

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

In the Matter of: )  
 ) OAH No. 15-1058-MDS  
 M O ) Agency Case No.  
 )  
\_\_\_\_\_)

**DECISION**

**I. Introduction**

The issue in this case is whether M O remains eligible for Medicaid Home and Community-Based Waiver services (waiver services).<sup>1</sup> The Division of Senior and Disabilities Services (Division) conducted an assessment and determined that Ms. O does not currently require skilled nursing care, intermediate nursing care, or extensive assistance with three or more designated ("shaded") activities of daily living.<sup>2</sup> Based on these findings, the Division determined that Ms. O was no longer eligible, and terminated Ms. O's waiver services. Ms. O appealed.

The evidence showed that Ms. O has significant physical impairments that limit her ability to function independently. She does not, however, currently require skilled or intermediate nursing care. Although Ms. O has some cognitive problems, and requires physical assistance with several of her activities of daily living (ADLs), neither the level of assistance she needs with her ADLs, nor the severity of her cognitive impairments, qualify her for waiver services. Ms. O clearly needs Medicaid Personal Care Assistant (PCA) services. However, with PCA services, Ms. O should still be able to function, in a home setting, if her waiver services are withdrawn. As a result, Ms. O is not presently eligible for waiver services. The Division's termination of Ms. O's waiver services is affirmed.<sup>3</sup>

**II. Facts**

**A. Ms. O's Medical Diagnoses and Reports from her Medical Providers**

Ms. O is a 72-year-old woman who lives in a two-story apartment located within a duplex.<sup>4</sup> Her daughter owns the duplex; Ms. O lives in one unit, and her daughter and son-in-law live in the other unit.<sup>5</sup> Her medical diagnoses include allergic rhinitis, anemia, arthritis, atrial fibrillation, bradycardia, cerebrovascular accident, conduction disorder of the heart, dementia (without behavioral disturbance), depressive disorder, edema, gastroesophageal reflux

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<sup>1</sup> Ex. D.

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

<sup>3</sup> Should Ms. O's medical condition or functional abilities worsen, she may reapply for waiver services at any time.

<sup>4</sup> Ex. E3.

<sup>5</sup> D J's hearing testimony.

disease (GERD), heart murmur, hypertension, hypothyroidism, insomnia, joint pain, lumbago, morbid obesity, muscle weakness, osteoporosis, restless leg syndrome (RLS), sleep apnea, unsteady gait, and urge incontinence.<sup>6</sup> She had a stroke in 2000 which left her with mild left-side hemiparesis.<sup>7</sup> She had hip replacement surgery in 2008, but the replacement was not successful, she had repeated infections of the surgical site, and the hip replacement was ultimately removed in 2013.<sup>8</sup> As a result of the failed hip replacement, her left leg is shorter than her right leg.<sup>9</sup> Because of this, Ms. O must wear special shoes and walk on the ball of her left foot using a walker.<sup>10</sup> She has also had surgery on the cervical and lower portions of her spine.<sup>11</sup> She takes at least seven different prescription medications each day.<sup>12</sup>

On July 21, 2014, Ms. O slipped and fell while trying to take a shower by herself.<sup>13</sup> Medical records dated September 3, 2014 state that, as of that date, Ms. O had the following limitations: unable to get out of a chair independently; unable to dress independently; unable to use the toilet independently; unable to perform personal hygiene tasks independently; unable to manage medications or money independently; unable to prepare meals independently; and unable to perform housework independently.<sup>14</sup> At that time, Ms. O's medical providers recommended that she ride her stationary exercise bike, with the goal of exercising for at least 30 minutes per day.<sup>15</sup>

On September 12, 2014, Ms. O was admitted to the hospital due to heart problems and edema. At that time the admitting physician wrote that he expected that Ms. O would need to remain in the hospital for about four days, but that she could be released back to her home, or to adult foster care, following her discharge from the hospital.<sup>16</sup>

At hearing, D J testified in relevant part as follows:

1. She is Ms. O's daughter, and holds a power of attorney from her mother.
2. Prior to 2013, her mother lived in assisted living homes (ALHs), first in Texas and then in Alaska. In September 2013, her mother moved out of the ALH and into Ms. J's duplex. Her mother has lived in the duplex for the last two years.

