

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

In the Matter of)
)
 N O U) OAH No. 15-1396-MDS
)
 _____)

DECISION

I. Introduction

N O U applied for services through the Medicaid Older Alaskan or Adult with a Physical Disability waiver program (waiver services). The Division of Senior and Disabilities Services assessed Ms. U, found that she did not meet the level of care requirements for waiver services, and denied the request. Ms. U appeals.

A telephonic hearing was originally convened on November 23, 2015, continued to January 13, 2016, and concluded on January 22, 2016. Mr. E C, Ms. U's son and holder of a power of attorney, represented Ms. U. Ms. U, Ms. U's care coordinator P T, and Mr. C's wife D C also participated. Ms. Darcie Shaffer represented the division. Assessor Ms. Natasha Fromm testified.

Based on the evidence presented, Ms. U has not met her burden of proving she requires a nursing home level of care. The division's decision that Ms. U is not eligible for waiver services is upheld.

II. Facts

N O U is 86 years old. She lives independently in an apartment in No Name A, and has a supportive community of friends and neighbors. Her son lives in No Name B, and visits her approximately once a week.¹

Ms. U is experiencing difficulties with memory, amnesia, and cognitive functioning.² Ms. U's doctor reports that Ms. U's memory has been steadily deteriorating.³ However, Ms. U is still functioning physically at a nearly independent level. At the time of the

¹ Division Exhibit E at 1; Testimony of Mr. C.

² Division Exhibit E at 3 - 4.

³ Letter from Dr. R F dated December 7, 2015. Dr. F has been Ms. U's physician for over 2 years.

assessment, she still had a car and was driving.⁴ She has a dog, and is physically able to take the dog outside if she remembers that the dog needs to go out.⁵

Ms. U has scoliosis, and if she exerts herself, for example by carrying and unloading groceries, she may experience back pain and a decreased physical ability the following day.⁶ Ms. U also has edema and hypertension.⁷

Ms. U was assessed for waiver services on September 29, 2015, by Natasha Fromm. Ms. Fromm found that Ms. U did not require a nursing home level of care. On October 17, 2015, the division notified Ms. U by letter, in care of Mr. C, that her application for the waiver program was denied.

III. Discussion

In order to qualify for home and community based waiver services as an older adult, the applicant must be 65 years of age or older and require a level of care provided in a skilled nursing facility or an intermediate care facility.⁸ The level of care that is provided in a nursing facility is described by regulation. Skilled nursing facility services are defined in 7 AAC 140.515. Intermediate care facility services are defined in 7 AAC 140.510.

The division determines what level of care is required using the consumer assessment tool (CAT).⁹ The CAT is an evaluation tool created by the Department of Health and Social Services.¹⁰ The CAT assesses an applicant's needs for professional nursing services, therapies, and special treatments, and whether an applicant has impaired cognition or displays problem behaviors.¹¹ The CAT also records the degree of assistance an applicant requires for various activities of daily living (ADLs), including the five "shaded" ADLs (body mobility, transfers, locomotion, eating, and toileting) considered in determining waiver eligibility.

To qualify for waiver services, a person must score three points on the scoring portion of the CAT. There are several ways a person can qualify for waiver services. A person may score the required three points based solely on the need for nursing services or

⁴ Testimony of T.

⁵ Testimony of Mr. C.

⁶ Division Exhibit E at 3; Testimony of Mr. C.

⁷ Division Exhibit E at 3.

⁸ 7 AAC 130.205(d)(4).

⁹ 7 AAC 130.215(4).

¹⁰ The CAT has been adopted by reference into the administrative code at 7 AAC 160.900(d)(6).

¹¹ Division Exhibit E at 13 - 17.

solely on the need for extensive assistance with physical functioning and activities of daily living. Alternatively, a person may score three points through a combination of needing at least limited assistance with some of the shaded ADLs as well having cognitive or behavioral issues. Ms. U was scored with zero points.¹²

At the hearing, Ms. U disputed the scoring on the assessment for the shaded activities of daily living, the cognitive assessment, and the behavioral assessment. The evidence in this case does not support eligibility based solely on a need for professional nursing services (section A of the CAT) or special treatments and therapies (section B of the CAT).

Because this is a new application for participation in the program, Ms. U has the burden of proving her eligibility by a preponderance of the evidence.¹³ The relevant period for evaluating Ms. U's need for assistance and program eligibility for purposes of this appeal is the period beginning on the date of the assessment, September 29, 2015, and ending on October 17, 2015, the date of the division's denial letter.

A. Activities of Daily Living

To qualify for waiver services based only on ADLs, an applicant must need extensive assistance (corresponding to a self-performance score of 3) with at least three of the following five "shaded" ADLs: bed mobility, transfers, locomotion, eating, and toilet use.¹⁴ To qualify based on a combination of ADLs and cognitive, behavioral, or other needs, an applicant must need at least limited assistance with one or more ADLs.¹⁵

The self-performance scores used in the CAT for these activities are defined as follows:

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-

¹² Division Exhibit E at 29.

