

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

In the Matter of)
)
X D) OAH No. 20-0774-MDS
) Agency No.
_____)

DECISION

I. Introduction

X D applied for Medicaid Home and Community-Based Waiver (Waiver) benefits. Following a video assessment, Mr. D’s application was denied by the Division of Senior and Disabilities Services (Division). Mr. D requested a hearing to contest that denial.

Mr. D’s hearing was held on October 28, 2020. Mr. D did not appear at the hearing. His daughter M O, who has his power-of-attorney represented him and testified on his behalf. A E, R. N., his Medicaid Care Coordinator, testified for him. Victoria Cobo-George, the Division’s Fair Hearing representative, represented the Division. Susan Kubitz, R. N., the Division’s assessor in this case, testified for the Division.

The evidence in this case shows that Mr. D has some functional limitations and experiences substantial cognitive impairment. His functional limitations are not sufficient to independently qualify him for Waiver benefits. And his cognitive impairment issues, combined with his functional limitations is not sufficient to qualify him for Waiver benefits. Consequently, the Division’s denial of his application is AFFIRMED.

II. Facts

Mr. D is 59 years old and lives in an assisted living home. His health conditions include a seizure disorder, rheumatic mitral stenosis, and alcohol-induced persisting dementia, and depression. He had a traumatic subdural hematoma in July 2020.¹

Mr. D was hospitalized in July 2020. He applied for Medicaid Waiver services and a video assessment was conducted on August 11, 2020 while he was in the hospital. Susan Kubitz, R. N., conducted the assessment for the Division. Ms. O and Ms. E were also present for the assessment.²

¹ *Consumer Assessment Tool (CAT)* for assessment conducted on August 11, 2020, p. 4.
² *CAT*, p. 3.

The Division’s assessor put Mr. D through some functional tests. She determined that he could touch his hands over his head and behind his back, could not stand up with his hands across his chest, had a strong grip in both hands, and that he could touch his feet while in a sitting position. Mr. D was using a hemi walker at the time.³

The assessor determined, based upon her observations and Mr. D’s statements, that Mr. D was independent with bed mobility (sitting up and turning from side to side), capable of transferring with supervision, able to walk independently using a walker with supervision, and could toilet with supervision and eat independently.⁴ The assessor also determined that Mr. D had very minor level of cognitive impairment with a score of 1, which was derived from her conclusion had “minimal difficulty remember[ing] and using information,” which included requiring direction/reminders up to three times daily⁵ The assessor similarly determined that Mr. D had no behavioral issues.⁶ The net result of the assessor’s determinations, as scored on the Consumer Assessment Tool (CAT) was that Mr. D was not eligible for Waiver benefits.⁷

Neither Ms. O nor Ms. E disagreed with the assessor’s conclusions about Mr. D’s physical functionality, although Ms. O noted that Mr. D had left sided weakness, and walked very slowly. Ms. O also pointed that Mr. D was very stubborn, did not accept defeat easily, and will do tasks just to show that he can do them, regardless of how difficult or painful they might be. Ms. E noted that her acquaintance with Mr. D’s functionality and his needs is very limited.⁸

Ms. O testified that Mr. D has introduced her to people who were not present in the room, has conversations with people who are no longer living, and remembers people visiting him that did not visit him.⁹

Mr. D was receiving physical therapy while he was hospitalized. The physical therapy notes from August 3, 2020 reflect that he was able to use a walker, but that he got frustrated and abandoned the walker and as a result required moderate to maximum physical assistance to return to his bed.¹⁰ His physical therapy notes for August 9, 2020 show that he was able to walk 25 ft using his walker with contact guard assistance, and that he lost his balance while

³ CAT, p. 6.

⁴ CAT, pp. 7 – 9; Ms. Kubitz’s testimony.

⁵ CAT, pp. 15 – 16, Ms. Kubitz’s testimony.

⁶ CAT, pp. 17 – 18, Ms. Kubitz’s testimony.

⁷ CAT, pp. 31 – 32, Ms. Kubitz’s testimony.

⁸ Ms. O’s testimony; Ms. E’s testimony.

⁹ Ms. O’s testimony.

