

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

In the Matter of:)
)
 S L) OAH No. 15-1109-MDS
) Agency Case No.
_____)

DECISION

I. Introduction

The issue in this case is whether S L remains eligible for Medicaid Home and Community-Based Waiver services (waiver services). The Division of Senior and Disabilities Services (Division) conducted an assessment on April 7, 2015 and subsequently determined that Ms. L does not currently require skilled nursing care, intermediate nursing care, or extensive assistance with three or more "shaded" activities of daily living.¹

This decision concludes that although Ms. L has significant physical impairments, and although these impairments limit her ability to function independently, she does not currently require skilled or intermediate level nursing care. This decision further concludes that, although Ms. L requires a greater level of physical assistance with her activities of daily living (ADLs) than originally determined by the Division, and has more significant cognitive and behavioral impairments than originally determined by the Division, she does not currently require enough assistance with her activities of daily living, and her cognitive and behavioral impairments are not severe enough, to qualify for waiver services on those grounds. The preponderance of the evidence indicates that Ms. L needs Personal Care Assistant (PCA) services, but can function in a home setting without the need for wavier services. As a result, Ms. L is not presently eligible for waiver services. The Division's termination of Ms. L's waiver services is therefore affirmed.²

II. Facts

A. Ms. L's Medical Diagnoses and Reports from Medical Providers

Ms. L is a 62-year-old woman who lives in an assisted living home (ALH).³ Her medical diagnoses include anemia, chronic kidney disease (stage III), depression, foot amputation,

¹ Exs. D, E.

² Should Ms. L's medical condition or functional abilities worsen, she may reapply for waiver services at any time.

³ Ex. E3; Ex. 7 p. 2.

osteoporosis, rheumatoid arthritis, and sensorineural hearing loss.⁴ She takes at least 10 different prescription medications each day.⁵

In a letter dated September 3, 2015, D J-D, ANP (who had seen Ms. L three times as of that date), provided his opinion regarding Ms. L's cognitive and behavioral problems.⁶ Mr. J-D addressed the same issues scored by the Division in its Supplemental Screening Tools (SSTs) for cognitive and behavioral problems, in the same format used by the Division. Mr. J-D found that Ms. L should be scored as follows on the cognitive SST: memory for events - score of one; memory and use of information - score of three; global confusion - score of two; spatial orientation - score of two; and verbal communication - score of two. Thus, Mr. J-D would have given Ms. L a total score of ten on the cognitive SST.

With regard to the behavioral SST, Mr. J-D found that Ms. L should be scored as follows: sleep patterns - score of one; behavioral demands on others - score of one; and awareness of needs/judgment - score of two. Thus, Mr. J-D would have given Ms. L a total score of four on the behavioral SST.⁷

With regard to Ms. L's ability to perform activities of daily living, Mr. J-D found that, due to her chronic rheumatoid arthritis, Ms. L requires assistance with toileting, personal hygiene, bathing, cutting up her food, administering her biweekly Humira injections, and attending medical appointments.⁸

A memo from D W T, MSW dated September 10, 2015 states in relevant part:⁹

[I] met S at her place of residence, No Name Assisted Living Home (ALH)... [The residence] appears to be clean and odor free. [I] met the owner . . . and a couple other ALH staff. All staff are very responsive and kind.

S is up showered and dressed. S's room is very clean and free from any odors. There is a bell [that] S rings for assistance from ALH staff. S appears to get along with all staff. The ALH bathroom has a toilet, grab bars, grab bars in the roll-in shower stall, along with a hand-held showerhead.

S informs [me] that she has struggled with rheumatoid arthritis (RA) for over 20 years. S's hands are visibly disfigured and do not function; the only function she maintains is the movement of her thumbs. S also shows me her feet which are also disfigured and do not function properly. S's left big toe has been amputated,

⁴ Ex. E5.

⁵ Ex. E22.

⁶ All factual findings in this paragraph are based on Ex. 5 and Ex. 7 pp. 3 - 4 unless otherwise stated.

