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

In the Matter of	)	
	)	
P X	)	OAH No. 17-1120-MDS
	)	Agency No.

DECISION

I. Introduction

P X most recently qualified for Medicaid Waiver program services in February 2016. She was reassessed for eligibility on February 10, 2017. On October 11, 2017, the Division of Senior and Disabilities Services (Division) notified her that she is no longer eligible for the program and those services would be discontinued.[1] Ms. X requested a hearing.[2]

The hearing took place on February 5, 2018. Ms. X represented herself, with assistance from friend and respite care provider, K S. Ms. X, Mr. S, and Care Coordinator E N testified on Ms. X's behalf. Terri Gagne represented the Division. The Division's assessor, Ernest Shipman, testified for the Division. All submitted documents were admitted to the record, which closed on February 5, 2018.

Ms. X experiences a number of significant medical and psychiatric challenges, and her medical history is complex. In 2016, she qualified for Waiver services primarily because of her need for skilled nursing services for wound care of a chronic stasis ulcer on her right leg. She no longer required that care as of the February 2017 reassessment or at the close of the Division's review in October 2017. She also did not require other therapies, nursing services, or extensive assistance with three of the five activities of daily living that are considered for Waiver eligibility. Despite her ongoing health concerns, this means Ms. X's condition has materially improved and no longer qualifies her for Waiver services.

II. Facts

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

Ms. X is 50 years old. She moves from place to place using either a four-wheeled, seated X or an electric scooter. She currently lives in her own apartment; however, she usually has someone with her and she is rarely alone.[3]

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1 Exhibit D.
2 Exhibit C.
3 X testimony.

Ms. X's medical diagnoses include bilateral leg lymphedema, chronic deep vein thrombosis of the right lower extremity, ulcer of the right leg, polyneuropathy, chronic thrombosis of the right iliac vein, chronic pain, osteoarthrosis of both knees, degenerative lumbar disc disease, closed compression fracture of the thoracic vertebrae, venous insufficiency, and long-term anticoagulation.[4] She has battled chronic lymphedema and venous stasis ulcers on her lower right leg for at least six years. From May 7 through 25, 2017, she required in-patient care at Alaska Regional Hospital because an ulcer on her right leg resulted in sepsis.[5]

Ms. X's psychiatric history includes diagnoses for generalized anxiety disorder, depression with psychosis, anxiety disorder and mixed mood disorder.[6] She sometimes exhibits delusional or paranoid thinking, and she can become aggressive when feeling anxious or when she does not receive a desired response.[7] She regularly fails to follow her doctors' recommendations or treatment plans, and she often does not keep medical appointments.[8] Medical providers have noted concerns about deceptive or manipulative behavior.[9] She is widely known as an unreliable historian.[10] Due to a recurrent belief that she is not safe in her home, Ms. X has a history of leaving residential placements, frequently choosing to stay at homeless shelters or seeking emergency department care, and she has often changed housing.[11]

As a result of her regular E.R. and other medical visits, the record in this case includes more than 2,500 pages of medical records documenting Ms. X's recent medical history.[12] Along with her other diagnoses, the records show a long history of significant poly substance abuse.[13]

Despite Ms. X's psychiatric diagnoses, she is cognitively capable of making her own medical and legal decisions.[14] She does not have a guardian or power of attorney. She can show a quiet and kind manner, as well as an ability to interact appropriately and process information reasonably.[15] At the hearing in this matter, she appeared in person and demonstrated an

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4 Exhibit G, p. 2; Exhibit E, p. 5. She was once diagnosed as morbidly obese, but she has had bariatric surgery.
5 Exhibit H, pp. 348 - 2046; Exhibit G, p. 9.
6 *See* Exhibit G, p. 2; Exhibit E, p. 5; Exhibit H, pp. 2514.
7 *See* Exhibit H, p. 12-13, 221-25, 255 -259.
8 *See* Exhibit H, pp. 12-13, 552-54.
9 Exhibit H, p. 250-259, 392, 552-564, 614.
10 *See, e.g.*, Exhibit G; Exhibit H, pp. 12-13, 2505.
11 Exhibit G; Exhibit H, pp. 9-14, 2503-2506.
12 Exhibit H.
13 *See, e.g.*, Exhibit G; Exhibit H, pp. 12, 257.
14 *See* Exhibit H, pp. 12-13.
15 *See* Exhibit H, pp. 12-13, 392.

appropriate demeanor and awareness of her surroundings, the subjects at issue, and her medical history.

