

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

In the Matter of )

C D )

OAH No. 18-0405-MDS )

**DECISION**

**I. Introduction**

C D applied for services under the Older Alaskan or Adult with a Physical Disability Waiver program, also known as the Waiver program. After conducting an assessment, the Division of Senior and Disabilities Services (SDS) issued a decision denying Waiver services. Ms. D appealed the determination. Her case came to hearing on June 22, 2018, with all participants appearing by telephone.

At the hearing, Ms. D testified on her own behalf and obtained testimony from her pastor, K F. The SDS side of the case was presented through testimony from Samantha Fili, who had conducted the assessment, with brief additional testimony from hearing representative Victoria Cobo about the program at issue and the assisted living options. Ms. D's care coordinator, M Q, also commented regarding assisted living home options.

At age 70, Ms. D is suffering from a distressing array of health challenges, including some that make her prone to falling. Everyone at the hearing agreed that she needs considerable assistance, ideally in an assisted living setting. However, qualification for the Waiver program carries a higher threshold.

As an initial applicant, Ms. D had the burden to show at hearing that she qualified for the Waiver program as of the date her application was denied. This decision concludes that she did not carry that burden. The hearing indicated that she might receive a qualifying score if certain therapies were initiated, however, and she may be well-advised to reapply if that occurs.

## II. Background Facts

C D suffers from morbid obesity and diabetes, coupled with circulatory disease that has led to at least one TIA. She has trouble with balance and has had several falls in the last year.<sup>1</sup>

Ms. D's physician feels that her medical history, medication, and fall risk make her appropriate for "assisted living placement" with "24 hour staffing."<sup>2</sup> At the hearing, SDS representative Victoria Cobo essentially stated an identical estimation of Ms. D's needs.<sup>3</sup> Ms. D is currently in an assisted living setting through General Relief, but it appears that the home she is in will decline to continue caring for her at that rate of reimbursement, forcing her to move to a more distant home.<sup>4</sup>

Assessor Samantha Fili visited Ms. D on March 13, 2018 as part of the process of evaluating her eligibility for Waiver services.<sup>5</sup> Ms. Fili also testified at length in the appeal hearing, and her testimony seemed frank, although in one respect she was surprisingly confused about the scoring standards for the assessment process. While she perceives Ms. D as a person who needs significant in-home help, she did not find her disabilities to rise to the threshold level for the Waiver program at present. The details of this evaluation are discussed below.

A key fact affecting Ms. D's Waiver eligibility is the status of her therapies. A patient who is receiving physical, speech/language, occupational, or respiratory therapy three or more times a week can receive a point toward Waiver qualification.<sup>6</sup> However, at the time the agency made her eligibility decision, Ms. D was not attending any such therapies. The only therapy she was attending was aquatherapy,<sup>7</sup> which is not one of the qualifying therapies.

After the Division denied Waiver services on April 10, 2018,<sup>8</sup> C D requested a Fair Hearing on the 16<sup>th</sup> of the same month.<sup>9</sup>

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<sup>1</sup> See Ex. E, p. 4.

<sup>2</sup> Ex. 1 (letter from B.T, M.D.). Testimony

<sup>3</sup> of Victoria Cobo.

<sup>4</sup> Testimony of C D.

<sup>5</sup> Ex. E.

<sup>6</sup> Ex. E, pp. 13 and 32.

<sup>7</sup> Testimony of Ms. D.

<sup>8</sup> Ex. D.

<sup>9</sup> Ex. C.

### **III. Qualification for Waiver**

#### ***A. Home and Community-Based Waiver Program***

An adult with a physical disability is eligible to receive benefits under the Waiver program if he or she requires the level of care that is normally provided in a skilled or intermediate nursing facility.<sup>10</sup> The program pays for services that allow an eligible person to stay in his or her home (which may be an assisted living home) rather than move into a nursing facility. The level of care that is provided in a nursing facility is described by regulation. Skilled nursing facility services are defined in 7 AAC 140.515. Intermediate care facility services are defined in 7 AAC 140.510.

The department determines whether an applicant requires nursing facility level of care services by conducting an assessment.<sup>11</sup> For adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and 515,<sup>12</sup> and is done with a Consumer Assessment Tool, or CAT. The CAT is an evaluation tool in the nature of a questionnaire and scoring mechanism. Because it is adopted by reference in 7 AAC 160.900(d)(6),<sup>13</sup> it is itself a regulation.

There are a variety of ways to score a sufficient number of points on the CAT to qualify for Waiver. In this decision, it will not be necessary to review all of them in detail; only one is potentially applicable to Ms. D. This route to qualification is through demonstrated need for “extensive assistance” with three or more key activities of daily living, or “ADLs.” This qualification route will be evaluated in Part B.

