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

In the Matter of	)	
	)	
E L	)	OAH No. 16-0967-MDS
	)	Agency No.

DECISION

I. Introduction

E L was previously found eligible for the Medicaid Home and Community-Based Waiver (Waiver) program.[1] She was reassessed. The Division of Senior and Disabilities Services found that she had materially improved and was no longer eligible for Waiver.[2] Ms. L appealed and requested a hearing.[3]

A telephonic hearing was held on October 13, 2016. Victoria Cobo presented the Division's position and Assessor David Chadwick testified on its behalf. Ms. L represented herself. Ms. L testified, as did M L, her son and PCA. Ms. L's care coordinator, B C, also testified.

The Division established that Ms. L does not meet the Waiver program eligibility requirements. The record shows that the Division's 2015 Waiver qualification was unsupported by the record. Accordingly, its decision terminating her Waiver enrollment is affirmed.

II. Facts

Ms. L is 47 years old. Ms. L's diagnoses include epilepsy, fibromyalgia, chronic pain syndrome, migraines, adult failure to thrive, edema, compression of brain, joint pain, worsening vision, hypothyroidism, anxiety disorder, neuropathy, sleep apnea, regularly occurring urinary tract infections, shortness of breath, and nicotine dependence.[4] She takes medication for pain and seizure control. Ms. L makes her own medical decisions manages her finances.

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1 Exhibits D; E; F.
2 Exhibit D1.
3 Exhibit C.
4 Exhibit E5, medical records.

The Division found Ms. L eligible for Waiver based on a March 31, 2015, assessment.[5] That assessment stated Ms. L's eligibility was based on her needing care 5 -6 days per week to manage uncontrolled seizures.[6] The assessment noted that "E has [o]ngoing uncontrolled seizures ranging in severity and type even with current medication. She will be re-evaluated in May by her neurologist."[7]

Mr. Chadwick reassessed Ms. L on April 18, 2016.[8] That assessment showed that Ms. L's functional abilities improved and that her seizure activity did not qualify her for the Waiver program.[9] The Division notified Ms. L of its decision to terminate Waiver services on July 18, 2016.[10] Ms. L appealed the Division's decision, and her hearing was held in October 2016.[11] The record was held open in order for Ms. L to submit results of a seizure study scheduled a few days after hearing. The Division was given the opportunity to respond to the seizure study filings.[12] In addition to the seizure study, Ms. L's physician supplied a letter requesting additional PCA services.[13] The letter did not support a basis for continued Waiver program qualification.

The following assessment sections relate to Ms. L's Waiver eligibility.

1. Seizure Activity

Ms. L experiences both grand mal and petit mal seizures. Her grand mal seizures are somewhat infrequent (ten in six months), though traumatic.[14] She experiences petit mal seizures two to three times per week.[15] Ms. L testified concerning a petit mal, "it's like my brain shuts down and I go to sleep." Ms. L may sleep for up to twelve hours after experiencing a seizure. Her petit mal seizures are followed by confusion and tiredness.[16]

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5 Exhibit F.

6 Exhibit F14; F29. The 2015 assessor marked "ventilator/respirator" care as the basis for qualification. Ms. L does not have a respirator or ventilator. She has seizures. "Uncontrolled seizures" is the line directly under "ventilator/respirator." *See* F14. The Division mischaracterizes her 2015 approval as a "reporting error." *See* E32; F355. This issue is addressed under Discussion.

7 Exhibit F3; F21.

8 Exhibit E.

9 Exhibit E31-32.

10 Exhibit D.

11 Exhibit C.

12 Ms. L submitted the seizure study results after the deadline. The Division was then given time to respond to the late filing. The record closed on December 7, 2016.

13 Letter from N N, M.D., November 2, 2016.

14 Exhibit 4, Medical Facility A, Seizure study; L testimony.

15 L testimony; Exhibit 2, pp. 41-48, PCA Weekly Case Notes.

16 L testimony.

When asked what type of assistance she gets with a petit mal seizure, Ms. L explained that her PCA will observe her until she awakes.[17] Ms. L did not describe any other intervention or assistance with seizures.

A three-day seizure study confirmed that Ms. L's grand mal seizures are fairly well controlled with medication.[18] Ms. L's medical providers withheld her seizure medication before the study's start.[19] During the study, Ms. L had 2 grand mal and 3 petit mal seizures.[20] Doctor K T wrote that medication suppresses Ms. L's convulsions, but she still experiences mild complex partial seizures.[21] Ms. L testified credibly that her seizures have not decreased in the past year.