1. 2016 Waiver Eligibility

Ms. X was last approved for Waiver services in February 2016.[16] At that time, she was recovering from recent shoulder surgery. She attended physical therapy two times per week while she recuperated. Her right arm was in a sling, and she had limited ability to use it. This significantly impacted her ability to perform some tasks independently.

Due largely to the limited use of her right arm, the 2016 assessment found that Ms. X required extensive assistance with her toilet use activity of daily living (ADL). She required limited assistance to transfer in or out of chairs or her bed, and supervision and set-up help to ambulate between rooms in her home. She required set-up help for eating, but otherwise ate and drank without assistance. She was independent with bed mobility tasks.[17]

On their own, these needs would not have satisfied Waiver program eligibility requirements, and the Division initially determined that Ms. X was not eligible.[18] However, it reversed its decision after additional information showed she required frequent wound care for a stasis ulcer on her right lower leg.[19] In combination with her need for physical assistance with transfers and toilet use, the wound care qualified Ms. X for the Waiver program.

2. February 2017 Assessment

By the time of her February 10, 2017 assessment, Ms. X's arm was no longer in a sling and she did not have any stasis or other ulcers.[20] The Division's assessor, Ernest Shipman, visited Ms. X at her home. Ms. X answered the front door using her four-wheeled X for support as she moved around. She was well-oriented to the people present, the place and the time.[21] Mr. Shipman observed Ms. X touch her hands over her head and behind her back. She had strong grips with both right and left hands, and she could touch her feet from a sitting position.[22]

At that time, Ms. X was not receiving any therapies or skilled nursing services.[23] She did not exhibit any notable behavioral or cognitive problems.[24] Regarding the five activities of daily

16 Exhibit F.
17 *See* Exhibit F, p. 18.
18 Exhibit G, p. 1; Exhibit H, p. 2503.
19 Exhibit G, p. 1; Exhibit H, pp. 2499, 2503.
20 Shipman testimony; Exhibit E, p.
21 Exhibit E, p. 6. Also present during the assessment were Y Q, a representative from Ms. X's PCA agency, and Care Coordinator, T S.
22 Exhibit E, p. 6.
23 Exhibit E, pp. 7, 15-17
24 *See* Exhibit E, pp. 1-2, 18-19.

living that are assessed for Waiver eligibility, Mr. Shipman concluded that Ms. X could eat independently, though she required set-up help. She could independently manage her bed mobility, locomotion and toilet use tasks. She required limited assistance to transfer between surfaces.[25]

On February 24, 2017, the Division informed Ms. X of its preliminary decision to terminate her Waiver services.[26] However, it requested additional medical documentation to more fully review her circumstances. It received medical records through May 25, 2017.[27]

Those records documented Ms. X's 18-day in-patient stay at Alaska Regional Hospital from May 7 through May 25, 2017, for chronic lymphedema and a stasis ulcer on her right leg, resulting in sepsis. When Ms. X was discharged on May 25th, the wound was nearly healed.[28] She left the hospital with instructions for wound care.[29] The instructions did not appear to require skilled nursing care, and records from Ms. X's primary care provider indicate that the wound was fully closed by June 5, 2017.[30] Ms. X has not had other stasis ulcers since May 2017, though she is always concerned one may recur.[31]

On June 30, 2017, Marianne Sullivan, a registered nurse employed by the Division, conducted a second review of Ms. X's documentation, including the February 10, 2017 assessment, the medical documentation from the 2016 assessment, and the medical records the Division had received. Ms. Sullivan concluded that Ms. X's overall functional abilities had materially improved since the 2016 assessment, and she no longer qualified for Waiver services.[32]