A person can also receive points for combinations of required professional nursing services, therapies, significantly impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive behaviors, etc.),<sup>14</sup> but these do not apply to Ms. D. Her cognition and behaviors are good and, as has already been noted, she is not receiving any qualifying services or therapies.

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<sup>10</sup> 7 AAC 130.205(d)(2); 7 AAC 130.215(4).

<sup>11</sup> 7 AAC 130.213.

<sup>12</sup> 7 AAC 130.213(b).

<sup>13</sup> Adopting January 29, 2009 version of the CAT.

<sup>14</sup> Ex. E, p. 31.

As the Division’s decision is reviewed on appeal, the relevant date for purposes of assessing the state of the facts is, in general, the date of the agency’s decision under review.<sup>15</sup> In this case, that is April 10, 2018.

***B. Extensive Assistance with ADLs***

A client who is receiving no qualifying special therapies may nonetheless qualify for Waiver services via a need for extensive assistance with certain ADLs. A person can qualify for Waiver services if he or she has a self-performance score of 3 (extensive assistance) or 4 (dependent) in three of five “shaded” ADLs. These are bed mobility (moving within a bed); transfers (i.e., moving from the bed to a chair or a couch, etc.); locomotion within the home (walking or movement when using a device such as a cane, walker, or wheelchair); eating; and toilet use (which includes transferring on and off the toilet and associated hygiene).<sup>16</sup> Ms. Fili scored Ms. D at 3 in toilet use, 2 in transfers, 1 in locomotion and bed mobility, and 0 (independent) in eating.

*1. Bed Mobility*

Bed mobility is defined as how a “person moves to and from lying position, turns side to side, and positions body while in bed.”<sup>17</sup> Ms. Fili observed Ms. D repositioning herself in a recliner and scoot to the end of the recliner.<sup>18</sup> Ms. D did not really contest this assessment. Ms. Fili’s score of 1 is probably appropriate; in any event, there is no basis to raise the score all the way to 3.

*2. Transfers*

In the area of transfers, Ms. Fili perceived Ms. D as having quite a bit more difficulty. Transfers are defined as how a “person moves between surfaces,” such as from a sitting to a standing position.<sup>19</sup> Ms. D made careful notes on this activity, recording that at the beginning of her visit Ms. D able to stand once without assistance, but it took three minutes to accomplish the task, and that on a later occasion in the visit staff had to bear some of her weight to get Ms. D up.<sup>20</sup> Ms. D scored transfers at 2, for “limited assistance,” meaning that while Ms. D herself is

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<sup>15</sup> 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>).

<sup>16</sup> Ex. E, pp. 7, 32. This qualification route is found on page 32 under NF.1(e).

<sup>17</sup> Ex. E, p. 7.

<sup>18</sup> Testimony of Ms. Fili; Ex. E, p. 7.

<sup>19</sup> Ex. E, p. 7.

<sup>20</sup> *Id.*

“highly involved in [the] activity,” she needs hands-on “nonweight-bearing assistance,” with actual weight-bearing assistance needed up to twice a week.<sup>21</sup>

What seems to have happened here is that while Ms. Fili did an excellent job of recording her observations, she—like some of her fellow assessors<sup>22</sup>—seems to have been erroneously trained on the meaning of “weight bearing.” She had seen Ms. D need weight-bearing assistance, not just twice in a week, but once in a one-hour visit, and seen her almost need it a second time in the same hour. However, since the staff did not bear *all* of Ms. D’s weight, she gave an essentially non-weight-bearing score of 2.

The notion that “weight-bearing” in the regulatory language (*i.e.*, in the CAT, as adopted by regulation) means *100 percent* of weight is one that has been rejected explicitly and repeatedly in multiple decisions of this tribunal.<sup>23</sup> These decisions have become final under a delegation from the Commissioner of Health and Social Services. The assessors are not free to apply a different interpretation from the Commissioner.

The result in this case is that the transfers self-performance score must be adjusted to 3.

### 3. Toilet Use

There is no dispute in this case that Ms. D should receive a self-performance score of 3 in toilet use, as assessed by Ms. Fili.

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<sup>21</sup> See *id.*

<sup>22</sup> See, e.g., *In re B.W.*, OAH Case No. 18-0382-MDS (adopted Aug. 1, 2018; publication pending).

<sup>23</sup> There are many examples. Three of them are *In re K T-Q*, OAH No. 13-0271-MDS (Delegate of Comm’r of HSS 2013) (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130271.pdf>); *In re M.C.*, OAH No. 13-1191-MDS (Delegate of Comm’r of HSS 2014); *In re D.M.*, OAH No. 17-0912-MDS (final by op. of law 2017). *In re B.W.*, cited previously, is in the same vein.

