

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

In the Matter of)	
)	
E D)	OAH No. 17-0145-MDS
_____)	Division No.

DECISION

I. Introduction

E D was receiving Medicaid Home and Community-Based Waiver (“Waiver”) benefits. The Division of Senior and Disabilities Services (Division) notified him that those benefits would be terminated. Mr. D requested a hearing to challenge the denial.¹

Mr. D’s hearing was held on March 29, and April 26, 2017. Mr. D represented himself, with assistance from his care coordinator, B C. Laura Baldwin represented the Division.

Mr. D had previously qualified for Waiver benefits because he needed extensive assistance with transfers, locomotion, and toileting. His medical condition has not improved, is unlikely to improve, and the Division did not prove, by a preponderance of the evidence, that he no longer requires extensive assistance with transfers, locomotion, and toileting. As a result, the Division’s termination of his Waiver benefits is reversed.

II. Background Facts

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

Mr. D is 65 years old and lives by himself. He was severely injured years ago, is blind in one eye, is diabetic, has chronic kidney disease, segmental and somatic dysfunction of both the cervical and thoracic spine, congestive heart failure, coronary artery disease, chronic obstructive pulmonary disease, hypertension, and experiences chronic migraines approximately 17 days per month, which incapacitate him. He also has a controlled seizure disorder.²

Two of Mr. D’s medical providers wrote letters detailing his needs. ANP J wrote that he “has severe migraines which leave [him] with an inability to care for himself when an active migraine is in progress. He has these migraines on average 17 times per month.” ANP J further wrote that Mr. D’s “migraines at times cause increased pain and decreased cognitive function

¹ Ex. C.

² E J, ANP, letter faxed March 27, 2017; Dr. Z letter, faxed April 25, 2017; Mr. D’s testimony; Ex. H, pp. 1636 – 1637.

and limited mobility.”³ Dr. Z wrote that Mr. D has “debilitating migraines, which prevent him from leaving his bed. This affects if he eats for the day, showers, walks, general movements and any other chores.” Dr. Z further wrote that “[p]rior to July 26, 2016 to present, Mr. D has shown no improvements and will continue to decrease in his health.”⁴ Dr. Z completed a department “Level of Care Verification Request” form sometime after July 26, 2016, where he stated that he would not admit Mr. D to a skilled nursing facility, and that Mr. D does not have intermediate nursing needs.⁵

Mr. D has been receiving Waiver benefits since 2007. He was last found eligible for Waiver benefits in 2015, based upon a July 14, 2015 assessment that found he required extensive assistance with transfers, locomotion, and toileting.⁶

Natasha Fromm works for the Division. She assessed Mr. D on July 11, 2016, to determine if he remained eligible for Waiver services. That assessment found that Mr. D no longer qualified for Waiver services because he no longer required extensive assistance with his transfers, locomotion, and toileting.⁷ The assessment did not show any other nursing needs, therapies, behavioral, or cognitive impairment.⁸ A registered nurse employed by Qualis Health performed a third-party document review of the Division’s determination that Mr. D was no longer eligible for Waiver services. That review concurred with the Division’s determination.⁹ The Division notified Mr. D, on January 5, 2017, that his Waiver benefits were terminated.¹⁰

B C, Mr. D’s Care Coordinator, testified that Mr. D’s functionality during the day of the assessment did not accurately reflect his condition because he did not have a migraine that day, and because he had out-of-state visitors that day, being his son and grandchildren, both of which would have affected his performance at the assessment.¹¹ Mr. D has a PCA, W X. Ms. X started working for Mr. D in mid-October 2016. She then took a leave of absence for the months of November and December and resumed working for Mr. D the beginning of January 2017. Her testimony was that his physical functioning from January forward was consistent with his level

³ ANP J’s letter.

⁴ Dr. Z’s letter.

⁵ Ex. H, p. 17.

⁶ Ex. F, pp. 7 - 9, 10, 31; Ex. H, p. 1633.

⁷ Ms. Fromm’s testimony; Ex. E, pp. 8 – 9, 11, 31.

⁸ Ex. E, pp. 1 – 2, 15 – 19.

