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

In the Matter of	)	
	)	
B X	)	OAH No. 20-0821-MDS
	)	Agency No.

NOTICE OF REVISION AND ADOPTION

The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(4), revises and adopts as follows the proposed decision issued by Administrative Law Judge Sullivan in this matter on December 2, 2020.

I conclude that the assessor originally reached the proper decision based upon the limited information available at the time. At the hearing, however, the ALJ was presented with far more information. This included the testimony of Ms. T, Mr. C, and Ms. X. It also included detailed discussions of Ms. X's "good days" and "bad days" and how her many and complex medical diagnoses result in a highly variable condition and presentation.

Obviously, it would have been helpful and preferrable had the assessor been provided this information at the time of the assessment either through statements or medical documentation. Ultimately, the detailed hearing testimony allowed the ALJ to reach a conclusion linking the documentary evidence and other information together. The assessor understandably could not do this with the limited information, knowledge, and background available to her at the time. Viewing the evidence at the hearing in this totality and context allowed the ALJ to reach a different conclusion concerning Medicaid waiver eligibility. Because the ALJ's conclusion concerning Ms. X's Medicaid waiver eligibility was properly performed after consideration of all the evidence and testimony presented at the hearing, the ALJ's ultimate decision in this case was proper.

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 31st day of December, 2020.

By *Signed*
Jillian Gellings
Project Analyst
Alaska Dept. of Health and Social Services

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DECISION

I. Introduction

B X applied for Medicaid Home and Community-Based Waiver program ("Waiver") services. The Division of Senior and Disabilities Services ("Division") assessed her for eligibility. Based on that assessment, it denied her application and she requested a hearing.

The evidence presented at the hearing demonstrates that it is more likely true than not true that Ms. X meets the requirements for Waiver services. The Division's denial of her application for Waiver services is therefore reversed.

II. Facts

The hearing in this case was conducted telephonically on November 9, 2020. Ms. X participated as did her Care Coordinator, F W, one of her roommates, K C, and one of her therapists, E. G T, Ed.M., M.Ed., M.S., CCC-SLP. The Division was represented by Terri Gagne, a Fair Hearing Representative. Michaela Schaefer, an assessor with the Division, also testified on its behalf.

A. Ms. X's Medical Condition and Supporting Witnesses

Ms. X is 38 years old and has a complex medical history.[1] She is afflicted with and affected by at least 39 separate medical conditions and significant surgeries, most of which are well-documented in the medical records.[2]

Since early childhood, Ms. X suffered from asthma, eczema, chronic abdominal pain, and chronic ear infections.[3] At the age of 22, she was treated for persistent vertigo, including a mastoidectomy. A year later, she was diagnosed with irritable bowel syndrome, colitis, and diverticulitis. She also had a cholecystectomy. During the five following years, she was diagnosed with cystitis, depression, anxiety, endometriosis, polycystic ovary syndrome, joint

1 Ex. F, p. 2; Ex. G, pp. 4-6.
2 Ex. G, pp. 20-21.
3 Ex. G, p. 16.

pain and worsening allergic asthma. While attending college, she developed debilitating fatigue, joint pain, tachycardia, and increasing ear and sinus infections. Over the years, her symptoms have progressively worsened.[4] Ms. X's primary diagnoses now include: 1) myalgic encephalomyelitis/chronic fatigue syndrome; 2) postural orthostatic tachycardia syndrome; 3) migraine disorder; 4) shoulder and knee reconstruction, hip arthropathy/ruptured lumbar disc; 5) peripheral neuropathy/mobility impairment; 6) Ehlers-Danlos syndrome; 7) cognitive impairment; 8) Lyme - multiple systemic immune deficiency syndrome; 9) chronic brain injury with loss of consciousness; and 10) chronic gastrointestinal distress with impaired absorption.[5]

Ms. X's primary care physician reports that she is receiving care from a team of providers, including neurology, psychology, pain management, orthopedics, cardiology, and infectious disease.[6] Although this care and treatments are helpful, she still suffers from reduced stamina compared to people twice her age. She is afflicted with short-term memory deficits and cognitive compromise (a/k/a brain fog) which correlate to her fatigue and depression. Any exertion causes her increased fatigue and pain that often takes her days to recover from. She is generally unable to stand without assistive devices and is accompanied to all medical appointments. Her pain is highly variable, she relies heavily on fulltime care, and is mostly homebound.[7]

