

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

In the Matter of )  
 )  
 S E ) OAH No. 15-1266-MDS  
 ) Agency No.  
\_\_\_\_\_ )

**DECISION**

**I. Introduction**

S E has a progressive dementia condition, is frequently confused, and needs assistance from others on many tasks. His children applied on his behalf for Home-and-Community-Based Waiver benefits. The Division of Senior and Disabilities Services evaluated Mr. E, and determined that he did not meet the nursing-home level of care that is required to be eligible for waiver benefits. At a fair hearing regarding his eligibility, the family was not able to prove that Mr. E's dementia had advanced to the level that the regulations have designated as meeting the first-step for nursing-home level of care. In addition, the family did not show that he needed the type of physical assistance on the five designated activities of daily living that would qualify him if he had met the cognitive score. Therefore, at this time, Mr. E is not eligible for the waiver program.

**II. Facts**

S E is a 74-year-old resident of Anchorage. He lives in an assisted living home. Mr. E suffers from several different maladies, including gallbladder disease, chronic obstructive pulmonary disease (COPD), and Gastroesophageal Reflux Disease (GERD). Because of his COPD, Mr. E has difficulty breathing and requires supplemental oxygen. Because of his shortness of breath, and his other physical impairments, Mr. E needs some assistance, or at least close observation, with activities of daily living (ADLs).<sup>1</sup>

The main issue in this hearing, however, is Mr. E's dementia. He suffers from a progressive dementia condition that leaves him confused and dazed regarding his living conditions. He is a proud man, however, and does his best to cope with his condition and hide his limitations.<sup>2</sup>

Because of Mr. E's need for assistance, Mr. E's daughter, D J, and son, S E, Jr., both of whom serve as Mr. E's powers of attorney, applied on his behalf for benefits under the Home-and-Community-Based Waiver program. This program provides certain types of assistance to elderly people who need nursing-home level of care, but who do not live in a nursing-home.

---

<sup>1</sup> See, e.g., E Exhibits (medical reports from No Name); Division Exhibit E.  
<sup>2</sup> S. E., Jr., testimony.

To determine whether Mr. E qualified for waiver services, Natasha Fromm, a nurse with the Division, visited Mr. E's assisted living home on August 21, 2015. She evaluated Mr. E's need for nursing services, and his physical ability to do ADLs. She recorded her assessment on a standardized assessment format, called the Consumer Assessment Tool (CAT).<sup>3</sup> Under the CAT, the assessor will assign a numerical score for each nursing service, and each of several ADLs. The Division then uses the scoring on the CAT, and other information it may have, such as medical records, to determine whether the client is eligible for waiver services.

Ms. Fromm determined that Mr. E did not need nursing services, as that term is used by the CAT for determining waiver eligibility. She determined that his cognitive deficits did not score high enough to meet the requirements toward qualifying for waiver services. In addition, she found that his need for assistance on the five qualifying ADLs was not at the level required for waiver eligibility.

On August 26, 2015, the Division denied Mr. E's application for waiver services. On September 21, 2015, Ms. J appealed the denial, and requested a fair hearing.<sup>4</sup> A hearing was held on December 15, 2015. S E, Jr., represented the family.

### **III. Discussion**

The Home-and-Community-Based Waiver services program provides an alternative to institutional care for individuals who meet the eligibility criteria.<sup>5</sup> To be eligible for waiver services, Mr. E must need "nursing facility level of care."<sup>6</sup> This level of care can be either "skilled nursing services" or "intermediate nursing services."<sup>7</sup>

Although the CAT provides several different avenues for determining eligibility for waiver services, the family agreed that the only possible way for Mr. E to qualify for waiver at this time was if his cognitive capacity was at or below the threshold for waiver services.<sup>8</sup> My

---

<sup>3</sup> Division Exhibit E.

<sup>4</sup> Division Exhibit C.

<sup>5</sup> 7 AAC 130.200.

<sup>6</sup> 7 AAC 130.205.

<sup>7</sup> For a definition of skilled care, see 7 AAC 140.515(b) ("Skilled nursing services are the observation, assessment, and treatment of a recipient's unstable condition requiring the care of licensed nursing personnel to identify and evaluate the recipient's need for possible modification of treatment, the initiation of ordered medical procedures, or both, until the recipient's condition stabilizes."); for intermediate care, see 7 AAC 140.510(b) ("Intermediate nursing services are the observation, assessment, and treatment of a recipient with long-term illness or disability whose condition is relatively stable and where the emphasis is on maintenance rather than rehabilitation, or care for a recipient nearing recovery and discharge whose condition is relatively stable but who continues to require professional medical or nursing supervision.").