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<sup>6</sup> Exs. E5, F49, F78, F101, F107.

<sup>7</sup> Ex. F80.

<sup>8</sup> Exs. F49, F80.

<sup>9</sup> Ex. F78.

<sup>10</sup> Ex. F101.

<sup>11</sup> Ex. F102.

<sup>12</sup> Ex. E22.

<sup>13</sup> Exs. F116 - F117.

<sup>14</sup> All factual findings in this paragraph are based on Ex. F53 unless otherwise stated.

<sup>15</sup> All factual findings in this paragraph are based on Ex. F54 unless otherwise stated.

<sup>16</sup> All factual findings in this paragraph are based on Exs. F108 - F109 unless otherwise stated.

3. Her mother was receiving therapies in 2013 that she is no longer receiving.
4. Her mother had several urinary tract infections in 2013 and before. However, since 2013, her mother has no longer had those infections.
5. In spite of the above, she feels that her mother's over-all condition has remained about the same since the 2013 assessment.

***B. The Division's 2014 and 2015 Assessments***<sup>17</sup>

Ms. O has received Medicaid Home and Community-Based Waiver services since 2013.<sup>18</sup> Ms. O was initially assessed for waiver services eligibility on September 24, 2013 by Sam Cornell, R.N.<sup>19</sup> Mr. Cornell found Ms. O to be eligible for waiver services at that time because (1) Ms. O was receiving therapy five or more days per week; and (2) Ms. O required extensive assistance with transfers, locomotion, and toilet use.<sup>20</sup>

The assessment which resulted in the filing of the present case was performed on March 17, 2015 by nurse-assessor Paula Ray, R.N.<sup>21</sup> Ms. Ray recorded her assessment in a standardized tool known as the "Consumer Assessment Tool," or "CAT." Based on Ms. O's CAT scores, Ms. Ray found that Ms. O does not currently require skilled or intermediate nursing care, and does not otherwise qualify for waiver services based on cognitive issues, behavioral issues, and/or her level of need for assistance with her activities of daily living (ADLs).<sup>22</sup>

On May 4, 2015, a different registered nurse reviewed nurse-assessor Ray's waiver services eligibility decision.<sup>23</sup> The nurse-supervisor agreed that Ms. O is not currently eligible to participate in the waiver services program.<sup>24</sup>

Finally, the nurse-assessor's eligibility decision subsequently underwent a second-level review by a registered nurse and/or licensed physician employed by the Division's independent contractor Qualis Health.<sup>25</sup> Qualis also concurred with the nurse-assessor's determination that Ms. O has "materially improved" and no longer requires a nursing facility level of care.<sup>26</sup>

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<sup>17</sup> The Division's assessment findings are discussed in detail in Section III, below.

<sup>18</sup> Ex. F.

<sup>19</sup> Ex. F.

<sup>20</sup> Ex. F.

<sup>21</sup> Ex. E.

<sup>22</sup> Exs. E31, E32.

<sup>23</sup> Exs. F40 - F47.

<sup>24</sup> Ex. F47.

<sup>25</sup> Exs. D2, G.

<sup>26</sup> Ex. D2.

### **C. Relevant Procedural History**

On July 11, 2015, the Division notified Ms. O that she was no longer eligible for waiver services, and that her waiver services would be terminated in thirty days.<sup>27</sup> On August 10, 2015, Ms. O requested a hearing to contest the Division's determination.<sup>28</sup>

Ms. O's hearing was held on September 28, 2015. Ms. O participated in the hearing by phone but did not testify. D J, Ms. O's daughter and power of attorney holder, represented her mother and testified on her behalf. Ms. O's care coordinator, L Q, participated in the hearing by phone but did not testify. Laura Baldwin, M.S.W. participated in the hearing by phone and represented the Division. Paula Ray, R.N. participated in the hearing by phone and testified for the Division. 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.<sup>29</sup> The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.<sup>30</sup> 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 Medicaid Waiver Services Statutes and Regulations**

States participating in the Medicaid program must provide certain mandatory services under the state's medical assistance plan.<sup>31</sup> States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program<sup>32</sup> ("waiver services").<sup>33</sup> 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

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<sup>27</sup> Ex. D1.

<sup>28</sup> Ex. C.

<sup>29</sup> 42 CFR § 435.930, 7 AAC 49.135.

