

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

In the Matter of)	
)	
H T)	OAH No. 15-1337-MDS
_____)	Agency No.

DECISION

I. Introduction

H T applied for Medicaid Choice Waiver services (Waiver). The Division of Senior and Disabilities Services (division) denied his application. The Waiver program pays for services that allow an eligible person to stay in his or her home (or an assisted living home) rather than move into a nursing facility.¹ The record reveals that Mr. T requires some physical assistance, but he does not meet the Waiver eligibility criteria at this time.

II. The Assessment

The division determines whether an applicant requires nursing facility level of care services by conducting an assessment.² For adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and .515,³ and incorporates the results of the consumer assessment tool (CAT).⁴ The CAT is an evaluation tool created by the Department of Health and Social Services, and is adopted by reference in 7 AAC 160.900(d)(6). The division also looks at medical records and other assessments of an applicant's physical ability, such as those done by physical therapists or occupational therapists.

III. Facts

Mr. T is a proud 62-year-old man who lives alone. In May and June 2015, he was hospitalized for two months for gastrointestinal bleeding and a series of strokes. The strokes have resulted in right side paralysis. Mr. T retains some upper right side extremity mobility and weak grasp with his right hand, but his right leg is immobile and must be physically repositioned. His left hand grasp was characterized as strong and he exhibited good range of motion.⁵ Mr. T uses a

¹ 7 AAC 130.205(d)(2).
² 7 AAC 130.230.
³ 7 AAC 130.230(b)(2)(A).
⁴ 7 AAC 130.230(b).
⁵ Exhibit E4.

walker and has difficulty balancing. He has diabetes which is controlled through daily insulin.⁶ He receives in-home assistance and therapies that are paid for by his brother.

Mr. T was represented by his Power of Attorney and brother T N. Mr. N testified, as did Mr. T's current assistant J Q, and his agency representative Q R. Mr. N submitted several medical records including a prescription for aqua therapy. Many of the records, including the prescription, are dated after September 23, 2015. September 23 is the date of the division's determination letter.⁷

IV. Discussion

This hearing involves Mr. T's eligibility for the Medicaid Home and Community-Based Waiver Services program. Because this is an application for services Mr. T has the burden of proving he is eligible.⁸ Under the Waiver program, if an eligible applicant is determined to have "a functional limitation or cognitive impairment that would result in the need for nursing home placement" the applicant may elect to receive home or community-based services in lieu of placement in a nursing home. To determine eligibility for Waiver services, the division employs a structured assessment tool called the "Consumer Assessment Tool," better known as the "CAT."⁹

Not every activity or score recorded in the CAT is relevant to a Waiver determination. Although a respondent can qualify for Waiver services in many different ways under the CAT, close examination of the CAT and the evidence reveals only two areas in which Mr. T might qualify.¹⁰ First, if Mr. T requires extensive assistance or is completely dependent on others for three or more of the structural/physical activities of daily living (the shaded ADLs), he would qualify.¹¹ These are Bed Mobility, Transfers, Locomotion, Eating, and Toilet Use. Second, if Mr. T's cognition/memory is sufficiently compromised, then his total nursing and ADL scores

⁶ Daily insulin for a person whose diabetes is under control is not recognized as a professional nursing service. Exhibit E13 §A1.

⁷ Exhibit D.

⁸ 7 AAC 49.135.

⁹ See 7 AAC 160.900(d)(6) (adopting CAT by reference); see also Exhibit E.

¹⁰ The CAT has several different tests under which a person can qualify for Waiver services. These tests are found on page 29 of Exhibit E. The various tests are abbreviated as "NF.1, NF.2," and so on, up to "NF.6." Under NF.1, a person can qualify if any of the questions are answered "yes." Under the other tests, the scores a person receives can be aggregated for a "total nursing and ADL Needs Score" (which is called "NF.7"). If this score is three or more, a person qualifies for Waiver services.

¹¹ This qualification is listed under NF.1.e. See Exhibit E at 29. Mr. T does not qualify under any of the other "NF.1" categories—during the relative time period, he did not require nursing services, a ventilator, or therapies, and he did not have uncontrolled seizures. Mr. T does not require nursing services, NF. 2, or exhibit inappropriate behavior, NF. 4. Testimony of Q R.

could qualify him for Waiver services.¹²

A. *What Is The Time Period For New Evidence?*

The ultimate question here is whether Mr. T's scores on the CAT should be adjusted because the scores he received on the September 23, 2015 determination assessment do not accurately reflect his level of care. The first question to be addressed, however, is what is the relevant time period for assessing Mr. T's needs? There was some new evidence placed into the record, including some evidence of aquatic therapy that was prescribed by Mr. T's doctor as recently as October 1, 2015. The therapy is for Mr. T's right shoulder. Is that evidence admissible to show that Mr. T needs nursing services?