¹⁰ Physical Therapy Summary dated August 3, 2020.

transferring to a standing position.¹¹ The hospital discharge notes provide that his condition had improved and that he was walking using a hemi walker.¹²

Mr. D was not receiving therapy after his hospital discharge. However, he began receiving both physical therapy and occupational therapy in October 2020.¹³ He had a seizure which resulted in an emergency room visit on September 9, 2020, where his Dilantin (seizure medication) level was low and he was sent home with Dilantin. Those same notes show that he uses a wheelchair.¹⁴ The notes from a medical appointment on October 19, 2020 provide that he was using a wheelchair and was able to transfer and toilet himself.¹⁵

III. Discussion

A. *Burden of Proof*

Mr. D is an applicant for Waiver benefits. He therefore has the burden of proving by a preponderance of the evidence that he is eligible for Waiver benefit.¹⁶ Parties can meet their burden of proof using any evidence on which reasonable people might rely in the conduct of serious affairs,¹⁷ including such sources as written reports of firsthand evaluations of the patient. The relevant date for purposes of assessing the state of the facts is, in general, the date of the agency's decision under review.¹⁸

B. *The Consumer Assessment Tool Scoring*

The Alaska Medicaid program provides Waiver benefits to adults with physical disabilities who require “a level of care provided in a nursing facility.”¹⁹ The nursing facility level of care²⁰ requirement is determined by an assessment which is documented by the Consumer Assessment Tool (CAT).²¹

The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,²² and whether an applicant has impaired cognition or displays problem

¹¹ Physical Therapy Summary dated August 9, 2020.

¹² Discharge Summary dated August 10, 2020.

¹³ Ms. E's testimony.

¹⁴ Emergency Room Report dated September 9, 2020.

¹⁵ Medical notes dated October 19, 2020.

¹⁶ 7 AAC 49.135.

¹⁷ 2 AAC 64.290(a)(1).

¹⁸ 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>).

¹⁹ 7 AAC 130.205(d)(4).

²⁰ See 7 AAC 130.205(d)(4); 7 AAC 130.215.

²¹ 7 AAC 130.215(4).

²² CAT, pp. 6, 12 – 14.

behaviors.²³ Each of the assessed items are coded and contribute 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 3.²⁴

The CAT also records the degree of assistance an applicant requires for Activities of Daily Living (ADLs).²⁵ The CAT provides applicants with a two-part numerical score to reflect their ability to perform the activity and need for assistance in doing so. The score consists of a self-performance code, which rates a person's ability to perform the activity, followed by a support code, which reflects the degree of assistance required to do so.

The ADLs measured by the CAT are bed mobility, transfers, locomotion, dressing, eating, toilet use, personal hygiene, and bathing.²⁶ For ADLs, the possible self-performance codes are:

0 – “Independent.” This code is used if help or oversight was provided no more than twice in the prior seven days.

1 – “Supervision.” This code is used if the person requires only “oversight, encouragement, or cueing” while performing the activity.

2 – “Limited Assistance.” This Code is used if the person is “highly involved” in the activity” and “received physical help in guided maneuvering of limbs, or other nonweight-bearing assistance” three or more times in the last seven days, or received physical help in guided maneuvering of limbs plus weight bearing assistance no more than twice in the last seven days.

3 – “Extensive Assistance.” This code is used where the person performed part of the activity, but over the past seven days received weight-bearing support and/or full caregiver performance of the activity three or more times.

4 – “Total Dependence.” This code is used where there has been full staff/care giver performance of the activity during the entire prior seven days.²⁷

For ADLs, the possible support codes used to determine a service level are as follows, with each option reflecting the “most support provided” over each 24-hour period during the prior seven days.

0 – The person required no set up or physical help.

1 – The person required only setup help.

2 – The person required a one-person physical assist.

²³ CAT, pp. 15 - 18.

²⁴ Exhibit E, p. 32.

²⁵ Exhibit E, pp. 7 - 12.

²⁶ CAT, pp. 7 - 12.

²⁷ CAT, p. 7.

3 – The person required a physical assist from two- or more people.²⁸

C. *Mr. D's Waiver Eligibility*

Waiver eligibility requires that an applicant have a score of three or more on the CAT. That score can be arrived at through several scenarios, all of which are set out in the CAT itself.²⁹ For instance, if Mr. D required nursing services seven days per week, or had therapy five or more times per week, or if he required extensive physical assistance with three or more of five specific ADLs (bed mobility, transfers, locomotion, toileting, and eating), he would qualify for Waiver benefits.³⁰ Because the Division's denial of Mr. D's application is dated September 1, 2020, his eligibility is determined based upon his condition as of September 1, 2020.

