

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

In the Matter of )  
 )  
S N ) OAH No. 19-0790-MDS  
 ) Agency No.  
\_\_\_\_\_ )

**DECISION**

**I. Introduction**

S N applied for Medicaid Waiver services on June 20, 2019. The Division of Senior and Disabilities Services (Division) denied the application finding he did not meet the level of care requirements for Waiver services based on an assessment of his condition conducted July 15, 2019. Mr. N requested a hearing.

The hearing took place over two days: October 14 and 28, 2019.<sup>1</sup> Mr. N was represented by his wife, D, with assistance from his Care Coordinator, Z T. Both Ms. N and Mr. T testified on Mr. N's behalf. Terri Gagne represented the Division. She called Robin Platt, who conducted the assessment, as her only witness.

Mr. N suffers several significant medical challenges which impact his quality of life and reduce his ability to participate in normal activities. At the time of the assessment, however, he did not require nursing services, other therapies, or extensive assistance with three of the five activities of daily living that are considered for Waiver eligibility. Thus, despite his on-going health concerns, Mr. N did not qualify for Waiver services. The Division's denial of his application is Affirmed.

It must be noted, however, that testimony at the hearing established the existence of additional medical and therapeutic records not provided to the Division or at the hearing. It is possible information in those records and subsequent changes to Mr. N's health could materially impact evaluation of a future Waiver application.

**II. Facts**

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

S N is a fifty-six-year-old man disabled by chronic obstructive pulmonary disease (COPD) and congestive heart failure.<sup>2</sup> He is not eligible for a lung transplant due to his heart disease, nor is he a good candidate for heart surgery due to his pulmonary issues. He uses a portable oxygen tank. He relies

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<sup>1</sup> Due to the extension of the hearing, fourteen days were added to the regulatory deadlines.

<sup>2</sup> Ex. E., p. 4.

on a four-wheeled seated walker for mobility within the home, and requires a wheelchair for more extensive travel. He cannot sleep in a supine position and does not use a conventional bed. Instead, he sleeps in a reclining chair. He is required to keep his feet elevated in the recliner due to his congestive heart disease.<sup>3</sup>

His wife, D, is his primary caretaker. She also works full-time outside the home. Due to Mr. N's physical condition, she leaves him sleeping or resting in the recliner when she goes to work. When she returns home, she performs the household chores, prepares their meals, and assists him with personal care.<sup>4</sup>

Mr. N had a heart attack in early 2019. After his release from Providence Hospital, the hospital provided several therapeutic services in the home. Those services included regular skilled nursing, weekly in-home physical and occupation therapy, and respite assistance. The hospital also put the Ns in contact with Z T, a care coordinator, to help them identify and apply for Alaska benefit services.<sup>5</sup>

Mr. T recommended that Mr. N apply for Alaskans Living Independently (ALI) Medicaid Waiver benefits. Mr. T observed Mr. N needed more assistance than many of his other clients who were already receiving those services.<sup>6</sup> Mr. N did so on June 20, 2019.<sup>7</sup>

On July 15, 2019, Robin Platt, a Senior Disabilities Services (SDS) assessor, evaluated Mr. N for program eligibility. To qualify for Waiver benefits, an individual's level of care (LOC) needs must meet a nursing level of care as defined by regulation.<sup>8</sup> Ms. Platt conducts an in-home evaluation using the CAT tool and reviews medical records to reach her conclusions regarding level of care.<sup>9</sup> She reviewed approximately 45 pages of medical records documenting Mr. N's medical status.<sup>10</sup> However, those records did not include any information regarding prior PCA care, the nursing and therapeutic services provided by Providence, nor details regarding his need for home health care services.<sup>11</sup> The records provided referenced Mr. N's clinically stable condition<sup>12</sup> and the provider's expectation he would be

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<sup>3</sup> Testimony of C. N.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Testimony of R. T.

<sup>7</sup> Ex. G, p. 1.

<sup>8</sup> See 7 AAC 130.215.

<sup>9</sup> Testimony of R. Platt.

