

Non-Adoption Options

C. The undersigned, in accordance with AS 44.64.060(e)(4), rejects, modifies or amends one or more factual findings as follows, based on the specific evidence in the record described below:

Based on the proposed decision, in order to qualify for Waiver services, Ms. L needed to establish that she requires “extensive assistance,” i.e. a self-performance score of 3, for three of the following five ADLs: bed mobility, transfers, locomotion, eating and toileting. In this case only transfers, locomotion and toileting were at issue. Even if one assumes that Ms. L requires extensive assistance for the ADLs of transfers and toileting, she did not meet her burden of proof of establishing, by a preponderance of the evidence, that she requires extensive assistance for the ADL of locomotion.

To establish that she needs extensive assistance with locomotion, Ms. L needed to show that she requires weight-bearing assistance three or more times over a seven-day period. Based on the record, Ms. L offered personal and witness testimony concerning her capacity for locomotion. The Division also offered testimony concerning Ms. L’s capacity for locomotion. After reviewing the record, including testimony offered by both parties, I conclude that Ms. L did not prove by a preponderance of the evidence that she requires weight-bearing assistance for locomotion.

This conclusion is supported by the testimony of the assisted living home provider. Between 36:30 – 47:10 of the hearing, there is an exchange of testimony in which the provider states that due to Ms. L’s shortness of breath, staff has to be “right there” with her when she is locomoting to the bathroom. However, based on this testimony, a reasonable person would conclude that standing with and walking alongside her during locomotion does not require weight-bearing assistance. Rather, it requires limited assistance at most.

This conclusion is further supported by testimony from Ms. L’s care coordinator. Between 50:00 – 54:15 of the hearing, the care coordinator describes how Ms. L needs assistance with stability and assistance with her oxygen cord while she uses her walker for locomotion. This type of assistance also qualifies at most as limited assistance.

Again, while there is no dispute over the need for some assistance in the ADL of locomotion, the threshold question pertains to the level of assistance required. Ms. L asserts that she requires weight-bearing assistance that merits a self-performance score of 3. However, she does not prove this by a preponderance of the evidence because the testimony on the record supports only a need for limited assistance for locomotion. Ms. L uses a walker for locomotion, and although staff may follow her or walk alongside of her, the assistance they are providing her is limited in nature because it appears to be preventative (i.e. in case she were to lose her balance and fall), and to help her with her oxygen cord and with stability. There is no clear testimony that supports the contention that the assistance provided is weight bearing. Since there is no clear testimony that weight-bearing assistance is being provided at least three times per week, a self-performance score of 3 for locomotion would not be correct.

Since Ms. L did not prove by a preponderance of the evidence that a score of 3 or more is warranted for the ADL of locomotion, even if she were to receive scores of 3 in the other relevant ADLs (transfers and toileting), she still would not be not eligible for Waiver services. Therefore, the Division’s decision is affirmed, but only based on the issue of

locomotion. There is no need for this decision to consider the other ADLs at issue because based on the conclusion for locomotion, Ms. L is not eligible for Waiver services.

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 2nd day of February, 2015.

By: Signed
Jared C. Kosin, Executive Director
DHSS Office of Rate Review

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

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

In the Matter of:)
) OAH No. 14-1432-MDS
 U L) Agency No.
_____)

DECISION

I. Introduction

U L applied for Medicaid Home and Community-based Waiver (Waiver) benefits. She was assessed by the Division of Senior and Disabilities Services (Division) to determine her eligibility for Waiver benefits. The Division notified her on July 15, 2014 that her application was denied. Ms. L appealed the denial.

Ms. L’s hearing was held on September 30, 2014. She represented herself. T C, her care coordinator, and F D, the administrator from Ms. L’s assisted living home, both testified for Ms. L. Angela Ybarra represented the Division. Naomi Schlup, R.N., testified for the Division.

After a review of the evidence, the Division’s denial of Ms. L’s application for Waiver services is reversed.

II. Background Facts

Ms. L is 74 years old. She lives in an assisted living home (ALH). She has diverticulosis of the colon, a ventricular septal defect, congestive heart failure, severe chronic obstructive pulmonary disease, chronic lower back pain, and she receives continuous oxygen.¹ She uses a walker within her room. She has a wheelchair which is outside of her room. She cannot propel the wheelchair by herself.² Ms. L experiences significant shortness of breath on “minimal exertion.”³

Ms. L applied for Waiver benefits. Naomi Schlup, a Division nurse, made a visit to assess Ms. L’s eligibility for Waiver benefits on June 25, 2014. She recorded the assessment visit in the CAT. Her findings resulted in a denial of Ms. L’s application.⁴ In general, Ms. Schlup found that Ms. L was not cognitively impaired, did not have any behavioral issues, did not require any specialized nursing services, did not receive any specialized therapies or

¹ Ex. E, pp. 3 – 5. *See also* Clinic Notes from September 19, 2014, p. 4 (documents submitted at hearing).

