

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

In the Matter of )  
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K O ) OAH No. 17-1209-MDS  
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**DECISION**

**I. Introduction**

K O applied for Medicaid waiver services in November 2017. The Division of Senior and Disabilities Services found that he did not meet the level of care requirements for waiver services based on an assessment of his condition conducted in May 2017, and denied the application. Mr. O requested a hearing.

Mr. O needs limited assistance with toileting, but is physically able to accomplish the other activities of daily living evaluated for purposes of determining eligibility for the waiver program. Mr. O has some cognitive and behavioral needs, but considered together with his physical functioning they are not sufficiently severe to qualify him for the waiver program. The division's denial of Mr. O's application for waiver services is upheld.

**II. Facts**

K O (Mr. O) is 56 years old.<sup>1</sup> He lives with his brother K (L) O, who holds a power of attorney for Mr. O.<sup>2</sup> Z O, L O's wife, provides personal care services to Mr. O under the division's personal care services (PCS) program. Both L O and Z O work outside the home.<sup>3</sup>

Mr. O has dementia.<sup>4</sup> Mr. O suffered a major head injury in 1986.<sup>5</sup> He had a stroke in 2016.<sup>6</sup> Mr. O has also been diagnosed with paranoid schizophrenia, "other vascular syndromes of brain in cerebrovascular diseases," severe intellectual disabilities, and

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<sup>1</sup> Div. Ex. E at 1, 3.

<sup>2</sup> Testimony of L O.

<sup>3</sup> Test. of Z O.

<sup>4</sup> Div. Ex. E at 3.

<sup>5</sup> O Ex. 4 at 10, Ex. 8. Based on his birthDoe as noted on Ex. E at 1, he would have been 23 or 24 years old at the time.

<sup>6</sup> O Ex. 4 at 10.

migraines. He has been diagnosed with hemiplegia affecting his right side, and a paralytic gate. He is at risk of falling.<sup>7</sup> He is bladder and bowel incontinent all of the time.<sup>8</sup>

On November 2, 2017, Jane Doe, Mr. O's care coordinator, filed an application for the Alaskans Living Independently waiver program for Mr. O.<sup>9</sup> In considering the waiver application, the division relied on a May 17, 2017 assessment of Mr. O's condition conducted as part of his application for the personal care services program.<sup>10</sup> Ernest Shipman, a Health Program Manager with the Division of Senior and Disabilities Services, visited the O home and conducted that assessment using the consumer assessment tool (CAT).<sup>11</sup> On November 14, 2017, the division denied Mr. O's application for waiver services.<sup>12</sup>

A telephonic hearing was held on January 12, 2018. L O represented Mr. O. Victoria Cobo represented the division. Z O, Jane Doe, and Ernest Shipman testified.

The division submitted a written position statement, with the denial letter, the appeal form, and the CAT as exhibits. Mr. O submitted medical records and a copy of the waiver application.<sup>13</sup> The division objected to the consideration of materials dated after its denial decision on the basis of relevance. The materials are admitted into the record, however, the focus of this decision will be on the division's November 14, 2017 decision. The information most relevant to whether that decision was correct is information that predates the decision. Records and events after that date may be more relevant to a future application.

### **III. Discussion**

To qualify for home and community based waiver services, an applicant must require the level of care provided in a nursing facility.<sup>14</sup> The program pays for services that allow an eligible person to stay in the person's home (which may be an assisted living home)

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<sup>7</sup> Div. Ex. E at 3; O Ex. 2, Ex. 6.

<sup>8</sup> Div. Ex. E at 3, 23; test. of Z O.

<sup>9</sup> Test. of Doe; Div. Ex. D at 1; O Ex. 2 at 3.

<sup>10</sup> Div. Ex. D.

<sup>11</sup> Div. Ex. E.

<sup>12</sup> Div. Ex. D.

<sup>13</sup> O Ex. 1 (Power of Att'y and PA-C Smith records); Ex 2 (Waiver App.); Ex. 3 (No Name Psychological records); Ex 4 (Center X records); Ex. 5 (Smith letter); Ex. 6 (Verif. of Diagnosis form); Ex. 7 (Clinic Y records); Ex. 8 (Center X letter). Exhibits 2 - 8 were filed and marked January 12, 2017 after the hearing.

<sup>14</sup> 7 AAC 130.205(d)(4).

rather than move into a nursing facility. The level of care that is provided in a nursing facility is described by regulation.<sup>15</sup>

To determine whether Mr. O met the level of care standard for the waiver program, the division relied on a CAT conducted on May 17, 2017 in connection with an application for personal care services. The division concluded that Mr. O did not meet the standard and was not eligible for the waiver program.