¹³ 7 AAC 49.135.

¹⁴ The CAT evaluates a person's need for assistance with seven ADLs, however, only the four shown as shaded on Exhibit E at 18 are considered in determining eligibility for waiver services.

¹⁵ Exhibit E at 29.

- bearing assistance 3+ times – or Limited assistance (as just described) plus weight-bearing 1 or 2 times during last 7 days.
- 3. Extensive Assistance – While person performed part of activity, over last 7-day period, help of following type(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.

The CAT also evaluates the amount of support provided to a person in order to perform an activity:

- 0. No setup or physical help from staff
- 1. Setup help only
- 2. One-person physical assist
- 3. Two+ persons physical assist^[16]

Ms. U was scored at 1/1 for transfer and locomotion, and 0/0 for bed mobility, eating, and toilet use. As explained below, a preponderance of the evidence supports these scores.

Because Ms. U did not demonstrate that she requires extensive assistance or limited assistance with any of the five ADLs considered in evaluating waiver eligibility, she is not eligible for waiver services based on her ADL scores.

Bed Mobility. Ms. U received a score of 0/0 for bed mobility. Bed mobility involves how a person moves to and from a lying position, turns side to side, and positions the person's body while in bed. Ms. U reported to the assessor that she could turn side to side in bed by herself, and the assessor observed her repositioning her body on the bench she was sitting on. There was no report of bed sores at the time of the assessment.¹⁷ Ms. U did not provide evidence or testimony that she is not able to reposition herself in bed, but Mr. C argued that the score was incorrect because the assessor had not actually seen Ms. U reposition herself in bed. However, Ms. U has the burden of proof, and a preponderance of the evidence supports the score of 0/0 for bed mobility.

Transfers. Ms. U scored a 1/1 for transfers.¹⁸ Transfer refers to how a person moves between surfaces -- to and from bed, into and out of a chair, and to and from a standing

¹⁶ See for example Division Exhibit E 6 (Code descriptions in CAT).

¹⁷ Division Exhibit E at 6.

¹⁸ Division Exhibit E at 6.

position. Mr. C admitted that Ms. U was able to transfer on her own on most occasions.¹⁹ Ms. T testified that Ms. U required weight bearing assistance with transfers, and that she had helped Ms. U up from a seated to a standing position on November 23, 2015. The assessor observed Ms. U use her hands to push off and raise herself from a seated position on a bench to standing. Ms. U reported to the assessor that she pauses before standing up from bed in order to get her bearings, and that she likes to hold onto the cart when shopping in order to stabilize herself. Mr. C reported to the assessor that Ms. U gets light headed when she stands up. He said that neighbors who attended the assessment said that sometimes Ms. U is too dizzy to stand up on her own. However, he also said that Ms. U was able to stand up most of the time.²⁰

The evidence indicates that, while Ms. U may occasionally benefit from a helping hand, she is generally able to transfer by herself. Ms. U did not demonstrate that she required assistance more than three times in the seven days before the assessment, or weight bearing assistance in the seven days before the assessment. Ms. U has not demonstrated by a preponderance of the evidence that the transfer score of 1/1 is incorrect.

Locomotion. Ms. U received a score of 1/1 for locomotion. A self-performance score of 1 corresponds not to independence, but to a need for oversight, encouragement, or cueing, with the possibility of weight bearing assistance no more than once or twice during the last seven days. Locomotion is measured based upon the ability to move within an applicant's home – the locomotion score is not based upon the ability to move outside the home.

The assessor observed Ms. U walk from the living room to her bedroom, then to the bathroom, and back to the living room without assistance. She noted that Ms. U has a walker, which she sometimes remembers to use when walking outside, but did not use inside the apartment during the assessment.²¹ At the hearing, Mr. C acknowledged that Ms. U was able to shuffle around her apartment on her own, and that she was physically able to take her dog outside.²² Ms. T testified that she had arrived for a visit with Ms. U to find Ms.

¹⁹ Testimony of Mr. C.

²⁰ Division Exhibit E at 6; testimony of C.

²¹ Division Exhibit E at 7.

²² Testimony of Mr. C.

U in the hallway of her apartment building, disoriented. Ms. U leaned on Ms. T to get back to her apartment.²³

Mr. C also testified that Ms. U had taken a fall in August, 2015, and badly sprained her ankle. Her neighbor took Ms. U to the emergency room. Ms. U could not remember having fallen, and also had trouble remembering to wear the brace she was given.²⁴

Ms. U is generally able to move around in her apartment on her own. Ms. U has not demonstrated by a preponderance of the evidence that the CAT score of 1/1 for locomotion is incorrect.

Toileting. Ms. U received a score of 0/0 for toilet use on the CAT. This was based on Ms. U's report that she can walk to the bathroom, sit and stand, and cleanse herself by herself. The assessor observed her walk to the bathroom, and stand up from a bench on her own.²⁵ Mr. C admitted that he had seen his mother stand up and walk to the bathroom on her own, and that he had never actually been in the bathroom with Ms. U.

