

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

In the Matter of)
)
E N) OAH No. 17-0912-MDS
) Agency No.
_____)

NOTICE TRANSMITTING FINAL DECISION

Attached is the administrative law judge's decision in this matter, which became the final agency decision on March 16, 2018 by operation of AS 44.64.060(f).

Judicial review of the decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the decision is mailed or otherwise distributed.

DATED March 19, 2018

By: Signed _____
Law Office Assistant
Office of Administrative Hearings

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DECISION

I. Introduction

E N was receiving Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (Division) assessed her for continuing eligibility on March 6, 2017. The Division subsequently notified Ms. N that her Waiver services were terminated.¹ Ms. N requested a hearing.²

The evidence at hearing demonstrated that Ms. N requires extensive assistance with three of her scored activities of daily living, specifically bed mobility, transfers, and toileting. As a result, Ms. N continues to qualify for Waiver services, and the Division’s decision terminating those services is reversed.

II. Background Facts and Procedural History

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

Ms. N is currently 55 years old. The Division’s assessments show that her diagnoses include a chronic obstructive pulmonary disease, hypothyroidism, diabetes, neuropathy, polyarthritis, sleep apnea, osteoarthritis, morbid obesity, and degenerative disc disease.³ She is 5’7” and weighed 350 pounds at the end of December 2017.⁴

The last time the Division’s assessment process found that Ms. N was undisputedly eligible for Waiver services was in 2014. Her 2014 assessment found that she was eligible because she required extensive assistance in three activities of daily living (ADLS): bed mobility, transfers, and toileting.⁵ In 2015, despite an assessment that found she was not eligible, the Division agreed that she remained eligible. The Division reassessed Ms. N on March 1, 2016. That assessment found that she required no assistance with bed mobility and eating, and

¹ Ex. D.
² Ex. C.
³ Ex. E, pp. 3, 6.
⁴ Occupational Therapy Discharge Notes, dated December 27, 2017.
⁵ Ex. H, pp. 193, 195.

required limited assistance with transfers and locomotion, and extensive assistance with toileting. That 2016 assessment showed that Ms. N weighed 300 pounds, which is 50 pounds less than she weighed at the end of December 2017.⁶ Those 2016 scores would not normally provide eligibility for Waiver services. However, the Division’s reviewer found that Ms. N was a borderline case on eligibility and therefore should remain Waiver eligible.⁷

Ms. N was assessed at her home on March 6, 2017 by the Division’s assessor to determine whether she remained eligible for Waiver services. The assessor conducted a functional assessment in which he determined that Ms. N was not able to touch her hands over her head, could not touch her hands behind her back, could not stand up while placing her hands across her chest, and could not touch her feet while in a sitting position. The assessor tested Ms. N’s grip strength, concluding that Ms. N had a strong grip in both hands.⁸ The assessor concluded that Ms. N was independent in bed mobility after observing Ms. N reposition herself in her recliner. Ms. N, however, told the assessor that she ““can move my shoulder and legs a little bit, but my whole body, my husband or my family has to do it.””⁹

The assessor observed Ms. N transferring from an electric recliner to a standing position, “[w]hen her chair was lifted, her son/PCA grabbed her by both hands & pulled her to a standing position.” Based on his observation, the assessor concluded that Ms. N required limited assistance with transfers.¹⁰

The assessor observed Ms. N walking a few steps using her walker. “She was only able to take 2 – 3 steps before she had to return to her recliner.” He concluded that she required limited assistance with locomotion.¹¹

Ms. N told the assessor that she uses a commode (potty chair) for toileting. Her PCA puts the chair next to the recliner and helps her transfer to and from the recliner to the commode. Ms. N told the assessor that she has accidents, and that when she is home alone, she manages to get to the commode by herself. The assessor concluded that she required limited assistance with toileting.¹²

⁶ Ex. F, pp. 6 – 7, 9.

⁷ Ex. I, p. 7; Ms. Sullivan’s testimony.

⁸ Ex. E, p. 7.

⁹ Ex. E, p. 9.

¹⁰ Ex. E, p. 9.

¹¹ Ex. E, p. 10.

¹² Ex. E, p. 12.

Ms. N disagreed with the assessor’s conclusions on bed mobility, transfers, and toileting. She testified that her husband had to lift her legs to get her into, out of, and positioned in bed, and that he has to lower her down into bed and has to pull her up to a sitting position in bed. She testified that she has to be pulled up from her bed, and that she also has to be pulled up from the recliner. She further testified that she has to be lowered down onto the commode and that she has to be pulled up from the commode. She also testified that when she is alone and needs to use the toilet, that she waits or has an accident.¹³

Ms. N had aquatic occupational therapy beginning on October 4, 2107. She had absences from that therapy, and had only four sessions from October 4 through December 1, 2107, which was her last session. She was discharged from aquatic occupational therapy on December 27, 2017. The discharge notes states that she requires moderate assistance with moving from a supine position to a sitting position, and moderate assistance with moving from a sitting position to a standing position. The therapist notes state that “[s]he is able to sit to stand from bench at 50% WBL using buoyancy as assist. She will occasionally sit to stand from recliner at home but only with elevation from multiple pillows and with great exertion.” Those same notes indicate that Ms. N has a 91% lower extremity impairment and has a Berg score of “18/56.”¹⁴

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.”¹⁵ The nursing facility level of care¹⁶ requirement is determined by an assessment which is documented by the CAT.¹⁷ The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,¹⁸ and whether an applicant has impaired cognition or displays problem behaviors.¹⁹ 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 3.²⁰

¹³ Ms. N’s testimony.

¹⁴ Occupational Therapy Discharge Summary, p. 3.