⁷ All factual findings in this paragraph are based on Ex. 5 and Ex. 7 pp. 3 - 4 unless otherwise stated.

⁸ All factual findings in this paragraph are based on Ex. 5 and Ex. 7 p. 4 unless otherwise stated.

⁹ Ex. 6 and Ex. 7 p. 2. Ms. W T is a social worker with the No Name nation (Ex. 6 and Ex. 7 p. 2).

making her gait unsteady [and] causing her to utilize a walker. S has to wear special shoes provided by Dr. F, a podiatrist, due to her toes being grossly disfigured from RA. S reports fracturing her hip in 2005 which also contributes to an unsteady gait. S reports suffering with bowel incontinence more than a few times per week; she does utilize Depends (adult diapers). She states that she is unable to properly clean herself after bowel incontinence and ALH staff have to assist her after every incident

S states due to her hands being disfigured and dysfunctional from RA she is unable to button any clothing items, zip any clothing items, [or] pull up or pull down any clothing items without assistance. S states she is unable to bathe herself due to limited range of motion along with complications from RA to her hands and feet. S states she does not know what her medications are prescribed for [her] or when she takes them. She does state she has one injectable medication for her RA once every 2 weeks. S discloses she does not remember any doctor appointments nor could she arrange for doctor appointments. S states she is hard of hearing and utilizes hearing aids. S does not have any natural teeth but does have dentures which she . . . cannot properly sanitize on her own. S reports struggling with depression but states it is [controlled] with medication. She states it is hard not being able to do things on her own.

S states she is not able to prepare or cook any nutritious meals nor is she able to cut any of her food into bite-size bites. She states she does not have problems with chewing or swallowing. S does report having cataract eye surgery, spine surgery to remove some discs in her neck, along with gallbladder removal. [I] witnessed an open hole in the palm of both S's hands which had a white powder medication on them

On September 18, 2015, one of the caretakers from Ms. L's ALH provided a written memo concerning Ms. L's care needs.¹⁰ The memo states that Ms. L requires assistance with cleaning herself after toilet use, brushing her teeth, and taking a shower. The memo also states that Ms. L cannot walk without her walker, that the ALH staff must cut-up her food before she can eat, and that the ALH staff must apply Nystatin powder to Ms. L's hands and cornstarch powder to her abdomen.

On May 12, 2015, the Division sent a form titled "Level of Care Verification Request" to K J, M.D., one of Ms. L's treating physicians.¹¹ In response to the question, "At this time, would you admit this patient to a skilled nursing facility?" Dr. J answered "no." In response to the question, "At this time, does this patient have intermediate nursing needs?" Dr. J responded that Ms. L has an inability to perform her ADLs due to hand deformities caused by rheumatoid arthritis.

¹⁰ All factual findings in this paragraph are based on Ex. 7 p. 5 unless otherwise stated.

¹¹ All factual findings in this paragraph are based on Exs. F32 - F36 unless otherwise stated.

B. The Division's Findings from its 2014 and 2015 Assessments

Ms. L has received Medicaid Home and Community-Based Waiver services since 2013 or before.¹² Ms. L was previously assessed as to her eligibility for waiver services on February 6, 2014 by Michelle Russell-Brown, R.N.¹³ Then as now, the Division used the Consumer Assessment Tool or "CAT," a system for scoring a person's need for nursing assistance and physical assistance (described in detail in Part III of this decision) to record and score the assessment.¹⁴ Based on her 2013 assessment, the Division found that Ms. L required the following levels of assistance with her ADLs:¹⁵ body mobility - independent (CAT score 0/0); transfers - extensive assistance (CAT score 3/2); locomotion - extensive assistance (CAT score 3/2); dressing - extensive assistance (CAT score 3/2); eating - limited assistance (CAT score 2/2); toilet use - extensive assistance (CAT score 3/2); personal hygiene - extensive assistance (CAT score 3/2); and bathing - extensive assistance (CAT score 3/2). Based on the assessment, Ms. Russell-Brown concluded that Ms. L was eligible for waiver services based on her need for extensive assistance with three of the "shaded" ADLs.¹⁶

