

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

In the Matter of)
)
Q M) OAH No. 20-0765-MDS
) Agency No.
_____)

DECISION

I. Introduction

Q M applied for Medicaid Home and Community-Based Waiver program (“Waiver”) and Personal Care Services (“PCS”). The Division of Senior and Disabilities Services (“Division”) assessed her for eligibility. Based on that assessment, it notified Ms. M that her application for Waiver services was denied, and she requested a hearing.

The evidence presented at the hearing demonstrates that it is more likely true than not true that Ms. M, although experiencing severe health conditions, does not meet the stringent requirements to qualify for Waiver services. The Division’s denial of her application for Waiver services is therefore affirmed.

II. Background

A. *The Hearing and Status of PCS Eligibility*

Ms. M’s hearing was held telephonically on October 26, 2020. Ms. M participated as did her Care Coordinator, Mr. T K. The Division was represented by Ms. Terri Gagne, a Fair Hearing Representative with the Division. Ms. Rae Norton, an assessor with the Division also testified on behalf of the Division.

At the outset of the hearing, confusion existed regarding what was at issue for purposes of the hearing. Although it was clear that Ms. M had initially applied for both PCS and Waiver services, as of the date of the hearing, the Division had only denied Waiver eligibility.¹ Consequently, Ms. M anticipated addressing both PCS and Waiver eligibility at the hearing.²

On the other hand, the Division represented that it had preliminarily determined to potentially award Ms. M approximately 9.75 hrs./week for PCS. But finalization of that determination was awaiting a response to an email sent to Mr. K at the end of September. The email asked to have Ms. M’s PCS agency, Business A, contact and coordinate with the Division

¹ Compare Ex. G, p. 1 with Ex. D, pp. 1-2.
² Ms. M Testimony; See also, M Discussion of Appeal Issues, filed October 22, 2020.

prior to it finalizing its PCS determination. Because that had not occurred, SDS had not issued its PCS determination and only anticipated addressing Ms. M's Waiver ineligibility at the hearing.³

After discussion between the parties, it was agreed that Mr. K would follow-up with Business A and have it contact and coordinate with SDS concerning Ms. M's PCS. To the extent the parties disagreed regarding the outcome of any determination the Division might make as to PCS, it would be dealt with by way of a separate hearing. Consequently, the parties agreed that the hearing on October 26, 2020 would be limited to Ms. M's eligibility for Waiver services alone and would not address PCS eligibility.⁴

B. Facts

The facts concerning Ms. M's eligibility for Waiver services are generally not in dispute. Ms. M is currently 55 years old.⁵ Her primary diagnoses include cauda equina syndrome, neurogenic bladder and bowel with saddle numbness, and incisional hernia. Her secondary diagnoses include major depressive disorder, muscle weakness, and parastomal hernia. She also suffers from retention of urine, incontinence, Functional Neurologic Disorder, ischemic bowel and sleep apnea. She generally self-ambulates in her home using a wheelchair and to a limited extent, forearm crutches. Despite experiencing significant physical and neurological limitations, Ms. M suffers little if any cognitive difficulties.⁶

At the time of her denial of eligibility on August 14, 2020,⁷ Ms. M was not receiving any physical, speech/language, occupational or respiratory therapy.⁸ Since August 20, she has begun to receive physical therapy approximately once per week.⁹

Ms. M applied for Medicaid Waiver services on June 26, 2020.¹⁰ Her application stated that she was neither receiving nursing services nor skilled therapies once per week.¹¹ She was also identified as being independent regarding bed mobility, transferring, locomotion, and

³ Terri Gagne Testimony.

⁴ Ms. M Testimony; Ms. Gagne Testimony; Mr. K Testimony.

⁵ Ex. F, p. 3.

⁶ *See generally*, Ex. G; Ex. F; M Discussion of Appeal Issues.

⁷ Ex. D, p. 1.

⁸ Ex. F, p. 13; Ms. M Testimony.

⁹ Ms. M Testimony.

¹⁰ Ex. G, pp. 1-66.