<sup>8</sup> Statement of F T, affirmed by Mr. E, Jr. One factor in making this determination is whether a person needs what are called "professional nursing services." These services include injections, intravenous feedings, feeding tubes, suctioning, treatments and dressings, oxygen administration, catheters, comatose care, ventilator or respirator,

independent review of the evidence affirms that the family is correct—the only way for Mr. E to qualify for waiver at this time is to demonstrate qualifying scores on his cognitive deficits, and, at the same time, demonstrate a need for at least limited one-person assistance on two of the qualifying ADLs. Whether Mr. E meets these criteria is discussed below.

**A. Does Mr. E score high enough on the measure for cognitive impairment to meet the first test for waiver eligibility under the cognitive eligibility criteria?**

A person can qualify for waiver services under the CAT based on a severe cognitive disability. This pathway to waiver services is complicated, however. First, the applicant has to score at least 13 points on what is called the “supplemental screening tool.” This tool asks the assessor to rate a person’s ability on the following five issues:

1. Memory for Events;
2. Memory and Use of Information;
3. Global Confusion;
4. Spatial Orientation; and
5. Verbal Communication.

For each of these five issues, the CAT provides a specific scoring regimen of from zero to three or four points, depending on the degree of impairment. Here, the record did not contain Ms. Fromm’s original scoring of the supplemental screening tool. She did not remember the score, but did remember that it was not high enough to qualify Mr. E for the next step (which would be to determine whether he needs “limited” assistance on two of the qualifying ADLs). At the hearing, Ms. Fromm recreated her scores for Mr. E on the supplemental screening tool, and determined that Mr. E qualified for nine points on the supplemental screening tool. This score indicates a significant impairment, but would not be sufficient to move to the next step in qualify for waiver services.

Second, even if the applicant scores 13 or more points on the supplemental screening tool, the applicant still must need at least limited assistance on two of the five qualifying ADLs (bed mobility, transfers, locomotion, eating, and toilet use). In filling out the CAT, Ms. Fromm found that Mr. E needed this level of assistance for only one of the qualifying ADLs, transfers. For the other four ADLs, she found that Mr. E needed no or only supervisory/cueing assistance.

---

uncontrolled seizure disorder, therapies, and assessment/management services. Mr. E, however, does not need nursing services. Another measure on the CAT that is relevant to waiver eligibility is how much assistance a person needs on the five ADLs that are evaluated for purposes of waiver eligibility—bed mobility, locomotion, transferring, toilet use, and eating. If an individual needs extensive assistance on three of these ADLs (numerical scores of at least “3/2”), the individual will qualify for waiver. The evidence showed that although Mr. E needed some assistance and supervision, he did not need extensive assistance.

Therefore, unless the family can prove that Mr. E needs at least “limited” assistance on one additional qualifying ADL, Mr. E would not qualify for waiver services even if he scored a 13 on the supplemental screening tool.

Turning first to the score on the supplemental screening tool, at the hearing Mr. E, Jr., testified that he was in a better position to evaluate his father’s cognitive ability than Ms. Fromm because he saw his father in many different circumstances, not just for one short period of time. He went through each of the five questions on the tool, and scored his father’s cognitive ability.

Although Mr. E makes a good point regarding his superior knowledge of his father’s condition, in many cases, this superior knowledge may not translate into a better ability to score the CAT. In some cases, a trained professional will be able to ask questions of those with first-hand knowledge and supplement his or her own observations. Sometimes, too, family members may not be accurate reporters. Therefore, a trained professional’s score may be as good, or sometimes better, than a family member’s. Here, however, Mr. E gave very good explanations of his reasons for his scores. His scores will be accepted as accurate. The scores he gave on the five issues are as follows:

1. Memory for Events: score of 2, based on his father’s failure to remember things that occurred, such as a haircut, a shave, or a visit from relatives.
2. Memory and Use of Information: score of 3, based on having to constantly remind his father regarding tasks—for example, to check the level of his oxygen.
3. Global Confusion: score of 2 (periodic confusion), based on his father’s getting day and night confused; not knowing what day of the week it is, and continued confusion about life events—for example, although he frequently reminded his father that he was now working at Facility X, his father would still ask him about his (long since over) job in No Name or his framing job.
4. Spatial Orientation: score of 2. Although his father would definitely get lost if ever allowed outside on his own, Mr. E, Jr., believed that he had “fairly good handle” on where he stashes his belongings in the home.
5. Verbal Communication: score of 2. Mr. E, Sr., is able to understand and to have conversations, but his train of thought can wander so that he is unable to have more complex conversations.