At the hearing, Mr. O's care coordinator argued that Mr. O was entitled to a new assessment after he submitted the waiver application. The care coordinator's argument finds some support in 7 AAC 130.207(c), which provides that "[n]ot later than 30 business days after the department determines that the application is complete, the department will (1) conduct an assessment under 7 AAC 130.213, (2) make a level of care determination under 7 AAC 130.215, (3) notify the applicant and the care coordinator of the level-of-care determination..."

However, the regulation does not necessarily require that the division conduct an assessment in response to every waiver application -- 7 AAC 130.207(c)(1) refers to 7 AAC 130.213, on assessment and reassessment. That section provides that if an application *reasonably indicates the need for services*, "the department will conduct an assessment to determine the level of care the applicant requires." Thus, the regulation appears to give the division latitude to deny an application without conducting a CAT if it determines that the application does not reasonably indicate a need for services. Furthermore, 7 AAC 130.211(a) provides for the screening of applications to determine "whether there is a reasonable indication that the applicant might need services at "a level of care provided in a hospital, nursing facility, or ICF/IID in 30 or fewer days unless the applicant receives home and community-based waiver."

In this case, the division apparently denied Mr. O's application based on the May 17, 2017 CAT.<sup>16</sup> At the hearing, Mr. O's family and care coordinator introduced additional evidence, and argued that Mr. O's condition had worsened substantially since May 2017.

The division's denial is reviewed *de novo* here, meaning this decision takes a new look at the evidence, including the new evidence introduced during the hearing process that may not

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<sup>15</sup> Skilled nursing facility services are defined in 7 AAC 140.515. Intermediate care facility services are defined in 7 AA 140.510.

<sup>16</sup> Div. Ex. D at 1.

have been available to the division when it issued the denial notice.<sup>17</sup> The evidence indicates that Mr. O needs a great deal of assistance in his daily life, and that his needs are taxing his family's resources. Mr. O's family has shown that they need additional support and services to create a workable living situation for Mr. O. Nonetheless, the weight of the evidence supports the division's conclusion that Mr. O's physical condition in November 2017 was not such that he could have met the eligibility criteria for the waiver program.

There are several ways to qualify for the choice waiver program. A person might be medically eligible based on a need for nursing services, use of a ventilator or respirator, uncontrolled seizures, needing therapy five or more days a week, or needing extensive assistance with physical functioning. If none of these apply, a person might qualify based on a combination of the need for nursing services, cognitive and behavioral factors, and physical functioning. The May 2017 CAT scoring showed that Mr. O did not require the level and type of care necessary to qualify for the waiver program.<sup>18</sup> The inquiry here must be whether Mr. O's condition had changed sufficiently by November 2017 to qualify for the waiver program.

#### ***A. Physical functioning***

Physically, Mr. O's ability to get around has suffered since he had a stroke; in April 2017 his doctor noted that his right side is weak and he walks slowly.<sup>19</sup> The May 2017 CAT documented that Mr. O was able to walk around the house without an assistive device.<sup>20</sup> At the hearing, L and Z O expressed concern about Mr. O falling. He has fallen out of bed and off the front porch. Ms. O testified that when Mr. O goes shopping with her, he uses an electric scooter in the store.

The CAT scored Mr. O at 0/5 for locomotion, meaning he was independent in the sense of not requiring help or oversight to walk, but needed cuing support with the activity of walking seven days a week. L and Z O did not dispute that Mr. O is still able to walk on his own. L O reported that Mr. O is getting slower, and now holds onto furniture as he moves around the house. The need for extensive cuing has not diminished. Mr. O frequently comes to a stop and

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<sup>17</sup> See, e.g., *In re O.E.*, OAH No. 13-0542-MDS (Commissioner of Health & Soc. Serv., Kosin, Commissioner's Designee, 2013), *In re X. M.*, OAH No. 15-0090-MDS (Commissioner of Health & Soc. Serv., 2015), accessible at <http://aws.state.ak.us/officeofadminhearings/Category.aspx?CatName=MDS>.

<sup>18</sup> Div. Ex. E at 29.

<sup>19</sup> O Ex. 4 at 6 (Notes of Dr. Roe re 4/20/17 visit).

<sup>20</sup> Div. Ex. E at 4, 7.

stands in one place, often for several minutes. He needs to be cued to keep walking. Because of the extensive need for cuing, Mr. O should be scored 1/5 for locomotion.

Toileting is a particular problem for Mr. O according to his caregivers. Mr. O can walk from the living room to the bathroom, but he does not do so when he needs to relieve himself. If he does go to the restroom, he does not necessarily hit the toilet. He wets the bed. He wears adult diapers, and needs to be cued to clean himself up and change when he has had an accident. He needs assistance to cleanse himself effectively. The CAT scored Mr. O at 2/2 for toileting, meaning he needed limited physical assistance from one person to perform that activity. This score is consistent with the situation described by L and Z O.

