

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

| | | |
|------------------|---|---------------------|
| In the Matter of |) | |
| |) | |
| S L |) | OAH No. 19-0601-MDS |
| _____ |) | Agency No. |

DECISION

I. Introduction

S L applied for Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (Division) assessed her for eligibility on April 16, 2019. The Division subsequently notified Ms. L that her application was denied.¹ Ms. L requested a hearing.²

The evidence presented at hearing demonstrates that it is more likely true than not true that Ms. L, although clearly physically disabled, does not meet the stringent requirements to qualify for Waiver services. The Division’s denial of her application is therefore **AFFIRMED**.

II. Facts and Procedural History

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

Ms. L is currently 66 years old. She lives in an assisted living home. She has severe rheumatoid arthritis, which has resulted in considerable damage to both feet, and to both hands. Both her hands are contracted and very difficult to use. In addition to the rheumatoid arthritis, she experiences stage three kidney disease, osteoporosis, depression, and hearing loss.³

Ms. L was assessed at her home on April 16, 2019 to determine if she was eligible for Waiver services. The assessment notes that her “hands are closed flat and deformed ... as well as her feet.”⁴

The assessment provided that Ms. L reported that she could reposition herself and sit up in bed without assistance, that she could stand without assistance, and that she could only walk very short distances without using her walker, but that she used her walker for longer distances, that she could feed herself and drink without assistance, and that she needs help with adjusting her clothing and cleansing while toileting.⁵ The assessment further stated that the assessor saw

¹ Ex. D.
² Ex. C.
³ Ex. E, pp. 2 – 3; Photographs of hands and feet received on August 23, 2019.
⁴ Ex. E, p. 5.
⁵ Ex. E, pp. 6 – 8.

Ms. L transfer without assistance, walk, albeit in a “wobbly” manner for a short distance without using her walker, and also saw her walking using her walker, and saw her drinking from a water bottle.⁶

Based upon her observations and discussions with Ms. L, the assessor concluded that Ms. L was independent with bed mobility, with locomotion, transfers, and eating, and she required limited assistance (self-performance code of 2) with toileting.⁷ In addition, the assessor found that Ms. L had very minor cognitive difficulties, specifically not able to recall entire recent events or names of close friends/relatives without prompting, and minor issues with speech and finding words.⁸ The assessor further found that Ms. L exhibited very minor behavioral issues, specifically exhibiting “[a]ttitudes, habits and emotional states [that] limit [her] type of living arrangement and companions.”⁹ The assessment, as scored by the assessor, then found that Ms. L was not eligible for Waiver services.¹⁰

Ms. L disagreed with the Division’s determination that she did not qualify for Waiver services and requested a hearing to challenge its determination. That hearing was held on September 10, 2019. Ms. L represented herself with some limited assistance from N K, her Medicaid Care Coordinator. Both Ms. K and Y Z, the administrator of the assisted living home, where Ms. L has been residing since 2014, testified on Ms. L’s behalf. The Division was represented by Victoria Cobo-George. Scott Chow, a Nurse III Supervisor employed by the Division, testified on its behalf.¹¹

Ms. L testified that she was able to reposition herself in bed, that she could walk using a walker, and could transfer, and eat and drink without assistance. She testified that she did need help with adjusting her clothing and cleansing after using the bathroom. Ms. Z’s testimony was similar. Ms. K’s testimony was also similar, however, she did say that Ms. L occasionally required assistance with transfers, depending upon her level of pain. Ms. L, Ms. K, and Ms. Z also addressed Ms. L’s cognitive difficulties and behavior issues. In essence, they agreed that while Ms. L’s cognitive difficulties were minor to moderate, albeit slightly more severe than

⁶ Ex. E, pp. 6 – 8.

⁷ Ex. E, pp. 6 - 8.

⁸ Ex. E, p. 15.

⁹ Ex. E, p. 16.

¹⁰ Ex. E, pp. 31 – 32.

¹¹ The assessor is recently deceased, and hence not able to testify.

those determined by the assessor. They also agreed that any behavioral issues were minor and easily rectified.