1. K C Testimony

One witness testifying on Ms. X's behalf at the hearing was one of her roommates, K C. Mr. C is one of two adult roommates who live with Ms. X.[8] He testified in detail about Ms. X having "good days" and "bad days." Specifically, that when she has a good day, she can move about the downstairs of the home on her own. However, he also testified that when Ms. X has a "good day," it is almost always followed by at least a week of "bad days." When these occur, which is frequent, she requires extensive assistance, including weight-bearing assistance regarding toileting.[9]

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4 Ex. G, p. 16.
5 Ex. G, pp. 16-18, 20, 21.
6 Ex. G, p. 18.
7 Ex. G, p. 18.
8 Mr. C Testimony.
9 Mr. C Testimony.

Further, Mr. C testified that from March 2020 until approximately two weeks prior to the hearing on November 9, 2020, he was telecommuting and working largely from home. As such, he was able to be around and assist Ms. X much of the time. He also testified that between himself, and the other two adult roommates in Ms. X's home, there was usually someone available to assist her nearly all the time. However, that had recently changed because he had been given approval to return to work.[10]

2. E. G T Testimony

Another witness testifying on Ms. X's behalf was E. G T, Ed.M., M.Ed., M.S., CCC-SLP. She has been providing cognition and language therapy to Ms. X approximately twice per week. As such she has significant direct personal knowledge and experience with her. Ms. T also has extensive qualifications, including as a medical speech/language pathologist, certified brain injury specialist, current director of Business A of Alaska, and former director of rehabilitation at Business B of City A.[11]

As Ms. T testified, "Ms. X represents one of the most physically ill patients in our clinic."[12] She said that Ms. X's condition is complex and difficult to assess because of not only how highly variable it is, but also because her diagnoses includes relatively rare conditions little understood by many therapists. These include Ehlers Danlos Syndrome, neurological physical fatigue, and the impacts of traumatic brain injury with loss of consciousness. Further, in her experience as a rehabilitation director, the impacts from these conditions can be very difficult to capture with a short, non-longitudinal assessment.[13]

Ms. T testified at length about Ms. X having good days and bad days. She said that on the bad days, Ms. X is not able to arrive at or participate in her therapy appointments at all. Even when she does, she is frequently vomiting, needing to lie reclined on the couch, and requiring assistance with toileting. Further, she is at significant risk of re-damaging her brain by falling. As such, they prefer that she wears a gait belt while at their facility. Ms. T testified that Ms. X always attends her appointments with the assistance of others. During her therapy sessions,

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10 Mr. C Testimony.
11 Ms. T Testimony.
12 Ms. T Testimony.
13 Ms. T Testimony.

which Ms. T emphasized do not occur on the bad days, Ms. X always requires at least contact guard assistance and sometimes more.[14]

In Ms. T's opinion, because of how highly variable Ms. X's condition is and how that variability affects her ambulation, in her opinion it is not safe for Ms. X to perform eating, toileting, bed transfers or other such activities on her own. By X of example, she has even observed Ms. X experiencing subluxation while attempting to simply adjust herself in bed.[15]

Finally, Ms. T testified that she reviewed Ms. X's assessment and physical therapy notes. She was saddened by and disagrees with some of what they provided. Specifically, she does not believe that those records fully demonstrate Ms. X's deficits. She said she understands when persons assess things such as range of motion. However, in Ms. X's case, they needed to also account for things such as hypermobility and the risk of subluxation and dislocation. Sometimes, however, things such as that are simply not within the purview and skillset of the persons performing the assessment. She is not saying that the records or assessment are dishonest, but instead, that they are simply inaccurate related to educational knowledge surrounding her very complex and rare conditions/diseases.[16]

3. B X Testimony

Ms. X also testified on her own behalf.[17] Her testimony was consistent with that of Mr. C and Ms. T. She testified as to her hypermobility which causes a significant risk of subluxation and dislocation. She also testified that when she has bad days, she experiences significant paralysis though much of her body. She said she struggles significantly with eating, swallowing food and choking. She further faces big challenges with toileting and specifically with getting off the commode. She explained that when she is on the commode for more than a few minutes, her legs go numb to the point of paralysis. She said frequently falls from the commode and either lies or crawls on the floor, waiting to regain feeling in her legs.[18]

