

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

In the Matter of)	
)	
C K)	OAH No. 16-0624-MDS
_____)	Agency No.

DECISION

I. Introduction

C K applied for Medicaid Home and Community-Based Waiver program (Waiver) services. The Division of Senior and Disabilities Services (Division) denied her application.

Ms. K has shown that she requires extensive assistance with the activities of bed mobility, transfers, locomotion, and toileting. As a result, she is eligible for Waiver services. The denial of her application is reversed.

II. Facts¹

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

C K is 57 years old. She stands 5 feet, 5 inches tall, and she weighs 550 to 570 pounds.² In addition to morbid obesity, she experiences other medical problems, including chronic obstructive pulmonary disease, hypertension, osteoarthritis of the knee, and anxiety disorders.³

Ms. K's medical conditions make many ordinary daily events more challenging. She lives at home with her husband, who helps her in numerous ways. To get from place to place, she uses an oversized manual wheelchair that her husband pushes. The chair is too wide to fit through some doorways in her house, including her bathroom entrance. Ms. K does not confidently walk more than a few steps with her walker, so this limits her use of those rooms. For this reason, in combination with her high anxiety and fear of falling, Ms. K no longer uses her bathroom.

When she falls, Ms. K cannot get up even with her husband's help. She last fell in June 2016, when her knee buckled under her as she attempted to get out of bed.⁴ Emergency medical technicians were called, and they helped her back up and into bed.

Nurse-assessor Kelley Russell, R.N., assessed Ms. K for Waiver eligibility on February 16, 2016. Ms. Russell's conclusions regarding Ms. K's physical and mental function are documented on the Consumer Assessment Tool (CAT).

¹ Unless noted otherwise, the facts are based on the testimonies of C K, E D, and Marianne Sullivan, R.N.

² K Exhibit H, p. 2 (550 pounds); Testimony of C K (570 pounds). The Consumer Assessment Tool incorrectly indicates that Ms. K weighs 380 pounds. *See* Div. Exhibit E, p. 11.

³ Div. Exhibit E, p. 5.

⁴ Testimony of B. K. *See also* K Exhibits I, J.

The CAT indicates that Ms. K is cognitively capable, and she does not display any significant behavioral problems. It also indicates that Ms. K does not need any professional nursing services, therapies, or special treatments.⁵ These findings are not challenged.

In this appeal, the relevant sections of the CAT are those that summarize Ms. K's abilities and functional limitations with respect to five different activities of daily living (ADLs). These are: bed mobility, transfers, locomotion (walking), eating and toileting.⁶ On the CAT, the nurse-assessor concluded that Ms. K requires extensive assistance from one person with her locomotion and toilet use activities (self-performance score 3, support score 2).⁷ She requires limited assistance from one person for her transfers and bed mobility activities (self-performance score 2, support score 2).⁸ She is independent with regard to her eating activities (self-performance score 0, support score 0).

Based on this assessment, on May 24, 2016, the Division denied Ms. K's application for Waiver services.⁹ Ms. K requested a hearing.¹⁰ She disagrees with the assessment's conclusions about her ability to manage her transfers and bed mobility with limited assistance. She contends that she requires extensive assistance from one person for both activities.¹¹

Ms. K's hearing took place on July 29, 2016, and the record closed that day. Ms. K appeared telephonically and represented herself. Her Care Coordinator E D testified on her behalf. Fair Hearing Representative Victoria Cobo also appeared telephonically and represented the Division. Marianne Sullivan, R.N., a supervisor in the Division's Intake and Assessment Unit, testified for the Division. The hearing was recorded. All offered exhibits were admitted into evidence.

⁵ Div. Exhibit E, pp. 15-17.

⁶ Div. Exhibit E, p. 20 (shaded areas).

⁷ Extensive assistance includes weight-bearing support provided at least 3 times over the last 7 days, or full caregiver performance of the activity during part (but not all) of the last 7 days. Div. Exhibit E, pp. 9, 11.

⁸ Limited assistance includes physical help in the guided maneuvering of limbs, or other nonweight-bearing assistance three or more times per week, or, that assistance plus weight-bearing assistance once or twice a week. Div. Exhibit E, p. 8.