¹⁵ 7 AAC 130.205(d)(4).

¹⁶ See 7 AAC 130.205(d)(4); 7 AAC 130.215.

¹⁷ 7 AAC 130.215(4).

¹⁸ Ex. E, pp. 16 - 18.

¹⁹ Ex. E, pp. 19 - 20.

²⁰ Ex. E, p. 32.

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), 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.²¹

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).²²

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.²³

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.²⁴

B. Eligibility

Ms. N receives Waiver services. The Division has the burden of proof by a preponderance of the evidence when it seeks to terminate services.²⁵ Ms. N did not dispute that, at the time of the Division's termination decision, she did not have substantially impaired cognition, any behavioral issues, and was not then receiving therapies from a qualified therapist three or more days per week, nor was she receiving any specialized treatments.²⁶ To qualify for Waiver services, Ms. N would therefore require extensive or complete assistance in at least three of the five scored ADLs. Ms. N maintains that she requires extensive assistance in four of those ADLs: bed mobility, transfers, toileting.²⁷

The most compelling and persuasive evidence in this case consists of the aquatic occupational therapist's notes that Ms. N requires moderate assistance with moving from a

²¹ Ex. E, pp. 21, 32.

²² Ex. E, p. 32.

²³ Ex. E, p. 33.

²⁴ Ex. E, p. 32.

²⁵ 7 AAC 49.135.

²⁶ Ms. N began receiving aquatic occupational therapy twice per week at the beginning of October 2017.

²⁷ The assessor found that Ms. N was independent with eating. Ms. N did not disagree with that finding and it is therefore not necessary to discuss that ADL.

supine to sit position, and to transfer from a sitting to standing position. The other findings that are directly relevant are that Ms. N has a 91% lower extremity impairment, and that her Berg score is 18/56. This Berg score shows that Ms. N is at a high risk for falls.²⁸

The question then arises as to what “moderate assistance” means from an occupational 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

In 2013, the Commissioner reviewed the term “weight bearing assistance” as it is used in the CAT, and held that that:

Weight bearing assistance should be interpreted as supporting more than a minimal amount of weight. It does not require that the assistant bear most of the recipient’s weight, but instead that the recipient could not perform the task without the weight bearing assistance.³⁰

Moderate assistance, under the first definition provided above, involves the recipient requiring at least 25% of the needed effort to complete an activity. This means that the recipient is able to only assume part of his or her body weight, *i.e.*, the assistant assumes a minimum of 25% of the recipient’s body weight under the first definition. This weight bearing component of a physical therapist’s definition of moderate assistance fits squarely within “weight bearing assistance” as interpreted by the Commissioner. As a result, moderate assistance as used in the aquatic occupational therapy notes corresponds to the term extensive assistance as used in the CAT.

The occupational therapist’s conclusion that Ms. N requires moderate assistance with moving from a supine to sitting position demonstrates that she requires extensive assistance with bed mobility.³¹ Similarly, the finding that Ms. N requires moderate assistance with transfers

²⁸ For an explanation of the Berg Balance scoring, see http://www.brandeis.edu/roybal/docs/Berg-Balance-Scale_Website.pdf (date accessed January 29, 2018).

²⁹ <http://medical-dictionary.thefreedictionary.com/moderate+assistance> (date accessed August 10, 2017).

³⁰ See *In re K T-Q*, OAH Case No. 13-0271-MDS, p. 4 (Commissioner DHSS June 21, 2013). This decision is available at the OAH website: <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130271.pdf>

³¹ The definition of bed mobility contained in the CAT includes moving from a supine to sitting position: “[h]ow person moves to and from lying position.” See Ex. E, p. 9.

demonstrates that she requires extensive assistance with transfers. It should be noted that the therapist's notes that Ms. N can occasionally, with great exertion, transfer out of her recliner does not change this conclusion, for two reasons. The first is that transfers encompass not only moving from the recliner, but also moving from the bed. The second is that extensive assistance only requires weight-bearing assistance three or more times per week.³²

Ms. N's testimony was consistent with the aquatic physical therapy notes. It should be noted that the assessor saw Ms. N "pulled" up from her recliner. Being pulled up is weight-bearing. Based upon that observation, the assessor should have found that Ms. N required extensive assistance rather than limited assistance with transfers.

The Division argued that the aquatic occupational therapy notes should be disregarded because Ms. N's "living condition is within her control" and because Ms. N "chose to no longer participate" in her therapy.³³ However, the facts show that Ms. N requires weight-bearing assistance in bed mobility (moving from a supine to sitting position), and that she requires weight-bearing assistance for transfers. This also supports a finding of weight-bearing assistance for toileting, because transfers are an inherent part of toileting. The CAT defines toileting as "[h]ow a person uses the toilet room (or commode, bedpan, urinal); transfers on/off toilet"³⁴ Even though it is possible that Ms. N could improve her functionality, through therapy or restructuring her living condition, this decision must be based upon her actual needs, not upon speculation.

The Division has the burden of proof in this case. It did not meet it. The evidence, as discussed above, demonstrates that it is more likely true than not true that Ms. N requires extensive assistance with bed mobility, transfers, and toileting. As a result, she continues to be eligible for Waiver services.

IV. Conclusion

Ms. N requires extensive assistance with three of the five scored activities of daily living: bed mobility, transfers, and toileting. This qualifies her for Waiver services. Consequently, the

³² Ex. E, p. 9.

³³ See January 8, 2018 written statement from the Division.

³⁴ Ex. E, p. 12.

Division's decision to terminate her Waiver services is reversed.

DATED this 30th day of January, 2018.

Signed _____

Lawrence A. Pederson

Administrative Law Judge

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]