III. Discussion

A. 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.”¹² The nursing facility level of care¹³ requirement is determined by an assessment which is documented by the CAT.¹⁴ The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,¹⁵ and whether an applicant has impaired cognition or displays problem behaviors.¹⁶ 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 3.¹⁷

The CAT also records the degree of assistance an applicant requires for activities of daily living (ADL), which include five specific categories: bed mobility (moving within a bed), transfers (i.e., moving from the bed to a chair or a couch, etc.), locomotion (walking or movement when using a device such as a cane, walker, or wheelchair) within the home, eating, and toilet use, which includes transferring on and off the toilet and personal hygiene care.¹⁸

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 activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting).¹⁹

A person can also receive points for combinations of required professional nursing services, therapies, severely impaired cognition (memory/reasoning difficulties), or extensive difficult behaviors (wandering, abusive behaviors, etc.), and if they require either limited or extensive assistance with the five specified activities of daily living.²⁰

¹² 7 AAC 130.205(d)(4).

¹³ See 7 AAC 130.205(d)(4); 7 AAC 130.215.

¹⁴ 7 AAC 130.215(4).

¹⁵ Ex. E, pp. 11 - 13.

¹⁶ Ex. E, pp. 14 - 17.

¹⁷ Ex. E, pp. 31 - 32.

¹⁸ Ex. E, pp. 17 - 18, 31 - 32.

¹⁹ Ex. E, p. 31.

²⁰ Ex. E, p. 31 - 32.

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

B. Eligibility

Ms. L applied for Waiver services. As an applicant, she has the burden of proof.²² Ms. L was not receiving any specialized treatments or therapies. Ms. L's cognitive abilities are slightly impaired. Based upon her participation during the hearing, she was aware that she was in a hearing, understood and was responsive to the questions, and knew the people who accompanied her to the hearing. She has very minor behavioral issues, as agreed to by Ms. L and her witnesses. However, neither her cognitive impairment nor her behavioral issues are severe enough to assist her in qualifying for Waiver services.²³

In order to qualify for Waiver services, Ms. L would therefore require extensive or complete assistance in at least three of the five scored ADLs. "Extensive assistance," as defined in the CAT, requires that a person receive weight bearing support three or more times per week in a specified ADL.²⁴ In a 2013 decision, the Commissioner reviewed the term "weight bearing" as it is used in the CAT, and held that that:

Weight bearing assistance should be 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.²⁵

The assessment found that Ms. L did not require any assistance with bed mobility, transfers, locomotion, or eating. Neither Ms. L nor Ms. Z disagreed with that finding. While Ms. K disagreed with that finding – stating that Ms. L occasionally needed assistance with transfers due to pain, the weight of the evidence shows that it is more likely true than not true that Ms. L can transfer independently. The evidence also shows that Ms. L requires assistance with toileting. However, that assistance consists of cleansing and adjusting clothing, neither of

²¹ Ex. E, p. 32.

²² 7 AAC 49.135.

²³ To achieve a point towards eligibility based on cognition, Ms. L would need to be severely cognitively impaired and also require a minimum of limited assistance on at least one of the five scored ADLs. *See* Ex. E, pp. 15 – 16, 31 – 32. To achieve a point toward eligibility based on behavioral issues, she would similarly have to exhibit severe behavior issues and require a minimum of limited assistance on at least one of the five scored ADLs. *See* Ex. E, pp. 17 - 18, 31 – 32. While the evidence shows that she has some cognitive impairment and some behavioral issues, neither of them are near the high threshold required for eligibility scoring.

²⁴ Ex. E, p. 7.

²⁵ *See In re K T-Q*, OAH Case No. 13-0271-MDS, p. 4 (Commissioner DHSS June 21, 2013). This decision is available at the OAH website: <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130271.pdf>

which reach the level of extensive assistance. As a result, Ms. L does not require extensive assistance with any of the five scored ADLs. This means that Ms. L does not qualify for Waiver services, because qualification requires extensive assistance with at least three of the five scored ADLs.

IV. Conclusion

In order to qualify for Waiver services, Ms. L would need to require extensive assistance with three of the five scored activities of daily living. She does not require extensive assistance with any of the five scored activities of daily living. As a result, she does not qualify for Waiver services. Consequently, the Division's denial of her application is affirmed.

DATED this 20th day of September, 2019.

Signed _____

Lawrence A. Pederson

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 4th day of October, 2019.

By: *Signed* _____

Name: Lawrence A. Pederson

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.]