Ms. X also testified at length regarding the frequency of her good days and bad days and her reliance upon others during the bad days. Specifically, she indicated that on average, she has bad days roughly 15 days per month and struggles mightily as to all aspects of her daily life

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14 Ms. T Testimony.
15 Ms. T Testimony. Ms. T testified that she has observed Ms. X in her home via Telehealth.
16 Ms. T Testimony.
17 Ms. X Testimony.
18 Ms. X Testimony.

when those bad days occur. She also testified that the day of her assessment happened on what she considers was one of her better days.[19]

B. The Assessed Activities of Daily Living

Ms. X applied for Medicaid Waiver services on August 11, 2020 and was ultimately denied eligibility on September 10, 2020.[20] Her application contained a number of medical records, including a letter from her primary care physician outlining in detail her medical history, diagnoses, condition, and functionality.[21]

Following her Waiver application, the Division assessed Ms. X on August 31, 2020, to evaluate her eligibility for both PCS and Waiver services.[22] The assessment occurred via Zoom video conference with Ms. X located at her home at City B, Alaska.[23] Participating were Ms. X, her care coordinator Mr. W, and the Division's assessor, Ms. Schaefer. Both Ms. Schaefer and Mr. W participated via Zoom.[24] At the time of her assessment, Ms. X was receiving physical therapy twice per week and occupational therapy once per week.[25]

Ms. X 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. In doing so, 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.[26] The assessor addresses each of the five physical functional criteria used for determining Waiver eligibility, namely bed mobility, transfers, locomotion, eating, and toileting.[27]

1. Bed Mobility

As to bed mobility, the assessor noted on the day of the assessment that Ms. X was able to lie down, roll onto her side and sit up in the bed unassisted.[28] She was also able to scoot herself to the end of her bed. The assessor also referenced and relied upon physical therapy records from August 26, 2020, indicating that Ms. X was between independent and moderately

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19 Ms. X Testimony.
20 Ex. G.
21 Ex.s G and D.
22 Ex. F, p. 1.
23 Ex. F, p. 2; Ms. Schaefer Testimony.
24 Ms. Schaefer.
25 Ex. F, p. 7.
26 Ms. Schaefer Testimony.
27 Ms. Schaefer Testimony.
28 Ex. F, p. 8; Ms. Schaefer Testimony.

independent as to bed mobility.[29] Based on the assessor's observations, as well as her review of the medical records, she concluded that Ms. X was independent as to bed mobility (self-performance score of 0 and support score of 0).[30]

However, a physical therapy assessment from August 18, 2020, indicates that Ms. X exhibits weakness and pain as to bed mobility. This same assessment further noted that she requires contact guard assistance as to all aspects of bed mobility.[31]

As Ms. X herself testified, on some days, she is fully independent as to all aspects of bed mobility. However, when her medical conditions flare-up, particularly the Lyme's disease, it causes a near paralysis which lasts 48 hours to a week at a time, making it extremely difficult for her to function at all, including as to bed mobility.[32] During these bad days, she is so immobilized by pain, weakness, and paralysis, that she frequently is unable to even adjust her pillow, much less move around in bed. When this occurs, she is dependent on the help of others, including her roommate, Mr. C.[33] These individuals assist her in adjusting her pillow, helping her to sit-up, lie down and roll over in bed.

When asked to quantify the frequency of these bad days, where her needed assistance with bed mobility is extensive, Ms. X indicated that it is approximately 15 days per month.[34] Ms. X's testimony regarding her good days and bad days and how debilitating her bad days are was further supported and confirmed by the testimony of her roommate K C, and by her therapist, Ms. T.[35]

2. Transfers

As to transfers, the assessor noted on the day of the assessment that Ms. X was able to successfully transfer independently from the edge of her bed to a standing position. She did so by placing her hands on the bedside and nearby shelf and pushing upwards.[36] However, the assessor also cited to and recognized concerns raised by Ms. X's medical records. These include doctor's notes from January 1, 2020, indicating that while Ms. X can stand and leave the house

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29 Ex. K, p. 57; Ex. F, p. 8; Ms. Schaefer Testimony.
30 Ex. F, p. 8; Ms. Schaefer Testimony.
31 Ex. K, p. 46.
32 Ms. X Testimony.
33 Mr. C also testified that Ms. X has two other roommates who assist with these tasks and that there is nearly always someone present in the home to assist Ms. X when she requires it.
34 Ms. X Testimony.
35 Mr. C Testimony; Ms. T Testimony.
36 Ex. F, p. 8; Ms. Schaefer Testimony.

