

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

In the Matter of)
)
L J) OAH No. 16-0515-MDS
) Agency No.
_____)

DECISION

I. Introduction

L J applied for Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (Division) denied her application, and Ms. J requested a hearing.¹

Ms. J’s hearing was held on June 22, 2016. She appeared for the hearing and was represented by her daughter, L C, who also holds power of attorney for her. Ms. C, B P, the administrator of the assisted living home (ALH) where Ms. J resides, and N H, a caregiver at the ALH, all testified on her behalf. Victoria Cobo represented the Division, and assessor David Chadwick testified for the Division.

Ms. J undeniably suffers from poor physical and mental health. However, she has not met her burden of establishing that her care needs are sufficiently acute to qualify her for Waiver services. As a result, the Division’s decision denying her application is affirmed.

II. Method for Assessing Eligibility

The Alaska Medicaid program provides Waiver services to adults with physical disabilities who require “a level of care provided in a nursing facility.”² The nursing facility level of care³ requirement is determined by an assessment which is documented by the CAT.⁴ The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,⁵ and whether an applicant has impaired cognition or displays problem behaviors.⁶ Each of the assessed items is coded and contributes to a final numerical score. For instance, if an

¹ Ex. C.
² 7 AAC 130.205(d)(4).
³ See 7 AAC 130.205(d)(4); 7 AAC 130.215.
⁴ 7 AAC 130.215(4).
⁵ Ex. E13-15.
⁶ Ex. E16-19.

individual requires 5 days or more of therapies (physical, speech/language, occupation, or respiratory therapy) per week, he or she would receive a score of 3.⁷

The CAT also records the degree of assistance an applicant requires for certain activities of daily living (“ADLs”), which include five specific categories: bed mobility (moving within a bed, also referred to as “body mobility”), transfers (i.e., moving from the bed to a chair or a couch, etc.), locomotion (walking or movement when using a device such as a cane, walker, or wheelchair) within the home, eating, and toilet use (which includes transferring on and off the toilet and related cleansing and hygiene care).⁸

In order for a person who only has physical assistance needs to score as eligible for Waiver services on the CAT, he or she would need a self-performance code of 3 (extensive assistance) or 4 (total dependence) and a support code of 2 or 3 for three or more of the five specified activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting).⁹

A person can also receive points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive behaviors, etc.), and if they require either limited or extensive assistance with the five specified activities of daily living.¹⁰

The results of the assessment portion of the CAT are then scored. If an applicant’s score is a 3 or higher, the applicant is medically eligible for Waiver services.¹¹

III. Facts

The following facts were established by a preponderance of the evidence.

Ms. J is 57 years old. She has been diagnosed with epilepsy (specified as “not intractable”), viral hepatitis C, hepatic encephalopathy, alcohol dependence, polysubstance abuse, chronic obstructive pulmonary disease, alcoholic cirrhosis of the liver, depression, iron deficiency anemia, mild cognitive impairment, vertigo (intermittent), thyroid disease, migraines, and an unspecified disorder causing focal (localized) seizures.¹²

⁷ Ex. E31.

⁸ Ex. E20.

⁹ Ex. E31.

¹⁰ Ex. E31.

¹¹ Ex. E31.

¹² Ex. E3; Chadwick testimony; Providence Alaska Medical Center record, 2/12/16.

Ms. J was assessed on April 1, 2016 by Mr. Chadwick, an assessor and program manager employed by the Division, to determine whether she qualified for Waiver services. Subsequently, the Division notified Ms. J that her application was denied by letter dated April 8, 2016.¹³

Mr. Chadwick testified at the hearing regarding the assessment and his conclusions regarding Ms. J's physical and mental function. In addition, those conclusions, as of the date of the assessment visit, are documented on the Consumer Assessment Tool (CAT) as follows:

- Mr. Chadwick performed a functional assessment of Ms. J that showed she had good upper extremity range of motion, was able to touch her hands over her head and touch her hands behind her back, had strong grips with both hands, had “good dexterity,” was able to lean forward to touch her feet while seated, but was not able to cross her hands over her chest and stand up.¹⁴
- He performed a cognition assessment of Ms. J and noted she was able to draw a clock (although it “was not a very good clock”); and she was able to recall two of three items, five minutes after having the items mentioned to her.¹⁵
- Ms. J did not require any assistance with the activity of daily living (ADL) of bed mobility, based upon the assessor's observation of her repositioning herself in bed and in a chair, and the ALH staff's comments that she does not need help repositioning in bed.¹⁶ Ms. J was given a score of “0/0” for bed mobility (“independent/no setup or physical help from staff”).¹⁷
- Ms. J required supervision with the ADL of transfers, based upon the assessor's observation of her standing up from a kitchen table under supervision of an ALH staff member; she was given a score of “1/0” for transfers (“supervision/no setup or physical help from staff”).¹⁸
- Ms. J did not require any assistance with the ADL of locomotion within the home, based upon the assessor's observation of her walking “with weight lightly placed on [her] cane,” and Ms. J's statement that she was able to walk with the use of her cane

¹³ Ex. D.

¹⁴ Ex. E4; Chadwick testimony.

¹⁵ Ex. E4; Chadwick testimony.

¹⁶ Ex. E6.

¹⁷ *Id.*

¹⁸ *Id.*

inside the home and using a walker outside the home; she was given a score of “0/0” for locomotion.¹⁹

- Ms. J did not require any assistance with the ADL of eating, based upon her statement to that effect and the assessor’s observations of her range of motion and manual dexterity; she was given a score of “0/0” for eating.²⁰
- Regarding the activity of toileting, the assessment found, based upon the statements of Ms. J and ALH staff, that Ms. J has “rare episodes of incontinence,” which occur less than weekly and are controlled with diapers; she is usually able to clean herself but occasionally needs help.²¹ She was scored a “1/1,” meaning she requires supervision and setup help, along with non-weight bearing assistance once or twice per week.²²
- Ms. J had no wounds that required care, and she was not receiving any nursing services or therapies at the time of the assessment.²³
- Ms. J displayed some cognition issues, in the form of short-term memory problems and “moderately impaired” cognitive skills for daily decision-making; she was deemed to not require professional nursing to manage her cognitive patterns.²⁴ The assessor’s total “cognition” score for Ms. J was 9, which was arrived at from a “memory for events” score of 2 (“cannot recall entire events ... or names of close friends or relatives without prompting”), a “memory and use of information” score of 1 (“has minimal difficulty remembering and using information ... requires direction and reminding one to three times per day ... can follow simple written instructions”), a “global confusion” score of 2 (“periodic confusion during daytime”), a “spatial orientation” score of 3 (“gets lost in own home or present environment”), and a ‘verbal communication’ score of 1 (“minor difficulty with speech or word-finding difficulties”).²⁵

¹⁹ Ex. E7.

²⁰ Ex. E9.

²¹ *Id.*

²² *Id.*

²³ Ex. E13-15.

²⁴ Ex. E16.

²⁵ Ex. E17.

- Ms. J was assessed with some minor behavioral issues, in the form of wandering (“moved with no rational purpose, seemingly oblivious to needs or safety”) four to six days per week, but less than daily.²⁶ She was also assessed as engaging in “socially inappropriate/disruptive behavior,” four to six days per week, but less than daily; these behaviors were noted as “not easily altered.”²⁷ Her total behavior score in the CAT was 5, which was arrived at from a score of 1 for sleep patterns (“sleeps noticeably more or less than normal”), a score of 2 for wandering (“wanders within the facility ... and may wander outside, but does not jeopardize health and safety”), a “behavioral demand” score of 1 (“attitudes, habits and emotional states limit the individual’s type of living arrangement and companions”), a “danger to self and others” score of 0 (“is not disruptive or aggressive, and is not dangerous”), and a score of 1 for “awareness of needs/judgment” (regarding her “needs that must be met to maintain self care,” she “sometimes (1 to 3 times in last 7 days) has difficulty understanding those needs that must be met but will cooperate when given direction or explanation”).²⁸

Ms. J currently resides in an ALH administered by Ms. P. Previously she had lived in an ALH that provided a lower level of care; she moved to the current ALH in approximately September 2015. Ms. J’s daughter Ms. C testified that the staff at the previous ALH were not able to care for her mother; the lower level of care provided there was insufficient, and she wandered off and had seizures more often than she does in her current ALH environment. Ms. P and Ms. C explained that without the benefits available under the Waiver program, Ms. J will not be able to afford to stay at her current ALH. It was also confirmed that Ms. J is not currently receiving Medicaid general relief benefits.

