

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

In the Matter of:)
)
 M D) OAH No. 16-0571-MDS
) Agency Case No.

DECISION

I. Introduction

The issue in this case is whether M D is currently eligible for Medicaid Home and Community-Based Waiver services (waiver services). To be eligible, an applicant must generally demonstrate that he or she requires either skilled nursing care, intermediate nursing care, extensive assistance with at least three designated activities of daily living (ADLs),¹ or has serious cognitive or behavioral problems. The Division of Senior and Disabilities Services (DSDS or Division) conducted an assessment on April 26, 2016 and determined that Ms. D does not currently require skilled nursing care, intermediate nursing care, or extensive assistance with three or more "shaded" activities of daily living, and has no significant cognitive or behavioral problems.² Accordingly, the Division denied Ms. D's application for waiver services.³

My independent review of the record indicates that Ms. D does not currently require skilled or intermediate nursing care as defined by the Division's regulations. The preponderance of the evidence also indicates that Ms. D does not currently require extensive assistance with three or more ADLs, and that she presently has no significant cognitive or behavioral problems. Accordingly, the Division was correct to deny Ms. D's application for waiver services. The Division's decision denying Ms. D's application for waiver services is therefore affirmed.⁴

¹ See 7 AAC 130.205, 7 AAC 130.215, 7 AAC 140.510, 7 AAC 140.515, and the scoring page of the Consumer Assessment Tool (CAT). These five ADLs, known as the "shaded" ADLs, are body mobility, transfers, locomotion, eating, and toilet use.

² Exhibits D, E.

³ Exhibit D.

⁴ The record in this case indicates that Ms. D currently receives services through the Medicaid Personal Care Assistant (PCA) program, and that she has been accepted into the General Relief Program's Assisted Living Facility program (although she currently chooses to remain living in her own home). Ms. D may seek additional PCA services by submitting a service plan amendment request. In addition, should Ms. D's condition deteriorate significantly in the future, she may reapply for waiver services, and obtain a new assessment, at that time.

II. Facts

A. *Ms. D's Current Diagnoses and Relevant Medical History*

Ms. D is a 97-year-old woman who lives in her own private apartment within a senior housing development.⁵ Her medical diagnoses include abdominal pain, abnormality of gait, abnormal jaw closure, abnormal weight loss due to malnutrition, anemia, Bell's palsy, cachexia, cardiac arrhythmia, diverticulitis, dry mouth, dysphagia, malignant neoplasm of the parotid gland, muscle weakness, osteoporosis, and syncope.⁶ She takes no prescription medications, but does take some non-prescription medications.⁷

Ms. D has poor dentition, and the right side of her face is somewhat numb due to a parotidectomy.⁸ She is at risk for choking and for falls,⁹ and both her arms are weak.¹⁰ She lost approximately 40 pounds during the last year because she underwent radiation therapy which affected her sense of taste.¹¹

On June 17, 2016 M J. T, M.D., Ms. D's primary treating physician, wrote a letter or memo on Ms. D's behalf, which states in relevant part as follows:¹²

M D is a 97 year old lady who has had surgery and radiation for parotid gland cancer. She is very quickly declining with progressive weight loss and weakness and now has bladder and bowel incontinence at times. She needs assistance on a daily basis with food preparation, personal care, and ambulation and rides to appointments. Her needs can no longer be met by all of her good friends, and at this point she needs to be in an assisted living facility.

On June 20, 2016 Ms. D was evaluated for home health services.¹³ As to Ms. D's body mobility, the assessment states that she has "no limitations," can move independently in her bed and chair, and can make "major and frequent changes in position without assistance."¹⁴ With regard to transfers, the assessment found that Ms. D is "able to independently transfer."¹⁵ With regard to locomotion, the assessment found that Ms. D "requires use of a two handed device" (such as a X or two crutches) in order to walk alone on a level surface, but requires

⁵ Exhibit E3; G X's hearing testimony.

⁶ Exhibit E5; Exhibit 3 pp. 6, 7, 12.

⁷ Exhibit E22.

⁸ Exhibit 3 p. 10.

⁹ Exhibit 3 p. 5.

¹⁰ Exhibit 3 pp. 10, 15.

¹¹ Exhibit 3 p. 22.

¹² Exhibit 1 p. 2.