The assessment which resulted in the filing of the present case was performed on April 7, 2015 by nurse-assessor Paula Ray, R.N. of DSIDS.¹⁷ In completing the CAT, Ms. Ray reported that Ms. L has the following care needs, abilities, and limitations:¹⁸

Significant Problems Since Last Assessment:¹⁹ Ms. Ray reported that, during the year prior to the current assessment, Ms. L (1) had cataract surgery in both her eyes; (2) had her abdominal wound heal; (3) became better able to walk due to recovery from the amputation of her left big toe in 2012;²⁰ (4) had no falls in the last six months; (7) had five emergency room (ER) visits; and (8) had one hospitalization.

Functional Assessment:²¹ Ms. Ray reported that Ms. L is able to touch her feet while sitting, but is unable to touch her hands over her head or behind her back, cannot place her hands across her chest and stand up, and (due to her rheumatoid arthritis) cannot grip well with either

¹² Ex. F.

¹³ Ex. F.

¹⁴ Ex. F.

¹⁵ All factual findings in this paragraph are based on Exs. F6 - F12 unless otherwise stated.

¹⁶ Exs. F30 - F31.

¹⁷ Ex. E.

¹⁸ Ex. E.

¹⁹ Ex. E5.

²⁰ Ex. F3.

²¹ Ex. E6.

hand. Ms. Ray also wrote that Ms. L's hands are almost shut due to arthritis-caused contracture; that she can hold a pen or fork with her right thumb; that she has a limited range of motion in both arms; that both her feet bore visible effects of her arthritis; and that her left big toe had been amputated.

Physical Therapy:²² Ms. Ray reported that Ms. L is not currently receiving occupational therapy, physical therapy, respiratory therapy, or speech/language therapy, and has no current prescription for range of motion exercises, walking for exercise, or foot care.

Bed/Body Mobility:²³ Ms. Ray reported that Ms. L told her that she had no decubitus ulcers, and that she can reposition herself in bed as needed without help. Ms. Ray reported that she observed Ms. L reposition herself in her chair during the assessment (scored 0/0).

Transfers:²⁴ Ms. Ray reported she was told by Ms. L that she can transfer independently using her four-wheeled walker. Ms. Ray reported that she observed Ms. L stand up from sitting on her bed by holding onto her walker with both hands and then pushing up (scored 0/0).

Locomotion:²⁵ Ms. Ray reported she was told by Ms. L that she is able to ambulate without assistance using her four-wheeled walker. Ms. Ray reported that she observed Ms. L walk within her residence using her walker, as well as by using furniture for support (scored 0/0).

Dressing:²⁶ Ms. Ray reported that she observed Ms. L struggle to put on a coat, ultimately needing assistance from the ALH staff to do so. Based on this, and on Ms. L's weak, contractured hands and poor range of motion, Ms. Ray concluded that Ms. L requires extensive assistance with dressing (scored 3/2).

Eating:²⁷ Ms. Ray reported she was told by Ms. L that she needs someone to prepare and cut-up her food for her, but that, once this has been done, she can eat and drink independently. Ms. Ray reported that she observed Ms. L drink from a large covered cup using a straw (scored 0/1).

Toileting:²⁸ Ms. Ray reported (1) she was told by Ms. L that she cannot clean herself after a bowel movement; and (2) she was told by the ALH staff that Ms. L is becoming more

22 Ex. E7.
23 Ex. E8.
24 Ex. E8.
25 Ex. E9.
26 Ex. E10.
27 Ex. E11.
28 Ex. E11.

incontinent as time goes on. Ms. Ray concluded that Ms. L requires extensive assistance with toilet use (scored 3/2).

Personal Hygiene:²⁹ Ms. Ray reported she was told by Ms. L that she needs assistance to brush her gums, wash and dry her face and hands, and apply lotions and powders to her skin. Ms. Ray concluded that Ms. L requires extensive assistance with her personal hygiene (scored 3/2).

