

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

In the Matter of)
) OAH No. 15-1054-MDS
 T D) Agency No.
_____)

DECISION

I. Introduction

T D applied for services under the Medicaid Home and Community-Based Waiver program. Senior and Disabilities Services (SDS) denied her application, and Ms. D appealed.

A hearing was held on September 24, 2015. Ms. D was represented by her legal guardian, C K. SDS was represented by a lay advocate, Laura Baldwin. Based on the evidence presented, the denial of Ms. D’s application is affirmed.

II. Facts

Ms. D was evaluated for waiver services on July 6, 2015, by nurse assessor Margaret Rogers. At the time, Ms. D was 69 years old and was living in an Assisted Living Facility.¹ She has been diagnosed with schizoaffective disorder and tardive dyskinesia (TD).² The TD causes a persistent tremor in her upper and lower extremities, most likely from her long term use of various medications.³

The parties discussed this case between themselves off record prior to the hearing. During their conversation, they narrowed the issues in dispute. For purposes of this hearing, the only issues are the level of assistance needed with Transfers, Locomotion, and Toileting.

III. Discussion

A. Home and Community-Based Waiver

The Alaska Medicaid program provides Waiver services to adults with physical disabilities who require “a level of care provided in a nursing facility.”⁴ The nursing facility level of care⁵ requirement is determined by an assessment which is documented by the Consumer

¹ Exhibit E.
² Facility X medical record (Facility X) dated June 29, 2015.
³ Facility X June 8, 2015; Facility X August 11, 2015.
⁴ 7 AAC 130.205(d)(4).
⁵ See 7 AAC 130.205(d)(4); 7 AAC 130.215.

Assessment Tool (CAT).⁶ The CAT records an applicant's needs for professional nursing services, therapies, and special treatments, and whether an applicant has impaired cognition or displays problem behaviors. Each of the assessed items is coded and contributes to a final numerical score.

The CAT also records the degree of assistance an applicant requires for activities of daily living, which include five categories that are specific to Waiver eligibility: 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.⁷

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).⁸ A person also can receive points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), difficult behaviors (wandering, abusive behaviors, etc.), and the need for either limited or extensive assistance with the five specified activities of daily living.⁹

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.¹⁰

B. Ms. D's Activities of Daily Living

There was credible testimony that Ms. D needs constant supervision as well as physical assistance with all of her activities of daily living. However, for purposes of the Waiver program, only five ADLs are considered. Of those, only three are contested by Ms. D: transfers, locomotion, and toileting.

To qualify for the Waiver program, Ms. D must show a need for extensive assistance with each of these three ADLs. The distinction between extensive assistance and limited assistance is based on 1) whether weight-bearing support was provided at least three times during

⁶ 7 AAC 130.215(4); Exhibit E.

⁷ Exhibit E.

⁸ Ex. E scoring page, (NF.1e).

⁹ *Id.* (NF.2-6).

¹⁰ *Id.* (NF.7).

the past week or 2) whether the recipient was completely unable to assist with performing the ADL at least once during the past week.¹¹

Weight-bearing support is defined as supporting more than a minimal amount of weight. It does not require that the assistant bear most of the recipient's weight. Instead, it is enough that the recipient would be unable to reasonably complete the ADL without the weight-bearing assistance.¹² This is the definition that both SDS and OAH are required to use in considering whether a recipient needs extensive assistance.

1. Transfers

An assistant manager for the assisted living home, G L, reported to Ms. Rogers that Ms. D needs assistance approximately two times a week.¹³ In addition, Ms. Rogers observed Ms. D transferring without assistance.¹⁴

However, T J provided different information.¹⁵ Ms. J explained that as of the assessment in July, Ms. D needed at least one person to help support her weight when getting up from the couch or a chair. Ms. D would sometimes try to do this on her own, but would generally fall if not assisted. Ms. J testified that the staff person would support about 25% of Ms. D's weight.

