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

In the Matter of	)	
	)	
K H	)	OAH No. 17-0913-MDS
	)	Agency No.

DECISION

I. Introduction

K H is a former recipient of Medicaid Home and Community-Based Waiver (Waiver) services. Her most recent eligibility lapsed on March 31, 2017, while Ms. H was with her grandson in California for a six-month or longer visit. When she returned to Alaska, Ms. H submitted a new application for the program. The Division performed an assessment and determined she does not require a nursing facility level of care. It denied the application.[1] Ms. H requested a hearing.[2]

Ms. H has significant physical impairments. However, she did not show that her impairments rise to the level necessary to qualify her for Waiver services. As a result, the decision denying her application for Waiver services is upheld.

II. Background Facts

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

A. Overview

Ms. H is 75 years old. She lives in her own home in No Name City. The home shares kitchen facilities with Ms. H's son and granddaughter, who live next door.[3] Ms. H is morbidly obese, standing 5'4" tall and weighing close to 300 pounds.[4] Her muscle tone and conditioning is poor, as is her cardiovascular endurance.[5] Ms. H typically gets from place to place using a front-wheeled walker for support, though she often needs to rest and catch her breath after eight or ten steps.[6]

---

1 Exhibit D.
2 Exhibit C.
3 Exhibit E, p. 1; Shipman testimony.
4 Exhibit E, p. 9.
5 No Name City Physical Therapy, Initial Evaluation & Plan of Care dated 7/13/2017.
6 Exhibit E, p. 7; C testimony; H testimony.

Ms. H's medical diagnoses include Type 2 Diabetes Mellitus, hypertension, osteoarthritis, joint pain, asthma, chronic airway obstruction, and morbid obesity.[7] She also reports experiencing chronic peripheral neuropathy and bursitis in both shoulders. The bursitis prevents her from lifting her arms above shoulder height. However, Ms. H has a strong grip in both hands, and she uses her hands and arms well if they remain below shoulder height. Ms. H testified that her neuropathy can cause her leg to go numb without warning.[8] Because of this risk, Ms. H is careful and makes sure to have another person with her when she moves around. If her leg goes numb and she falls, she cannot get up without significant assistance.

In 2015, Ms. H received a right-side hip replacement after she was severely injured in a car accident. Since the surgery, her hip has dislocated five times and required additional surgery.[9] Ms. H cannot bend forward too far or she risks another displacement.[10] She still experiences chronic pain in that hip, which she described as constant 24/7 pain, and which she manages with pain medications.[11] She also experiences chronic back and knee pain.

Ms. H's hip most recently dislocated on April 13, 2017, when she bent forward while sitting in bed.[12] She was in California at the time. After undergoing a hip reduction procedure, she was placed in a knee immobilizer and discharged with precautions to avoid forward hip flexion more than 90 degrees, avoid internal rotation, and avoid adduction past the midline.[13] She was able to walk and was instructed to bear weight as tolerated.[14] While she was in California, Ms. H also experienced significant shortness of breath, for which she sought frequent medical care from a walk-in urgent care clinic. She was diagnosed with acute bronchitis.

Ms. H returned to Alaska in mid-May 2017. She saw her orthopedic provider on June 8, 2017. She used a wheelchair during the visit because of her bronchial problems rather than her hip trouble. Ms. H demonstrated her ability to walk during that visit; however, the exertion

---

7 Exhibit E, p. 3; 2016 CAT dated 1/26/2016, p. 3.

8 H testimony.

9 H testimony; UC Davis Health Center records dated 4/13/17; CAT dated 1/26/16, p. 3.

10 H testimony; No Name Clinic records dated 6/8/17. Ms. H could not remember whether she is not supposed to bend forward more than 45 degrees or 90 degrees. She can feel when she is bending too far and needs to pull back.

11 H testimony; No Name City Physical Therapy records.

12 UC Davis Health Records dated 4/13/17.

13 *Id*. at p. 16.