<sup>30</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); *Murphy v. Curtis*, 930 N.E.2d 1228 (Ind. App. 2010).

<sup>31</sup> 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.

<sup>32</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>33</sup> See 42 USC § 1396a(a)(10)(A).

eligible individuals in their own homes and communities instead of in nursing facilities.<sup>34</sup>

Alaska participates in the waiver services program.<sup>35</sup>

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. O), 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>36</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 CAT in determining whether an applicant requires intermediate or skilled nursing care.<sup>37</sup>

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<sup>34</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 treatment . . . (9) Other services requested by the agency and approved by CMS *as cost effective and necessary to avoid institutionalization*. [Emphasis added].

<sup>35</sup> 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>36</sup> 7 AAC 130.215.

<sup>37</sup> 7 AAC 130.215.

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>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

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 . . . ."<sup>41</sup> 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.<sup>[42]</sup>

Finally, in an order issued recently 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;"<sup>43</sup> 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."

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<sup>38</sup> Ex. E31.

<sup>39</sup> Ex. E31.

<sup>40</sup> Ex. E31.

<sup>41</sup> AS 47.07.045(b)(1).

<sup>42</sup> AS 47.07.045(b)(3).

<sup>43</sup> *Krone* order dated October 1, 2014 at page 6.

### ***C. The CAT***

Under state Medicaid regulation 7 AAC 130.230(b)(2)(B), level of care determinations for waiver services applicants seeking services under the "adults with physical disabilities" or "older adults" categories must incorporate the results of the CAT, which is adopted by regulation at 7 AAC 160.900(d)(6). The CAT attempts to quantify the recipient's need for nursing services, as well as the recipient's ability to perform activities of daily living (ADLs). The ADLs scored by the CAT are body mobility, transfers, locomotion, dressing, eating, toilet use, personal hygiene, and bathing.<sup>44</sup>

The CAT numerical scoring system has two components. The first component is the *self-performance score*. These scores rate how capable a person is of performing a particular ADL.<sup>45</sup> 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).<sup>46</sup>

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

### ***D. Does Ms. O Require Intermediate or Skilled Nursing Care?***

As discussed above, there are several ways in which a waiver services applicant or recipient can qualify for (or remain qualified for) waiver services. The first way is to demonstrate a need for either skilled nursing care or intermediate nursing care.<sup>47</sup> Because skilled care is a higher level of care than intermediate care, the minimum level of nursing care for which Ms. O must demonstrate a need, in order to remain eligible for waiver services on that basis, is intermediate care.

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<sup>44</sup> The CAT also scores the recipient's ability to perform Instrumental Activities of Daily Living (IADLs). However, although IADL scores are important for determining the recipient's eligibility for Medicaid Personal Care Assistant (PCA) services, the recipient's IADL scores are not considered in determining eligibility for waiver services.

<sup>45</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>46</sup> See, for example, Ex. E8.

<sup>47</sup> 7 AAC 140.510, 7 AAC 140.515.

The intermediate care regulation (7 AAC 140.510) has three subsections (see text of regulation quoted in Section III(B), above). Ms. O clearly satisfies *some* of the criteria stated in the regulation. For example, Ms. O has a long-term illness or disability. Her condition is relatively stable, and her treatments emphasize maintenance of her condition rather than rehabilitation. However, one of the mandatory requirements, under 7 AAC 140.510(a) and (c), is that the recipient *either* requires services ordered by and under the direction of a physician, *or* be receiving occupational, physical, or speech-language therapy provided by an aide or orderly under the supervision of licensed nursing personnel or a licensed occupational, physical, or speech-language therapist. There is no evidence in the record indicating that Ms. O satisfies either of these requirements, and Ms. Ray testified at hearing that she does not. During the *prior* assessment period, Ms. O was receiving physical and occupational therapy five times per week.<sup>48</sup> However, Ms. O is no longer receiving those therapies, and so she no longer satisfies the nursing level of care requirement.

The Division's nurse-assessor, reviewing nurse, and independent contractor all agreed that Ms. O does not currently require nursing services.<sup>49</sup> Independent review of the record likewise indicates that Ms. O currently has no nursing needs as defined by the applicable regulations.