In a letter sent on September 17, 2015, Ms. J wrote, "In regards to bed mobility and transfers: she is a one due to needing oversight and encouragement, and is using a one-person assist frequently." This is different than her testimony at the hearing. However, Ms. J explained that she had not participated in a hearing before, and was not sure what to write. Ms. J did not initially understand the definition of weight-bearing assistance, and appears not to have understood other aspects of the CAT scoring process. For example, her statement that Ms. D is a 1 because she needs supervision is contrary to her simultaneous written statement that Ms. D needs a one-person assist frequently.

The question for this hearing is not whether Ms. D can ever transfer without assistance. Instead, the question is whether Ms. D meets the definition for requiring extensive assistance with transfers. Ms. L noted that Ms. D needed some form of assistance twice a week. Ms. J

¹¹ Exhibit E.

¹² *In re K T-Q*, OAH No. 13-0217-MDS (Commissioner of Health and Social Services 2013), available at <http://doa.alaska.gov/oah/Decisions/mds.html>. During the hearing Ms. D's witnesses initially thought that weight-bearing meant bearing 100% of the recipient's weight. That misunderstanding was corrected during the hearing.

¹³ Ms. L was not present during the CAT assessment. *See* Exhibit E4. She was also not called as a witness by either party, and therefore was not available to confirm what she said to Ms. Rogers.

¹⁴ Exhibit E.

¹⁵ Ms. J is the General Manager for Ms. D's assisted living home.

testified that she needed weight-bearing assistance for most transfers. It is more likely true than not true that Ms. D needs weight-bearing assistance to transfer at least three times each week. Thus, she should have been scored as needing extensive assistance.

2. *Locomotion*

Ms. Rogers observed Ms. D “walk from her bedroom to the dining room and back without her walker” with a slow steady gait.¹⁶ Ms. L told Ms. Rogers that Ms. D uses a walker in the home, and that she is steadier using a walker.¹⁷ A medical note from her mental health clinic states “She ambulates slowly with a walker. She appears to manage to get around without being especially unsteady.”¹⁸

Ms. J testified that Ms. D uses her walker and that she is able to support her own weight while moving forward. However, when walking from one place to another, Ms. D will stop moving forward. When this happens, she shakes too much to stand still and needs weight-bearing assistance to remain standing until she is ready to move forward again.

The act of locomotion is defined as how a person “moves between locations.”¹⁹ This would include stopping along the way as described in Ms. J’s testimony. However, nothing else in the record corroborates Ms. J’s testimony, and Ms. Rogers’ observations contradict that testimony. Where the evidence is equally balanced on an issue, resolution of the factual dispute will often be based on which party has the burden of proof. Because this is an initial application, it is Ms. D’s burden to prove her eligibility. She has not met that burden as to the need for extensive assistance with locomotion.

3. *Toileting*

Ms. Rogers noted that Ms. D was able to transfer without assistance. She also reported being told that Ms. D does not need assistance 90% of the time.²⁰ Ms. J testified that the note in the CAT was an error and that Ms. D needs weight-bearing assistance with toileting transfers most of the time. As discussed above, Ms. D needs weight-bearing assistance with other transfers at least three times a week. She is likely to also need that level of assistance with her toileting transfers at least three times a week. She should have been scored as needing extensive assistance with toileting.

¹⁶ Exhibit E.

¹⁷ Exhibit E.

¹⁸ Facility X August 11, 2015.

¹⁹ Exhibit E.

²⁰ Exhibit E.

IV. Conclusion

Based on the parties’ agreement at the beginning of the hearing, the only issue in dispute was the level of assistance needed for three ADLs. Ms. D is eligible for the Waiver program only if she needs extensive assistance with all three. Because she did not meet her burden of proof as to locomotion, Ms. D is not eligible, and the Division’s decision is AFFIRMED. This does not preclude her from reapplying if her condition has declined since the assessment.

Dated this 30th day of September, 2015.

Signed _____
Jeffrey A. Friedman
Administrative Law Judge

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 14th day of October, 2015.

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

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