On July 28, 2017, and again on October 10, 2017, a registered nurse employed by Qualis Health and licensed in the State of Alaska performed a third-party document review of the Division's determination.[33] Each Qualis review concurred with the Division's determination that Ms. X has made material functional gain, such that she no longer has the limitations that would result in nursing home placement.[34]

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25 Exhibit E, p. 20 (shaded areas).
26 Exhibit D, p. 1.
27 *See* Exhibit H.
28 Exhibit H, p. 607, 645.
29 Exhibit H, pp. 645, 2049 – 2051.
30 X submission received 2/2/18 (Dr. C records, Prov. Family Medicine Ctr., 6/5/17, p. 8-9 of 18). Ms. X and Care Coordinator N also recalled that the ulcer clearly had healed and required no wound care by September 2017. X testimony; N testimony.
31 X testimony.
32 Exhibit H, pp. 2499-2506.
33 Exhibit G.
34 *Id.*

On October 11, 2017, the Division notified Ms. X of its determination and advised her that she was no longer eligible for the Waiver program.[35] Ms. X appealed. The hearing was rescheduled more than once, and Ms. X was afforded ample opportunity to supplement the hearing record with documentation showing any functional limitations, needs for therapy, or needs for skilled nursing services that existed after her May 25, 2017 hospital discharge and up to the Division's October 11, 2017 notice. In general, Ms. X' submissions confirm her medical condition and diagnoses, but they show few limitations specific to the activities of daily living that are assessed for Waiver eligibility. Her submissions included:[36]

(1) records from four June 2017 visits with Dr. C, her primary care provider, primarily to discuss chronic pain including leg and abdominal pain, anxiety, an HPV test, urinary incontinence, and Ms. X's need for additional incontinence supplies;[37]

(2) records from a November 29, 2017 consultation with Dr. Z of the Alaska Center for No Name, noting that Ms. X was ambulating with her X and appeared to be in good health, and confirming her severe bi-lateral thrombosis and high risk of venous stasis ulcers;[38]

(3) a January 24, 2018 prescription from Dr. Z for compression stockings;[39]

(4) three prescriptions dated January 25, 2018 from A B, PA-C, for durable medical equipment, and one prescription stating, "Patient needs help with transportation, bathing, laundry, housekeeping, grooming due to her multiple medical issues";[40]

(5) Providence Imaging Center records dated July 2017, including images of Ms. X's lower extremities and abdomen, and October 2017 records regarding images of her left knee and lumbar spine.[41]

A reviewer at Qualis Health performed another third-party review of the records Ms. X submitted by January 26, 2018, and again concluded that Ms. X does not require a skilled nursing level of care.[42]

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35 Exhibit D.

36 Also included were records already in the Division's exhibits. *E.g.*, Dr. C's records from visits in February and April 2017; a Plan of Care dated May 15, 2017; Providence Hospital ER records from March 2017.

37 X submission received 2/2/18 (Providence Family Medical Ctr. records for June 5, 8, 15, and 26, 2017). Ms. X has experienced urinary incontinence for many years, which she manages with absorbent briefs.

38 X submission received 1/23/18 (7 pages).

39 X submission received 1/31/18.

40 *Id.*

41 X Exhibits received 2/5/18 (Providence Imaging Center records, including 97 pages of images).

42 Exhibit I1.

III. Discussion

A. Burden of Proof, Termination of Waiver Services

Before the Division may terminate Waiver services for a person who was previously approved for those services, it must 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."[43] The Division must make this showing by a preponderance of the evidence.[44] It can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs.[45]

In general, the relevant timeframe under review involves Ms. X's condition and functional abilities as of the date of the agency's decision.[46] This case presents an unusually long time period under review because Ms. X was reassessed on February 10, 2017, but not notified of her termination from the program until October 11, 2017.