2. Bed Mobility

Ms. L is able to move from lying to sitting in bed, and reposition her body without assistance.[22] The Division's score of 0/0 is affirmed.

3. Transfer

In 2015, the Division scored Ms. L as needing limited assistance from one person for transfers (score of 2/2).[23] In 2016, the Division scored Ms. L as needing supervision or setup help only (score of 1/1).[24] At hearing, Ms. L explained that she experiences significant knee pain, which interferes with both transfer and locomotion. Ms. L testified credibly that she is fearful of falling and has experienced falls in the past. As a result, she spends the majority of her day in her recliner. Ms. C testified credibly that she observes Ms. L display external indicators of pain (wincing, shortness of breath) when transferring.

Ms. L testified that M wraps his arms around her and bears her weight when providing transfer assistance. According to Ms. L, her other PCA, Z A, also provides weight-bearing assistance, but not as much as M. In contrast, Mr. Chadwick testified that he observed Ms. L transfer with only stand-by assistance.

Ms. L denied that Mr. Chadwick observed her transfer without physical assistance. Mr. Chadwick's testimony was more credible than Ms. L's on this point. First, Ms. L's medical

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17 L testimony.
18 Exhibit 4.
19 Exhibit 4.
20 Exhibit 4.
21 Exhibit 4.
22 Exhibit E8.
23 Exhibit F6.
24 Exhibit E8.

records indicate that she has the ability to transfer without physical assistance.[25] Next, Ms. L ordinarily gets more assistance with transfers than she did during the assessment. Mr. Chadwick explained that he asks applicants to perform tasks independently if they are able, and he did so during Ms. L's assessment. Lastly, Ms. C testified to several observations, but did not provide testimonial support for Ms. L's version of the level of assistance provided during the assessment.

Overall, it is more likely than not that Mr. Chadwick's recollection of the assessment, and his contemporaneous recording of his observations, are more accurate that Ms. L's. Mr. Chadwick observed Ms. L transfer independently during the assessment. This is not dispositive, though. Ms. L's description of her pain level, and resulting unsteadiness, supports her need for weight-bearing assistance to transfer 1 or 2 times per week (a score of 2/2). Ms. L's pain level and occasional instability is supported in the record by Ms. C's testimony, as well as Dr. N's letter. Accordingly, the Division's transfer score is reversed. Ms. L's transfer score remains 2/2.[26]

4. Locomotion

In 2015, the Division scored Ms. L as needing limited assistance with locomotion.[27] In 2016, the Division scored Ms. L as needing supervision and setup help only with locomotion.[28] The assessor observed Ms. L walk from the living room to the L using her cane.[29] Ms. L's medical records contain multiple reports that Ms. L walks with a cane and has a normal gait.[30] Her medical records do not describe assistance with locomotion. Ms. L, on the other hand, described that her PCAs put their arms around her and provide weight-bearing assistance when she walks.[31] Ms. L's report is less persuasive than the combination of Mr. Chadwick's observation and that of multiple medical providers.

The Division established that Ms. L is able to locomote without hands-on physical assistance. Its score of 1/1, supervision only, is affirmed.

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25 Exhibit F57; F191.

26 The Division explained that it did not reduce Ms. L's PCA hours based on the 2016 assessment. Although this is a Waiver, not PCA, case, its determinations apply to the assessment for both programs. Ms. L's PCA score and frequency for transfer remains at 2015 levels.

27 Exhibit F7; F12;

28 Exhibit E14.

29 Exhibit E14; Chadwick testimony.

30 Exhibit F41; F45; F57; F179; F191; F230; F254; F295; Exhibit 1, p. 5 of 22; Exhibit 1, p. 12 of 22; Exhibit 2, p. 16 of 48.

31 L testimony.

5. Eating

Although Ms. L has difficulty maintaining weight, she is able to feed herself.[32] Ms. L did not submit evidence to the contrary. The Division's eating score of 0/0 is affirmed.

6. Toilet Use

The Division scored Ms. L as needing limited assistance (score of 2/2) for toileting in both 2015 and 2016. Ms. L's history of chronic UTIs supports a score of 2/2. Ms. L did not provide information that would qualify her for an increase to her toileting score. The Division's score of 2/2, limited assistance, is therefore affirmed.