for medical appointments, doing so "*will require a prolonged recovery period*."[37] Based on this as well as the assessor's review of the medical records, she concluded that Ms. X required supervision and setup help only as to transfers (self-performance score of 1 and support score of 1).[38]

Further, physical therapy records from August 24, 2020, indicate that Ms. X was unable to perform her transfer training due to "pain and fatigue."[39] On August 26, 2020, while she was able to perform a transfer twice from the edge of her bed using her upper extremities to push to stand, the records indicate that she had a "low standing tolerance due to pain in [her] bilateral feet from neuropathy."[40] A physical therapy assessment from August 18, 2020, notes that Ms. X is "[a]ble to bear weight and pivot during the transfer process *but unable to transfer self*."[41]

3. <u>Locomotion</u>

As to locomotion, the assessor stated that Ms. X uses a cane, walker, and wheelchair to move throughout the home.[42] Although the home is two levels, she infrequently goes up the stairs to the second level of the home where the kitchen is located because she has to crawl up the stairs in order to do so. The upper level is also where the home's exit is. The assessor indicated that it had been over a week since Ms. X had accessed the home's upper level. The assessor also noted that part of Ms. X's difficulty in locomotion is balance. She tends to have much greater balance while moving as opposed to remaining still in one place. Ms. X was observed walking a short distance from her bedside to the foot of her bed. She did not use any assistive devices while doing so but did hold onto her bed for support with her hand as she moved.[43] Based on the assessor's observations, as well as her review of the medical records, she concluded that as to locomotion, Ms. X required supervision and setup help only (self-performance score of 1 and support score of 1).[44]

However, in Ms. X's physical therapy assessment on August 18, 2020, it is noted that walking 50 feet, walking 150 feet, and walking 10 feet on uneven surfaces, were not even

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37 Ex. F., p. 8 (emphasis added).
38 Ex. F, p. 8; Ms. Schaefer Testimony.
39 Ex. K, p. 57.
40 Ex. K., p. 57.
41 Ex. K, p. 27 (emphasis added).
42 Ex. K, pp. 8-9; Ms. Schaefer Testimony.
43 Ex. K, p. 9; Ms. Schaefer Testimony.
44 Ex. F, p. 8; Ms. Schaefer Testimony.

attempted due to medical conditions or safety concerns.[45] These same records also note that she requires contact guard assistance for walking 25 feet on level ground.[46] Further, the physical therapy assessment concludes that while Ms. X presents with only mild functional mobility deficits, she nevertheless has significant endurance and balance deficits. Although the physical therapy assessment occurred on a good day, it is noted that on her worst days, she can barely walk.[47] Finally, Ms. X's physical therapy records from August 24, 2020, indicate that she refused to attempt to walk on level ground, unlevel ground and steps/stairs due to pain and fatigue.[48]

4. Eating

As to eating, the assessor notes that Ms. X follows a liquid diet 90% of the time because of her need to avoid choking from her frequent vomiting.[49] She does, however, rely upon roommates to cut up meat for her before bringing her meals down to her from the upstairs kitchen. During the assessment, she was observed being able to lift both of her hands to her face, consistent with what she would be able to do while eating. Ms. X also reported being able to lift a cup to her mouth to drink from and to feed herself.[50]

Based on this and the assessor's review of the medical records, the assessor concluded that as to eating, Ms. X was independent as to self-performance and required only set-up help for support (self-performance score of 0 and support score of 1).[51]

Ms. X's physical therapy assessment on August 18, 2020, notes that she requires supervision or touching assistance regarding eating.[52] Her occupational therapy records from August 25, 2020, note that she requires standby assistance only regarding eating.[53]

5. Toileting

On the issue of toileting, the assessor stated that Ms. X reported being able to use and get on and off from the commode herself as well as cleanse herself and adjust her clothing.[54] However, the assessor indicated that Ms. X does ask for assistance from a roommate during

45 Ex. K, pp. 31-32.
46 Ex. K, p. 46.
47 Ex. K, p. 48.
48 Ex. K., p. 57.
49 Ex. F, p. 9; Ms. Schaefer Testimony.
50 Ex. F, p. 9; Ms. Schaefer Testimony.
51 Ex. F, p. 8; Ms. Schaefer Testimony.
52 Ex. K, p. 30.
53 Ex. K, p. 73.
54 Ex. F, p. 10; Ms. Schaefer Testimony.