B. 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."[47] The nursing facility level of care[48] requirement is determined by an assessment which is documented by the Consumer Assessment Tool, known as the CAT.[49] The CAT records an applicant's medical care needs and ability to function physically. It documents the applicant's needs (if any) for professional nursing services, therapies, and special treatments,[50] any significant cognitive impairments or problem behaviors,[51] the applicant's ability to perform specific activities of daily living (ADLs), and the type of assistance he or she needs with those activities.[52] Each of the assessed items contributes to a final numerical score. If an applicant's score is 3 or higher, the applicant is medically eligible for Waiver services.[53]

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43 AS 47.07.045(b)(1), (b)(3)(C).
44 7 AAC 49.135.
45 2 AAC 64.290(a)(1).
46 *See* 7 AAC 49.170; *In re T.C.*, OAH No. 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013), available online at http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf.
47 7 AAC 130.205(d)(4).
48 *See* 7 AAC 130.205(d)(4); 7 AAC 130.215.
49 7 AAC 130.215(4).
50 Exhibit E, pp. 15-17.
51 Exhibit E, pp. 18-19.
52 Exhibit E, pp. 8-9, 11, 20.
53 Exhibit E, p. 31.

An individual who requires professional nursing services 7 days a week, or who requires therapy 5 or more days per week (e.g., physical, speech/language, occupational, or respiratory therapy), would receive a qualifying score of 3.[54] Similarly, a person who requires extensive physical assistance or is completely dependent on others (self-performance code of 3 or 4) for three or more of five specified ADLs also would receive a score of 3.[55] The five ADLs that pertain to Waiver eligibility are bed mobility, transfers, locomotion within the home (same level), eating, and toilet use.[56]

A person also can receive eligibility points for combinations of required nursing services, therapies, severely impaired cognition (memory/reasoning difficulties), problem behaviors (wandering, abusive behaviors, etc.), and the need for either limited or extensive assistance with the five specified activities of daily living.[57]

C. Ms. X No Longer Satisfies Waiver Program Eligibility Requirements

After she was discharged from the hospital on May 25, 2017, Ms. X likely did not require professional nursing services to care for her stasis ulcer until it fully healed. Even if she did, however, the ulcer had closed by early June 2017 and no longer required wound care.[58] Since then, she has not had other stasis ulcers or other medical problems requiring skilled nursing care.[59]

In addition, Ms. X has not required any other specialized treatments or therapies such as physical or occupational therapy. Though Ms. X has documented cognitive and behavioral problems, they are not so severe that she requires skilled intervention to manage them. She therefore cannot receive Waiver eligibility points for those issues.

As a result, the only way Ms. X can remain eligible for Waiver services is if she requires extensive physical assistance from another person (self-performance code 3, support code 2), or a higher level of assistance, to perform three or more of the five ADLs that are assessed for Waiver eligibility.[60] Extensive assistance means she requires weight-bearing assistance at least three times a week to perform the ADL in question.[61]

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54 *Id.*
55 *Id.*
56 Exhibit E, p. 20.
57 Exhibit E, p. 31.
58 X submission received 2/2/18 (Dr. C records dated 6/5/17); X testimony (definitely closed by September 2017); N testimony (same).
59 X testimony; N testimony.
60 Exhibit E, p. 31 (CAT Scoring).
61 Exhibit E, p. 20.

Based on the evidence in the record and after careful consideration, Ms. X does not require this degree of assistance for any of the five ADLs. For purposes of the CAT, the eating ADL refers to how a person eats and drinks, not including food preparation or cooking.[62] During the hearing, Ms. X agreed she can eat and drink without assistance. Hospital records from her May 2017 stay also document that she eats and drinks independently.[63] No evidence contradicts her eating score as independent, but requiring set-up help (self-performance code 0, support code 1).