It is undisputed that Mr. D can engage in the five specified ADLs of bed mobility, transfers, locomotion – using either a walker or a wheelchair, eating, and toileting without requiring someone to furnish hands-on physical assistance. As such, he does not require either limited or extensive physical assistance with any of these. He does not require nursing services seven days per week. As of September 1, 2020, he was not receiving any therapies. While he does have a documented seizure disorder, it is not uncontrolled to the extent that he requires care for it at least once per week.³¹ In fact, his September 19, 2020 visit to the emergency room due to a seizure seems to have been occasioned by low Dilantin levels, which could mean that he was not taking his medication.³² Regardless, there is no evidence demonstrating that he required medical care for his seizure disorder at least once weekly. As a result, he does not qualify for Waiver benefits based upon those needs.

The Waiver program has other paths to eligibility. Those, however, require a combination of care requirements, including professional nursing services or therapies multiple times per week in conjunction with needing either limited or a higher level of physical assistance with one or more of the five specified ADLs.³³ The facts in this case do not show therapies, professional nursing services, or a need for hands-on physical assistance with any of the five specified ADLs.

²⁸ CAT, p. 7.

²⁹ CAT, pp. 32 – 33.

³⁰ CAT, p. 32, question NF 1.

³¹ CAT, p. 32.

³² The emergency room records state that Mr. D was not sure if he had been taking his Dilantin. Emergency Room Report dated September 9, 2020.

³³ CAT, pp. 32 – 33, questions NF 2 and NF 5.

Mr. D's only other possible path towards Waiver eligibility would require him to experience a very severe level of either or both cognitive impairment and problem behaviors, in conjunction with a need for limited or extensive assistance with the scored ADLs (bed mobility, transfers, locomotion, toileting, and eating).³⁴

Mr. D experiences cognitive impairment, and his record shows that he has a history of resisting care, specifically refusing to use his walker. Ms. O's testimony demonstrates that his cognitive impairment is more severe than found by the assessor, and that he has been at some point delusional. However, that his cognitive impairment is not severe enough to assist him in scoring a point based upon cognitive impairment.³⁵ Similarly, his behavioral issues are not severe enough to assist him towards scoring a point towards his Waiver eligibility.³⁶

Even if either or both of Mr. D's cognitive or problem behavior scores reached the high threshold level necessary to assist in scoring a point towards his Waiver eligibility, Mr. D would also need to have a minimum score of limited assistance in one (if he met the threshold scoring for both cognitive impairment and problem behaviors) or two (if he met the threshold scoring for either one of the cognitive impairment or problem behaviors) of the five scored ADLS (bed mobility, transfers, locomotion, toileting, and eating), to obtain the final score of three on the CAT.³⁷ However, Mr. D does not require a limited or a higher degree of assistance with any of the five scored ADLs. Consequently, he does not qualify for Waiver via this path.

IV. Conclusion

Mr. D has complicated medical needs, which include some cognitive impairments and behavioral issues. However, his needs and the medical care and supervision that he undoubtedly requires do not rise to the level of qualifying him for Waiver benefits. As a result, the Division's determination that he is not eligible for Waiver benefits is AFFIRMED.

Dated: December 3, 2020

Signed
Lawrence A. Pederson
Administrative Law Judge

³⁴ See CAT, pp. 32 – 33; question NF 3 (cognitive impairment plus scored ADL); question NF 4 (problem behavior plus scored ADL); questions NF 5 - 7.

³⁵ Mr. D's cognitive impairment score would need to be 13 or higher to assist him in scoring towards his Waiver eligibility. See CAT, p. 32, question NF 3. See CAT, pp. 15 – 16 for the questions regarding cognitive impairment and the scoring on those questions.

³⁶ Mr. D's problem behavior score would need to be 14 or higher to assist him in scoring towards his Waiver eligibility. See CAT, p. 33, question NF 4. See CAT, pp. 16 - 17 for the questions regarding problem behaviors and the scoring on those questions.

³⁷ See CAT, pp. 32 - 33: question NF 3 (cognitive impairment plus scored ADL); question NF 4 (problem behavior plus scored ADL); questions NF 5 - 7.

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 15th day of December, 2020.

By: Signed _____
Name: Lawrence A. Pederson
Title: Administrative Law Judge

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