⁹ Ex. D, p. 2.

¹⁰ Ex. D.

¹¹ Ms. C’s testimony.

of functioning when she started working with him in mid-October.¹² Mr. D testified that he stayed with his sisters during the two months he did not have a PCA, because of his care needs.

All the witnesses in this case were credible. Mr. D's testimony was a bit unfocused, but he answered the questions without being evasive.

III. Discussion

A. Method for Assessing Eligibility

An applicant must require a nursing facility level of care to qualify for Medicaid Waiver benefits. That level of care¹³ requirement is determined by an assessment which is documented by the Consumer Assessment Tool (CAT).¹⁴ The assessment measures an applicant's medical care needs, and his or her ability to function physically: it records an applicant's needs for professional nursing services, therapies, and special treatments,¹⁵ whether an applicant has substantially impaired cognition or problem behaviors,¹⁶ and the applicant's ability to perform specific measured activities of daily living (ADLs), and what type of assistance he or she needs, if any, with those activities.¹⁷ Each of the assessed items contributes to a final numerical score. For instance, if an individual required 5 days or more of therapies (physical, speech/language, occupation, or respiratory therapy) per week, he or she would receive a score of 3.¹⁸ Alternatively, if a person requires extensive physical assistance (self-performance code of 3) or is completely dependent (self-performance code of 4) with three or more of five specified ADLs (bed mobility, transfers, locomotion within the home, eating, and toileting), that person would also receive a score of 3.¹⁹

A person can also receive points for combinations of required nursing services, therapies, substantially 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.²⁰ If an applicant's score is a 3 or higher, the applicant is medically eligible for Waiver services.²¹

¹² Ms. X's testimony.

¹³ See 7 AAC 130.205(d)(4); 7 AAC 130.215.

¹⁴ 7 AAC 130.215(4).

¹⁵ Ex. E, pp. 15 - 17.

¹⁶ Ex. E, pp. 18 - 19.

¹⁷ Ex. E, pp. 8 - 9, 11, 20.

¹⁸ Ex. E, p. 31.

¹⁹ Ex. E, pp. 20, 31.

²⁰ Ex. E, p. 31.

²¹ Ex. E, p. 31.

Mr. D does not have any documented nursing needs, substantial mental or behavioral impairments, no specialized medical care, and does not receive any therapies, such as occupational or physical therapy, three or more days per week.²² Accordingly, his only path to continued Waiver eligibility is if he requires a minimum of extensive assistance with three or more of the scored ADLs (bed mobility, transfers, locomotion, eating, and toileting).

The assessment found that Mr. D required limited assistance with transfers, but was independent with locomotion and toileting.²³ He, however, contends that he requires extensive assistance with each of those activities.

1. Transfers

Transfers are defined as how a “person moves between surfaces,” such as from a sitting to a standing position.²⁴ In 2015, Mr. D was found to require extensive assistance (self-performance code of 3) for transfers.²⁵ In 2016, the assessor found Mr. D required limited assistance with transfers, meaning non-weight-bearing physical assistance or weight-bearing assistance less than three times weekly, based upon Mr. D’s statement that he had to have help on occasion, and her own observations of him standing, sitting down, and standing up again without assistance.²⁶ Mr. D said that on the day he was assessed, he was able to hold onto a cane with one hand, and still had to be helped out of the chair. He is not always able to use a cane because his hands swell.²⁷

Mr. D testified that he requires help transferring out of the bed in the morning, a minimum of six times per week – he has to be pulled out of bed. Mr. D did not claim that he needed help transferring into bed. His testimony described a process where he essentially laid face forward onto the bed and managed to get his body into bed, sometimes incompletely, from his face forward lying position.²⁸ This convoluted process to get into bed without assistance demonstrates that he would have even more difficulty in getting out of bed without assistance, corroborating his testimony that he needs assistance in transferring from the bed.

In evaluating the evidence on this point, there are several items to be considered. The first is that Mr. D’s medical condition has not improved since 2015, when he was found to require

²² Ex. E, pp. 1 - 2, 15 – 19.

²³ Ms. Fromm’s testimony; Ex. E, pp. 8 – 9, 11.

