment, and so she received no points in this category.⁷⁹

The third way to obtain points (under NF3(c)) is to be moderately or severely impaired in one's cognitive skills for daily decision-making. The Division found that Ms. D is independent as to her cognitive skills for daily decision-making,⁸⁰ and she did not assert otherwise at hearing. Accordingly, Ms. D received no points under this subsection.

The fourth/last way to obtain points (under NF3(d)) is to require *either* professional nursing care due to cognitive problems, *or both* (1) score at least a 2/2 as to any shaded ADL, *and* (2) score 13 or more on the Division's Supplemental Screening Tool (SST) for cognitive issues. The Division found that Ms. D does not require professional nursing care to manage her cognitive problems. This finding is supported by the record, and Ms. D did not assert otherwise. As discussed above, Ms. D received a score equal to or greater than 2/2 as to one or more shaded ADLs. However, Ms. D received a score of zero on the

⁷⁶ Exhibit F17.

⁷⁷ Exhibits E1, E6.

⁷⁸ Ms. D did not contest this finding at hearing.

⁷⁹ Exhibits E1, E18. Ms. D did not contest this finding at hearing.

⁸⁰ Exhibits E1, E18. Ms. D did not contest this finding at hearing.

cognitive SST. Because Ms. D satisfied only one of the three elements of NF3(d), Ms. D receives no points under NF3(d).

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

4. NF4

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

There are two subsections to NF4, and an applicant must qualify under both of these subsections in order to receive the one point available under NF4. Under NF4(a), an applicant must either wander, engage in socially inappropriate or disruptive behavior, be verbally abusive, or be physically abusive at least four days per week. The Division found that Ms. D engages in none of these behaviors, and Ms. D provided no evidence to the contrary.⁸¹ Accordingly, Ms. D receives no points under NF4(a).

Under NF4(b), an applicant must *either* require professional nursing care as a result of problem behaviors, *or both* (1) score at least 2/2 as to any shaded ADL, *and* (2) score 14 or more on the portion of the Division’s Supplemental Screening Tool (SST) dealing with problem behavior. In this case, the Division assigned Ms. D a score of four on the behavioral portion of the SST, and found that she does not require professional nursing care for any behavioral problems.⁸² Ms. D did not assert otherwise.

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

⁸¹ Exhibits E2, E19.

⁸² Exhibits E2, E19.

5. NF5

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

IV. Conclusion

Ms. D had no nursing needs during the time period at issue in this case. She has no serious cognitive or behavioral issues. Although Ms. D requires a somewhat greater level of physical assistance with some of her ADLs than was indicated in her assessment, at present she requires extensive assistance with only two “shaded” ADLs. Under the Division’s regulations, an applicant or recipient must require extensive assistance with three or more shaded ADLs in order to qualify for waiver services on that basis. The preponderance of the evidence indicates that Ms. D needs *PCA services* (which she currently receives), but has the ability to function in a home setting without the need for *waiver services*. Accordingly, Ms. D is not currently eligible to receive waiver services. The Division’s decision terminating Ms. D’s waiver services is therefore affirmed.

DATED this 4th day of December, 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 16th day of December, 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.]