

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

In the Matter of )  
 )  
H S ) OAH No. 20-0979-MDS  
 ) Agency No.  
\_\_\_\_\_ )

**DECISION**

**I. Introduction**

H S applied for Medicaid Home and Community-Based Waiver (Waiver) services. The Division of Senior and Disabilities Services (Division) initially assessed Ms. S for program eligibility on November 13, 2020.<sup>1</sup> It denied her application on December 1, 2020.<sup>2</sup> Ms. S, through her power of attorney S D, requested a hearing to contest the Division’s denial.<sup>3</sup>

Ms. S has a number of medical conditions and she requires an increasing level of physical assistance. While her physical condition is in flux, when looking at the totality of the evidence, this decision finds that Ms. S met her burden to show that at the time of her assessment for Waiver it is more likely than not that she needs extensive assistance in three of the relevant Activities of Daily Living: bed mobility, transfers, and toileting. This change in scoring qualifies Ms. S for Waiver services. Therefore, the Division’s decision is overturned.

**II. Facts and Procedural History**

*A. The Hearing*

A hearing on Ms. S’s eligibility for Waiver services was held over three days: February 3, 2021, February 8, 2021, and February 22, 2021. S D appeared on behalf of Ms. S, and she testified and also called the following individuals to testify about her mother’s condition: D B, the nurse at Ms. S’s assisted living home; Y J, a home health physical therapist who was working with Ms. S, but had not been at the time of the assessment; B U, a care attendant at Ms. S’s assisted living home, and M C, Ms. S’s care coordinator. Victoria Cobo-George represented the Division, and Robin Platt who conducted the assessment and Marianne Sullivan who conducted the Division’s second level review, both testified on the Division’s behalf.

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<sup>1</sup> Exhibit C, page 3.  
<sup>2</sup> Exhibit C, page 3.  
<sup>3</sup> Exhibit C, page 2.

*B. Finding of Facts*

Ms. S is a 74 year old female who lives in an assisted living facility. She has a number of diagnosis which include stage 3 chronic kidney disease, seizures, Parkinson’s, diabetes, and congestive heart failure.<sup>4</sup> She also has dementia and sometimes needs to be redirected, however she continues to know who her family is.<sup>5</sup> The Division assessed Ms. S via video conference due to the Coronavirus pandemic.<sup>6</sup> During the assessment, Ms. D and her husband were physically present with Ms. S, along with D B, and Ms. C participated by video.<sup>7</sup>

Ms. S has received physical therapy and occupational therapy sporadically both before and after the assessment, however she was receiving fewer than three days per week between November 13, 2020 and December 1, 2020.<sup>8</sup> She also has received home health services, however she was not actively receiving home health services at the time of the assessment.<sup>9</sup> Ms. S’s physical condition is rapidly declining.<sup>10</sup>

**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.”<sup>11</sup> The nursing facility level of care<sup>12</sup> requirement is determined by an assessment which is documented by the Consumer Assessment Tool (CAT).<sup>13</sup> The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,<sup>14</sup> and whether an applicant has impaired cognition or displays problem behaviors.<sup>15</sup> Each of the assessed items are coded and contribute

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<sup>4</sup> CAT assessment, 11/13/2020, (CAT) page 4.

<sup>5</sup> Testimony of Ms. D.

<sup>6</sup> Testimony of Ms. Platt.

<sup>7</sup> Testimony of Ms. D, CAT page 4.

<sup>8</sup> Testimony of Ms. Platt.

<sup>9</sup> Testimony of Ms. Platt. The home health services that Ms. S has received were based on an assessment done by Ms. D, and the services were provided by a home health agency owned by Ms. D. The Division was very concerned about Ms. D’s involvement with the agency. However, Ms. Sullivan testified that there is technically nothing improper about Ms. D’s involvement. Because it is undisputed that Ms. S was not receiving home health services at the time of the assessment, Ms. D’s involvement is entirely irrelevant to this decision.

<sup>10</sup> Testimony of Ms. B, Testimony of Ms. J, Testimony of Ms. D. This is also supported by physical therapy notes that document that Ms. S could do more in May, 2020 than January, 2021.

<sup>11</sup> 7 AAC 130.205(d)(4).

<sup>12</sup> See 7 AAC 130.205(d)(4); 7 AAC 130.215.

<sup>13</sup> 7 AAC 130.215(4).

<sup>14</sup> CAT, pages 6, 12-14.

<sup>15</sup> CAT, pages 15-18.