⁹ Div. Exhibit D.

¹⁰ Div. Exhibit C.

¹¹ Ms. K's pre-hearing brief asserts that she requires extensive assistance from two people to transfer and extensive assistance from one person for bed mobility. See K Statement of Areas of Disagreement. At the hearing, Ms. K and her care coordinator discussed her need for weight-bearing assistance from one person in order to stand up. This decision therefore addresses her need for assistance from one person for both of the contested ADLs.

III. Discussion

A. *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.”¹² The purpose of these services is “to offer a choice between home and community-based waiver services and institutional care.”¹³

The nursing facility level of care¹⁴ requirement is determined in part by an assessment which is documented by the CAT.¹⁵ The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,¹⁶ and whether an applicant has impaired cognition or displays problem behaviors.¹⁷ Each of the assessed items is coded and contributes to a final numerical score. For instance, if an individual required 5 days or more of therapies (physical, speech/language, occupational, or respiratory therapy) per week, he or she would receive a score of 3.¹⁸

The CAT also records the degree of assistance an applicant requires for activities of daily living, which include five specific categories: bed mobility (moving within a bed), transfers (i.e., moving from the bed to a chair or a couch, etc.), locomotion (walking or movement within the home when using a device such as a cane, walker, or wheelchair), eating, and toilet use, which includes transferring on and off the toilet and personal hygiene care.¹⁹

If a person has a self-performance code of 2 (limited assistance, which consists of non-weight-bearing physical assistance three or more times during the last seven days, or limited assistance plus weight-bearing assistance one or two times during the last seven days) or 3 (extensive assistance, which consists of weight-bearing support three or more times during the past seven days, or the caregiver provides complete performance of the activity during a portion of the past seven days), plus a support code of 2 (physical assistance from one person) or 3 (physical assistance from two or more persons), that person receives points toward his or her total eligibility score on the CAT.

¹² 7 AAC 130.205(d)(1)(B), (d)(2).

¹³ 7 AAC 130.200.

¹⁴ See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

¹⁵ 7 AAC 130.230(b)(2)(B).

¹⁶ Div. Exhibit E, pp. 15-17.

¹⁷ Div. Exhibit E, pp. 18-19.

¹⁸ Div. Exhibit E, p. 31.

¹⁹ Div. Exhibit E, p. 20.

A person also can receive points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive behaviors, etc.), and required assistance with the five specified activities of daily living.²⁰

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).²¹

The results of the assessment portion of the CAT are then scored.²² If an applicant's score is a 3 or higher, the applicant is medically eligible for Waiver services.²³

B. Burden of Proof

Ms. K seeks Waiver services, so she bears the burden to prove by a preponderance of the evidence that she satisfies the eligibility requirements.²⁴ She can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs.²⁵

C. Eligibility

The only issue in this case is whether Ms. K qualifies for Waiver services because she needs extensive assistance from one person with three or more of the five scored activities of daily living.²⁶ The CAT already indicates that she requires this level of assistance with locomotion and toileting (self-performance score 3, support score 2). Ms. K challenges the assessment's conclusions regarding her need for assistance with transfers and bed mobility.

1. Transfers

For purposes of Waiver eligibility, "transfers" refer to how someone moves between surfaces, such as to and from a chair, wheelchair, bed, or standing position. It does not include transfers to and from the bath or toilet.²⁷ At the assessment, Ms. K told the nurse-assessor that

²⁰ Div. Exhibit E, p. 31.

²¹ Div. Exhibit E, p. 31 (NF. 1.e).

²² The various tests are abbreviated "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 are aggregated for a total nursing and ADL needs score, at NF.7. Div. Exhibit E, p. 31.

²³ Div. Exhibit E, p. 31 (NF.7).

²⁴ 7 AAC 49.135.

²⁵ 2 AAC 64.290(a)(2).

²⁶ Ms. K does not argue that she should have received Waiver eligibility points for any nursing services, special treatments, or therapies. She was receiving physical therapy twice per week by April 2016, but this does not meet the frequency requirements to qualify for a Waiver eligibility point. *See* K Exhibit G, p. 1 (receiving PT as of 4/21/16); Div. Exhibit E, p. 31, NF.2 (point for therapy if 3 or 4 times per week).