¹³ Exhibit 3 pp. 2 - 21. This evaluation was performed by nurses who were not employed by the Division.

¹⁴ Exhibit 3 p. 11.

¹⁵ Exhibit 3 p. 16.

supervision and assistance to walk on uneven surfaces or go up or down stairs.¹⁶ With regard to eating, the assessment found that Ms. D was "able to feed herself independently," but requires meal set-up, or intermittent assistance or supervision, or a pureed diet.¹⁷ With regard to toilet use, the assessment found that Ms. D is able to transfer on and off her toilet independently and that she can adjust her clothing and perform her own post-toileting hygiene if the necessary products are laid out for her beforehand.¹⁸ Finally, the assessment states that Ms. D receives assistance with ADLs or IADLs, from persons other than her home health care provider, only one or two times per week.¹⁹

As to Ms. D's degree of physical activity, the assessment states that she "walks frequently," that she walks outside her bedroom twice per day, and that she walks within her bedroom every two hours except when asleep at night.²⁰ As to skin lesions, the assessment found that Ms. D has no surgical wounds, pressure ulcers, or open sores.²¹ As to understanding the spoken word, the evaluation states that Ms. D understands when someone is talking to her, and has "clear comprehension without cues or repetition."²² As to speaking, the evaluation indicates that Ms. D "[e]xpresses complex ideas, feelings, and needs clearly, completely, and easily in all situations with no observable impairment."²³ As to basic cognitive functioning, the evaluation found that Ms. D was alert, oriented, able to focus and shift attention, and able to comprehend and recall tasks independently.²⁴ As to behavioral problems, the assessment stated that Ms. D has "impaired decision-making; failure to perform usual ADLs or IADLs; inability to appropriately stop activities, [and] jeopardizes [her] safety through actions."²⁵ The evaluation described Ms. D's overall status as follows:²⁶

The patient is temporarily facing high health risks but is likely to return to being stable without heightened risks for serious complications and death (beyond those typical of the patient's age).

¹⁶ Exhibit 3 p. 16.

¹⁷ Exhibit 3 p. 16.

¹⁸ Exhibit 3 p. 15.

¹⁹ Exhibit 3 p. 18.

²⁰ Exhibit 3 p. 11.

²¹ Exhibit 3 pp. 11 - 12.

²² Exhibit 3 p. 10.

²³ Exhibit 3 p. 10.

²⁴ Exhibit 3 p. 14. In a different location on the assessment form, however, it was stated that Ms. D is "forgetful" (Exhibit 3 p. 15).

²⁵ Exhibit 3 p. 23.

²⁶ Exhibit 3 p. 8.

B. Relevant Procedural History

The assessment which resulted in the filing of this case was performed on April 26, 2016 by David Chadwick of DSDS.²⁷ Based on that assessment, Mr. Chadwick concluded that Ms. D is not currently eligible for participation in the waiver services program.²⁸ Accordingly, on May 5, 2016 the Division mailed a notice to Ms. D stating that it had determined that she did not require the level of care necessary to qualify for waiver services, and that her waiver application had therefore been denied.²⁹ On May 25, 2016 Ms. D's Care Coordinator requested a hearing to contest the Division's decision.³⁰

Ms. D's hearing was held on June 29 and July 1, 2016. Ms. D participated in the hearing by phone, represented herself, and testified briefly on her own behalf. Ms. D's Care Coordinator, G X, and her friends J and K U, participated by phone and testified on Ms. D's behalf. The Division was represented by Victoria Cobo, who participated by phone. David Chadwick participated by phone and testified for the Division. The record closed at the end of the hearing on July 1, 2016.

III. Discussion

A. Applicable Burden of Proof, Standard of Proof, and Standard of Review

Pursuant to applicable state and federal regulations, Ms. D, as applicant, bears the burden of proof in this case.³¹ The applicable standard of proof is the "preponderance of the evidence" standard.³² This standard is met when the evidence, taken as a whole, shows that the fact sought to be proved is more probable than not or more likely than not.³³

The standard of review in a Medicaid "Fair Hearing" proceeding is *de novo* review.³⁴ Pursuant to this standard, the administrative law judge 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.

²⁷ Exhibit E; David Chadwick's hearing testimony.

²⁸ Exhibits E31 - E32; David Chadwick's hearing testimony.

²⁹ Exhibit D.

³⁰ Exhibit C.