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.<sup>16</sup>

The CAT also records the degree of assistance an applicant requires for activities of daily living (ADL), which include the following: 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 as related to toileting.<sup>17</sup> ADL's are scored based on the level of assistance an individual requires. To be eligible for Waiver services based entirely on physical assistance needs with ADL's, an individual would need a self-performance code of 3 (extensive assistance) or 4 (total dependence) for three or more of the five ADL's highlighted above (bed mobility, transfers, locomotion within the home, eating, and toileting).<sup>18</sup> Extensive assistance is defined as being able to perform part of the activity, but only with "[w]eight-bearing support and/or [f]ull staff/caregiver performance" at least three times in the seven day period leading up to the assessment.<sup>19</sup> Total dependence means the individual required that a caregiver perform the activity for them entirely in the seven day period leading up to the assessment.<sup>20</sup>

A person can also be eligible for Waiver services if they require certain combinations of required professional nursing services, therapies, assistance with ADL's, and/or if they have impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive behaviors, etc.).<sup>21</sup>

### *B. Burden of Proof*

In this case, Ms. S seeks Waiver eligibility and bears the burden to prove by a preponderance of the evidence that she satisfies eligibility requirements.<sup>22</sup> She can meet this burden using any evidence on which reasonable people might rely in the conduct of serious affairs.<sup>23</sup>

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<sup>16</sup> CAT, page 32.

<sup>17</sup> CAT, pages 7-12.

<sup>18</sup> CAT, page 32.

<sup>19</sup> CAT, page 7.

<sup>20</sup> CAT, page 7.

<sup>21</sup> CAT, pages 32-33.

<sup>22</sup> 7 AAC 49.135.

<sup>23</sup> 2 AAC 64.290(a)(1).

### *C. Eligibility*

Ms. S requires some nursing services that are currently being provided through her Assisted Living Home.<sup>24</sup> The Division argues that none of these nursing services are those in Section A of the CAT that would count towards Waiver eligibility for Ms. S.<sup>25</sup> There is not sufficient evidence to support a finding that Ms. S currently receives nursing services measured in the CAT. Additionally, Ms. S was not receiving occupational and physical therapies three times per week or more at the time of her assessment.<sup>26</sup> Therefore, her only path to qualify for the Waiver is if she requires extensive assistance or more with at least three of the five relevant activities of daily living: Bed Mobility, Transfers, Toileting, Eating, and Locomotion.

Because Ms. S's physical condition is declining, it is important to attempt to isolate her eligibility during the relevant period, as this decision is a review of the Division's decision. The assessment took place on November 13, 2020.<sup>27</sup> The assessment scores based on a person's condition over the seven days prior to that assessment.<sup>28</sup> The Division issued its decision on December 1, 2020.<sup>29</sup> That makes the relevant time-period early November through the first of December 2020.

#### *1. Bed mobility*

Bed mobility is how a person moves within their bed.<sup>30</sup> At her assessment, Ms. S told the assessor that she could not turn herself in bed because of lack of strength.<sup>31</sup> Ms. S and the ALH nurse, Ms. B, told the assessor that Ms. S had pressure sores on her back side from sitting in one place.<sup>32</sup> Nonetheless, the Division scored Ms. S as independent with bed mobility.<sup>33</sup> This decision was based on observations that Ms. S could lean over to get something from a side table and otherwise reposition herself while sitting in her chair.<sup>34</sup>

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<sup>24</sup> Testimony of Ms. D.

<sup>25</sup> Testimony of Ms. Sullivan.

<sup>26</sup> See, CAT, page 32 for the scoring requirements based on therapies.

<sup>27</sup> CAT.

<sup>28</sup> CAT, page 6.

<sup>29</sup> Exhibit C.

<sup>30</sup> CAT, page 7 ("How person moves to and from lying position, turns side to side, and positions body while in bed.").

<sup>31</sup> CAT, page 7.

<sup>32</sup> CAT, page 7.

<sup>33</sup> CAT, page 7.

<sup>34</sup> CAT, page 7; Testimony of Ms. Platt.

Caregiver Mr. U testified that Ms. S requires assistance to reposition in bed.<sup>35</sup> He said that each morning he must help Ms. S to get up within her bed, and that at night someone comes in to get her up to use the toilet.<sup>36</sup> He said that he was asked to work with Ms. S by her physical therapist, to see if she could turn herself, and she was unsuccessful.<sup>37</sup> In the morning he testified that he physically lifts her upper body to help her sit up in bed to a sitting position. He said that he wraps his arms around her like a hug, and she holds onto his elbows, and she pulls her up. Mr. U's testimony was credible, he spoke from experience without any apparent ulterior motive.

Ms. S stated at her assessment that she cannot get up out of bed or move in the middle of the night. This was consistent with the testimony of Mr. U, Ms. D, and Ms. B, as well as medical records from March, 2020.<sup>38</sup> The fact that Ms. S could sit in a chair and grab something off of a table does not counter the weight of the evidence that she cannot turn herself in bed. Therefore, this decision finds that Ms. S requires weight bearing assistance to position in bed more than three times per week; she should therefore receive a score of extensive assistance, or a self-performance score of 3.