Bathing:³⁰ Ms. Ray reported she was told by Ms. L that (1) she takes a shower every other day; (2) she must hold onto grab bars while showering; and (3) because her hands are already holding the grab bars, the ALH staff must wash her hair, body, and feet. Ms. Ray concluded that Ms. L requires extensive assistance with bathing (scored 3/2).

Professional Nursing Services:³¹ Ms. Ray found that Ms. L has no current need for professional nursing services. Specifically, Ms. Ray found that Ms. L is currently receiving no injections or intravenous feedings, is not using any type of feeding tube, does not require nasopharyngeal suctioning or tracheotomy care, is not receiving treatment for open lesions, ulcers, burns, or surgical sites, and has not begun using oxygen within the last 30 days.³² Ms. Ray further found that Ms. L does not currently have any unstable medical conditions, and specifically, that she does not use a catheter or ventilator/respirator, is not comatose, and does not have an uncontrolled seizure disorder.³³ In addition, Ms. Ray found that Ms. L is not receiving physical therapy, speech therapy, occupational therapy, or respiratory therapy, and does not require professional nursing assessment, observation, and/or management at least once per month.³⁴ Ms. Ray also found that Ms. L does not receive medications via tube, does not require tracheostomy care, does not use a urinary catheter, and does not require venipuncture, injections, barrier dressings for ulcers, chest physical therapy by a registered nurse, or oxygen therapy performed by a nurse to treat an unstable chronic condition.³⁵ Finally, Ms. Ray found that Ms. L does not currently undergo chemotherapy, radiation therapy, hemodialysis, or peritoneal dialysis.³⁶

²⁹ Ex. E12.

³⁰ Ex. E13.

³¹ Exs. E15 - E17.

³² Ex. E15.

³³ Ex. E16.

³⁴ Ex. E16.

³⁵ Ex. E17.

³⁶ Ex. E17.

Cognition:³⁷ Ms. Ray found that Ms. L has short-term memory problems but no long-term memory problems; that Ms. L is generally able to recall names and faces, where she is, and the location of her room, but not the current season; that Ms. L is mostly independent with daily decision-making, needing help only in new situations; and that Ms. L's cognitive status does not require professional nursing assessment, observation, or management at least once per month.³⁸

Behavioral Problems:³⁹ Ms. Ray found that Ms. L does not wander, is not verbally or physically abusive, and does not engage in socially inappropriate or disruptive behavior, but sometimes resists care. Ms. Ray also found Ms. L does not need professional nursing assessment, observation, or management at least once per month due to any behavioral problems.⁴⁰

Medication Management:⁴¹ Ms. Ray reported that Ms. L takes 10 different prescription medications, and two non-prescription supplements, on a daily basis; that she cannot prepare, but can administer, her own medications (including giving herself injections); and that she is always compliant in taking her medications.

Communication:⁴² Ms. Ray found that Ms. L's vision is impaired, making it necessary for her to wear glasses, but that she has no difficulty hearing; that she has some minor difficulty making herself understood; and that she has some minor difficulty understanding others.

Based on the foregoing CAT scores, Ms. Ray found that Ms. L does not currently require skilled level or intermediate level 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).⁴³

On June 26, 2015, a different registered nurse reviewed nurse-assessor Ray's waiver services eligibility decision.⁴⁴ The nurse-supervisor agreed that Ms. L is not currently eligible to participate in the waiver services program.⁴⁵

³⁷ Ex. E18.

³⁸ Ex. E18. Ms. Ray did, however, complete the Division's supplemental screening tool (SST) for cognitive difficulties for Ms. L (Ex. E1). Ms. L received a total score of zero points on the cognitive SST.

³⁹ Ex. E19.

⁴⁰ Ex. E19. Ms. Ray did, however, complete the Division's supplemental screening tool (SST) for behavioral problems for Ms. L (Ex. E2). Ms. L received a total score of zero points on the behavioral SST.