In summary, the preponderance of the evidence demonstrates that Ms. O does not currently require the types of services that indicate a need for intermediate nursing care under 7 AAC 140.510. Accordingly, the Division correctly determined that Ms. O does not qualify for waiver services based on a need for skilled or intermediate nursing care. The next issue is whether Ms. O qualifies for waiver services based on cognitive and/or behavioral problems, combined with the extent of her need for assistance with ADLs.

***E. Does Ms. O Qualify for Waiver Services Based on Cognitive or Behavioral Problems, or her Need for Assistance with Activities of Daily Living?***

The CAT's scoring summary is located at page 29 of the CAT.<sup>50</sup> Under the CAT, an individual may also qualify for waiver services if the individual has serious cognitive or behavioral problems, and if his or her level of need for assistance with activities of daily

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<sup>48</sup> Ex. F6.

<sup>49</sup> Exs. D1 - D2, E31 - E32, F40 - F47.

<sup>50</sup> Ex. E31.



living (ADLs) is sufficiently high.<sup>51</sup> The CAT scoring page divides the possible scoring 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. O does not require nursing services seven or more days per week. The second way (under NF1(b)) is to require use of a ventilator or respirator at least three days per week. Ms. O does not use a ventilator or respirator. The third way (under NF1(c)) is to require care due to uncontrolled seizures at least once per week. Ms. O does not currently require nursing care due to uncontrolled seizures at least once per week. The fourth way (under NF1(d)) is to receive some form of therapy from a qualified therapist at least five days per week. As discussed above, Ms. O is no longer receiving any form of therapy.

The fifth and 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 five "shaded" ADLs listed at page 18 of the CAT.<sup>52</sup> The CAT scores which the Division assigned to Ms. O with regard to the five "shaded" ADLs are: body mobility: 0/0; transfers: 2/2; locomotion: 0/0; eating: 0/1; and toilet use: 2/2.<sup>53</sup> Those five ADLs are discussed below.

*a. Body/Bed Mobility*

For purposes of waiver services eligibility, body/bed mobility is defined as "how a person moves to and from a lying position, turns side to side, and positions his or her body while in bed."<sup>54</sup> To receive a self-performance score of three (extensive assistance) with regard to bed/body mobility, a person must require either weight-bearing support three or more times per week, or full caregiver performance of the activity three times or more during the week of the assessment.<sup>55</sup>

Ms. O's 2013 assessment found that Ms. O required limited assistance with body mobility (CAT score 2/2).<sup>56</sup> Ms. O's 2015 assessment found that Ms. O is now independent with body

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<sup>51</sup> Ex. E31.  
<sup>52</sup> Ex. E20.  
<sup>53</sup> Ex. E20.  
<sup>54</sup> Ex. E8.  
<sup>55</sup> Ex. E8.  
<sup>56</sup> Ex. F7.

mobility (CAT score 0/0).<sup>57</sup> Ms. Ray reported that Ms. O told her during the assessment that (1) her left leg does not move, but (2) she has a hospital-type bed, and (3) she can use the bed railing to pull herself to the side if necessary. Ms. Ray further reported that, during the assessment, she saw Ms. O reposition herself while sitting in an electric recliner, and lay down in bed independently, using a leg strap to lift her left leg into bed. At hearing, although Ms. J did not concede that the Division's body mobility scoring is correct, she did not provide any evidence to contradict Ms. Ray's findings on this issue. Accordingly, the preponderance of the evidence indicates that Ms. O is currently independent with body mobility (CAT score 0/0).

*b. Transfers*

For purposes of waiver services eligibility, a transfer is defined as "how a person moves between surfaces" (with the exception of transfers on and off a toilet, and transfers in and out of a bathtub or shower, which are handled as separate ADLs).<sup>58</sup> In order to receive a self-performance score of three (extensive assistance) for transfers, a person must require either weight-bearing support three or more times per week, or full caregiver performance of the activity three or more times during the week of the assessment.<sup>59</sup>

In 2013, the Division found that Ms. O required extensive assistance with transfers (CAT score 3/2).<sup>60</sup> In 2015, the Division found that Ms. O now requires only limited assistance with transfers (CAT score 2/2).<sup>61</sup> Ms. Ray reported that Ms. O and Ms. J told her during the assessment that no one helps Ms. O get out of bed, and that she uses her walker to stand up, and can then pivot herself and "flop" into her electric wheelchair.<sup>62</sup> Ms. Ray reported that, during the assessment, she observed Ms. O (1) use the controls of her electric/power recliner to raise herself up, (2) then, grab her two-wheel walker and push herself up into a standing position, and then (3) pivot and sit down onto the seat of her electric wheelchair, independently.