³¹ 42 CFR § 435.930, 7 AAC 49.135.

³² 7 AAC 49.135.

³³ *Black's Law Dictionary* at page 1064 (West Publishing, Fifth Edition, 1979).

³⁴ 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).

B. Relevant Medicaid Waiver Services Statutes and Regulations

The Medicaid program has a number of coverage categories. One of those categories is the Home and Community-Based Waiver Services program³⁵ (“waiver services”). 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.³⁶ Alaska participates in the waiver services program.³⁷

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. D), that level of care must be either “intermediate care” as defined by 7 AAC 140.510, or “skilled care” as defined by 7 AAC 140.515.³⁸ 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 is relatively stable and where the emphasis is on maintenance rather than rehabilitation

³⁵ 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; this agreement waives certain Medicaid eligibility and income requirements which would otherwise apply. *Id.*

³⁶ *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].

³⁷ 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

³⁸ 7 AAC 130.215.

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.³⁹ Under the CAT, an individual can qualify for waiver services by demonstrating a need for extensive assistance with at least three designated ADLs, even without demonstrating a need for skilled or intermediate level nursing care.⁴⁰

Finally, under the CAT, an individual may qualify for waiver services by having a certain minimum level of nursing needs and/or cognitive and/or behavioral problems, *combined with* a certain minimum level of need for physical assistance with ADLs.⁴¹

C. The Consumer Assessment Tool (CAT)

Under 7 AAC 130.215, 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), adopted by regulation at 7 AAC 160.900(d)(6). The activities of daily living (ADLs) scored by the CAT are body mobility, transfers, locomotion, dressing, eating, toilet use, personal hygiene, and bathing.⁴²

The CAT 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.⁴³ The self-performance scores relevant to eligibility 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).

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 to perform a particular ADL. The support scores relevant to eligibility 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).

An individual can qualify for waiver services by scoring a three (extensive assistance required) or a four (completely dependent) in the self-performance portion of three or more of

³⁹ Exhibit E31.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Exhibits E6 - E11.

⁴³ 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."

the five "shaded" ADLs listed at page 20 of the CAT.⁴⁴ The five "shaded" ADLs are bed / body mobility, transfers, locomotion, eating, and toilet use.⁴⁵

D. Does Ms. D Require Skilled or Intermediate Nursing Care?

A person qualifies for waiver services if he or she requires skilled nursing services as defined by 7 AAC 140.515, or intermediate nursing services as defined by 7 AAC 140.510. David Chadwick, the assessor who performed Ms. D's assessment, testified at hearing that Ms. D has no skilled or intermediate-level nursing needs. Neither Ms. D nor her witnesses asserted that she has any skilled or intermediate nursing needs as those are defined in the Division's regulations. Independent review of Ms. D's medical records likewise fails to disclose the existence of any need for skilled or intermediate nursing care.

In summary, the preponderance of the evidence indicates that, although Ms. D requires assistance with most instrumental activities of daily living,⁴⁶ and although she requires assistance with one activity of daily living,⁴⁷ she does not currently require skilled or intermediate nursing care. Because Ms. D does not require that level of nursing care, she does not qualify for waiver services on that basis. However, this does not end the inquiry because, under the CAT, an applicant can qualify for waiver services, even without requiring intermediate nursing care, if the applicant's CAT scores in other areas are sufficiently high.

E. Does Ms. D Qualify for Waiver Services Based on her CAT Scores?

The Consumer Assessment Tool's scoring summary is located at page 29 of the CAT.⁴⁸ As indicated by that scoring summary, there are numerous possible scoring combinations. Some of these combinations (discussed below) allow a person to qualify for waiver services without demonstrating a need for nursing services. The CAT divides these possible 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. Ms. D did not assert that she satisfies NF1(a), and the record indicates that she does not. The second way (under NF1(b)) is to require use of a ventilator or respirator at least three days per week. Ms. D did

⁴⁴ Exhibit E20.

⁴⁵ Exhibit E20.

⁴⁶ Exhibit E28.

⁴⁷ Exhibit E13.

⁴⁸ Exhibits E31 - E32.

not assert that she satisfies NF1(b), and the record indicates that she does not. The third way (under NF1(c)) is to require care due to uncontrolled seizures at least once per week. Ms. D did not assert that she satisfies NF1(c), and the record indicates that she does not. The fourth way (under NF1(d)) is to receive some form of therapy at least five days per week. Ms. D did not assert that she satisfies NF1(d), and the record indicates that she does not.