⁴¹ Exs. E22 - E23.

⁴² Ex. E24.

⁴³ Exs. E31, E32.

⁴⁴ Exs. F38 - F45.

⁴⁵ Ex. F43.

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 Qualis Health.⁴⁶ Qualis also concurred with the nurse-assessor's determination that Ms. L has "materially improved" and no longer requires a nursing facility level of care.⁴⁷

C. Relevant Procedural History

On July 25, 2015, the Division notified Ms. L that she was no longer eligible for waiver services, and that her waiver services would be terminated in thirty days.⁴⁸ On August 20, 2015, Ms. L requested a hearing to contest the Division's determination.⁴⁹

Ms. L's hearing was held on September 22, 2015. Ms. L participated in the hearing by phone but did not testify. B T represented Ms. L and testified on her behalf. Ms. L's care coordinator, T U, participated in the hearing by phone and testified on Ms. L's behalf. Laura Baldwin, M.S.W. participated 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.⁵⁰ The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.⁵¹ 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.⁵² States may also, at their option, provide certain

⁴⁶ Ex. D2.

⁴⁷ Ex. D2.

⁴⁸ Ex. D.

⁴⁹ Ex. C.

⁵⁰ 42 CFR § 435.930, 7 AAC 49.135.

⁵¹ 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).

⁵² See 42 USC §§ 1396a(a)(10)(A); 1396d(a)(1) - (5), 1396a(a)(17), and 1396a(a)(21); see also 42 CFR 440.210 & 440.220.

additional services, one of which is the Home and Community-Based Waiver Services program⁵³ (“waiver services”).⁵⁴ Congress created the waiver services program in 1981 to allow states to offer long-term care, not otherwise available through the states' Medicaid programs, to serve eligible individuals in their own homes and communities instead of in nursing facilities.⁵⁵ Alaska participates in the waiver services program.⁵⁶

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. L), that level of care must be either “intermediate care” as defined by 7 AAC 140.510, or “skilled care” as defined by 7 AAC 140.515.⁵⁷ 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

⁵³ 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.*

⁵⁴ *See* 42 USC § 1396a(a)(10)(A).

⁵⁵ *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].

⁵⁶ 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

⁵⁷ 7 AAC 130.215.

is relatively stable and where the emphasis is on maintenance rather than rehabilitation

(c) Intermediate care may include occupational, physical, or speech-language therapy provided by an aide or orderly under the supervision of licensed nursing personnel or a licensed occupational, physical, or speech-language therapist.

The Division is required to incorporate the results of the Consumer Assessment Tool (CAT) in determining whether an applicant requires intermediate or skilled nursing care.⁵⁸

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.⁵⁹ Under the CAT, an individual can qualify for waiver services by demonstrating a need for extensive assistance with at least three designated ADLs, known as "shaded" ADLs, even without demonstrating a need for professional nursing care.⁶⁰ 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.⁶¹

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"⁶² 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.^[63]

Finally, in an order issued recently in the class action⁶⁴ 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

⁵⁸ 7 AAC 130.215.

⁵⁹ Ex. E31.

⁶⁰ Ex. E31.

⁶¹ Ex. E31.

⁶² AS 47.07.045(b)(1).

⁶³ AS 47.07.045(b)(3).

⁶⁴ Although a Superior Court decision generally does not constitute binding precedent for the Office of Administrative Hearings (except in the particular case being appealed), a class action like the *Krone* case is binding in all cases involving class members, one of whom is Ms. L.

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;"⁶⁵ 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."

C. The Consumer Assessment Tool (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 Department's Consumer Assessment Tool (CAT), which is adopted by regulation at 7 AAC 160.900(d)(6). The CAT covers both the recipient's need for nursing services, as well as the recipient's ability to perform his or her activities of daily living (ADLs). The ADLs scored by the CAT are body mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room, between levels, and to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, and bathing.⁶⁶

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.⁶⁷ 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).⁶⁸

⁶⁵ *Krone* order dated October 1, 2014 at page 6.

