

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

In the Matter of)
)
 H P) OAH No. 17-0746-MDS
) Division No.

DECISION

I. Introduction

H P applied for Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (Division) denied her application on July 3, 2017.¹ Ms. P requested a hearing.²

Ms. P’s hearing was held on August 18 and 29, 2017. Ms. P was represented by her daughter M Z, who holds her power-of-attorney. Ms. Z testified on her mother’s behalf. Victoria Cobo represented the Division. Keith Masker, the Division’s assessor, testified on its behalf.

Ms. P has significant health issues, including impaired mobility and Alzheimer’s disease. She requires limited assistance with transfers, locomotion, and toileting. She requires extensive assistance with bed mobility. These functional limitations, on their own, are not sufficient to make her eligible for Waiver services. While she has impaired cognition and minor behavioral issues, these do not rise to the level required, in conjunction with her functional limitations, to qualify her for Waiver services. As a result, Ms. P does not qualify for Waiver services, and the Division’s decision denying her application is AFFIRMED.

II. Background Facts

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

Ms. P is 69 years old and lives with family members.³ Her diagnoses include diabetes, cervicgia, shoulder pain, osteoporosis, and Alzheimer’s disease.⁴

¹ Ms. P had an assessment done on February 27, 2017 to determine whether she was eligible for personal care services. After that assessment was done, she then applied for Waiver services on June 6, 2017. The Division did not conduct a new assessment. Instead, it used the February assessment when it processed her Waiver application, which it denied on July 3, 2017. *See* Exh. D.

² Exh. C. It was apparent during the August 18, 2017 hearing, that Ms. Z wanted to challenge the amount of personal care services that she received. However, the only hearing request in this case was with regard to Waiver eligibility. Accordingly, personal care services are not an issue for this case and will not be considered.

³ Exh. E, p. 1

⁴ Exh. E, p. 3.

Ms. P was assessed at her home on February 27, 2017, by the Division’s assessor, to determine her eligibility for personal care services. The assessor determined that Ms. P was capable of moving and repositioning in bed without physical assistance, based upon his observation of Ms. P rolling from side to side in her bed.⁵ The assessor observed Ms. P transferring from her bed with her daughter “engag[ing] in an arm in arm lock w/GO as GO pushed off her mattress, & daughter helped GO getting up.” The assessor coded Ms. P as requiring only supervision and/or cueing with transfers.⁶ The assessor further observed Ms. P walking in her home, with her daughter holding her right arm, by using her walker. The assessor coded Ms. P as requiring only supervision and/or cueing with locomotion.⁷ The assessor found no need for assistance with eating, based upon the daughter’s report.⁸ Ms. P’s daughter reported that Ms. P needed help with the toilet, including adjusting clothing and cleansing. The assessor’s observation was that Ms. P “needs assistance w/transfers, adjusting her clothing, & cleansing herself.” The assessor coded Ms. P as requiring only supervision/cueing with toileting.⁹

Mr. Masker, the assessor, however, did not base his coding of Ms. P’s abilities with transfers and toileting on either the daughter’s reports or his own observation. He testified that if he had done so, he would have found her to require limited assistance with transfers, and extensive assistance with toileting. Instead, he based his coding upon her medical records, which said that she could move all of her extremities.¹⁰

The February 2017 assessment did not show any professional nursing services, therapies, cognitive impairments, and only minor cognitive and behavioral issues.¹¹ That assessment was originally done to determine whether Ms. P should receive personal care services. In June 2017, Ms. P applied for Waiver services. The Division did not reassess Ms. P, but instead used the February 2017 assessment to determine whether she was eligible for Waiver services. The assessment, as scored on the Consumer Assessment Tool (CAT), found that Ms. P was not eligible for Waiver services.¹²

⁵ Exh. E, p. 6; Mr. Masker’s testimony.

⁶ Exh. E, p. 6; Mr. Masker’s testimony.

⁷ Exh. E, p. 7; Mr. Masker’s testimony.

⁸ Exh. E, p. 9; Mr. Masker’s testimony.

⁹ Exh. E, p. 9; Mr. Masker’s testimony.

¹⁰ Mr. Masker’s testimony; Exh. E, pp. 7, 9.

¹¹ Exh. E, pp. 13 - 17; Mr. Masker’s testimony.

¹² Exh. D; Exh. E, p. 29; Mr. Masker’s testimony.