²⁷ Div. Exhibit E, p. 8.

she transfers between surfaces with assistance from her husband. The assessor observed Mr. K help Ms. K stand up from her chair. The assessor's notes indicate that Mr. K "held onto the back of her pants and steadied her as she stood." They also indicate that Ms. K was wheezing and out of breath from this effort.²⁸

At the hearing, Ms. K described her transfers somewhat differently. She explained that, when she gets out of her chair, her husband first puts her recliner in an upright position by lowering the footrest, and he places her walker in front of the recliner. Ms. K scoots toward the edge of the chair. Mr. K stands on the other side of the walker, facing Ms. K. He grasps her under her arms. Mr. and Ms. K then begin to rock back and forth together on a count of one to five, sometimes more. At the count of five, Mr. K braces himself and pulls backward on her arms, while Ms. K works to stand up. At some point in the process, Ms. K can take over and finish standing on her own. However, she cannot stand up without this kind of assistance. She asserted that Mr. K is bearing weight while he helps pull her up.

Once she is standing, Ms. K pivots so that she can sit back down in her wheelchair, or other chair that is placed next to the recliner. She can sit down without any assistance. As a result of her weak knees and a side tremor that worsens with anxiety, Ms. K described having very high anxiety if she must do more than stand and pivot from one chair to another.

Ms. K submitted medical records that support her statements about the level of assistance she requires to stand up from her recliner. A number of the submitted records are in reference to medical visits starting the day after the Division denied Ms. K's application for the Waiver program. All of the records are instructive regarding Ms. K's abilities and assistance needs between February and May 2016, however, because her condition has not changed in recent months.

On May 25, 2016, a physical therapist noted that Ms. K's "sit to stand transfers require maximum assist."²⁹ However, once standing, she can pivot and transfer with standby assistance if she is using her front-wheeled walker.³⁰ A June 8th physical therapy progress note indicates that one of Ms. K's short-term goals is to "complete sit to stand and stand pivot transfer with HD walker and minimal assist."³¹ This suggests that she could not perform those tasks with minimal,

²⁸

Id.

²⁹ K Exhibit H, p. 2.

³⁰ *Id.*

³¹ K Exhibit J, pp. 5, 7.

or limited, assistance at that time. A June 27, 2016 physical therapy note also indicates that Ms. K can move from sitting to standing only if she receives moderate to maximum assistance.³²

Mr. D has been Ms. K's care coordinator since March 2016, or for roughly four months. He visits Ms. K about once per month, and he has observed her transfer from a sitting to a standing position at least two times. He described Mr. K's assistance during sit-to-stand transfers in the same way that Ms. K did. He indicated that Mr. K must bear weight as he helps pull Ms. K forward, so she can stand up.

The Division contends that the type of assistance Mr. K offers is more like a steadying hand than a weight-bearing effort. It noted that Mr. K could not bear most or all of Ms. K's weight on his own, which is undoubtedly true. It asserted that, if Mr. K were bearing her weight as he leans backward and pulls, he would risk pulling Ms. K too far, and she would be prone to falling. The Division viewed the Ks' rocking motion as a way to develop momentum, which Mr. K then lightly guides or steers until Ms. K is standing. It compared his help to that of a railing, which Ms. K would use for steadying.

The weight of the evidence in the record does not support the Division's interpretation of Mr. K's assistance. Ms. K and Mr. D credibly testified that Mr. K is bracing himself and bearing weight while he pulls Ms. K forward. Clearly, momentum is also involved, and Mr. K also acts as a steadying force. In addition, Ms. K is actively involved, and she is bearing weight throughout the process. However, this is not inconsistent with the conclusion that Mr. K is pulling and bearing weight as Ms. K begins to stand. It is not necessary that Mr. K bear most or all of Ms. K's weight to do this.