The answer is no. As the Commissioner held in the case *In re T.C.*, unless the division offers to keep the record open, the record generally closes when the denial letter is sent.¹³ Under *In re T.C.*, the respondents may introduce evidence of changes in condition up to the date of the denial letter. Here, that date is September 23, 2015. Any evidence of new conditions or treatments that occurred after this date will not be considered unless that evidence is offered to show a condition that existed before September 23. However, here the dispute does not concern the existence of a condition but rather whether Mr. T requires nursing facility level of care.

B. *Mr. T Does Not Have a Functional Limitation That Would Result in the Need for Nursing Home Placement.*

On September 2, 2013, Peter Ndenderoh assessed Mr. T. For purposes of eligibility for Waiver services, a person's score on the shaded activities of daily living (ADL) are very important. A person will be eligible for Waiver services if he or she is scored as needing extensive assistance in three of the five "shaded ADLs."¹⁴ The five shaded ADLs are Bed

¹² See Exhibit E at 29, section NF.7.

¹³ *In re T.C.*, OAH No. 13-0204-MDS at 7 (Commissioner of Dep't of Health and Soc. Servs., 2013). As the commissioner noted in *In re T.C.*, the division's willingness to consider new information during the time period between the assessment and the termination letter is an indication that the record is not closed. *Id.* Here, the termination letter offered that "You may supplement your application with additional information to support your position that you meet level of care for the waiver program at anytime through the fair hearing process." Exhibit D at 5.

¹⁴ The numbers used in the CAT scoring of ADLs are first a "self-performance score" and second a "support score." The self-performance score is the classification for the amount of assistance a person needs, and the support score is the most support provided over the last 7 days. For self-performance scores, the codes have the following meaning:

0. Independent – No help or oversight – or – Help/oversight provided only 1 or 2 times during last 7 days.
1. Supervision – Oversight, encouragement or cueing provided 3 + times during last 7 days –OR– Supervision plus nonweight-bearing physical assistance provided only 1 or 2 times during last 7 days.
2. Limited Assistance – Person highly involved in activity; received physical help in guided maneuvering of limbs, or other nonweight-bearing assistance 3+ times – OR – Limited assistance (as just described) plus weight-bearing 1 or 2 times during the last 7 days.

Mobility, Transfer, Locomotion, Eating, and Toilet Use. Mr. T believes he should be scored as requiring extensive assistance in the ADLs of Transfer, Locomotion, and Toilet Use. He does not dispute the division's decision that he is independent with the activities of Bed Mobility and Eating.

Transfers: "How person moves between surfaces – to/from bed, chair, wheelchair, standing position (Exclude to/from bath/toilet)." ¹⁵ Mr. Ndenderoh wrote that he observed that by using his walker, Mr. T was able to "unsteadily & slowly move to standing position and back."¹⁶ Mr. T was assessed as requiring limited assistance (Score 2/2).¹⁷

The testimony established that when he is alone, Mr. T refrains from getting up from the couch or chair.¹⁸ Mr. T has difficulty maintaining his balance once he is up. He can transfer on his own by using his left arm to push up off of the couch. Once up, he requires standby assistance to transfer to his walker and locomote. His reluctance to transfer from the couch is likely attributable to his reluctance to locomote without hands on assistance. The Agency Representative, Ms. R described a process where weight bearing assistance is provided; however the evidence presented was insufficient to establish that it is more probable than not that Mr. T *reasonably required* weight bearing assistance to complete the transfer.¹⁹ Therefore, the division correctly scored this activity.

Locomotion: "How person moves between locations in his/her room and other areas on the same floor." Mr. T can locomote using his walker. He is unsteady and he drags his right leg

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3. Extensive Assistance – While person performed part of activity, over last 7-day period, help of following types(s) provided 3 or more times:
 - Weight-bearing support
 - Full staff/caregiver performance during part (but not all) of last 7 days.
 4. Total Dependence – Full staff/caregiver performance of activity during ENTIRE 7 days.
 5. Cueing – Spoken instruction or physical guidance which serves as a signal to do an activity are required 7 days a week. Cueing is typically used when caring for individuals who are cognitively impaired.
 8. ACTIVITY DID NOT OCCUR during entire 7 days.