Ms. Ray testified in support of her assessment findings at hearing. She testified that the improvement in Ms. O's ability to transfer was due in large part to (1) healing which has occurred at Ms. O's hip during the two years since the surgery to remove the failed hip

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<sup>57</sup> All factual findings in the remainder of this paragraph are based on Ex. E8 and Paula Ray's hearing testimony.

<sup>58</sup> Ex. E8.

<sup>59</sup> Ex. E8.

<sup>60</sup> Ex. F7.

<sup>61</sup> Ex. E8.

<sup>62</sup> All factual findings in the remainder of this paragraph are based on Ex. E8 and Paula Ray's hearing testimony.

replacement in 2013; and (2) a decrease in the number/frequency of Ms. O's urinary tract infections. This testimony was credible.

At hearing, Ms. J described Ms. O as still requiring weight-bearing assistance with transfers. However, Ms. J's testimony was less specific than, and therefore less persuasive than, Ms. Ray's testimony in this regard. Accordingly, the preponderance of the evidence indicates that Ms. O may sometimes require assistance with transfers, but that the assistance rendered is generally not weight-bearing assistance. I therefore find that Ms. O currently requires only limited assistance with transfers (CAT score 2/2).

*c.      Locomotion*

For purposes of waiver services eligibility, locomotion is defined as "how a person moves between locations in his or her room and other areas on the same floor/level."<sup>63</sup> In order to receive a self-performance score of three (extensive assistance) for locomotion, a person must require either weight-bearing support three or more times per week, or full caregiver performance three or more times during the week of the assessment.<sup>64</sup> In 2013, the Division found that Ms. O required extensive assistance with locomotion (CAT score 3/2).<sup>65</sup> In 2015, the Division found that Ms. O is now independent with locomotion, due to her use of a walker, an electric wheelchair, and a stair glide (CAT score 0/0).<sup>66</sup>

Ms. Ray reported that Ms. O told her during the 2015 assessment that (1) she uses a walker or electric wheelchair to move around inside her house; (2) she can get from the living room to the bathroom, using her walker, if she needs to; and (3) she uses the stair glide to go downstairs, but waits for someone to assist her when using it.<sup>67</sup> Ms. Ray also reported that, during the assessment, she observed Ms. O use her electric wheelchair to move independently from her living room to her bedroom.

At hearing, Ms. J testified that her mother has recently had problems with her power wheelchair because it runs out of power; evidently, the battery does not hold a charge. Ms. J stated that, if her mother cannot use her electric wheelchair, she needs someone to push her in a manual wheelchair because her left arm is weak. Ms. J's testimony in this regard was credible. However, Ms. Ray's testimony indicates that Ms. O was not having problems with her electric

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<sup>63</sup> Ex. E9.

<sup>64</sup> Ex. E9.

<sup>65</sup> Ex. F8.

<sup>66</sup> Ex. E9.

<sup>67</sup> All factual findings in this paragraph are based on Ex. E9 and Paula Ray's hearing testimony.

wheelchair at the time of the 2015 assessment, and Ms. J's testimony indicated this problem arose not too long before the hearing. Also, Ms. J testified that her mother was supposed to receive a new powered wheelchair in the near future. It therefore appears that the problem with Ms. O's electric wheelchair was a short-term problem, and one that occurred well after the Division's assessment.

Given the improvement of Ms. O's hip during the two years since her 2013 surgery, and given the decrease in the number/frequency of Ms. O's urinary tract infections, Ms. Ray's finding that Ms. O needs less assistance with locomotion now than she did in 2013, is credible. Accordingly, the preponderance of the evidence indicates that Ms. O is independent with single-level locomotion using her wheeled walker and electric wheelchair (CAT score 0/0).