⁶⁶ 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.

⁶⁷ 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."

⁶⁸ *See*, for example, Ex. E8.

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. L 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 level nursing care.⁶⁹ Because skilled care is a higher level of care than intermediate care, the minimum level of nursing care for which Ms. L must demonstrate a need, in order to remain eligible for waiver services on that basis, is intermediate care.

The intermediate care regulation (7 AAC 140.510) has three subsections (see text of regulation quoted in Section III(B), above). Ms. L clearly satisfies *some* of the criteria stated in the regulation. For example, Ms. L 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. L satisfies either of these requirements.⁷⁰ During the *prior* assessment period, Ms. L was receiving wound care three times per week. However, Ms. L's abdominal wounds had healed prior to the current assessment in April 2015. Because the wounds are now healed, they no longer create a need for nursing care.

The Division's nurse-assessor, reviewing nurse, and independent contractor all agreed that Ms. L does not currently require nursing services.⁷¹ My own independent

⁶⁹ 7 AAC 140.510, 7 AAC 140.515.

⁷⁰ It is true that Dr. J wrote, under "intermediate care needs," that Ms. L requires assistance with her activities of daily living (Ex. F32). The Division did not dispute that Ms. L requires assistance with many of her ADLs; the specific amount of assistance she requires with her ADLs is discussed in Section III(E), below. However, merely needing assistance with one's ADLs does not, by itself, constitute intermediate care as that term is defined by the Division's regulations.

⁷¹ Exs. D1 - D2, E31 - E32, F38 - F45.

review of the record likewise indicates that Ms. L currently has no nursing needs as defined by the applicable regulations.

In summary, the preponderance of the evidence demonstrates that Ms. L does not currently require the types of services which indicate a need for intermediate nursing care under 7 AAC 140.510. Accordingly, the Division correctly determined that Ms. L does not qualify for waiver services based on a need for skilled or intermediate nursing care. The next issue is whether Ms. L 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. L Qualify for Waiver Services Based on Cognitive or Behavioral Problems, or her Need for Assistance with Activities of Daily Living?

The Consumer Assessment Tool's scoring summary is located at page 29 of the CAT.⁷² As indicated by that summary, there are several scoring combinations through which one may qualify for waiver services. The first way, discussed immediately above, is to require skilled or intermediate level nursing care, as defined by the regulations and the CAT. However, under the CAT, an individual may also qualify for waiver services, even without demonstrating a need for skilled or intermediate nursing care, if the individual has serious cognitive or behavioral problems, and if his or her level of need for assistance with activities of daily living (ADLs) is sufficiently high.⁷³ The CAT 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. As discussed above, Ms. L 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. As discussed above, Ms. L 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. As discussed above, Ms. L 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. L was not receiving any therapy from the time of her assessment through the date of the hearing.

⁷² Ex. E31.

⁷³ Ex. E31.

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.⁷⁴ The CAT scores which the Division assigned to Ms. L with regard to the five "shaded" ADLs were: body mobility: 0/0; transfers: 0/0; locomotion: 0/0; eating: 0/1; and toilet use: 3/2.

Ms. L's hearing representatives did not dispute her self-performance or support scores for body mobility or eating, so it is not necessary to address those ADLs here. With regard to toilet use, Ms. L has already received a score of 3/2 from the Division based on her assessment. Because Ms. L has already received a qualifying score as to toilet use, and because a higher score as to toilet use will not affect the waiver scoring matrix, it is also unnecessary to address the ADL of toilet use. Accordingly, the only ADLs with a chance to change the outcome of the case are transfers and locomotion. Those two ADLs are addressed below.

a. 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).⁷⁵ 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.⁷⁶

In 2014, Ms. L was found to need extensive assistance with transfers (CAT score 3/2).⁷⁷ In 2015, Ms. L was found to be independent with transfers (CAT score 0/0).