14 *Id*. at pp. 9, 13 ("WBAT RLE in KI" refers to weight-bearing as tolerated, right lower extremity in knee immobilizer).

caused shortness of breath after several steps.[15] Her medical provider cautioned against additional surgery, advised her to strictly adhere to precautions on forward bending, and recommended that she follow up with her primary care provider for a referral to a nutritionist for weight loss.[16]

On July 13, 2017, Ms. H began physical therapy to address "deconditioning."[17] At her initial evaluation, she was able to walk 75 feet with the therapist's hand steadying her arm, though she stopped to rest a number of times while performing this activity.[18] Ms. H also performed other tests to assess her functional abilities. These included a "sit to stand" test and a TUG or "timed up and go" test. Ms. H also walked up and down four steps with moderate difficulty, while holding on to a rail for stability. The assessment concluded that Ms. H exhibits "global weakness", but her primary limiting factor for all activities is her lack of cardiovascular endurance.[19] Ms. H attended a few other PT appointments, but she did not continue with therapy.

B. Procedural History

Ernest Shipman assessed Ms. H to determine her eligibility for Waiver services on July 31, 2017. F C, Ms. H's Care Coordinator, also was present during the assessment. The assessment took between two and three hours.[20] Mr. Shipman recorded his observations and conclusions on the Consumer Assessment Tool, known as the CAT.

The CAT shows that Ms. H is cognitively well-oriented, and she does not display any problem behaviors.[21] She does not require professional nursing services, therapy from a qualified therapist, or special treatments or therapies.[22] Ms. H does not challenge these conclusions.

For the five activities of daily living (ADLs) that are assessed for Waiver eligibility, the CAT concluded that Ms. H requires limited assistance from one person for locomotion (walking

15 No Name Clinic records dated 6/8/17.
16 H 12/4/17 submission (No Name Clinic notes dated 6/8/17).
17 No Name City Physical Therapy records, 7/13/17.
18 *Id.*; H testimony.
19 No Name City Physical Therapy records, 7/13/17, at p. 3.
20 H testimony; C testimony; Shipman testimony.
21 Exhibit E, pp. 4, 16-17.
22 Exhibit E, pp. 5, 13-15.

within her home), but she can independently manage her eating, transfers, toilet use, and bed mobility activities.[23]

On August 23, 2017, the Division denied Ms. H's Waiver application.[24] Ms. H appealed.[25] The hearing took place by telephone on November 20, 2017. Ms. H represented herself, with assistance from her Care Coordinator, F C, and her grandson, E M. Ms. H, Mr. C and Mr. M each testified on Ms. H's behalf. Victoria Cobo represented the Division. Assessor Ernest Shipman testified for the Division. The record remained open until December 8, 2017, so Ms. H could submit additional medical information and the Division could respond.[26] All submitted documents were admitted.

III. Discussion

This case involves a new application for the Waiver program. Ms. H therefore bears the burden of proof to show by a preponderance of the evidence that she satisfies the eligibility requirements.[27] She can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs.[28] The relevant date for purposes of assessing the state of the facts is, in general, the date of the agency's decision under review.[29]

A. Method for Assessing Eligibility

To qualify for Medicaid Waiver benefits, an applicant must require a nursing facility level of care. That level of care[30] requirement is determined by an assessment which is documented by the Consumer Assessment Tool (CAT).[31] 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,[32] whether

---

23 Exhibit E, p. 18 (shaded areas).
24 Exhibit D.
25 Exhibit C.
26 Ms. H's California urgent care clinic records were to be forwarded to OAH after the hearing, but they are not in the evidentiary record. The Division responded to a follow-up OAH staff inquiry, indicating that it had forwarded the records it possessed. The Division's December 8th submission referenced additional physical therapy records from visits on August 24th, August 30th, and September 1st. At the administrative law judge's request, those records were submitted to OAH on December 11, 2017.
27 7 AAC 49.135.
28 2 AAC 64.290(a)(2).
29 *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).
30 *See* 7 AAC 130.205(d)(4); 7 AAC 130.215.
31 7 AAC 130.215(4).
32 Exhibit E, pp. 13 – 15.

an applicant has substantially impaired cognition or problem behaviors,[33] 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.[34]

Each of the assessed items contributes to a final numerical score. If an applicant's score is a 3 or higher, the applicant is medically eligible for Waiver services.[35] If, for instance, an individual required five or more days of therapy per week (physical, speech/language, occupational, or respiratory therapy), he or she would receive a score of 3.[36] 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 also would receive a qualifying score of 3.[37]