Ms. P had a separate physical therapy assessment performed on August 7, 2017. That assessment showed that Ms. P required moderate assistance to perform supine to sit transfers, and she was “[u]nable to attempt scooting and rolling due to cervical spine pain.” That assessment further showed that Ms. P required minimum assistance to perform sit to stand transfers, minimum assistance with stand to step transfers, and hand holding assistance for “gait on level indoor surface 20–25 feet.”¹³

Ms. P’s medical records from April 6, 2017 show that “she manages day to day purchases but needs help with banking.”¹⁴ Those same records show that she has symptoms of delirium, hearing noises, and “[s]ometimes she will call a random name or mess up the daughter[’]s [name].”¹⁵

Ms. Z testified regarding Ms. P’s cognitive and behavioral issues: she stated that Ms. P would forget Ms. Z’s name, did not know what season it was, and would get lost in her own home.¹⁶

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.”¹⁷ The nursing facility level of care¹⁸ requirement is determined by an assessment which is documented by the CAT.¹⁹ The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,²⁰ and whether an applicant has impaired cognition or displays problem behaviors.²¹ 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, occupation, or respiratory therapy) per week, he or she would receive a score of 3.²²

The CAT also records the degree of assistance an applicant requires for activities of daily living (ADL), which include five specific categories: bed mobility (moving within a bed),

¹³ See Physical Therapy Assessment notes, p. 3.

¹⁴ Exh. G, p. 29.

¹⁵ Exh. G, p. 32.

¹⁶ Ms. Z’s testimony.

¹⁷ 7 AAC 130.205(d)(4).

¹⁸ See 7 AAC 130.205(d)(4); 7 AAC 130.215.

¹⁹ 7 AAC 130.215(4).

²⁰ Exh. E, pp. 15 - 17.

²¹ Exh. E, pp. 18 - 19.

²² Exh. E, p. 31.

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 personal hygiene care.²³

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).²⁴

A person can also receive points for combinations of required professional 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.²⁵

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.²⁶ The relevant date for purposes of assessing the state of the facts is, in general, the date of the agency's decision under review.²⁷

B. Eligibility

Ms. P is an initial applicant for Waiver services. Initial applicants have the burden of proof by a preponderance of the evidence.²⁸ Ms. P is contesting the findings in the assessment regarding her need for assistance with four ADLs: bed mobility, transfers, locomotion, and toileting. She is also contesting the findings regarding her cognitive and behavioral impairments.

The primary evidence in this case consists of the assessment, Mr. Masker's testimony, Ms. Z's testimony, and the medical records, which include the August 7, 2017 physical therapy assessment. Although the Division's denial is dated July 3, 2017 and the physical therapy assessment took place a month later, it is close enough in time to the denial date to be considered as relevant evidence in this case.

The physical therapy assessment shows that Ms. P requires moderate assistance with bed mobility. The question then arises as to what "moderate assistance" means from a physical

²³ Exh. E, pp. 20, 31.

²⁴ Exh. E, p. 31.

²⁵ Exh. E, p. 31.

²⁶ Exh. E, p. 31.

²⁷ See 7 AAC 49.170; *In re T.C.*, OAH No. 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013) (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf>).

²⁸ 7 AAC 49.135.

therapist's standpoint and how it correlates to the term "extensive assistance" as used in the Division's assessment process. "Extensive assistance," as defined in the CAT, requires that a person receive weight-bearing assistance three or more times per week in a specified ADL.

There is a definition of moderate assistance contained on a medical dictionary website, which states that moderate assistance is:

Application of support or assistance at two points of contact by one or more people to enable a patient to perform a desired activity safely; caregivers supply 25-75% of needed effort.²⁹

Moderate assistance would therefore constitute weight-bearing support, or extensive assistance as defined in the CAT. The physical therapy assessment is persuasive evidence. Accordingly, Ms. P should have been coded as requiring extensive assistance (a score of 3/2) with regard to bed mobility.

The same physical therapy assessment found that Ms. P required minimum assistance with locomotion and transfers. The same medical dictionary provides a definition of minimum assistance as:

Application by a caregiver of support or assistance at a single point of contact to enable a patient to perform an activity safely. The patient expends at least 75% of the effort; the caregiver, 25% or less.³⁰

This is a definition which could apply to either weight-bearing (extensive assistance) or simply physical contact assistance (limited assistance). Mr. Masker's observations during the February assessment, however, showed hands-on contact with Ms. P during both transfers and locomotion, with no lifting. This supports a finding that Ms. P should receive a coding of limited assistance for both transfers and locomotion. Mr. Masker's testimony, at hearing, that he would have coded transfers as limited assistance based solely on his observations, supports this finding as to transfers. Mr. Masker also testified that he thought the locomotion assist appeared to be for balance. Physical touch, even a contact guard, still meets the CAT's definition of limited assistance: "received physical help in guided maneuvering of limbs, or other nonweight-bearing assistance 3+ times."³¹ This also supports a finding of limited assistance for locomotion.