²⁴ Ex. E, p. 8.

²⁵ Ex. F, p. 7.

²⁶ Ex. E, p. 8; Ms. Fromm’s testimony.

²⁷ Mr. D’s testimony.

²⁸ Mr. D’s testimony.

extensive assistance with transfers. The second is that his physical functionality is dependent upon whether he is experiencing one of his very frequent migraines, which Dr. Z describes as debilitating, and which Dr. Z and ANP J both describe as affecting his mobility. Third, Mr. D has been Waiver eligible since 2007; given that he has been eligible for this extended period, and his medical condition is not improving, it is unlikely that his physical functioning has improved.

The Division has the burden of proof. The totality of the evidence shows that Mr. D has good days and bad days. The assessment day appears to have been atypical: Mr. D did not have a migraine and he had company, which might have affected his performance, and may well have caused him to minimize his care needs.²⁹ His testimony established that he requires assistance transferring out of bed. He described this as being pulled out of bed. This is weight-bearing assistance, three or more times per week. As a result, the Division did not show that Mr. D no longer required extensive assistance with transfers.

2. *Locomotion*

Locomotion is the act of moving about in the home. It may involve the use of an assistive device such as a cane, walker, or a wheelchair.³⁰ In 2015, the assessor found that Mr. D required extensive assistance with locomotion.³¹ In 2016, the assessor found that Mr. D was independent with locomotion, based upon Mr. D's statements that he could walk with a cane, and her observation of Mr. D walking with a limp while holding onto the walls for support.³² Mr. D, however, testified that he has to lean on his PCA to walk over half of the time. He described this as him placing his weight on her, and on occasion placing his entire weight upon her. This results in her supporting his weight, and not merely using her for balance. As a result, this would be extensive assistance. As discussed above, the totality of the evidence shows that the assessment day was atypical and that it is unlikely that Mr. D no longer requires extensive assistance with locomotion. As a result, the Division has not met its burden of proof to establish that Mr. D no longer requires extensive assistance with locomotion.

²⁹ Mr. D expressed his displeasure at being assessed in a room full of people, and the intrusiveness of the process.

³⁰ Ex. E, p. 9.

³¹ Ex. F, p. 8.

³² Ex. E, p. 9; Ms. Fromm's testimony.

3. *Toileting*

Toileting is a complex process that combines locomotion, transfers, dressing, and cleansing.³³ In 2015, the assessor found that Mr. D required extensive assistance with toileting, based upon his observation that Mr. D required “support to transfer between surfaces and [his] inability to bend & touch his feet.”³⁴ In 2016, the assessor found that Mr. D was able to toilet without assistance based upon his statements, and her observation of his standing up from a couch and sitting in a recliner, both without assistance, and walking by holding onto walls for support.³⁵ Mr. D, however, testified that he needs to be helped on and off the toilet. As found above, Mr. D requires weight-bearing transfer assistance to transfer up from his bed. He would also require weight-bearing transfer assistance with toileting. Accordingly, the Division has not met its burden of proof to establish that Mr. D no longer requires extensive assistance with toileting.

B. Termination of Waiver Services

Before the Division may terminate Waiver services for a person who was previously approved for those services, Alaska Statute 47.07.045, enacted in 2006, requires that the Division demonstrate that the recipient’s condition has materially improved to the point that the recipient “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.”³⁶ Mr. D qualified for Waiver services in 2015 due to his need for extensive assistance with locomotion, transfers, and toileting. He continues to require extensive assistance with those activities. Consequently, the Division cannot terminate his Waiver services.

IV. Conclusion

Mr. D’s condition has not materially improved to the point that he no longer qualifies for Medicaid Waiver services. The Division’s decision to terminate Mr. D’s Waiver services is reversed.

DATED this 4th day of May, 2017

Signed

Lawrence A. Pederson
Administrative Law Judge

³³ Ex. E, p. 11.

³⁴ Ex. F, p. 10.

³⁵ Ex. E, p. 11; Ms. Fromm’s testimony.

³⁶ AS 47.07.045(b)(1) and (b)(3)(C).

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 18th day of May, 2017.

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

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