<sup>10</sup> Ex. G., pp. 16-61.

<sup>11</sup> Testimony of C. N.

<sup>12</sup> Ex. G, p. 24.

able to participate in activities such as walking on a treadmill in the near future.<sup>13</sup> Ms. Platt did not have access to a 2015 CAT assessment regarding Mr. N's prior need for PCA services.<sup>14</sup>

At the time of the assessment, Mr. N was not receiving any therapies or skilled nursing services. He did not exhibit any notable cognitive or behavior problems. Regarding the five activities of daily living assessed for Waiver eligibility, the assessor concluded Mr. N required set-up help to eat and transfer<sup>15</sup> but could position himself in bed, locomote through the home with his walker, and use the toilet independently.<sup>16</sup> Mr. N did not qualify for Waiver benefits given the results of her assessment.<sup>17</sup>

The witnesses for Mr. N testified that extensive medical records in addition to those reviewed by the assessor existed. Mr. N received regular PCA services until the self-employed Medicare premiums became too expensive in early 2019. When the Waiver application was filed in June 2019, he was receiving weekly nursing and therapeutic services in the home through Providence home health care, but by the time the Division arrived to conduct the assessment in July 2019, insurance eligibility for those services expired. However, they believed his physician expected the need for those services would continue and be supplied.<sup>18</sup>

The witnesses also testified Mr. N's needs for assistance were greater than those indicated by the CAT. For example, they explained Mr. N needed weight bearing assistance to rise from the toilet without risk. Mr. N can sit on the toilet but he cannot stand without another person physically pulling him to his feet. His walker is too tall to use as leverage from the toilet. In the past when no one was present to help him, he has used the toilet paper holder or the window sill but that is dangerous. The toilet paper holder has repeatedly broken, and he has fallen using the window sill.<sup>19</sup> Due to the danger presented, Mr. N keeps a portable urinal at his side so he can avoid the dangers of unsupervised toilet use when his wife is not home. She assists with the ADL on a regular basis.<sup>20</sup> His needs as described at the hearing demonstrated Mr. N cannot safely stand from the toilet without weight bearing support from his wife.

Since the assessment Mr. N's health had deteriorated. Subsequent medical care indicated additional loss range of motion in his upper body and an increase in tremors both of which impacted his

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<sup>13</sup> Ex. G, p. 27.

<sup>14</sup> Testimony of R. Platt.

<sup>15</sup> Self-Performance score of 1, support code 0 for each. Ex. E., pp. 7-8.

<sup>16</sup> Self-Performance score 0, support code 0 for each. Ex. E., pp. 7-9.

<sup>17</sup> Ex. E., p. 18-19.

<sup>18</sup> Ex. G, p. 28.

<sup>19</sup> Testimony of C. N and R. T.

<sup>20</sup> Testimony of C. N.

locomotion, transfer capability, and ability to eat independently.<sup>21</sup> Those records were not presented at the hearing and certain diagnostic testing had not been completed by the hearing date. The Division agreed the materials, particularly those related to a subsequent hospitalization, increase in tremors, and post-assessment MRIs, could be relevant to a future Waiver application.

### **III. Discussion**

#### ***A. Method for Assessing Eligibility***

The Alaska Medicaid program provides Waiver services to adults who, due to a medical condition and/or functional limitation, have health care needs that require the level of care provided in a skilled or intermediate nursing facility.<sup>22</sup> The requirements are described by regulation.<sup>23</sup> The Waiver program pays for services that allow an eligible person to stay in their home rather than move into the nursing facility.

A Consumer Assessment Tool, known as the CAT, is used to assess whether the applicant meets the level of care requirements.<sup>24</sup> The CAT documents the applicant's needs, if any, for professional nursing services, therapies, and special treatment;<sup>25</sup> any significant cognitive impairment or problem behavior;<sup>26</sup> the applicant's ability to perform specific activities of daily living (ADLs); and the type of assistance he needs with those activities.<sup>27</sup> It records the assessor's perception of an applicant's medical care needs and ability to function physically. Each of the assessed items is given a numeric score. If an applicant's score is high enough, he is eligible for Waiver services.