A person also can receive points for combinations of required nursing services, therapies, substantially impaired cognition (memory/reasoning difficulties), difficult behaviors (wandering, abusive behaviors, etc.), or needs for either limited or extensive assistance with the five specified activities of daily living.[38]

B. Role of Prior Assessments

Ms. H submitted copies of the Division's assessments from February 2013, November 2014 and January 2016. In each year, the Division concluded she satisfied the Waiver eligibility standard.[39] Ms. H argued that the prior CATs accurately document her needs for assistance, while the 2017 assessment does not. She asserted that her physical abilities have not improved since her most recent qualifying assessment on January 26, 2016. In that assessment, the Division agreed Ms. H required extensive assistance with transfers, locomotion and toilet use, and she required limited assistance with bed mobility.[40]

During the January 2016 assessment, however, Ms. H did not perform most of the ADLs that are assessed for Waiver eligibility. It appears she stood one time, demonstrating a transfer

33 Exhibit E, pp. 16 - 17.
34 Exhibit E, pp. 6 -7, 9, 18.
35 *Id.*
36 Exhibit E, p. 29.
37 *Id.*
38 *Id.*
39 *See* CATs dated 2/4/2013, 11/26/2014, and 1/26/2016.
40 CAT dated 1/26/16.

from her lift chair.[41] As a result, the assessment offers limited insight into her abilities and needs for assistance as of July 2017. For the 2017 assessment, the Division relied less heavily on Ms. H's self-reporting about her abilities or assistance needs. This is significant because, as documented in Ms. H's physical therapy evaluation, she may be capable of doing more on her own than she reports or believes she can do.[42] At issue is the assistance Ms. H genuinely requires in order to to perform each relevant ADL, not the assistance she strongly prefers to have.

This case does not involve "material improvement" or the termination of existing Waiver services. The Division therefore need not contrast Ms. H's functional abilities as of July and August 2017 with its conclusions from the January 2016 or earlier assessments. Ms. H bears the burden to show she requires a nursing facility level of care.

C. Eligibility

In this case, Ms. H does not have any documented needs for professional nursing services or other specialized medical care.[43] She is cognitively sharp and has no problem behaviors.[44] She does not receive any therapies (e.g., chemotherapy, radiation therapy, occupational or physical therapy) three or more times per week.[45] Accordingly, her only path to Waiver eligibility is if she requires a minimum of extensive assistance with three or more of the scored ADLs (bed mobility, transfers, locomotion, eating, and toileting).

1. Eating

Ms. H agreed she can eat and drink independently, though she cannot stand long enough to prepare food on her own. Meal preparation is not assessed as part of the Waiver eligibility process. Ms. H has strong grips in both hands and no manual dexterity problems. The evidence is that she can cut her own food and feed herself without supervision or other support. The Division correctly concluded she is independent with this ADL (self-performance code 0, support code 0).

---

41 *Id.* at p. 6.

42 *See* No Name City Physical Therapy records dated 7/13/17 (notes indicate that several locomotion and transferring tests were done without AD or assistive devices); No Name City Physical Therapy records for August 2017.

43 Exhibit E, pp. 13-15.

44 *Id.* at pp. 16 – 17.

45 *Id.* at p. 14.

2. Locomotion

Locomotion pertains to how someone moves between locations in her room and to other areas on the same floor of her residence. The assessment concluded Ms. H requires limited assistance with this task (self-performance code 2, support code 2).[46] The evidence supports this determination. There is also evidence indicating that, using her walker, Ms. H can go short distances either independently or with supervision and set-up help. However, more regularly, she requires some hands-on assistance from one person as she moves around.

Ms. H is always concerned about her risk of falling. She is also easily winded and often needs to rest and regain her breath.[47] Once she rests, she can carry on, using her walker for stability. She regularly has someone keep a hand on her arm or shoulder as she walks, to help if she starts to fall.[48] This practice is consistent with the assessor's observations on July 31, 2017, when Ms. H's assistant held the back of her gown while Ms. H walked.[49] This aid takes the form of a steadying or guiding hand, which qualifies as limited assistance. It clearly is not consistent weight-bearing help, and it cannot be classified as extensive assistance.