Ms. X also agreed she does not require regular weight-bearing assistance to move between locations on the same floor of her home.[64] She can move from place to place using her X or her scooter, though she noted that walking is painful. Similarly, she confirmed she can move to and from a lying position in bed, and she can reposition herself in bed. These statements are consistent with other evidence in the record, including her May 2017 Plan of Care, her providers' observations, and her ability to ambulate, to reposition in chairs and to use her arms.[65] The evidence supports the Division's conclusion that Ms. X is independent with the activities of locomotion and bed mobility.[66]

The ADL of transfers refers to how a person moves between surfaces, such as from a bed or chair to a standing position and vice versa.[67] It does not include transfers to and from the toilet, since that activity is assessed as part of the toilet use ADL. During the assessment, Mr. Shipman concluded that Ms. X requires limited assistance to transfer (self-performance code 2, support code 2).[68] He observed her move from a sitting to standing position more than once, using her hands to support herself. She also transferred from a regular chair to her X, again using her hands for support. Given Ms. X's testimony about her pain and risk of falls, Mr. Shipman apparently agreed she regularly requires assistance in the form of a steadying hand to transfer, though he did not specifically document that need.

The toilet use ADL refers to use of the toilet, including transfers on/off, cleansing, changing pads and adjusting clothing.[69] Bathing or showering is not included. Mr. Shipman

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62 Exhibit E, p. 11.
63 Exhibit H, p. 500.
64 *See also* N testimony.
65 *E.g.*, Exhibit H, pp. 12-13, 223 (noting that Ms. X did all ADL's independently as of March 20, 2017).
66 Locomotion pertains to how someone moves between locations in her room and to other areas on the same floor of his or her residence. Bed or body mobility refers to how a person moves to and from a lying position, turns side to side, and positions her body while in bed. Exhibit E, pp. 8-9.
67 Exhibit E, pp. 8-9.
68 *Id.*
69 Exhibit E, p. 9.

concluded the Ms. X is independent with her toilet use ADL, based on her statements and his observations of her ability to ambulate, transfer and use her hands.

Ms. X presented evidence that contradicts the Division's scores for transferring and toilet use. However, even accepting all of her assertions as true, the assistance she described would not support a finding of extensive assistance for either task.

Ms. X explained that she pushed herself to do as much as she could during her assessment, but it was painful and very difficult for her. Nonetheless, she agreed she can transfer on and off her motorized scooter without assistance. She also normally gets on and off the toilet without assistance. However, she reported recent falls, unsteadiness, and increasing pain in her back. She explained that spinal stenosis sometimes limits her ability to twist or bend down to manage post-toileting hygiene and clothing. For this reason, she stated that she usually has someone stand outside her bathroom door to assist if needed. That person may help by steadying her, helping with her clothing, or helping with cleansing. Mr. S confirmed this summary.

The record supports Ms. X's statements that she often independently transfers and manages her toilet use tasks.[70] However, at times, she requires assistance in the form of supervision, a steadying hand, or other non-weightbearing physical help. Depending on the frequency with which hands-on assistance is needed, this help could be characterized as either supervision (self-performance code 1) or limited assistance (self-performance code 2). It clearly is not extensive assistance (self-performance code 3).

Mr. S indicated that Ms. X's health continues to deteriorate, and she generally requires more assistance than she has in the past. He emphasized her need for assistance with tasks like bathing or showering. Those needs also are documented in the January 2018 prescription Ms. X submitted, which specifies her need for assistance with transportation, bathing, laundry, housekeeping, and grooming. The May 2017 Plan of Care similarly states that she requires help with dressing and bathing.[71] However, these activities are not considered when determining Waiver program eligibility.

IV. Conclusion

Ms. X previously qualified for Waiver services due to her need for wound care, in combination with her need for physical assistance with the ADLs of toilet use and transfers. The 2017 reassessment showed she no longer requires wound care. In addition, she does not require

[70] *See, e.g.*, Exhibit H, pp. 12-13, 232; N testimony.
[71] Exhibit H, pp. 13.

any skilled nursing services, regular therapies, or extensive assistance with three of the five ADLs relevant to Waiver eligibility. As a result, Ms. X's condition has materially improved as defined by statute.

The Division has shown that Ms. X's physical needs do not rise to the nursing facility level of care that is necessary for Waiver services. Accordingly, its decision terminating Waiver services is affirmed.

DATED: February 22, 2018.

Signed
Kathryn A. Swiderski
Administrative Law Judge

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 March, 2018.

By: *Signed*
Name: Erin Shine
Title: Special Assistant to the Commissioner
Agency: Office of the Commissioner, DHSS

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