A necessary limitation of the assessment process is that the time an assessing nurse spends with an applicant is relatively brief. As a result, the assessor may observe an applicant perform an ADL with limited assistance during the assessment, even though that applicant requires more extensive assistance on a regular basis. In this case, the assessing nurse was not available during the hearing, so she could not more fully explain her observations or assessment notes. Even assuming that Ms. K transferred to a standing position with limited assistance during her assessment, however, she has shown that she likely requires weight-bearing assistance more than three times per week for this activity.

³² K Exhibit K (6/27/16 Home Based Services Note: "Pt's ADL status hasn't changed. . . . She can TF via Mod to Max A from sit to stand . . .").

This conclusion is consistent with other information in the CAT, which documents Ms. K's shortness of breath after quite limited activity.³³ It also documents that Ms. K's weight and girth significantly impede her ability to move on her own.³⁴ In light of her relatively poor physical conditioning and her knee problems, Ms. K's size and weight make it more likely that Mr. K bears weight as he helps pull, so that Ms. K can stand up.³⁵ This assistance is needed on a regular basis, and it is more than the "guided maneuvering of limbs" or infrequent weight-bearing assistance that constitutes limited assistance.

2. Bed Mobility

Bed mobility refers to how someone moves to and from a lying position, turns side to side, and positions his or her body while in bed.³⁶ At the assessment, Ms. K told the assessing nurse that her husband helps her reposition in bed by boosting her onto her side. She indicated that she can help by partially turning herself. It does not appear that the assessing nurse observed Ms. K move or reposition in her bed. However, she noted that Ms. K becomes short of breath easily.

At the hearing, Ms. K testified that her bed has a side rail, which she uses to help position herself in bed after she is sitting down. Using the rail, she can get in position to lie down or sit up in bed without assistance. However, she cannot turn onto her right side without help.³⁷ To turn to her right, she described a process similar to the one that the Ks use for transfers. That is, on the count of five, Mr. K bears weight while he pulls to help her turn. Ms. K is also actively involved and assisting in this process.

The resolution of this issue follows the same reasoning that applied to Ms. K's transfers. First, Ms. K's description of her need for weight-bearing assistance to turn on her side in bed is credible. During the hearing, she testified consistently and forthrightly about her need for assistance; she also volunteered information about activities for which she does not need assistance. Second, her weight and girth, in addition to her chronic shortness of breath, make it unsurprising that she might require weight-bearing assistance. Third, the summary in the CAT supports Ms. K's account of her need for assistance. The nurse-assessor did not observe Ms. K

³³ After her transfer to standing during the assessment, she was "wheezing and out of breath." Div. Exhibit E, p. 8.

³⁴ See, e.g., Div. Exhibit E, pp. 5, 8, 11.

³⁵ It appears that Mr. K is the person who almost exclusively assists Ms. K to stand. She recently began receiving assistance from a personal care assistant (PCA), but at the time of hearing, the PCA had not yet helped her to transfer.

³⁶ Div. Exhibit E, p. 8.

³⁷ Because the rail is located on the left side of her bed, Ms. K indicated that she does not turn to her left in bed.

reposition in her bed or attempt to turn on her side. However, Ms. K described a weight-bearing effort when she indicated that Mr. K “boosts” her onto her side when she turns over.³⁸ Last, Ms. K’s medical records support her perspective. One of her short-term goals for physical therapy is to “complete rolling left/right with [m]inimal assist.”³⁹ This suggests that she cannot manage this activity unless she receives something more than limited assistance. Based on the totality of the evidence in the record, Ms. K more likely than not requires weight-bearing support from one person at least three times a week to help her turn on her side while she is in bed.

IV. Conclusion

Based on the totality of the evidence in the record, Ms. K has established by a preponderance of the evidence that she requires extensive assistance from one person for her transfers and bed mobility ADLs (self-performance score 3, support score 2). Since the CAT already documented her need for extensive assistance with locomotion and toileting, she is eligible for Medicaid Waiver services. The Division’s decision denying her application is reversed.

DATED: August 3, 2016.

By: Signed
Kathryn Swiderski
Administrative Law Judge

Adoption

The undersigned 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 17th day of August, 2016.

By: Signed
Name: Lawrence A. Pederson
Title: Administrative Law Judge

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

³⁸ Div. Exhibit E, p. 8.

³⁹ K Exhibit J, p. 5.