The physical therapist wrote that Ms. H can walk up to 75 feet without an assistive device of any kind.[50] However, Ms. H credibly explained that she received a steadying or supportive hand from the therapist while she ambulated without her walker at the July 2017 physical therapy appointment. She also noted that one or two people followed behind her with a wheelchair for rests and safety.

Ms. H did not show she requires extensive assistance to ambulate within her home. She may be capable of moving from place to place with supervision only (self-performance code 1). However, the weight of the evidence supports the assessor's determination that she requires limited assistance with this task (self-performance code 2, support code 2).

---

46 This assistance includes the guided maneuvering of limbs or other non-weight bearing assistance three or more times per week, or weight-bearing support provided one or two times per week. *See* Exhibit E, p. 7.

47 H testimony; C testimony; No Name Clinic records.

48 H testimony.

49 Exhibit E, p. 7.

50 No Name City Physical Therapy records dated 7/13/17 at p. 1 ("Amb 75' without AD" is shorthand for "Ambulated 75 feet without assistive device.").

3. Transfers

Transferring refers to how a person moves between surfaces, such as from seated on a bed or chair to a standing position or from a standing position back to a seated one. It does not include transfers to or from the toilet.[51]

The assessment concluded that Ms. H can perform this activity either without help or oversight, or with help/oversight one or two times per week (self-performance code 0, support code 0). The assessor wrote that he observed Ms. H transfer out of her lift recliner by using the mechanical lift controls. Ms. H's assistant positioned her walker in front of her, and Ms. H used the walker to support herself while she stood.[52]

Ms. H disputes this summary. She and Mr. C testified that, after four requests from the assessor, she ultimately demonstrated one transfer, for which she required hands-on assistance. She described that assistance as weight-bearing. After she raised the lift chair to its maximum, her assistant took her arm and pulled her forward until she could steady herself with her walker. Ms. H asserted she requires this kind of assistance with most transfers, because she cannot rock or lean forward too far while trying to stand up. In addition, her bursitis in her shoulders limits her ability to reach up and pull herself to a standing position. When she sits back down, the process is reversed. Her assistant holds her arm, bearing weight, while easing her back into the chair.

The physical therapist's records from the July evaluation suggest Ms. H moved from a sitting to a standing position four times with only set-up help, though she required 21 to 27 seconds to stand on each effort.[53] Explaining this, Ms. H clarified she can get up with less assistance when she stands up from chairs with a high seat, like the high wheelchair she used during the PT session. For this reason, she keeps pillows on her chairs at home. She also gets mechanical assistance from her lift recliner, which she most often sits in. Ms. H did not clearly explain how she can transfer with minimal assistance from a high wheelchair, but she cannot do so from her mechanical lift recliner, except to say that her forward-bending restrictions limit her abilities.

---

51 *See* Exhibit E, p. 6.

52 *Id.*

53 *See* No Name City Physical Therapy records, 7/13/17.

Mr. C and Mr. M testified that Ms. H regularly requires weight-bearing assistance when she stands up from a seated position, and she regularly requires weight-bearing assistance when she sits back down. In contrast, the PT records are written in a terse and summary style. They are not conclusive as to Ms. H's typical assistance needs. Mr. Shipman's memory of the assessment was unclear. He initially stated he could not recall whether Ms. H received hands-on assistance when she transferred during the assessment. He later indicated that she did not.

More likely than not, the assessment understated Ms. H's assistance needs with transfers. There are times she can stand without assistance, though with significant difficulty. Other times, she may get by with limited assistance. At least three or more times per week, however, the evidence is that Ms. H requires weight-bearing assistance to transfer. This qualifies as extensive assistance (self-performance score 3, support code 2).

4. Toilet Use

Under the CAT, toileting refers to use of the toilet, including transfers on/off, cleansing, changing pads and adjusting clothing.[54] Bathing or showering is not included.

According to the CAT, Ms. H reported during the assessment that she can get on and off her raised toilet seat, manage cleansing and her clothing without assistance. During the hearing, Ms. H denied this report. She and Mr. C indicated that Ms. H told the assessor she needs physical assistance. Ms. H said she typically needs weight-bearing assistance to transfer on and off the toilet because she does not have grab bars that might help with toilet transfers, her hip precautions limit her ability to bend forward, and she cannot reach up to pull herself to a stand. She agreed she can manage her cleansing needs independently.