¹¹ Ex. G, p. 23.

eating.¹² However, she indicated that she required hands-on or total assistance regarding toileting.¹³

Following her Waiver application, the Division assessed Ms. M on July 23, 2020, to evaluate her eligibility for both PCS and Waiver services. The assessment occurred via Zoom video conference with Ms. M located at the motel she was temporarily living in City A, Alaska.¹⁴ Participating were Ms. M and the Division's assessor, Ms. Rae Norton.¹⁵

Ms. M was observed throughout the assessment via video. The assessor testified that the Division conducts in-person assessments, and assessments using Zoom, in the same manner. During assessments, the Division evaluates an applicant's physical functional abilities and any deficits stated, identified, or observed that can be supported by the medical records on file.¹⁶ The assessor addressed each of the five physical functional criteria used for determining Waiver eligibility, namely bed mobility, transfers, locomotion, eating, and toileting.¹⁷

As to bed mobility, Ms. M stated that she was ambulatory in bed and can roll and reposition herself. During the assessment, she was observed to reposition herself independently and while on the edge of the bed.¹⁸

As to transferring, during the assessment Ms. M was observed to transfer independently using her wheelchair and its arms. Her movement was reported as being balanced and fluid. Although Ms. M was noted as taking extra time to transfer, it is also indicated that she did so without struggling to bear the weight of her legs and her movement appears normal.¹⁹

Regarding the issue of locomotion, Ms. M was observed using her wheelchair to move independently and by self-propulsion inside her home.²⁰ She was also observed walking independently inside the home using forearm crutches. As of the date of the assessment, she was able to do so using a slow, balanced gait, without the need to drag her legs.²¹ The assessor did

¹² Ex. G, pp. 23-24.

¹³ Ex. G, p. 24.

¹⁴ Ex. F, p. 1; Ms. M Testimony.

¹⁵ Ms. Norton Testimony.

¹⁶ Ms. Norton Testimony.

¹⁷ Ms. Norton Testimony.

¹⁸ Ex. F, p. 6; Ms. Norton Testimony.

¹⁹ Ex. F, p. 6; Ms. Norton Testimony.

²⁰ Ex. F, p. 7; Ms. Norton Testimony.

²¹ Ex. F, p. 7; Ms. Norton Testimony.

note, however, that because of a step outside of the home, and also due to her difficulty with uneven surfaces, Ms. M requires extensive assistance for locomotion outside of the home.²²

As to eating, Ms. M reported being able to fix light meals and snacks. She also reported being able to feed herself independently.²³

Finally, as to toileting, Ms. M stated that she moves her wheelchair to the bathroom door but cannot get the chair through the door because it is too narrow. While she can use her crutches to get into the bathroom and on the toilet about half the time, the other half the time she needs assistance getting onto and off the toilet. In doing so, she needs to be physically lifted both up and down from the toilet, using weight-bearing assistance.²⁴ She also reported being able to independently use a straight catheter and empty her colostomy bag. However, because of frequent incontinence, she requires assistance regarding leakage issues.²⁵

Based on the assessor's observations and discussions with Ms. M, as well as a review of the medical records, the assessor concluded that Ms. M was independent as to bed mobility, transferring, locomotion, and eating. She concluded, however, that M required limited assistance (self-performance score of 2), and one-person physical assistance (support score of 2), for toileting.²⁶ The assessor also concluded that Ms. M did not require any professional nursing services, special treatments and therapies, and did not suffer from any significant cognition or problem behavior issues. Consequently, the assessment as scored by the assessor, found that Ms. M was not eligible for Waiver services.²⁷ On August 14, 2020, the Division sent Ms. M notice that her application for Medicaid Waiver was denied.²⁸

Ms. M disagreed with the assessor's conclusions and requested a fair hearing.²⁹ In doing so, she submitted a four-page document outlining in detail her disagreement with specific findings contained in the skilled level of care form/medical certification and the assessment.³⁰ However, as noted above, much of the disagreement raised by Ms. M is regarding issues relevant to PCS as opposed to Waiver.³¹ This was also confirmed at the hearing, where during

²² Ex. F, p. 7; Ms. Norton Testimony.

²³ Ex. F, p. 8; Ms. Norton Testimony.

²⁴ Ms. M Testimony.

²⁵ Ex. F, p. 8; Ms. Norton Testimony.

²⁶ Ex. F, p. 8; Ms. Norton Testimony.

²⁷ Ex. F, pp. 31-33.

²⁸ Ex. D, pp. 1-2.

²⁹ Ex. C.

³⁰ M Discussion of Appeal Issues.