Ms. Ray reported Ms. L told her during the latest assessment that she can transfer independently using her four-wheeled walker, and Ms. Ray reported that she observed Ms. L stand up from sitting on her bed by holding onto her walker with both hands and then pushing up.⁷⁸

Ms. Ray testified in support of her assessment findings at hearing. She testified that the significant improvement in Ms. L's ability to transfer and move about her home is due in large

⁷⁴ Ex. E20.

⁷⁵ Ex. E8.

⁷⁶ Ex. E8.

⁷⁷ Ex. F6.

⁷⁸ Ex. E8.

part to her current use of Humira (adalimumab), a prescription drug used to treat her rheumatoid arthritis. This testimony was credible.

On the other hand, Ms. T testified that the 2015 assessment was conducted on a "good day" for Ms. L, and that on many occasions (*i.e.* on her "bad days") she needs assistance with transfers. This testimony was also credible. However, Ms. T never asserted that Ms. L requires weight-bearing assistance with transfers three or more times per week, and there is no persuasive evidence indicating that Ms. L requires weight-bearing assistance with transfers frequently enough to qualify as needing extensive assistance under the CAT.

Accordingly, the preponderance of the evidence indicates that Ms. L requires assistance with transfers on her "bad days," but that the assistance rendered is generally not weight-bearing assistance. I therefore find that Ms. L currently requires only limited assistance with transfers (CAT score 2/2). However, although this score is higher than that assigned by the Division, it is still not high enough to help Ms. L qualify for waiver services.

b. 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.⁷⁹ 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.⁸⁰ In 2014, Ms. L was found to require extensive assistance with locomotion (CAT score 3/2).⁸¹ In 2015, Ms. L was found to be independent with locomotion (CAT score 0/0).⁸²

Ms. Ray reported that Ms. L told her during the 2015 assessment that she is able to ambulate without assistance using her four-wheeled walker; Ms. Ray also reported that she observed Ms. L walk within her residence using her walker, as well as by using furniture for support ("wall-walking").⁸³ Ms. Ray testified at hearing that the significant improvement in Ms. L's ability to move about her home ("locomotion") is due in large part to her current use of Humira (adalimumab), a prescription drug used to treat her rheumatoid arthritis. This testimony was credible. On the other hand, Ms. T testified that the 2015 assessment was conducted on a

⁷⁹ Ex. E9.

⁸⁰ Ex. E9.

⁸¹ Ex. F7.

⁸² Ex. E9.

⁸³ Ex. E9.

"good day" for Ms. L, and that on many occasions (*i.e.* on her "bad days") she needs assistance with locomotion. This testimony was also credible. However, Ms. T never asserted that Ms. L requires weight-bearing assistance with locomotion three or more times per week, and there is no evidence indicating that Ms. L requires weight-bearing assistance with locomotion frequently enough to qualify as needing extensive assistance under the CAT.

Accordingly, the preponderance of the evidence indicates that Ms. L requires assistance with locomotion on her "bad days," but that the assistance rendered is generally not weight-bearing assistance. I therefore find that Ms. L currently requires only limited assistance with locomotion (CAT score 2/2). Again, although this score is higher than that assigned by the Division, it is still not high enough to help Ms. L qualify for waiver services.

c. Summary - Degree of Assistance Required with Shaded ADLs

Independent review indicates that Ms. L requires a greater degree of assistance than was found by the Division with regard to the "shaded" ADLs of transfers and locomotion. However, 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. Because I find that Ms. L currently requires extensive assistance with only one "shaded" ADL (toilet use), she does not meet NFLOC under NF1(e).

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 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. L requires any of these services, so she scores no points at NF2(a).⁸⁴

⁸⁴ Ms. T testified at hearing that, contrary to the assessment findings, Ms. L cannot perform her own insulin injections. That testimony is credible. However, no evidence was presented that Ms. L's insulin injections need to be overseen by nursing personnel. Rather, the evidence indicates that the assistance with insulin injections is provided by the staff of Ms. L's ALH. Because the insulin injections can be provided without nursing oversight, they do not assist Ms. L in qualifying for waiver services.