² Ex. E, p. 9.

³ Ex. E, p. 11.

⁴ Ex. D.

treatments, and did not require a minimum of extensive assistance with three or more of the scored activities of daily living (body mobility, transfers, locomotion, eating, or toileting).⁵

III. Discussion

In this case, in which a claimant is applying for benefits, the claimant has the burden of proving by a preponderance of the evidence that the Division's denial was incorrect.⁶

1. Overview

The Alaska Medicaid program provides Waiver services to adults with physical disabilities who require “a level of care provided in a nursing facility.”⁷ The purpose of these services is “to offer a choice between home and community-based waiver services and institutional care.”⁸

The nursing facility level of care⁹ requirement is determined in part by an assessment which is documented by the CAT.¹⁰ The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,¹¹ and whether an applicant has impaired cognition or displays problem behaviors.¹² 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 3.¹³

The CAT also bases Waiver eligibility upon the coding provided for five specified activities of daily living (ADLs): body mobility, transfers, locomotion within the home, toileting, and eating. The CAT numerical coding system has two components. The first component is the *self-performance code*. These codes rate how capable a person is of performing a particular ADL. The possible codes are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance¹⁴); **3** (the person requires extensive assistance¹⁵); and **4** (the person is totally

⁵ Ms. Schlup's testimony; Ex. E., pp. 1 – 2, 7, 15 – 20.

⁶ 7 AAC 49.135.

⁷ 7 AAC 130.205(d)(1)(B) and (d)(2).

⁸ 7 AAC 130.200.

⁹ See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

¹⁰ 7 AAC 130.230(b)(2)(B).

¹¹ Ex. E, pp. 15 - 17.

¹² Ex. E, pp. 18 - 19.

¹³ Ex. E, p. 31.

¹⁴ Pursuant to 7 AAC 125.020(a)(1), limited assistance with an ADL “means a recipient, who is highly involved in the activity, receives direct physical help from another individual in the form of guided maneuvering of limbs, including help with weight-bearing when needed.”

dependent¹⁶). There are also codes which are not used in calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).¹⁷

The second component of the CAT scoring system is the *support code*. These codes rate the degree of assistance that a person requires for a particular ADL. The possible codes are **0** (no setup or physical help required); **1** (only setup help required); **2** (one person physical assist required); and **3** (two or more person physical assist required). Again, there are additional codes which are not used to arrive at a service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).¹⁸

If a person has a self-performance code of 2 (limited assistance, which consists of non-weight bearing physical assistance three or more times during the last seven days, or limited assistance plus weight-bearing assistance one or two times during the last seven days), or 3 (extensive assistance, which consists of weight-bearing support three or more times during the past seven days, or the caregiver provides complete performance of the activity during a portion of the past seven days), plus a support code of 2 (physical assistance from one person) or 3 (physical assistance from two or more persons) with any of the five specified ADLs, that person receives points toward his or her total Waiver program eligibility score on the CAT. A person can also receive points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive behaviors, etc.), and required assistance with any of the five specified ADLs.¹⁹

In order 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 ADLs (bed mobility, transfers, locomotion within the home, eating, and toileting).²⁰

The results of the assessment portion of the CAT are then scored. If an applicant's score is 3 or higher, the applicant is medically eligible for Waiver services.²¹

¹⁵ Pursuant to 7 AAC 125.020(a)(2), extensive assistance with an ADL “means that the recipient is able to perform part of the activity, but periodically requires direct physical help from another individual for weight-bearing support or full performance of the activity.”

¹⁶ Pursuant to 7 AAC 125.020(a)(3), dependent as to an ADL, or dependent as to an IADL, “means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity.”

¹⁷ Ex. E, p. 20.

¹⁸ Ex. E, p. 20.

¹⁹ Ex. E, p. 31.

²⁰ Ex. E, p. 31.

²¹ Ex. E, p. 31.

2. Eligibility Decision

The 2014 assessment found that Ms. L was not receiving any therapies (physical, speech, occupation, respiratory, or specialized treatments/therapies), had no impaired cognition or behavioral issues, and was not receiving professional nursing services.²² The record does not contain any evidence that contradicts those findings. While Ms. L receives oxygen on a continuous basis, it is for a long-term chronic condition and is monitored by ALH staff, not by a nurse, so it does not provide a scoring point on the CAT.²³ Consequently, her only path to eligibility for Waiver benefits is if she requires extensive physical assistance (self-performance code of 3) or is completely dependent (self-performance code of 4) in three or more of the qualifying ADLs of bed mobility, transfers, locomotion within the home, eating, and toileting.