In their testimony, Ms. P and Ms. C disagreed in a general sense with some of the scoring in the CAT. They testified that Ms. J may be fairly independent with ADLs on her “good days,” but on her “bad days” she requires a higher level of assistance. Ms. P estimated that such bad days occur about three times per month.²⁹ Ms. C elaborated on Ms. P’s testimony, stating that Ms. J’s “three-per-month” bad days are when she doesn’t even get out of bed and is sometimes incoherent, but there are other days that occur more frequently where she does get up but she

²⁶ Ex. E18.

²⁷ *Id.*

²⁸ Ex. E19.

²⁹ P testimony.

requires more physical assistance than on her good days.³⁰ Ms. H, a caregiver at the current ALH, testified that Ms. J has such bad days several times per week, perhaps every other day, and on those days she requires weight-bearing assistance with locomotion, transfers, and toileting.³¹ Both Ms. P and Ms. C testified that Ms. J's seizures seem to be under control at the present time due to increases in her medication, but they anticipate that they could very well get out of control again in the near future.

Ms. C and Ms. P did not dispute the CAT scoring regarding Ms. J not requiring wound care, professional nursing services or therapies at the time of the assessment. They both commented, however, on Ms. J's behavioral and cognitive deficits, explaining that they could lead to dangerous situations, such as Ms. J smoking near her oxygen tank or leaving a lit cigarette on the ALH's wooden outdoor patio. However, Ms. C and Ms. P did not dispute the scoring given to Ms. J on the CAT regarding cognition and behavior.

Ms. J appeared in person at the hearing. She did not have portable oxygen with her at the hearing and for a short time at the start of the hearing appeared to experience some difficulty with her breathing. After a few minutes her difficulty abated and she was able to speak briefly on her own behalf. She did not seem to grasp the technical requirements for Waiver program eligibility; she testified only generally about suffering from consistent headaches and dizziness, and about being appreciative of the help she gets from the ALH staff.³²

III. Discussion

Because this is a case in which a claimant is appealing the denial of an initial application for benefits, the claimant, Ms. J, has the burden of proving by a preponderance of the evidence that the Division's denial was incorrect.³³

It is undisputed that Ms. J has both "good days" and "bad days," in the sense that her need for assistance can vary significantly from day to day. The challenge in this case lies in determining whether her needs on her bad days are great enough, and occur frequently enough, to result in the scoring on the CAT being incorrect, and most importantly, whether any corrections to the CAT scoring would result in her being eligible for the Waiver program.

³⁰ C testimony.

³¹ H testimony.

³² J testimony.

³³ 7 AAC 49.135.

Ms. J does not receive or require professional nursing services, although she may require such services in the future if her seizures worsen. Nor does she receive oxygen therapy that requires professional medical assistance.

Regarding Ms. J's seizures, Mr. Chadwick testified that he had thoroughly reviewed medical records that Ms. C submitted after the assessment took place, and the records did not support a conclusion that Ms. J's seizures are uncontrolled or frequent enough to require professional nursing assistance. Review of the records by the undersigned administrative law judge confirms that they do not indicate that her seizures are considered to be uncontrolled or intractable at this time.³⁴

Because Ms. J does not receive professional nursing services or therapies five times or more per week, she is not eligible for Waiver services based upon those criteria.³⁵

Next, as discussed above, the scoring on the CAT indicates that Ms. J does not require extensive or limited physical assistance with any of the five specified activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting) that can form the basis for Waiver program eligibility. She received scores of 0/0 for bed mobility, locomotion and eating; 1/0 for transfers (supervision but no setup or physical help from staff), and 1/1 for toileting (supervision and setup help, with non-weight bearing assistance once or twice per week). Ms. P, Ms. C and Ms. H all testified, however, that on her bad days she requires a much greater degree of physical assistance than those scores would indicate.