flare-ups. As to the frequency of these flare-ups, the assessor stated that they only "occur every 6 weeks and last for 3 days."[55]

During the assessment, the assessor observed Ms. X touching the top of her head with both hands and reaching her arms around and touching both sides of her lower back with her hands. She was also observed successfully transferring from the edge of the bed to a standing position independently. Based on Ms. X's reporting and the assessor's observations and review of the medical records, the assessor concluded that as to toileting, Ms. X required supervision and set-up help only (self-performance score of 1 and support score of 1).[56]

In Ms. X's physical therapy assessment on August 18, 2020, it notes that she requires supervision or touching assistance regarding toileting hygiene and transfers.[57] Her occupational therapy records from August 25, 2020, indicate that she requires contact guard assistance as to both toileting and toileting hygiene.[58]

Both Ms. X and Mr. C testified at length regarding the issue of toileting.[59] First, they testified regarding the frequency of Ms. X's bad days and they stated that when these bad days occur, she needs far more extensive assistance regarding the issue of toileting. Their testimony was consistent. Specifically, Mr. C testified that he would help Ms. X to and from the toilet approximately 5 days a week, on average. He also said that when he does so, he provides Ms. X support by allowing her to grab onto his arm, giving her support so that she can stay upright. He then leads her to the toilet. He testified that he also frequently must lift Ms. X back up off the toilet or sometimes, off of the floor.[60]

Ms. X testified that on her bad days she experiences significant difficulty with the issue of toileting, describing how her legs go numb when she is on the commode for more than a few minutes. When this occurs, she falls from the toilet and is forced to either lie on the floor or crawl on the floor, until she regains feeling in her legs. In quantifying the frequency of good and bad days, Ms. X testified that the bad days occur roughly 15 days per month.[61]

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55 Ex. F, p. 10; Ms. Schaefer Testimony.
56 Ex. F, p. 10; Ms. Schaefer Testimony.
57 Ex. K, p. 30, 32.
58 Ex. K, p. 73.
59 Mr. C Testimony; Ms. X Testimony.
60 Mr. C Testimony.
61 Ms. X Testimony.

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."[62] The nursing facility level of care[63] requirement is determined by an assessment which is documented by the Consumer Assessment Tool (CAT).[64] The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,[65] and whether an applicant has impaired cognition or displays problem behaviors.[66] 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.[67]

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.[68]

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).[69]

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.[70]

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62 7 AAC 130.205(d)(4).
63 *See* 7 AAC 130.205(d)(4); 7 AAC 130.215.
64 7 AAC 130.215(4).
65 Ex. F, pp. 11 - 13.
66 Ex. F, pp. 14 - 17.
67 Ex. F, pp. 31 - 33.
68 Ex. F, pp. 17 - 18, 31 – 32.
69 Ex. F, pp. 31 - 32.
70 Ex. F, pp. 31 - 33.

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.[71]

B. Considerations in Determining Eligibility

As an applicant for Waiver services, Ms. X has the burden of proof by a preponderance of the evidence.[72] The relevant date for purposes of assessing the facts is, in general, the date of the agency's decision under review,[73] or in this instance, September 10, 2020.[74]

As of the date of the denial for Waiver eligibility, Ms. X was receiving physical therapy twice per week and occupational therapy once per week.[75] Because Ms. X was receiving physical and occupational therapy a total of at least three times per week as of the date of her denial, she is eligible to receive one point toward Waiver eligibility on that basis alone.[76]

There was also evidence and testimony that Ms. X experiences cognition deficiencies which impact her physical abilities.[77] This includes significant brain fog and days in which she cannot even form complete sentences.[78] Her recent neurological exam notes state she has: a slowed response time to cognitive stimulus; hypervigilance and nervous system overarousal; variable recognition of environmental stimulus; impulsivity and poor visual discrimination; responds to stimulus incorrectly (commission errors); and delayed N1 latency and reduced neurological capacity associated with visual and auditory processing.[79] However, as notable as these issues may be, they are not severe enough to assist Ms. X in qualifying for Waiver services under the stringent Waiver requirements.[80]

Based on the above, to qualify for Waiver services under the circumstances present here, Ms. X requires limited assistance or more in at least two of the five scored ADLs.[81] "Limited

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71 Ex. F, p. 33.