Individuals who do not require regular professional nursing or therapy services, may nevertheless qualify for Waiver services if they require extensive physical assistance or are totally dependent on others<sup>28</sup> to perform three or more of the five specified ADL. Numerically, this means they must score 3 or higher on three or more of the pertinent ADL. Those ADL are eating, bed mobility, locomotion within the home, transfers, and toilet use.

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<sup>21</sup> Testimony of C. N and R. T.

<sup>22</sup> 7 AAC 130.205; AS 47.07,.020(b)(2).

<sup>23</sup> Skilled nursing facility services are defined in 7 AAC 140.515. Intermediate care facility services are defined in 7 AAC 140.510.

<sup>24</sup> 7 AAC 130.215(4).

<sup>25</sup> Ex. E, pp 6, 12-14.

<sup>26</sup> Ex. E., pp. 15-17.

<sup>27</sup> Ex. E, pp. 7-9, 18-19.

<sup>28</sup> Self-performance score code of 3 or 4.

## ***B. Eligibility***

An applicant for Waiver services has the burden of proof by a preponderance of the evidence.<sup>29</sup> The date of the agency's decision is the relevant date for determining whether the eligibility criteria were met.<sup>30</sup>

Based on the evidence in the record and after careful consideration, Mr. N did not meet his burden to establish that he was eligible for Waiver services. The evidence indicates that Mr. N has serious and debilitating medical conditions, needs assistance in his daily life, and those needs are taxing his family's resources. Mr. N's family has shown they need additional support and services to create a workable living situation. Nonetheless, the weight of the evidence supports the Division's conclusion.

Mr. N did not have any documented nursing needs, mental or behavioral impairments. Nor was he receiving nursing or specialized therapy three or more times per week at the time of his application.<sup>31</sup> Accordingly, he was only eligible for Medicaid Waiver if he required a minimum of extensive assistance with three or more of the scored ADLs (eating, bed mobility, transfer, locomotion, and toileting). Extensive assistance is defined as the need to receive weight bearing support from the caregiver to perform the ADL three or more times within the last seven days or full performance by the caregiver during part but not all of the last seven days.<sup>32</sup> Weight bearing assistance is 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.<sup>33</sup>

For purposes of the CAT, the eating ADL refers to how a person eats and drinks, not including any food preparation or cooking.<sup>34</sup> There was no dispute that at the time of the CAT, Mr. N could eat and drink independently.<sup>35</sup> The original eating score as independent but requiring set-up help (self-performance code 0, support code 1) is supported by the evidence.<sup>36</sup>

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<sup>29</sup> 7 AAC 49.135.

<sup>30</sup> See, 7 AAC 49.170; *In re T.C.*, OAH No. 13-0204-MDS (Commissioner of DHSS 2013) (available at <http://aws.state.ak.us/OAH>).

<sup>31</sup> Ex. E., p. 6; Testimony of C. N and R. T.

<sup>32</sup> Ex. E., p. 7.

<sup>33</sup> See *In re K T-Q*, OAH Case No. 13-0271-MDS, p. 4 (Commissioner DHSS June 21, 2013) (Available at <http://aws.state.ak.us/OAH>).

<sup>34</sup> Ex. E., p. 8.

<sup>35</sup> Mr. N's ability to do so has noticeable declined since the CAT according to witnesses at the hearing. The diagnostic results to explain causation were not available at the time of the hearing. This change in circumstance could impact a subsequent application.

<sup>36</sup> Ex. E., p. 8.