However, in 2016 the Division reduced Ms. L's frequency from 4 to 2 times per day. Mr. Chadwick gave toileting assistance for post-bowel movement cleansing only. Ms. L's UTI history and regular reports of chronic and foul-smelling discharge do not support a reduction in frequency. Ms. L's toileting frequency remains 4 times per day.[33]

7. Cognition

Ms. L did not display cognitive deficits during the 2015 or 2016 assessments.[34] The Division's cognitive score of zero is affirmed.

8. Behavior

Ms. L did not display or report any problem behaviors during the 2015 or 2016 assessments.[35] The Division's behavior score of zero is affirmed.

9. Other

Ms. L does not attend physical therapy or receive professional nursing services.

III. Discussion

A. Medicaid Home and Community-Based Waiver Program

An adult with a physical disability is eligible to receive benefits under the Waiver program if he or she meets the eligibility requirements, including requiring the level of care that is normally provided in a nursing facility.[36] If eligible, the program pays for services that allow the recipient to stay in his or her home, or in an assisted living home, rather than

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32 Exhibit E11.
33 Although this is a Wavier case, the assessment scoring and frequency applies to both PCA and Waiver.
34 Exhibit E1; E18; Exhibit F16.
35 Exhibit E2; E20.
36 7 AAC 130.205(d)(2).

move into a nursing facility. The level of care that is provided in a nursing facility is described by regulation.[37]

The Division determines whether an applicant requires nursing facility level of care services by conducting an assessment.[38] For older adults or adults with disabilities, this assessment looks at nursing level services definitions and incorporates the results of the Consumer Assessment Tool (CAT).[39] The CAT is an evaluation tool created by the Department of Health and Social Services and is adopted by reference in 7 AAC 160.900(d)(6). The assessment includes the CAT and consideration of medical documentation.

Once an individual has qualified to participate in the Waiver program, certain requirements must be met before he or she can be removed from that program. Specifically, the individual must have had an annual assessment, the assessment must find that the individual has materially improved, and the assessment must have been reviewed by an independent qualified health professional.[40] The Division must also review relevant medical information of which it is aware.[41] Material improvement for an adult with physical disabilities is defined as

> no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for Waiver services.[42]

Based on this definition, a "material improvement" determination is focused on whether the individual currently qualifies for the Waiver program rather than on any specific changes in functional limitation or cognitive impairment since a prior assessment.[43] In deciding whether a person is eligible, the Division looks at the recipient's level of care needs as of the date the Division notified the person of its determination.[44] Because the

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37 Skilled nursing facility services are defined in 7 AAC 140.515. Intermediate care facility services are defined in 7 AAC 140.510.

38 7 AAC 130.213.

39 *See* 7 AAC 130.213(4)(A) & (B); 7 AAC 140.510; 7 AAC 140.515.

40 AS 47.07.045(b)(1) – (3).

41 *Krone v. Dept. of Health and Soc. Services*, 3AN-05-10283 CI, Order Clarifying Final Judgment (October 1, 2014, Alaska Superior Ct.).

42 AS 47.07.045(b)(3)(C).

43 *In re E H*, OAH No. 13-1000-MDS, at 3 (Comm'r of Health & Soc. Serv. 2013).

44 *In re T C*, OAH No. 13-0204-MDS, at 7 (Comm'r of Health & Soc. Serv. 2013).

Division seeks to terminate Ms. L's participation in the program, it has the burden of proof.[45] The Division has met this burden.

B. Ms. L does not qualify for the Waiver program.

There are several different ways in which the scoring on the CAT indicates that a person qualifies for the Waiver program. The various means of qualification are listed on the scoring page, broken down by categories NF1 – NF7.[46]

Ms. L would qualify for the program if she had certain skilled nursing needs listed in section NF1 of the scoring page. Uncontrolled seizure disorder is listed under professional nursing services.[47] Uncontrolled seizures requiring direct assistance from others at least once one a week qualifies a person for Waiver.[48] The care must be of the type performed by or under the supervision of a registered nurse.[49]

The 2015 assessment stated that Ms. L had uncontrolled seizures ranging in severity and type despite medication. In 2015, the Division approved Ms. L for Waiver eligibility based on her needing direct assistance from others 5-6 days per week (score of 3) for safe management of an uncontrolled seizure disorder.[50] The 2015 assessment does not mention what type of direct assistance Ms. L needed or received to safely manage her seizure disorder. The 2015 assessor scored Ms. L as needing direct assistance almost daily, despite the lack of quantity or seizure type identified, and the failure to identify assistance provided.