Mr. C had expressed concern to care coordinator Q J that Ms. U was not cleansing herself as well as she should.²⁶ However, the assessor testified that Ms. U was able to reach behind her back, indicating that she should be physically able to cleanse herself.

The care coordinator expressed concern that Ms. U had not been entirely forthright with the assessor about her incontinence because she was embarrassed to admit that it was an issue. The assessor testified that Ms. U denied using pads, however, it was reported by neighbors and family that she did use pads or briefs. Continence is evaluated in the CAT. For purposes of the CAT, continence is evaluated based on a person's control with pads, if pads are used. Ms. U was scored as continent, with the notation that she used pads or briefs. There was no indication that Ms. U had continence issues that could not be controlled with pads or briefs.

The toilet use score reflects how a person uses the toilet room, transfers on and off the toilet, cleanses, changes pads, and adjusts clothing. Ms. U has not demonstrated by a preponderance of the evidence that the CAT score of 0/0 for toileting is incorrect.

²³ Testimony of T.
²⁴ Testimony of Mr. C.
²⁵ Division Exhibit E at 9.
²⁶ Division Exhibit C at 2.

Eating. The assessor gave Ms. U a score of 0/0 for eating. Concerns were raised in the care coordinator's statement of disputed issues and Mr. C's testimony about Ms. U's dietary choices. Ms. U herself testified that she needed help getting her dinner in the evening, and that she neglected meal preparation if somebody does not help her.

However, scoring for the eating ADL reflects not the quality of a person's diet, but whether they are physically able to eat and drink. The assessor noted that Ms. U was able to bring her hands to her face, and Ms. U reported that she can feed herself.²⁷ Mr. C acknowledged at the hearing that Ms. U did not have difficulty swallowing, did not choke, and did not require a feeding tube. The CAT does look at meal preparation, and scored Ms. U as needing assistance with light meal preparation and dependent on others for main meal preparation.²⁸ However, this inquiry is part of the Instrumental Activities of Daily Living (IADL) analysis, and IADLs are not considered in determining waiver eligibility.

Although Ms. U clearly needs help maintaining a proper diet, there was no evidence presented that she needs assistance with the physical acts of eating or drinking. The score of 0/0 for the ADL of eating is upheld.

B. Cognition and Behavior Assessments

The CAT also considers a person's memory, cognition, and behaviors in determining the need for a nursing facility level of care. A person may score one point on the cognition and memory section of the CAT (NF3), and another point on the behavior section (NF4). Ms. U received scores of 0 in both of these sections. Ms. U disputed her scores in both the memory and cognition section and the behavioral section of the CAT. However, because she did not receive a score of 2/2 or more for any of the five ADLs considered for waiver eligibility, she is not eligible for any points under section NF6, and therefore is not qualified for waiver services based on a combination of ADLs and cognitive or behavioral needs.

1. Cognition

Ms. U clearly has memory loss and impaired cognition. The CAT has a supplemental screening tool for cognition, found at section C4B. Ms. U received a score of 9 on this tool. Ms. T argued that Ms. U should have received a higher score, specifically a 2 for memory for events (cannot recall entire events), a 3 for global confusion (nearly always

²⁷ Division Exhibit E at 9.

²⁸ Division Exhibit E at 26.

confused), and a 2 for verbal communication (able to carry out only simple conversations), for a total score of 13. Assuming for purposes of analysis that Ms. T's scoring of the C4B cognition assessment is correct, Ms. U still would not be entitled to a point for cognition under NF3 because she did not demonstrate a need for professional nursing assessment, observation, and management at least three days a week to manage her cognitive patterns, or a need for limited assistance with at least one shaded ADL. The score of 0 for subpart d of section NF3 was correct, and therefore the score of 0 for section NF3 as a whole was also correct.

Although Ms. U clearly has a number of cognitive and memory challenges, a preponderance of the evidence indicates that the score of 0 for section NF3 on the CAT was correct.

2. Behavior

The assessor gave Ms. U a total behavior score of 6 on CAT section D2B.²⁹ Her care coordinators argued that she should have received a score of 12 or 13.³⁰ A behavior score of 14 or more would be required to score a point on section NF4 of the CAT, but would not in itself suffice to score a point towards waiver eligibility. Ms. U would also have to require at least limited assistance with at least one shaded ADL. Ms. U does not qualify for a point based on behavior because she does not have the requisite score on the supplemental screening tool for behavior, and does not require limited assistance or more with any of the five shaded ADLs.

IV. Conclusion

Because Ms. U does not qualify for waiver services based on nursing services alone, her need for assistance with ADLs alone, or her combined cognitive, behavioral, and ADL needs, the division's denial of her application for waiver services is affirmed.

Dated: February 23, 2016.

Signed _____

Kathryn L. Kurtz
Administrative Law Judge

²⁹ Division Exhibit F at 2.
³⁰ Division Exhibit C at 2 - 3; Testimony of T.

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 1st day of April, 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.]