Appropriate scoring for this ADL closely follows Ms. H's score for transfers. Ms. H's hip precautions could limit her ability to adjust her clothing. At most, this assistance would qualify as non-weight bearing or limited assistance. Regarding her transfers on and off the toilet, the evidence is that Ms. H more likely than not requires extensive assistance (self-performance code 3, support code 2).

[54] Exhibit E, p. 9.

5. Bed Mobility

Bed mobility refers to how someone moves to and from a lying position, turns from side to side, and positions their body while in bed.[55] Ms. H has an adjustable queen bed that allows her to raise and lower the head and foot of the bed.

During the assessment, Ms. H declined to demonstrate her bed mobility skills and limitations, stating she would be out of breath and in pain if she had to walk to her bedroom.[56] She reported sleeping in one position once she is in bed because of her hip pain. She also reported being unable to turn herself in bed or to swing her legs into the bed from the bedside.

The assessment rated Ms. H as independent with bed mobility (self-performance code 0, support code 0). Mr. Shipman explained that he would expect to see problems with bedsores or decubitus ulcers if Ms. H truly was unable to reposition herself in bed. She does not have such problems. Based on this information and his other observations of Ms. H's abilities, he concluded she can independently manage her bed mobility activities.

The adjustable bed allows Ms. H to move between upright and flat positions in bed without hand-on assistance. Regarding her ability to reposition herself or turn from side to side in bed, Ms. H did not show she regularly requires weight-bearing assistance for this task. The evidence is that she does not do much repositioning and she does not turn on her side for two main reasons. One is that it causes significant hip pain to lie on her side. The other is that she sleeps with the head of her bed raised, because it helps her clear her lungs of phlegm and breathe more easily. Ms. H typically does not reposition in bed for reasons other than a physical inability to move herself.

Ms. H and her grandson both testified that she at times requires hands-on assistance to move her legs in and out of bed, and she would need help repositioning her legs if she were to turn on her side. They emphasized that she cannot safely lift her legs high enough to step into a traditional bathtub without weight-bearing assistance. Therefore, while in California (where she did not have a walk-in tub), Ms. H would sit on the tub edge and require weight-bearing assistance to help lift each leg into or out of the tub.

This movement is different than the activity of pulling one's legs into and out of bed, since it is possible to use hands and arms to help scoot backward or forward in the bed, pulling or

---

55 Exhibit E, p. 6.

56 *Id.*

gently lifting the legs in the process. Other evidence in the record shows that Ms. H can move her legs reasonably well while staying within the constraints of her hip precautions. Using her walker, she walks without obvious instability.[57] She can walk up and down stairs. She also has good hand strength and the ability to use her arms to reposition herself, as long as her arms are not above shoulder height. Given this, Mr. H more likely than not typically can move her legs within the bed, and in and out of bed, without regular weight-bearing assistance.

Ms. H's refusal to attempt a demonstration of her bed mobility needs is of concern. Ms. H gets in and out of bed twice per day, and she testified that she often stops to rest on her bed when she is walking from her lift recliner to the bathroom. She likely travels this distance multiple times per day in order for her to use the restroom. Standing alone, her testimony and firm belief about her need for extensive assistance is not sufficient to meet her burden of proof.

The assistance Ms. H typically requires for bed mobility should be characterized as limited assistance (self-performance code 2, support code 2). This is consistent with Mr. C's assertion that the assessment should have rated Ms. H "at least at a two," given her need for some hands-on physical assistance.

IV. Conclusion

Ms. H has not met her burden to show she requires extensive assistance (self-performance code 3, support code 2) with three or more of the scored ADLs. She showed she requires extensive assistance with her transferring and toilet use ADLs. However, she requires limited assistance with locomotion and bed mobility. She is independent with her eating ADL. As a result, Ms. H is not eligible for Medicaid Waiver benefits.

The Division's denial of Ms. H's application for Medicaid Waiver benefits is affirmed.

DATED: December 21, 2017.

Signed
Kathryn Swiderski
Administrative Law Judge

[57] *See* No Name City Physical Therapy records, 7/13/17.

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 4th day of January, 2018.

By: *Signed*
Signature
Andrew M. Lebo
Name
Administrative Law Judge
Title

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