72 7 AAC 49.135.

73 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).

74 Ex. D, p. 1.

75 Ex. F, p. 7.

76 Ex. E, p. 33.

77 Ex. G, pp. 16, 18, 21; B X Neurological Assessment, dated September 9, 2020; Ms. X Testimony; Ms. T Testimony.

78 Ms. T Testimony.

79 B X Neurological Assessment, dated September 9, 2020, at p. 1.

80 Impaired cognition in and of itself will not qualify an applicant for Waiver services. It, however, may be a factor in determining eligibility. That said, Ms. X's cognition difficulties are not near the high threshold required for eligibility scoring based upon cognitive impairment. Ex. F, pp. 16-17, 33.

81 This is due to Ms. X already receiving a point towards the three points needed for eligibility because of her receiving therapy three times a week or more. *See* Ex. F, p. 33.

assistance," as defined in the CAT, requires that a person be highly involved in the activity and receives physical help in guided maneuvering of limbs or other non-weight bearing assistance three or more times per week, or limited assistance plus weight-bearing assistance one or two times during the past seven days.[82] 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.[83]

The assessment found that Ms. X did not require any assistance with bed mobility.[84] As to eating, it found she only required setup help. As to transfers, locomotion, and toileting, the assessment concluded that Ms. X only required supervision (self-performance code of 1), and set-up help only (support score of 1).[85] Therefore, according, to the Division, Ms. X lacked the limited assistance or more required, in any of the five ADLs to qualify for Medicaid Waiver benefits.[86]

However, significantly impacting the analysis here is the highly variable nature of Ms. X's medical condition and functioning. As her medical records demonstrate, she suffers from numerous conditions, all well-documented, which are not only complex in how they present themselves, but are also highly variable in the manner, timing, and duration they afflict her.[87] She also presents with issues such as traumatic brain injury, brain fog, balance problems, and subluxation, all of which pose very real and significant threats to her long-term care and well-being. As Ms. T testified, she is treated with the utmost of care at Ms. T's facility, and is nearly always required to wear a gait belt, and to have hands-on supervision.[88] Despite this Ms. X is frequently unable to attend appointments at all, or even when she does, is required to lie prone on the couch because of how debilitating her conditions render her.[89]

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82 Ex. E, p. 18.

83 *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.

84 Ex. F, p. 8.

85 Ex. F, pp. 8-10.

86 Ex. F, pp. 8-10, 33-34.

87 Ex. G, pp. 16-18, 20, 21; Testimony of Ms. X; Testimony of Mr. C; Testimony of Ms. T.

88 Ms. T Testimony.

89 Ms. T Testimony.

This highly variable nature of Ms. X's condition is reflected by the records themselves. For instance, there are significant differences between the CAT assessment, the physical therapy assessment of August 18, physical therapy records of August 26, and the occupational therapy records of August 25. The highly variable nature of Ms. X's condition is also confirmed by Ms. T's testimony, including that there have been many days Ms. X has not even been able to attend her appointments because her condition has been so debilitating.[90]

Because Ms. X's chronic illnesses fluctuate in their severity, she can reasonably be expected to have good days and bad days. Further, in her testimony, Ms. X came across as a very credible witness. Her testimony was corroborated by the medical records as well as by the testimony of Mr. C, and Ms. T. As both Ms. X and Mr. C confirmed, she suffers from bad days, on average, roughly two weeks of every month. Further, when these episodes occur, they often render her nearly incapable of doing anything on her own. As she testified, during these times, she is frequently unable to even adjust her own pillow in bed and often experiences an almost near paralysis in her lower extremities.[91]

Ms. X also testified credibly that the CAT assessment took place on one of her good days. This conclusion plays a significant factor in addressing the five scored ADLs as referenced below.

1. <u>Bed Mobility</u>

As to bed mobility, Ms. X's credible testimony shows that on her bad days, she is so immobilized by pain, weakness, and paralysis, that she is frequently unable to even adjust her pillow, much less move around in bed. When this occurs, she is highly dependent on the assistance of others. This happens, on average, two weeks per month.[92] The evidence therefore shows that as to bed mobility Ms. X requires at a minimum contact guard assistance.[93] It also demonstrates that it is more likely true than not true, that as of the date of her denial of eligibility on September 10, 2020, Ms. X requires a minimum of limited assistance (self-support score of 2) and one-person physical assistance (support score of 2) regarding bed mobility.