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. L 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. L 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. L 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. L has memory problems, 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. L was able to recall three out of four of these items during the assessment, so Ms. L receives no points under NF3(b).

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. L's cognitive skills for daily decision-making are impaired only in new, unfamiliar situations. Accordingly, Ms. L 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. L does not require professional nursing care at least three days per week due to cognitive problems, and Ms. L

provided no evidence to contradict this. Ms. L scored 2/2 or higher as to one or more shaded ADLs. However, the Division assigned Ms. L a score of zero on the cognitive portion of the SST.⁸⁵

D J-D, ANP provided an independent assessment of Ms. L's cognitive and behavioral problems.⁸⁶ Mr. J-D addressed the same issues scored by the Division in its Supplemental Screening Tools (SSTs) for cognitive and behavioral problems, in the same format used by the Division. Mr. J-D assigned Ms. L a total score of ten on the cognitive portion of the SST.

Because Mr. J-D's scoring is based on a greater level of familiarity with Ms. L, and because his scoring is more consistent with the findings of D W T, MSW,⁸⁷ it is likely that his scoring is more accurate than that of the Division's assessor. I find that the preponderance of the evidence indicates that Ms. L should receive a score of ten on the cognitive portion of the SST. 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 with her much higher score on the cognitive portion of the SST, Ms. L 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. L received scores of zero on NF3(a), NF3(b), NF3(c), and NF3(d). Accordingly, Ms. L 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 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.

Ms. Ray found that Ms. L resists care one to three times per week, but does not wander, is not verbally or physically abusive, and does not engage in socially inappropriate or disruptive

⁸⁵ Ex. E1.

⁸⁶ All factual findings in this paragraph are based on Ex. 5 and Ex. 7 pp. 3 - 4 unless otherwise stated.

⁸⁷ Ex. 6 and Ex. 7 p. 2. Ms. W T is a social worker with the No Name nation (Ex. 6 and Ex. 7 p. 2).

behavior.⁸⁸ Mr. J-D found that Ms. L sleeps noticeably more or less than normal; that her behavioral demands on others limit her companions and living arrangements; and that she frequently (four or more times per week) has difficulty understanding her care needs, but will cooperate if given direction or explanation.

Because of his greater familiarity with Ms. L, I find it likely that his assessment of her behavioral issues is more accurate than the Division's. Mr. J-D's findings indicate that he believes Ms. L resists care at least four days per week. Accordingly, I find that Ms. L should receive one point 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. L 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. L did receive a score of 2/2 or better as to one or more "shaded" ADLs. However, Ms. Ray gave Ms. L a score of zero on the behavioral portion of the SST.⁸⁹ On the other hand, Mr. J-D found that Ms. L should receive a total score of four on the behavioral SST.⁹⁰ Again, because of his greater familiarity with Ms. L, I find it likely that his assessment of her behavioral issues is more accurate than the Division's, and that the preponderance of the evidence indicates that Ms. L should receive a score of four on the behavioral portion of the SST. 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 with her higher score on the behavioral portion of the SST, Ms. L 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. L received one point at NF4(a), but received no points at NF4(b). Accordingly, Ms. L receives no "overall" points under NF4.

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,

⁸⁸ Ex. E19.

⁸⁹ Ex. E2.

⁹⁰ Ex. 5; Ex. 7 pp. 3 - 4.

however, Ms. L'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. L does not currently require either intermediate or skilled nursing care as defined under the relevant regulations and the Consumer Assessment Tool. Ms. L requires more assistance with at least two of her ADLs than was found by the Division, and her cognitive and behavioral problems are worse than assessed by the Division. However, Ms. L's 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. L needs PCA services, but has the ability to function in a home setting without the need for waiver services. Ms. L's condition has thus materially improved since her 2014 assessment, and she is not currently eligible to receive waiver services. The Division's decision terminating Ms. L's waiver services is therefore affirmed.

DATED this 16th 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 November, 2015.

By: *Signed*

Name: Jay D. Durych
Title: Administrative Law Judge, DOA/OAH

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