The ADL of toileting is a bit more complex. It involves transfers, clothing adjustment, and cleansing. Due to the transfer component, at a minimum, Ms. P should receive a coding of

²⁹ <http://medical-dictionary.thefreedictionary.com/moderate+assistance> (date accessed December 28, 2017).

³⁰ <https://medical-dictionary.thefreedictionary.com/minimum+assistance> (date accessed December 28, 2017).

³¹ Exh. E, p. 7.

limited assistance for toileting. Mr. Masker testified that without reference to Ms. P's medical records, he would have coded her as requiring extensive assistance. The medical records he referred to, as he acknowledged in his testimony, did not directly bear on the need for assistance. Instead, as referenced in the CAT, they just showed that she could move her extremities: "On 1/9/17 Dr has stated 'moving all extremities symmetrically and spontaneously.' Has ROM adequate with hands."³² However, based upon the physical therapy evaluation, Ms. P only requires limited assistance with transfers. This same score, given that the evidence shows no need for weight-bearing assistance, also applies to toileting.

Scores of extensive assistance with bed mobility, and limited assistance with locomotion, transfers, and toileting, are insufficient to qualify Ms. P for Waiver services. In order to qualify based solely on ADLs, she would need to be scored as requiring extensive assistance with three or more of the scored ADLs (bed mobility, transfers, locomotion, eating, and toileting).

Her scoring of extensive assistance with one ADL (bed mobility) and limited assistance with three ADLs (transfers, locomotion, and toileting) would qualify her for Waiver services if either her cognitive impairment or her behavioral impairment were sufficiently severe. She would need a score of 14 or more for behavioral issues, or a score of 13 or more for cognitive issues to qualify.³³

The assessor scored Ms. P with a total behavior score of 4: 3 points for disturbed sleep patterns, and 1 point for behavioral demands.³⁴ The record does not contain any evidence that Ms. P wanders, is a very difficult person to manage, that she is a danger to herself or others, or that she is unaware of or unable to determine her own needs. Ms. P has the burden of proof on this point, and has not demonstrated that the total behavior score of 4 is incorrect. As a result, Ms. P's behavior issues do not provide her with a path towards Waiver eligibility.

The assessor scored Ms. P with a total cognitive impairment score of 3: 1 point for "Memory For Events," 1 point for "Memory And Use of Information," and 1 point for "Spatial Orientation." The relevant evidence in this case, being Ms. Z's testimony (lost in own home, unable to remember daughter's name), and the medical records from April 2017 (able to do day to day transactions, cannot do banking, delirium, hearing noises, "messes up daughter[']s [name]"), shows that Ms. P is arguably unable to recall entire events or names of close

³² Exh. E, p. 9.

³³ Exh. E, p. 29, Sections NF. 3 and 4.

³⁴ Consumer Assessment Tool, Sec. D2B (filed separately on August 18, 2017).

friends/relatives without prompting (Memory for Events 2 points); she has minimal difficulty remembering and using information (Memory And Use of Information 1 point); she is periodically confused during the daytime (Global Confusion 2 points); and she gets lost in her own home (Spatial Orientation 3 points).³⁵ There was no evidence showing that Ms. P's verbal communication skills were impaired. The medical records, for example, show clear communication.³⁶ It must be noted that Mr. Masker's testimony on Ms. P's cognitive abilities, and the reference in the medical records to her ability to handle day to day transactions, substantially diverge from Ms. Z's account of Ms. P's cognitive impairments. However, taking Ms. Z's testimony, as recited above, at face value, at best Ms. P would receive a cognitive impairment score of 8. In order to prevail and be found eligible for Waiver services, she would need a cognitive impairment score of 13 or higher.

As a result, even though Ms. P definitely has impaired physical functioning, neither Ms. P's behavioral issues or cognitive impairments, when considered in conjunction with her physical impairments, are sufficiently acute to qualify her for Waiver benefits.

IV. Conclusion

Ms. P requires extensive assistance with only one of the five scored activities of daily living: bed mobility. She requires limited assistance with transfers, locomotion, and toileting. However, to qualify for Waiver services, she must need extensive assistance with three of the five scored activities of daily living, or a behavioral score of 14 or more, or a cognitive impairment score of 13 or more. She has none of these. Consequently, the Division's decision to deny her application for Waiver services is affirmed.

DATED this 29th day of December, 2017.

Signed _____
Andrew M. Lebo
Administrative Law Judge

³⁵ See Consumer Assessment Tool, Sec. C4B (filed separately on August 18, 2017).

³⁶ Exh. G.

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 12th day of January, 2018.

By: Signed
Signature
Kathryn A. Swiderski
Name
Administrative Law Judge
Title

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