The fifth way to qualify for waiver services 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 "shaded" ADLs listed at page 18 of the CAT.⁴⁹ The "shaded" ADLs are body mobility, transfers, locomotion, eating, and toilet use. Ms. D's level of need for assistance with the five "shaded" ADLs is analyzed below in the order stated.

a. Body / Bed Mobility

For purposes of waiver services eligibility, body / bed mobility is defined as how a person moves to and from a lying position, turns side to side, and positions his or her body while in bed.⁵⁰ In order to receive a self-performance score of three (extensive assistance) with regard to bed / body mobility, a person must require either weight-bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁵¹

Mr. Chadwick testified that Ms. D is independent with body mobility (CAT score 0/0).⁵² At hearing, Ms. D's witnesses testified that her overall condition is deteriorating, and that she becomes exhausted over the course of each day, such that she can perform various activities in the morning but not later in the day. However, neither Ms. D nor her witnesses asserted that she regularly requires assistance with body mobility, let alone the extensive level of assistance required to score points for waiver eligibility. Although Ms. D's medical records indicate that her arms are weak, the assessment completed by her home healthcare nurses indicates that she is still able to reposition herself independently. Accordingly, the preponderance of the evidence indicates that Ms. D is independent as to body mobility (CAT score 0/0).

b. Transfers

For purposes of waiver services eligibility, a transfer is defined as how a person moves between surfaces (with the exception of the toilet and bathtub or shower, which are handled as

⁴⁹ Exhibit E20.

⁵⁰ Exhibit E8.

⁵¹ *Id.*

⁵² Exhibit E8; David Chadwick's hearing testimony.

separate ADLs).⁵³ 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 part of the time.⁵⁴

Mr. Chadwick testified that he observed Ms. D transfer during the assessment, using her X but without any physical assistance. Based on this, Mr. Chadwick found that Ms. D is independent with transfers (CAT score 0/0).⁵⁵ Although Ms. D's medical records indicate that her arms are weak, the assessment completed by her home healthcare nurses also indicates that she is still able to transfer independently. Finally, neither Ms. D nor her witnesses asserted that she regularly requires assistance with transfers, let alone the extensive level of assistance required to score points for waiver eligibility. Accordingly, the preponderance of the evidence indicates that Ms. D is independent with transfers (CAT score 0/0).

c. 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.⁵⁶ 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 of the activity part of the time.⁵⁷

Mr. Chadwick testified that he observed Ms. D walk through her home during the assessment, using her X, but without any physical assistance. Accordingly, Mr. Chadwick found that Ms. D is independent with in-room, single-level locomotion (CAT score 0/0).⁵⁸

On the other hand, Dr. T, Ms. D's primary treating physician, reported that Ms. D "needs assistance on a daily basis with . . . ambulation," and her home healthcare nurses reported that she requires supervision and assistance to walk on uneven surfaces or go up or down stairs. Although it is a close factual issue, I find that the preponderance of the evidence indicates that Ms. D needs limited assistance with single-level locomotion at least three times per week (CAT score 2/2).

⁵³ Exhibit E8.

⁵⁴ *Id.*

⁵⁵ Exhibit E8; David Chadwick's hearing testimony.

⁵⁶ Exhibit E9.

⁵⁷ *Id.*

⁵⁸ Exhibit E9; David Chadwick's hearing testimony. Mr. Chadwick found that Ms. D requires limited assistance with outside locomotion to access medical appointments, and I find that safety dictates that Ms. D have limited assistance with multi-level locomotion. However, a need for *extensive assistance* is necessary to receive points at Section NF1 of the CAT for purposes of waiver eligibility.

d. Eating

For purposes of waiver services eligibility, eating is defined as how a "person eats or drinks regardless of skill."⁵⁹ In order to receive a self-performance score of three (extensive assistance) with regard to eating, a person must require either weight-bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁶⁰

Mr. Chadwick testified that, although Ms. D has some difficulty chewing without teeth, and although she cannot swallow large pills, she is still independent with eating (CAT score 0/0).⁶¹ The assessment completed by Ms. D's home healthcare nurses also indicates that she is still able to eat independently. Finally, neither Ms. D nor her witnesses asserted that she regularly requires assistance with eating, let alone the extensive level of assistance required to score points for waiver eligibility. Accordingly, the preponderance of the evidence indicates that Ms. D is independent with eating (CAT score 0/0).