The Division characterized Ms. L's 2015 Waiver approval as a "reporting error." It is unclear whether the Division considers the reporting error the assessor's inadvertent scoring next to "ventilator/respirator" instead of "seizure disorder", or the assessor's failure to provide support for the seizure score.

In 2016, the Division scored Ms. L as needing direct assistance from others once a month for safe management of an uncontrolled seizure disorder.[51] At hearing, the Division asserted that in order to qualify for Waiver under an uncontrolled seizure disorder, the

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[45] 7 AAC 49.135.
[46] Exhibit E31–32.
[47] Exhibit. E15-17.
[48] Exhibit E31; Exhibit E15-16.
[49] Exhibit E15.
[50] Exhibit F14; F29. The Division erred and marked "ventilator/respirator" instead of uncontrolled seizure disorder.
[51] Exhibit E15-16.

person would have to experience two severe grand mal seizures a week.[52] The Division stated that this is the standard used to train assessors and the how Qualis (a third party reviewer) wants uncontrolled seizure activity defined. This argument is unsupportable.

The CAT, adopted by regulation, states that if a person needs direct assistance once a week (not twice) for the safe management of an uncontrolled seizure disorder, the person qualifies for Waiver. The CAT does not specify two severe grand mal seizures as the threshold. Nor is the threshold defined elsewhere in regulation, outside of the CAT. Likewise, nothing in the CAT defines grand mal as the only qualifying seizure type.[53]

The question, then, is whether Ms. L has uncontrolled seizures, requiring direct assistance from others, at least once a week. The record supports a finding that although Ms. L experiences multiple petit mal seizures per week, she does not require direct assistance from others for their safe management.

Ms. L described a petit mal seizure "like her brain shutting down" followed by sleep and disorientation.[54] She reported that after experiencing a petit mal, her PCA will observe her until she wakes up.[55] Ms. L did not report injuries or other concerns as a result of experiencing petit mal seizures. Observation alone does not appear to be the type of care performed by or under the supervision of a registered nurse. In sum, it does not appear that Ms. L requires direct assistance in response to her petit mal seizures. The intensity of her grand mal seizures may require direct assistance, but these occur less than once a week. Therefore, Ms. L does not qualify for Waiver based on her seizure disorder.

Considering that Ms. L's seizure activity does not currently qualify her for Waiver, and her seizure activity has not decreased in the last year, the Division incorrectly qualified Ms. L for Waiver in 2015.

Ms. L would also qualify if she needed at least extensive assistance with three or more of the "shaded" activities of daily living (ADLs). The shaded ADLs are Bed Mobility, Transfers, Locomotion, Eating, and Toilet Use.[56] Bathing and Dressing scores are not used to determine Waiver eligibility. Extensive assistance is defined as needing weight-bearing

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[52] Cobo statement.

[53] "Uncontrolled" also lacks definition. Because the Division rated Ms. L as requiring direct assistance once a month to manage her uncontrolled seizure disorder, no discussion of controlled versus uncontrolled is necessary.

[54] L testimony.

[55] L testimony.

[56] Exhibit E20.

support to perform the task three or more times during a week, or being totally dependent on a caretaker to perform the task during some, but not all, of the prior week.[57]
Ms. L does not need extensive assistance with the shaded ADLs.

Ms. L could also be found eligible for the Waiver program if she has sufficiently severe cognitive deficits or problem behaviors, or receives nursing services or therapies at least three days per week, and needs at least limited assistance with two or more of the shaded ADLs.[58] Ms. L qualifies for needing limited assistance with toileting and transfers, but she does not have other issues that combine to meet the Waiver eligibility threshold.

Lastly, the record does not support a finding that nursing home placement is appropriate for Ms. L or that she cannot function in a home setting absent Waiver services. Overall, the evidence supports the Division's determination that Ms. L is not eligible for Waiver.

IV. Conclusion

Ms. L's functional abilities do not meet the Waiver program requirements. Her seizure disorder does not qualify her for Waiver either. Accordingly, the Division's decision is affirmed. Ms. L may reapply if her condition declines.

Dated: January 31, 2017.

Signed
Bride Seifert
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 17th day of February, 2017.

By: *Signed*
Signature
Stephen C. Slotnick
Name
Administrative Law Judge
Title

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

57 *See* Exhibit E20.
58 *See* Exhibit E33.