In order to be eligible for Waiver services based on ADL assistance alone, Ms. J would need to require "extensive assistance," a score of 3/2 on the CAT, for at least three of the five specified ADLs. Extensive assistance is defined as requiring, over a seven-day period, weight-bearing support at least three times for the given ADL, or alternatively "full caregiver performance during part (but not all) of last seven days."³⁶

The testimony presented on Ms. J's behalf did not establish, by a preponderance of the evidence, that her need for assistance with any of the five specified ADLs reaches the level of extensive assistance. Ms. J's scores for eating and bed mobility were not disputed during the hearing. Regarding the other three specified ADLs—locomotion, eating and toileting—Ms. H testified that as often as "every other day," she has to provide weight-bearing assistance to Ms. J.

³⁴ See, e.g., ALH documents p. 28, 3/29/16, indicating physician comments "seizures – stable."

³⁵ Ex. E31, sections NF 1(a) and (d).

³⁶ See, e.g., ex. E9.

Ms. P and Ms. C did not provide precise estimates of how often in a given week Ms. J requires extensive assistance for those ADLs.³⁷

By contrast, assessor Chadwick noted in the CAT that Ms. J “was observed standing [up] from a kitchen table under supervision from a staff member ... [n]o assistance provided.”³⁸ He also noted that she “was observed walking from the kitchen to the bedroom and to the bathroom ... [i]ndependent locomotion with weight lightly placed on the cane, even steps.”³⁹ Regarding toileting, Mr. Chadwick noted that Ms. J “reported that she is able to clean herself after going to the bathroom,” that she “was observed walking and transferring independently with supervision using her cane,” and that she “displayed good range of motion to reach and clean herself,” with “good grips and good dexterity.”⁴⁰

In addition, the administrative law judge observed Ms. J transferring from a chair, and walking in and out of the hearing room, completely unassisted and unsupervised at the end of the hearing, prior to the record being closed.⁴¹ Ms. J did not use a cane on the day of the hearing.

Taking all of this evidence into account, Ms. J did not meet her burden of proving by a preponderance of the evidence that she requires extensive assistance, i.e. scores of 3/2, for transfers, locomotion, or toileting. To the extent that she may require that level of assistance on some of her “bad days,” the frequency with which that occurs was not established with a sufficient degree of certainty at the hearing. To say that it occurs more than three times per month is not enough. Testimony and/or documentation must be presented to establish that significant, weight-bearing assistance must be provided at least three times per week. To the extent that Ms. H’s testimony spoke to this question of the frequency of Ms. J’s need for extensive assistance with ADLs, she appeared to conflate the type of physical assistance required for a 3/2 score with her provision of supervision, guidance and direction to Ms. J.

Ms. J could also be deemed eligible for Waiver services if she received a cognition score of 13, or a behavior score of 14, and if she met the additional requirement of a minimum of limited assistance in at least one of the five specified ADLs.⁴² Her cognition and behavior scores, however, are only a 9 and a 5, respectively. In addition, the medical records submitted by

³⁷ As noted above, Ms. P estimated that Ms. J’s “bad days” occur about three times per month, or less than once per week.

³⁸ Ex. E6.

³⁹ Ex. E7.

⁴⁰ Ex. E9.

⁴¹ Ms. C testified that Ms. J was having what would be considered a “good day” on the date of the hearing.

⁴² Ex. E32, sections NF 3 and NF 6.

Ms. C do not indicate neurologic deficits to a degree necessary to support higher scores.⁴³

Therefore, at this time she cannot qualify for Waiver services based on cognition or behavior.

Ms. J needs fairly extensive supervision, so that she doesn't get lost when she wanders in the home or in public settings, and so that she doesn't cause a fire or explosion by smoking near her oxygen. But these needs do not rise to the level that would qualify her for Waiver program benefits. Similarly, at certain times she may require extensive assistance with some of her ADLs. But it was not established at the hearing that she requires extensive assistance frequently enough to qualify for the Waiver program. If, in the future, her need for assistance with ADLs increases, or her neurologic deficits worsen, she may reapply for the Waiver program.

IV. Conclusion

Ms. J did not meet her burden of establishing that her physical care needs are sufficiently acute to qualify her for Medicaid Waiver services. The Division's decision to deny her application, therefore, is upheld. To the extent that Ms. J's situation worsens, she is encouraged to reapply for this program.

Dated this 20th day of July, 2016.

Signed _____

Andrew M. Lebo

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 4th day of August, 2016.

By: *Signed* _____

Name: Andrew M. Lebo

Title: Administrative Law Judge

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

⁴³ See, e.g., Providence Alaska Medical Center records, p. 47.