e. Toilet Use

For purposes of waiver services eligibility, toilet use is defined as how a "person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet, cleanses, changes pads, manages ostomy or catheter, adjusts clothes."⁶² In order to receive a self-performance score of three (extensive assistance) for toilet use, a person must require either weight-bearing support three or more times per week, or full caregiver performance of the activity part of the time.⁶³

Mr. Chadwick testified that Ms. D told him during the assessment that she can use the toilet by herself, but wears incontinence products in case she is unable to make it to the bathroom in time.⁶⁴ Mr. Chadwick also testified that, because Ms. D is able to move about using her X and transfer independently, and because she has a good range of motion and adequate motor skills, she should be able to use the toilet independently.⁶⁵ Accordingly, Mr. Chadwick found that Ms. D is independent with toileting (CAT score 0/0).⁶⁶

Mr. Chadwick's findings are consistent with the assessment by Ms. D's home healthcare nurses, which found that she is able to transfer on and off her toilet independently, and that she can adjust her clothing and perform her own post-toileting hygiene if the necessary products

⁵⁹ Exhibit E11.

⁶⁰ *Id.*

⁶¹ Exhibit E11; David Chadwick's hearing testimony.

⁶² Exhibit E11.

⁶³ *Id.*

⁶⁴ Exhibit E11, David Chadwick's hearing testimony.

⁶⁵ *Id.*

⁶⁶ *Id.*

are laid out for her beforehand.⁶⁷ Finally, neither Ms. D nor her witnesses asserted that she regularly requires assistance with toilet use, let alone the extensive level of assistance required to score points for waiver eligibility. Accordingly, the preponderance of the evidence indicates that Ms. D is independent with toileting (CAT score 0/0).

f. Summary - Ms. D Does not Qualify Under NF1

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. The preponderance of the evidence indicates that Ms. D requires limited assistance with locomotion, but not with body mobility, transfers, eating, or toilet use. Because Ms. D does not require extensive assistance with three or more of the "shaded" ADLs, she does not qualify for waiver services on that basis.

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 the need for injections and/or IV hookups, feeding tubes, tracheotomy care or nasopharyngeal suctioning, application of treatments or dressings, administration of oxygen, the observation, assessment, or management of unstable conditions, catheter management, and/or care required due to a comatose condition. The record does not show that Ms. D requires any of these services, so she receives no points under NF2(a).

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. Ms. D does not receive any of these therapies, 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, veni-puncture, or barrier dressings for ulcers, at least three days per week. Again, however, the record does not show that Ms. D requires any of these procedures, so she receives no points under NF2(c).

The fourth 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,

⁶⁷ Exhibit 3 p. 15.

however, the record does not show that Ms. D requires any of these treatments, 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.

The first way to obtain a point (under NF3(a)) is to have short-term memory problems. Mr. Chadwick found that Ms. D has no significant short-term or long-term memory problems, and so Ms. D received no points under NF3(a).⁶⁸

The second way to obtain a point (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. Mr. Chadwick found that Ms. D is generally able to recall each of these items. Accordingly, Ms. D received no points under NF3(b).⁶⁹

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. Mr. Chadwick found that Ms. D is not moderately or severely impaired as to her cognitive skills for daily decision-making. Accordingly, Ms. D received no points under NF3(c).⁷⁰

The fourth way to obtain points (under NF3(d)) is to require *either* professional nursing care 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 Division's Supplemental Screening Tool (SST) for cognitive issues.⁷¹

As to the first item, Mr. Chadwick found that Ms. D does not require professional nursing observation, assessment, and management for cognitive problems, and this finding was not contested by Ms. D or her witnesses.⁷²

The last way to obtain points under NF3(d) is to *both* (1) score at least a 2/2 as to any shaded ADL, *and* (2) score 13 or greater on the cognitive portion of the Division's Supplemental Screening Tool (SST). This decision concludes that Ms. D requires limited assistance with locomotion, so she satisfies that portion of the test. However, Mr. Chadwick assigned Ms. D a score of only two on the Division's Supplemental Screening Tool (SST) for

⁶⁸ Exhibits E18, E32. Neither Ms. D nor her witnesses asserted that this scoring was incorrect.