Accepting Mr. E, Jr.’s scoring as accurate, Mr. E, Sr., scores a total of 11 points on the supplemental screening tool. Although this shows a relatively high level of cognitive

impairment, and is two points higher than scored by Ms. Fromm, it is still not high enough to meet the requirement of the CAT of 13 points. (The very high level of cognitive impairment required under the regulations is commensurate with the purpose of the form to identify those clients who need *nursing home* level of care—a significant level of care.) Therefore, Mr. E, Sr., does not qualify for waiver services.

**B. Does Mr. E need limited assistance on more than one qualifying ADL?**

The next question we will address is whether Mr. E, Sr., would need the appropriate level of assistance on his ADLs to qualify for waiver services if he had scored a 13 on the cognitive supplement screening tool. (Although Mr. E does not have a high enough score to proceed to this step, we address it anyway for two reasons. First, in case an error was made in the first inquiry, we want to know whether he would qualify under the second inquiry. Second, because we have the evidence to answer this second question, addressing it helps the applicants and family understand the process. Mr. E’s condition is progressive, and he may apply for waiver again in the future.) The qualifying level is “limited assistance,” provided by one person, which translates into a score of “2/2” on the CAT.

A need for assistance is considered “limited assistance” when a person

- needs some help, while still remaining highly involved in the activity, and either
  - at least three times per week, needs non-weight-bearing physical help from an assistant (such as guided maneuvering of limbs) to complete the ADL; or
  - one or two times per week, needs weight-bearing assistance to complete the ADL.<sup>9</sup>

Essentially, this means that a person must need actual hands-on physical assistance for each ADL at least three times a week, or needs actual weight-bearing assistance at least once. A person who requires a standby guard, or needs an assistant to set up a walker or other assistive device, would not qualify.

Here, the Division agrees that Mr. E, Sr., needs limited assistance on transfers because, although he can usually get up on his own (using assistive devices), he does occasionally have trouble standing up at least twice per week. Mr. E, Jr., testified that Mr. E, Sr., does need physical assistance for many tasks, including help into the truck, or help walking outside on

---

<sup>9</sup> Division Exhibit E at 8. The regulations define limited assistance to mean “a recipient, who is highly involved in the activity, receives direct physical help from another individual in the form of guided maneuvering of limbs, including help with weight-bearing when needed.” 7 AAC 125.020(a)(1).

uneven ground. Yet, the tasks that he described are not included in the specific ADLs that qualify for waiver services.<sup>10</sup> On the narrow question of the four other qualifying ADLs (turning in bed, walking, eating, and toilet use), F T, the owner of the assisted living home, affirmed that Mr. E, Sr., is either independent (with turning in bed, eating, and usually toilet use) or needs supervisory (but not hands-on) assistance with walking in the home.<sup>11</sup> Because Mr. E, Sr., does not need at least limited assistance on two of the qualifying ADLs, he would not meet the requirement for nursing-home level of care even if he had scored a 13 on the supplement screening tool. Therefore, the Division is correct that at this time, Mr. E, Sr., is not eligible for waiver benefits.

#### **IV. Conclusion**

The Division's decision denying S E's application for the Home and Community-Based Waiver program is affirmed.

DATED this 22nd of December, 2015.

By: Signed  
Stephen C. Slotnick  
Administrative Law Judge

### **Adoption**

The undersigned, by delegation from 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 7th day of January, 2016.

By: Signed  
Name: Stephen C. Slotnick  
Title: Administrative Law Judge/DOA

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

---

<sup>10</sup> Division Exhibit E. Walking outside the home, or getting into the truck, is not included in the CAT's definition of the qualifying ADL "locomotion," which means locomotion in the home. See Division Exhibit E at 9 ("locomotion" means "[h]ow person moves between locations in his/her room and other areas on the same floor.").

<sup>11</sup> T testimony.