The 2014 assessment found that Ms. L did not require extensive assistance in any of the qualifying ADLs.²⁴ Ms. L argues that she required assistance in three ADLs: transfers, locomotion, and toileting. Each is addressed below.

a. Transfers

The nurse-assessor concluded that Ms. L required limited assistance (self-performance code of 2) for transfers. This conclusion was based upon her observation of Ms. L getting up from bed by pushing off the bed with one arm while the ALH staff helped her to stand. She was observed to be wheezing and complaining of shortness of breath. The CAT recorded that Ms. L told the nurse-assessor that she could sometimes get up by herself by leaning on furniture, but that she was usually helped by ALH staff.²⁵ At hearing, the nurse-assessor supplemented the CAT by her testimony that at other times the ALH staff helped Ms. L transfer “by lifting her arm.”²⁶ The nurse-assessor later stated that Ms. L was lifted, but that she did not observe staff bearing any of Ms. L’s weight.²⁷

Ms. L and Ms. D both testified, however, that she holds onto staff who have to bear her weight. Ms. D testified that Ms. L has a gait belt, which staff have to grab to transfer her.

The use of the term “lifting” by the nurse-assessor supports a finding that weight-bearing support is used to transfer Ms. L. While the nurse-assessor spent some time trying to clarify the term “lifting” to explain that she did not mean weight-bearing support, the use of the term belies

²² Ms. Schlup’s testimony; Ex. E, pp. 7, 15 - 19.

²³ See Ex. E, p. 15 (A(5)), p. 17 (B(1)(i)), p. 31, (NF1(a) and NF2(a)

²⁴ Ex. E, pp. 8 – 9, 11.

²⁵ Ex. E, p. 8.

²⁶ Ms. Schlup’s testimony at 24:07 – 24:20.

²⁷ Ms. Schlup’s testimony at 37:20 – 38:25.

her explanation. Ms. D and Ms. L both testified that weight-bearing assistance was used. The use of a gait belt is consistent with weight-bearing assistance. Consequently, Ms. L met her burden of proof on this point and demonstrated that it is more likely true than not true that she requires weight-bearing, *i.e.*, extensive assistance (self-performance code of 3) for transfers.

b. Locomotion

The nurse-assessor concluded that Ms. L required limited assistance (self-performance code of 2) for locomotion. She arrived at this conclusion by observing Ms. L walk 10 feet without using her walker. The CAT recorded that Ms. L told her that she uses a walker within her room, but that she uses “a wheelchair for locomotion outside and to appointments.” The wheelchair is located outside Ms. L’s room. Ms. L is unable to self-propel the wheelchair.²⁸

The evidence on this issue is mixed. The nurse-assessor observed that Ms. L used the walker within her room, but used the wheelchair “outside” without defining whether the use “outside” was outside her room and within the ALH, or just outside of the building housing the ALH. Ms. D’s testimony mentioned Ms. L walking to the bathroom, which is outside her room, which would support an inference that Ms. L does not require the use of a wheelchair within the ALH, only outside the ALH. Ms. D’s testimony was that Ms. L always needed someone with her to provide weight-bearing assistance with locomotion, due to weakness and her persistent shortness of breath upon exertion. Given the fact that Ms. L indisputably has significant breathing difficulties on exertion and weakness, Ms. D’s testimony is credible. Ms. L has therefore met her burden of proof on this point and demonstrated that it is more likely true than not true that she requires weight-bearing, *i.e.*, extensive assistance (self-performance code of 3) for locomotion.

c. Toileting

The nurse-assessor concluded that Ms. L required limited assistance (self-performance code of 2) for toileting. She arrived at this conclusion based upon Ms. L’s statement that she needs help to transfer on and off the commode, and sometimes needs help cleansing herself after using the commode. She did not observe Ms. L using the toilet, but extrapolated her abilities from her transferring ability and her upper body range of motion.²⁹

As found above, Ms. L requires extensive assistance with transferring. This would carry over to toileting. Ms. D also testified that Ms. L requires weight-bearing assistance with

²⁸ Ex. E, p. 9; Ms. Schlup’s testimony.

²⁹ Ex. E, p. 11; Ms. Schlup’s testimony.

toileting. The preponderance of the evidence therefore supports a finding that Ms. L also requires extensive assistance (self-performance code of 3) for toileting.

IV. Conclusion

Ms. L requires extensive assistance with three of the scored ADLs: transfers, locomotion, and toileting. As a result, she qualifies for Medicaid Waiver benefits. The Division's decision denying her application is reversed.

DATED this 18th day of December, 2014.

Signed _____
Andrew M. Lebo
Administrative Law Judge

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