⁶⁹ Exhibits E18, E32. Neither Ms. D nor her witnesses asserted that this scoring was incorrect.

⁷⁰ Exhibits E18, E32. Neither Ms. D nor her witnesses asserted that this scoring was incorrect.

⁷¹ Exhibit E32.

⁷² Exhibit E18.

cognitive issues, finding that Ms. D has minor memory problems and minor speech problems.⁷³ This finding was not contested by Ms. D or her witnesses. Accordingly, the preponderance of the evidence indicates that Ms. D should receive a score of two on the cognitive portion of the SST. 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, Ms. D receives no points under NF3(d).

Under NF3, an applicant must receive a score of one *on all four subsections of NF3* in order to receive a single "overall" point at the conclusion of NF3. Here, Ms. D received no points under subsections NF3(a), NF3(b), NF3(c), or NF3(d). Accordingly, Ms. D receives an overall score of zero at section NF3 of the CAT's scoring matrix.

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 which, when added to points obtained under other subsections of NF1 - NF6, can qualify the applicant for waiver.

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 abusive, or be physically abusive at least four days per week.⁷⁴ Mr. Chadwick found that Ms. D has none of these behavior problems.⁷⁵ So, Ms. D receives no points at NF4(a).

To receive a point under NF4(b), an applicant must *either* require professional nursing care 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 Supplemental Screening Tool (SST).⁷⁶

As to the first item, Mr. Chadwick found that Ms. D does not require professional nursing observation, assessment, and management for her behavioral problems.⁷⁷ Ms. D did not contest this finding, and in any event the preponderance of the evidence in the record supports the Division's finding on this issue.

As to the second item, as discussed in the preceding section, the evidence indicates that Ms. D requires limited assistance with locomotion at least three times per week (CAT score 2/2), so she satisfies that portion of the test. However, Mr. Chadwick assigned Ms. D a score

⁷³ Exhibit E1.

⁷⁴ Exhibits E19, E31.

⁷⁵ Exhibits E19, E31. Neither Ms. D nor her witnesses asserted that this scoring was incorrect.

⁷⁶ Exhibits E19, E31.

⁷⁷ Exhibits E19, E31.

of only one on the Division's Supplemental Screening Tool (SST) for behavioral issues, finding that Ms. D sometimes has difficulty understanding those needs that must be met for her self-care, but that she will cooperate if given an explanation or directions. This finding was not contested by Ms. D or her witnesses. Accordingly, I find that the preponderance of the evidence indicates that Ms. D should receive a score of one on the behavioral portion of the SST.⁷⁸ 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. Ms. D thus receives no points at NF4(b).

Under NF4, an applicant must receive a score of one on *each* of the two subsections of NF4 in order to receive a single "overall" point at the conclusion of NF4. Here, Ms. D receives no points under either NF4(a) or NF4(b). Accordingly, Ms. D receives an overall score of zero at section NF4 of the CAT's scoring matrix.

5. NF5

At NF5, the scores from NF2, NF3, and NF4 are added together. If an applicant receives a score of one or more, then the analysis proceeds to NF6. In this case, Ms. D received "overall" scores of zero at NF2, NF3, and NF4, giving her a total score of zero at NF5. Accordingly, Ms. D is ineligible for waiver services at level NF5 of the CAT's scoring matrix, and the analysis in this case does not proceed to NF6.

IV. Conclusion

Ms. D does not currently require skilled or intermediate nursing care as defined by the Division's regulations. The preponderance of the evidence also indicates that Ms. D does not currently require extensive assistance with three or more ADLs, and that she presently has no significant cognitive or behavioral problems. Accordingly, the Division was correct to deny Ms. D's application for waiver services. The Division's decision denying Ms. D's application for waiver services is therefore affirmed.

Dated this 10th day of August, 2016.

Signed

Jay Durych
Administrative Law Judge

⁷⁸ The assessment performed by Ms. D's home healthcare nurses states that Ms. D has "impaired decision-making" and an "inability to appropriately stop activities," and that she "jeopardizes [her] safety through actions" (Exhibit 3 p. 23). However, even if Ms. D is given the maximum score for "awareness of needs and judgement" at Section 5 of the behavioral SST, she would still receive a total score of only three on that SST.

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 19th day of August, 2016.

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.]