³¹ M Discussion of Appeal Issues.

questioning, Ms. M acknowledged general agreement with the fact that both her application and the findings of the assessor were virtually identical and consistent as to the issues relevant to the Waiver analysis as discussed below.³²

III. Discussion

A. *Method of 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.”³³ The nursing facility level of care³⁴ requirement is determined by an assessment which is documented by the Consumer Assessment Tool (CAT).³⁵ The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,³⁶ and whether an applicant has impaired cognition or displays problem behaviors.³⁷ 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 3.³⁸

The CAT also records the degree of assistance an applicant requires for ADLs, 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.³⁹

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).⁴⁰

A person can also receive points for combinations of required professional nursing services, therapies, severely impaired cognition (memory/reasoning difficulties), or extensive

³² Ms. M Testimony.

³³ 7 AAC 130.205(d)(4).

³⁴ See 7 AAC 130.205(d)(4); 7 AAC 130.215.

³⁵ 7 AAC 130.215(4).

³⁶ Ex. F, pp. 11 - 13.

³⁷ Ex. F, pp. 14 - 17.

³⁸ Ex. F, pp. 31 - 33.

³⁹ Ex. F, pp. 17 - 18, 31 – 32.

⁴⁰ Ex. F, pp. 31 - 32.

difficult behaviors (wandering, abusive behaviors, etc.), and if they require either limited or extensive assistance with the five specified activities of daily living.⁴¹

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.⁴²

B. Considerations in Determining Eligibility

As an applicant for Waiver services, Ms. M has the burden of proof by a preponderance of the evidence.⁴³ The relevant date for purposes of assessing the facts is, in general, the date of the agency's decision under review,⁴⁴ or in this instance, August 14, 2020.⁴⁵

As of the date of the denial for Waiver eligibility, Ms. M was not receiving any specialized treatments or therapies for at least three times per week.⁴⁶ Although Ms. M is now receiving physical therapy once per week,⁴⁷ she would need to have received it a minimum of three times per week in order for her physical therapy to help qualify her for Waiver services.⁴⁸ She also did not report to the assessor or testify regarding experiencing any significant memory difficulties or problem behaviors.⁴⁹

To qualify for Waiver services, Ms. M would therefore require extensive or complete assistance in at least three of the five scored ADLs, which are bed mobility, transfers, locomotion, eating, and toileting. "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.⁵⁰ 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

⁴¹ Ex. F, pp. 31 - 33.

⁴² Ex. F, p. 33.

⁴³ 7 AAC 49.135.

⁴⁴ 7 AAC 49.170; *In re T.C.*, OAH 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013) (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf>).

⁴⁵ Ex. D, p. 1.

⁴⁶ Ex. F, p. 13; Ms. M Testimony.

⁴⁷ Ms. M Testimony.

⁴⁸ Ex. F, p. 31, Section NF. 2(b).

⁴⁹ Ex. F, pp. 14-17.

⁵⁰ Ex. F, p. 7.

of the recipient's weight, but instead that the recipient could not perform the task without the weight bearing assistance.⁵¹

The assessment found that Ms. M did not require any assistance with bed mobility, transfers, locomotion, or eating. Ms. M did not disagree with these findings.⁵² The only potential area of disagreement, at least regarding Waiver services, lies with the assessment's finding that Ms. M only requires limited assistance as opposed to extensive assistance with toileting.⁵³

In her application, Ms. M indicates that she requires "Hands-on or Total Assist" for toileting.⁵⁴ Her credible testimony showed, by a preponderance of the evidence, that she needs weight bearing assistance in both getting onto and off of the toilet several times per day and that she also requires one-person physical assistance to do so.⁵⁵ However, even with this issue decided in Ms. M's favor, it still fails to change the outcome for purposes of her Waiver eligibility.

Because even with this determination, Ms. M still only requires extensive assistance in one of the five scored ADLs. She is completely independent as to bed mobility, transferring, locomotion and eating. This means that, even though Ms. M clearly requires assistance in her home due to her medically documented health conditions, she does not meet the stringent requirements necessary to qualify for Medicaid Waiver benefits.

IV. Conclusion

To qualify for Waiver services, Ms. M would need to require extensive assistance with three of the five scored activities of daily living. She only requires extensive assistance with one 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: October 29, 2020

By: Signed
Z. Kent Sullivan
Administrative Law Judge

⁵¹ 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>.

⁵² Ms. M Testimony.

⁵³ Compare Ex. G, p. 24 with Ex. F, p. 8.

⁵⁴ Ex. G, p. 24.

⁵⁵ Ms. M Testimony.

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 17th day of November, 2020.

By: *Signed* _____
Name: Z. Kent Sullivan
Title: Administrative Law Judge

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