*d.     Eating*

For purposes of waiver services eligibility, eating is defined as how a "person eats or drinks regardless of skill."<sup>68</sup> In order to receive a self-performance score of three (extensive assistance) with regard to eating, a person must require either weight-bearing support three or more times per week, or full caregiver performance of the activity three times per week.<sup>69</sup>

In 2013, the Division found that Ms. O required only setup assistance with eating (CAT score 0/1).<sup>70</sup> In 2015 the Division found that Ms. O still requires only setup help with eating (CAT score 0/1).<sup>71</sup> Ms. Ray reported in her assessment that (1) Ms. O told her that she can eat and drink independently, and (2) she observed Ms. O drink water from a mug, using a straw, without assistance. At hearing, Ms. J did not expressly *agree* with the Division's scoring on this ADL, but neither did she provide specific testimony *contradicting* the nurse-assessor's findings. Accordingly, the preponderance of the evidence indicates that Ms. O currently requires only setup assistance with eating and drinking (CAT score 0/1).

*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."<sup>72</sup> In order to receive a self-performance score of three (extensive assistance) with regard to toilet use, a person must require either

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<sup>68</sup> Ex. E11.  
<sup>69</sup> Ex. E11.  
<sup>70</sup> Ex. F10.  
<sup>71</sup> Ex. E11.  
<sup>72</sup> Ex. E11.

weight-bearing support three or more times per week, or full caregiver performance of the activity three or more times during the week of the assessment.<sup>73</sup> In 2013, the Division found that Ms. O required extensive assistance with toileting (CAT score 3/2).<sup>74</sup> In 2015, the Division found that Ms. O now requires only limited assistance with toilet use (CAT score 2/2).<sup>75</sup>

Ms. Ray reported in her assessment that Ms. O told her (1) she is aware/can feel when she needs to use the toilet; (2) she wears incontinence briefs just in case she does not make it to the bathroom in time; (3) if she has an accident, she is able to change her pads/briefs by herself; and (4) she has a toilet wand, but there are times when she is unable to clean herself properly following a bowel movement.<sup>76</sup> Ms. Ray reported in her assessment that she observed (1) that Ms. O was able to transfer in and out of her wheelchair; and (2) that Ms. O's bathroom was equipped with a walker, a toilet frame over the toilet, and a "Bottom Buddy" device.

At hearing, Ms. J described Ms. O as still requiring weight-bearing assistance with toilet use. However, Ms. J did not describe the specific aspects of toilet use with which her mother requires weight-bearing or extensive assistance. Ms. J's testimony was therefore less persuasive than Ms. Ray's testimony in this regard. Given the improvement of Ms. O's hip during the two years since her 2013 surgery, and given the decrease in the number/frequency of Ms. O's urinary tract infections, Ms. Ray's finding that Ms. O needs less assistance with toilet use now than she did in 2013, is credible. Accordingly, the preponderance of the evidence indicates that Ms. O generally requires limited assistance with toileting (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. In this case, Ms. O currently requires limited assistance on two "shaded" ADLs, but she does not require extensive assistance with any "shaded" ADLs. Accordingly, Ms. O does not qualify to receive waiver services under Section NF1(e) of the CAT scoring summary.

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

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<sup>73</sup> Ex. E11.

<sup>74</sup> Ex. F10.

<sup>75</sup> Ex. E11.

<sup>76</sup> All factual findings in this paragraph are based on Ex. E11 and Paula Ray's hearing testimony.

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 needing injections and/or IV hookups, feeding tubes, tracheotomy care or nasopharyngeal suctioning, treatments or dressings, oxygen, requiring observation, assessment, and management of unstable conditions, catheter management, and/or care required due to a comatose condition. The record does not show that Ms. O requires any of these services, so she scores no points at 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. However, the record does not show that Ms. O currently receives or requires any of these therapies at least three days per week, so 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, venipuncture, or barrier dressings for ulcers, at least three days per week. The record does not show that Ms. O requires any of these procedures three or more days per week, so no points are awarded under NF2(c).

The fourth and 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, the record does not show that Ms. O requires any of these treatments at least three days per week, so she receives 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. The Division found that Ms. O has both short-term and long-term memory problems,<sup>77</sup> so she receives one point under NF3(a).

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. Ray found that Ms. O was able to recall all four of these items during the assessment,<sup>78</sup> so Ms. O receives no points under NF3(b).

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<sup>77</sup> Ex. E18.

<sup>78</sup> Ex. E18.