For support scores, the codes have the following meaning:

0. No setup or physical help from staff
1. Setup help only
2. One-person physical assist
3. Two+ persons physical assist
4. Cueing- Cueing support required 7 days a week

¹⁵ Exhibit E at 6.

¹⁶ Exhibit E at 6.

¹⁷ Exhibit E at 6.

¹⁸ Testimony of Mr. N and Ms. R.

¹⁹ Weight-bearing assistance has been defined as supporting more than a minimal amount of weight. It does not require that the assistant bear most of the recipient's weight, but instead that the recipient could not perform the task without the weight-bearing assistance.

In re K T-Q, OAH No. 13-0271-MDS (Commissioner of Health and Social Services 2013), page 4.

when walking. He requires hands-on supervision to keep him steady and prevent him from falling. After hearing the testimony, the Division agreed that the score should be increased from requiring supervision and setup assistance (Score 1/1) to limited assistance (Score 2/2). Limited assistance is the correct score.

Toileting: Mr. T was scored as requiring limited assistance (Score 2/2) to complete this activity. Under observation, Mr. Ndenderoh wrote that Mr. T “require[ed] support to move up/down surfaces and difficulties bending down to touch his feet.”²⁰ If no one is present, Mr. T will use a bottle rather than go to the bathroom because he cannot complete the task (voiding and dressing) without weight bearing assistance.²¹ Ms. R described how she will push/pull Mr. T up off of the toilet. She testified that he requires assistance with dressing because he holds onto the sink with his good hand and has no way to dress. What Ms. R described was weight bearing assistance that occurs more than twice a week. Mr. T has established by a preponderance of the evidence that he requires extensive assistance (Score 3/2) to complete the ADL of toileting.

Thus, based on this evidence, Mr. T needs limited assistance on two out of the five structural/physical ADLs and extensive assistance on one out of the five Shaded ADLs. These scores do not qualify him for Waiver services.²²

C. Mr. T Does Not Have a Cognitive Limitation That Would Result in the Need for Nursing Home Placement.

Another important category that is assessed under the CAT is a person’s cognition. Mr. T has some difficulty in new situations.²³ Mr. Ndenderoh, as part of the assessment, filled out a supplemental cognition form that asks the assessor to rate the client’s memory for events, memory and use of information, global confusion, spatial orientation, and verbal communication. Mr. Ndenderoh gave Mr. T a total cognitive score of 6 on this form.²⁴ Under the CAT, a person who does not need professional nursing assessment, observation, and management at least three days per week to manage the person’s cognitive patterns must score at least a 13 on this form to be eligible for Waiver services under the cognition category. He did not. Therefore, he has not established that he is eligible for Waiver services.

Testimony was presented that Mr. T gets depressed and angry but does not exhibit socially

²⁰ Exhibit E9.

²¹ Testimony of Q R.

²² Exhibit E at 30. Having a self-performance score of three or higher qualifies a person for Waiver services under NF.1.e.

²³ Exhibit E16.

²⁴ Exhibit F3.

inappropriate behavior.²⁵ He has a Power of Attorney because he cannot manage his own financials.²⁶ The evidence provided does not support increasing the scores assigned by Mr. Ndenderoh. If Mr. T's condition has changed and it is supported by medical information, it may be prudent to file a new application. However, as of September 23, 2015, Mr. T was not eligible for Waiver services.

V. Conclusion

There are several different ways in which the CAT can indicate that a person needs nursing facility level of care, and therefore is eligible for the Waiver program. Having considered the relevant medical records and the testimony received at hearing, Mr. T should be scored a 2/2 for transfers and locomotion, and a 3/2 for toileting. The evidence does not support a finding that his cognitive skills or behavior rises to the level required to be found eligible for nursing facility level of care. Mr. T does not have any specific nursing or therapy needs at this time.

Therefore, the division's denial of Mr. T's application for Waiver services is affirmed.

DATED: January 28, 2016.

By: Signed
Rebecca L. Pauli
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 March, 2016.

By: Signed
Name: Jared C. Kosin, J.D., M.B.A.
Title: Executive Director
Agency: Office of Rate Review, DHSS

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

²⁵ Testimony of T N and Q R.

²⁶ *Id.*