Mr. N cannot sleep in a traditional bed due to his respiratory needs. Mr. T, the care coordinator, stated he plans to request an adjustable bed for Mr. N. Until then, a reclining chair is Mr. N's only option for safe sleep. The recliner, therefore, qualifies as his bed for assessment of bed mobility.<sup>37</sup> Mr. N is able to reposition himself in the recliner. No evidence contradicts the independent bed mobility score.<sup>38</sup>

The ADL of transfer refers to how a person moves between surfaces such as from a bed or chair to a standing position. It does not include transfers to and from the toilet, since that activity is assessed as part of the toilet use ADL.<sup>39</sup> There is no doubt that Mr. N requires an assistive device to move in and out of the recliner, and that it is painful and difficult for him to rise from sitting to standing. He does not, though, require regular weight bearing assistance from another person to do so. He does require aid to re-position the foot-rest in the recliner to keep his feet properly elevated. No evidence contradicts the score for needing supervision or set-up assistance to transfer<sup>40</sup>

Because Mr. N can move from place to place within the home<sup>41</sup> using his walker the score for locomotion is supported by the evidence.<sup>42</sup>

The toileting ADL refers to use of the toilet, including transfers on/off, cleansing, changing pads and adjusting clothing. It does not include bathing or showering.<sup>43</sup> Ms. Platt concluded Mr. N could use the toilet independently.<sup>44</sup> Meaningful evidence was presented to contradict the Division's score for toilet use. Mr. N's medical condition and the testimony of his wife and care coordinator support a finding he should have been scored as requiring extensive assistance (self-performance code 3) with toileting because he needs weight bearing assistance (being pulled up from the toilet) when he uses the toilet and Ms. N provides this assistance to him.<sup>45</sup>

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<sup>37</sup> Testimony of R. Platt.

<sup>38</sup> Self-performance score 0, support code 0. Ex. E, p. 7.

<sup>39</sup> Ex. E., pg. 7.

<sup>40</sup> Self-performance score 1, support code 0. Ex. E, p. 7.

<sup>41</sup> The testimony established that Mr. N needs extensive assistance to walk up and down the stairs into his residence and to enter and exit a motor vehicle, but those activities are not part of the CAT Waiver assessment.

<sup>42</sup> Self-performance score 0, support code 0. Ex. E, p. 8.

<sup>43</sup> Ex. E., p. 9; *see also*, *In the Matter of P.X.*, 17-1120-MDS (Commissioner of DHSS 2018), p.8. (Available at <http://aws.state.ak.us/OAH>).

<sup>44</sup> Self-performance score 0, support code 0. Ex. E, p. 8.

<sup>45</sup> His needs as described at the hearing support a finding extensive assistance is required to perform this ADL. Mr. N may occasionally try to toilet independently and use the window sill when he does. However, it was clear from the hearing that was the exception not the rule, the approach is unsafe, and his wife supports him at least three times a week which meets the scoring criteria for extensive assistance. Ex. E., p. 6.

Ms. N and the care coordinator testified Mr. N's health continues to deteriorate, and he will continue to require more assistance with the passage of time. He cannot walk up or down the stairs to their home without weight-bearing support. Nor can he reasonably enter or exit a car. He falls forward then "rolls" in because while his wife does not have the physical strength to pick him up, she can with effort re-adjust him in the car. He is unable to perform tasks like bathing or showering on his own. He requires help to dress. Ms. N testified she no longer has the physical strength to provide this care. The testimony established a definite need for services, but many of the areas where help was most needed were not those used to determine eligibility for the specific Waiver benefits requested.

#### **IV. Conclusion**

To qualify for Medicaid Waiver benefits, Mr. N must need extensive assistance with three of the scored ADLs. Mr. N established he needs extensive assistance with one scored ADL- toileting. As a result, Mr. N has not met his burden of proof that he qualified for participation in the Waiver program at the time of his application. However, nothing in this decision precludes Mr. N from re-applying for Waiver benefits with inclusion of the missing and subsequent medical records or applying for other benefit services to address certain specific concerns such as bathing and transportation to and from the home.

The Division's denial of his application is Affirmed.

Dated: November 4, 2019

*Signed*  
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Carmen E. Clark  
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 19<sup>th</sup> day of November, 2019.

By: Signed \_\_\_\_\_  
Name: Carmen Clark  
Title: Administrative Law Judge

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