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. Ms. Ray found that Ms. O's cognitive skills for daily decision-making are impaired only in new, unfamiliar situations.<sup>79</sup> Accordingly, Ms. O receives no points under NF3(c).

The last way to obtain points (under NF3(d)) is to require *either* professional nursing care at least three days per week 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 cognitive portion of the Division's Supplemental Screening Tool (SST). The Division found that Ms. O does not require professional nursing care at least three days per week due to cognitive problems, and Ms. O provided no evidence to contradict this. Ms. O *did* score 2/2 or higher as to one or more shaded ADLs. However, the Division assigned Ms. O a score of three on the cognitive portion of the SST.<sup>80</sup>

Independent review of the record indicates that Ms. O could reasonably have received a score as high as eight on the SST for cognitive problems. However, in order to receive a point under NF3(d), an applicant must receive a score of *13 or higher* on the cognitive portion of the SST. Accordingly, even if Ms. O is assigned a score of eight on the cognitive portion of the SST, Ms. O still 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. O received a score of one on NF3(a), but received scores of zero on NF3(b), NF3(c), and NF3(d). Accordingly, Ms. O receives an "overall" score of zero at Section NF3 of the CAT's scoring summary.

#### 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 the other scoring sections, can qualify an 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 or physically abusive, or resist care, at least four days per week, to receive a point.

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<sup>79</sup> Ex. E18.

<sup>80</sup> Ex. E1.

Ms. Ray found that Ms. O does not wander, does not engage in socially inappropriate or disruptive behavior, is not verbally or physically abusive, and does not resist care.<sup>81</sup> There is no evidence in the record to the contrary. Accordingly, Ms. O receives no points at NF4(a).

Under NF4(b), an applicant must *either* require professional nursing care *at least three days per week* as a result of problem behaviors, *or both* (1) score at least 2/2 as to any "shaded" ADL, *and* (2) score 14 or more on the behavioral portion of the Division's Supplemental Screening Tool (SST). Ms. Ray found that Ms. O does not require or receive professional nursing assessment, observation, or management of behavioral problems three or more days per week. This finding is supported by the record and was not challenged.

Ms. O *did* receive a score of 2/2 or better as to one or more "shaded" ADLs. However, Ms. Ray gave Ms. O a score of zero on the behavioral portion of the SST.<sup>82</sup> Independent review of the record indicates that Ms. O could reasonably have received a score as high as five on the SST for behavioral problems. However, in order to receive a point under NF4(b), an applicant must receive *a score of 14 or higher* on the behavioral portion of the SST. Accordingly, even if Ms. O is assigned a score of five on the behavioral portion of the SST, Ms. O still receives no points under NF4(b).

In order to receive an "overall" score of one at NF4, an applicant must receive a point at both NF4(a) and NF4(b). Ms. O received no points at NF4(a) or NF4(b). Accordingly, Ms. O receives no "overall" points under Section NF4 of the CAT's scoring summary.

#### 5. NF5

At NF5, the total scores from NF2, NF3, and NF4 are added together. If an applicant or recipient receives a score of one or more, then the analysis proceeds to NF6. In this case, however, Ms. O's overall score as to NF2, NF3, and NF4 is zero. Accordingly, in this case, the CAT's scoring analysis ends here and does not proceed to NF6 or NF7.

#### **IV. Conclusion**

Independent review of the record indicates that Ms. O does not currently require either intermediate or skilled nursing care as defined under the relevant regulations and the Consumer Assessment Tool. Ms. O requires assistance with at least two of her ADLs, and her cognitive and behavioral problems may be worse than assessed by the Division.

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<sup>81</sup> Ex. E19.

<sup>82</sup> Ex. E2.



However, even if Ms. O is given the highest possible cognitive and behavioral scores arguably supported by the record, her level of need for assistance with ADLs, and her cognitive and behavioral problems, are still not severe enough to qualify her for waiver services. The preponderance of the evidence indicates that Ms. O needs PCA services (which she currently receives), but has the ability to function in a home setting without the need for waiver services. The evidence concerning Ms. O's hip and her urinary tract infections indicates that Ms. O's condition has materially improved since her 2013 assessment. Accordingly, Ms. O is not currently eligible to receive waiver services. The Division's decision terminating Ms. O's waiver services is therefore affirmed.

DATED this 30th day of November, 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 9th 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.]