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90 Ms. T Testimony.
91 Ms. X Testimony.
92 Ms. X Testimony.
93 Ex. K, p. 46.

2. Transfers

The evidence also shows that Ms. X faces significant challenges performing transfers on her bad days. Specifically, she is sometimes unable to perform transfers due to "pain and fatigue"[94] and transfers can leave her with a "low standing tolerance due to pain in [her] bilateral feet from neuropathy."[95] The totality of the evidence therefore shows that it is more likely true than not true, that as of the date of her denial of eligibility on September 10, 2020, Ms. X requires a minimum of limited assistance (self-support score of 2) and one-person physical assistance (support score of 2) concerning transfers.

3. Locomotion

Ms. T's testimony shows that Ms. X is at high risk of falling and re-damaging her brain. She also suffers from significant balance issues and endurance problems. This is confirmed by her physical therapy assessment on August 18, 2020, indicating that walking 50 feet, walking 150 feet, and walking 10 feet on uneven surfaces, were not even attempted due to medical conditions or safety concerns and that she requires contact guard assistance for walking 25 feet on level ground.[96] Therefore, the totality of the evidence shows it is more likely true than not true, that as of the date of her denial of eligibility on September 10, 2020, Ms. X requires a minimum of limited assistance (self-support score of 2) and one-person physical assistance (support score of 2) regarding locomotion.

4. Eating

As to eating, the concern here is that while Ms. X can physically feed herself, she cannot cut her own food, cannot physically access her own kitchen without significant assistance,[97] and when she does eat food, including food that has been cut up for her, she is at a significant risk of choking. As a result, she has a significant need for assistance throughout the eating process.

That said, however, it is also recognized that the eating ADL only addresses how a person eats and drinks, regarding of skill. In other words, it only addresses *whether a person is physically capable of feeding themselves.* It does not address how easily that can be done, from where within a home it must occur, or what sort of physical risks there might be to a person from

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94 Ex. K, p. 57.
95 Ex. K., pp. 27, 57.
96 Ex. K, p. 46.
97 Because it is upstairs on another level of the home.

the types of food they eat.[98] Accordingly, the above-referenced concerns, while very real, are unable to be accounted for with regard to the issue of Medicaid Waiver eligibility.

The totality of the evidence shows that it is more likely true than not true, that as of the date of her denial of eligibility on September 10, 2020, Ms. X is independent (self-support score of 0) and only requires a setup help only (support score of 1) concerning eating.

5. Toileting

Regarding toileting, to what Ms. X experiences with bed mobility, transfers, and locomotion as addressed above, she is sometimes able to access and use the commode entirely on her own. However, on bad days, occurring roughly two weeks out of the month, that is not the case. Instead, on those dates, she sometimes requires weight bearing support even getting to the bathroom and being seated on the commode. And, because she often experiences paralysis in her legs after only several minutes of being on the commode, she requires weight bearing assistance getting up and assistance with toilet hygiene. In the past, when this has not occurred, she has been forced to lay on the floor waiting to regain feeling in her legs sufficient to leave the bathroom. This has happened up to 10 times per day.[99]

Based on the totality of the evidence, it is more likely true than not true, that as of the date of her denial of eligibility on September 10, 2020, Ms. X requires extensive assistance (self-support score of 3) and one-person physical assistance (support score of 2) regarding toileting.

Because Ms. X is receiving therapy three or more days per week and requires limited assistance with three of the five scored ADLs and extensive assistance with toileting, she has a combined score of five.[100] She therefore meets the requirements for eligibility for Medicaid Waiver benefits.

IV. Conclusion

Because Ms. X is receiving therapy three days per week, to qualify for Waiver services, she must require limited assistance or more with two of the five scored activities of daily living. Because Ms. X needs extensive assistance with one of the five scored ADLs and limited

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98 Ex. F, p. 9.
99 Ms. X Testimony; Mr. C Testimony.
100 *See* Ex. F, pp. 33-34, and as analyzed above.

assistance with three of the other ADLs, she qualifies for Waiver services. Consequently, the Division's denial of her application is REVERSED.

Dated: December 2, 2020

By: *Signed*
Z. Kent Sullivan
Administrative Law Judge

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