Neither the CAT nor the testimony at hearing noted significant problems with other physical activities of daily living measured for purposes of evaluating waiver eligibility. When Mr. O gets to the kitchen table, he needs to be cued to sit down, or he will just stand there. However, he is physically able to eat. The CAT scored him at 0/1 for eating, meaning he can maneuver utensils and eat his food independently, but from setup help.<sup>21</sup> Mr. O is physically able to turn and reposition himself in bed. His family reports that Mr. O spends a lot of time in bed, and would not get up unless cued -- but this appears to be a behavioral or cognitive issue rather than one of physical functioning. The CAT scored Mr. O at 0/0 for bed mobility. The CAT scored Mr. O at 0/0 for transfers, and none of the testimony at the hearing indicated that transfers had become a problem. The remaining activities of daily living evaluated by the CAT -- dressing and personal hygiene -- are not considered in determining waiver qualification, and neither is bathing.<sup>22</sup>

### ***B. Cognition and Problem Behaviors***

In May, the CAT evaluation of Mr. O's behavior acknowledged that he was verbally abusive one to three times in the past week, and did not note other behavioral problems.<sup>23</sup> However, Z O reports that Mr. O continues to require extensive cuing with many activities in addition to walking and toileting, but also that he has become impatient with that cuing. At the hearing, Z O testified that Mr. O was getting "very verbal" with her, yelling at her on a daily basis, and swearing at her. He has started yelling at her in public. She expressed concern about

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<sup>21</sup> Testimony of L O; Div. Ex. E at 9.

<sup>22</sup> Div. Ex. E at 18, 29.

<sup>23</sup> Div. Ex. E at 17.

his use of the electric scooter at the store -- if she comes to a stop, he sometimes keeps going, and she worries about the possibility that he might run into a child or an elder.

Based on the testimony at the hearing, it appears that Mr. O has more problem behaviors than are reflected on the May 2017 CAT. Although there was no indication that he has become physically abusive, his caregivers reported increased verbal abuse, and behaviors that could be categorized as socially inappropriate or resisting care. Because verbal abuse has become a daily issue rather than a periodic one, the assessment of Mr. O's behavior must extend to the behaviors discussed on the supplemental screening tool, which was not included in the May 2017 CAT due to the assessor's evaluation of Mr. O's behavior at that time.

Furthermore, Mr. O has significant memory and cognition issues. In May 2017, Mr. O was able to draw a clock, but he could only remember one of three items after five minutes. The CAT noted that Mr. O is not able to manage his own finances.<sup>24</sup> The CAT also recorded short-term memory problems and moderately impaired cognitive skills (decisions poor, cues/supervision required).<sup>25</sup> Based on the testimony at the hearing, none of these issues have improved, and Mr. O's need for cuing may have increased. However, in May, the assessor did not note that Mr. O had difficulty remembering the current season, location of his own room, names and faces, or where he was.<sup>26</sup> Mr. O's caregivers did not establish at the hearing that these indicia of memory/recall ability had declined. Nor did the testimony at the hearing indicate that Mr. O would likely score 13 or more on the supplemental screening tool for cognition based on memory, recall, global confusion, spatial orientation, and verbal communication. Although he may have challenges in each of these areas, Mr. O is apparently able to communicate verbally and move around in his home. It does not appear that if the division had conducted a more detailed assessment of Mr. O's memory and cognition before issuing the denial in November that it would have changed the analysis. Mr. O clearly has significant cognitive and memory issues, but they do not appear to be so severe as to cross the threshold required to score an additional point on the CAT towards qualification for waiver services.<sup>27</sup>

Based on the testimony at the hearing, Mr. O's mental and physical condition declined between May 2017 November 14, 2017, when the division denied his waiver

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<sup>24</sup> Div. Ex. E at 4.

<sup>25</sup> Div. Ex. E at 16.

<sup>26</sup> Div. Ex. E at 16.

<sup>27</sup> See Div. Ex. E at 29; *In re S.E.*, 13-0406-MDS (Commissioner of Health and Social Services, 2013) (discussing the supplemental screening tools for behavior and cognition).

services application. However, even considering the decline, Mr. O did not meet the burden of establishing that his cognitive, behavioral, and physical issues are sufficiently severe to qualify for the waiver program. Mr. O does not require extensive physical assistance with activities of daily living or other needs that require a nursing home level of care such as to qualify him for the waiver program. The evidence does not indicate that Mr. O's condition in November 2017 qualified him for participation in the waiver program. However, nothing in this decision precludes Mr. O from reapplying.

#### **IV. Conclusion**

The division's denial of Mr. O's November 2017 waiver services application is affirmed.

Dated: March 9, 2018.

Signed  
Kathryn L. Kurtz  
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 27<sup>th</sup> Day of March, 2018.

By: Signed  
Name: Kathryn L. Kurtz  
Title: Administrative Law Judge

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