The CAT (Ex. E, p. 7) defines limited assistance (self-performance score of 2) as “Person highly involved in activity; recieved [sic] physical help in guided maneuvering of limbs, or other nonweight-bearing assistance 3+ times – or – Limited assistance (as just described) plus weight-bearing 1 or 2 times during last 7 days.” It defines extensive assistance (self-performance score of 3) as “While person performed part of activity, over last 7-day period, help of following type(s) provided 3 or more times: Weight-bearing support [or] Full staff/caregiver performance during part (but not all) of last 7 days.” Total dependence (self-performance score of 4) is “Full staff/ caregiver performance of activity during ENTIRE 7 days.” These definitions yield three separate reasons that “extensive assistance” as used in the CAT does not require complete weight bearing support. First, the definition does not include the term “complete.” Second, the definition allows the recipient to have “performed part of the activity.” Third, the definitions as a group draw a distinction between “Weight-bearing support” and “Full staff/caregiver performance.”

#### 4. *Eating*

Eating is defined as “how a person eats and drinks regardless of skill.”<sup>24</sup> Notably, it is not the same as meal preparation, which is separately scored and is not relevant to this decision.

Ms. D told Ms. Fili that she could feed herself and demonstrated that she could take liquids on her own. Ms. Fili therefore gave a self-performance score of 0.<sup>25</sup> At the hearing, Ms. D related that she has a tendency to choke while eating. This testimony was credible, but it would only raise the self-performance score to 1, reflecting that the person needs supervision while eating. There is no basis to adjust the eating score above that. There is certainly no possibility that a score of 3 for “extensive assistance” (defined in this context as “full staff/caregiver performance” of the activity at times<sup>26</sup>—essentially spoon feeding by another person) would be appropriate for this activity.

#### 5. *Locomotion*

The four sections above have established that, as of April 10, Ms. D was appropriately given scores of less than 3 on two of the five relevant ADLs. Because she needs a score of 3 or more in *three* of the five activities to qualify, she will need a score of 3 for locomotion if she is to be in the Waiver program at this time.

Ms. Fili gave a self-performance score of 1 for this activity, because, as she testified, Ms. D could “ambulate a l-i-i-i-tle bit to her side” using a walker. I feel this score is probably one grade low. Apart from the tentative tone of Ms. D’s “l-i-i-i-tle bit,” other evidence in the case clearly established that Ms. D needs help standing up in the first place on occasion, and documented a worrisome history of falls. More likely than not, Ms. D is in need of hands-on, non-weight-bearing assistance with ambulation to ensure she does not fall again, at least whenever she goes more than a few steps. This would give her a score of 2. However, there is no evidence in this case that would support raising this score to 3, a score that would be allowed only if she needed weight-bearing help with ambulation.

#### 6. *Overall Eligibility Picture*

With a maximum of two scores of 3 or more in five shaded ADLs, Ms. D cannot qualify for the Waiver program on the basis of ADLs alone. There are other kinds of assistance for which she appears to qualify, but not the program at issue in this case.

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<sup>24</sup> Ex. E, p. 9.

<sup>25</sup> *Id.*

<sup>26</sup> Ex. E, p. 6.

If Ms. D had been receiving a qualifying therapy at the time of the denial decision, that need, coupled with the ADL needs she has demonstrated, could have combined to produce a qualifying score.<sup>27</sup> Her care coordinator should be familiar with how the scoring works. If Ms. D's therapies have changed since April, therefore, the care coordinator may be able to advise her on whether she ought to reapply based on new information.

***D. Factors Beyond the CAT***

The CAT has been incorporated into the Department's regulations, and as the Department interprets those regulations, a non-qualifying CAT score creates at least a presumption that the recipient is ineligible for Waiver services.<sup>28</sup> It may be that in exceptional cases there are factors outside the CAT that might override a nonqualifying CAT score, but none have been suggested in this case.

**IV. Conclusion**

Because the evidence does not support a qualifying CAT score for Ms. D as of the time of the decision under review, the decision was correct. The decision to deny her application for Waiver services is affirmed. The date on which Ms. D shall be deemed to have fallen below level of care is the date of the adverse action letter, April 10, 2018.

If Ms. D's condition has changed since that date or changes in the future, she may reapply for the program.

DATED this 31<sup>st</sup> day of August, 2018.

*Signed*

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Christopher Kennedy  
Administrative Law Judge

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<sup>27</sup> Ex. E, p. 33 (NF.5 through NF.7).

<sup>28</sup> Cf. *In re O.P.*, OAH No. 13-0054-MDS (Comm'r of Health & Soc. Serv., adopted Feb. 20, 2013), at 8 (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130054.pdf>).

## Adoption

The undersigned, by delegation from of 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 14th day of September, 2018.

By: Signed  
Signature  
Kathryn A. Swiderski  
Name  
Administrative Law Judge  
Title

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