## 2. Transfers

Transfers determine the assistance an individual requires to move from seated to standing and vice-versa between the different surfaces in their home. During the assessment, Ms. S received help from two individuals to stand, however Ms. Platt reports that Ms. S started to get up on her own when asked and that Ms. D stopped Ms. S to get more assistance.<sup>39</sup> The Division scored Ms. S as independent with transfers, basing its decision on a hospital discharge note from about eight months before the assessment, which reported that Ms. S demonstrated a sit to stand transfer with only the assistance of a two-wheeled walker.<sup>40</sup>

Mr. U, Ms. S's main caregiver, testified that Ms. S spends most of her day in her chair in her room.<sup>41</sup> He said that Ms. S is unable to physically scoot herself to the edge of the chair to stand up. This was consistent with the testimony of others, including Ms. D who questioned Ms.

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<sup>35</sup> Testimony of Mr. U.

<sup>36</sup> Testimony of Mr. U.

<sup>37</sup> Testimony of Mr. U. The timeframe for this statement was unclear, however, given the weight of the evidence around the time of the assessment, this helps support the overall evidence even if this took place after December 1, 2020.

<sup>38</sup> See, e.g. "supine to sit and sit to supine, comments: total assist for repositioning in bed, with limited command following for more than 1 step motor planning." Physical therapy initial evaluation, 3/17/2020.

<sup>39</sup> Testimony of Ms. Platt.

<sup>40</sup> CAT, page 7-8; Discharge Summary dated March 20, 2020.

<sup>41</sup> Testimony of Mr. U.

Platt about whether she remembered that Ms. S could not scoot herself in her chair during the assessment. Ms. Platt did not recall, but it is unlikely that Ms. D would have asked such a specific question if she didn't at least believe that this happened during the assessment.

Care coordinator M C testified about her observations at Ms. S's assessment. She observed the two individuals physically help her to stand up. There was no gait belt that she recalls, but it wasn't just a light touch to the elbow – she thought the caregiver may have been grabbing the back of her pants.

Ms. B testified that Ms. S requires two caregivers to stand, and that they must physically pull her to standing. Mr. U at one point said that Ms. S could stand on her own, and that the two caregivers were there for guidance. However, earlier in his testimony he said that she needed help to stand because she did not have enough strength in her legs to do so on her own (which implies needing lifting help from those around her). Additionally, Mr. U testified that he provides weight-bearing assistance to Ms. S to transfer out of her bed each morning using a gait belt to help pull her to standing.<sup>42</sup> Ms. B testified after Mr. U, and was adamant that there is physical lifting help needed, and that sometimes more help is needed than at other times. Finally, while significantly later than the assessment, this finding is supported by the recent physician's note by L T, M.D.<sup>43</sup>

This decision finds that it is more likely than not that Ms. S requires physical lifting help to stand at least 3 times per week. Therefore, Ms. S should receive a score of extensive assistance, or a self-performance score of 3, with transfers.

### 3. *Locomotion*

Locomotion for purposes of Waiver eligibility is defined in relation to the physical assistance one needs to move around within their home on the same floor. The use of assistive devices is not considered physical assistance. Ms. S demonstrated some steps using a walker during her assessment and reported at the assessment that she could walk with a walker and people alongside her.<sup>44</sup> This is consistent with a letter from Ms. S's physician who said that Ms. S must be prompted during walking, and that she can only go short distances.<sup>45</sup> There was

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<sup>42</sup> Testimony of Mr. U.

<sup>43</sup> Exhibit 1, Letter from L T, MD, 1/29/2021: "H is unable to rise from a seated position without assistance." And "H needs 1 person assist for transfers. She needs prompting and at times gait/transfer belt assist. This is due to neglect from her stroke."

<sup>44</sup> CAT, page 8.

<sup>45</sup> Letter form L T, MD, dated January 29, 2021.

testimony from Mr. U and Ms. B that caregivers assist Ms. S with walking using a gait belt. Sometimes a gait belt is used to bear weight, however the weight of the evidence indicates that it is more likely that the gait belt is used for guidance while Ms. S is walking, rather than bearing her weight. The Division scored Ms. S as requiring supervision and set up help for locomotion.<sup>46</sup> This is consistent with the testimony of Ms. S's witnesses and her physician's letter dated January 29, 2021.<sup>47</sup> Therefore, the Division's decision as to locomotion is affirmed.

#### 4. *Eating*

Eating is how someone eats or drinks. The Division scored Ms. S as independent with eating.<sup>48</sup> Ms. S drank water independently during the assessment, but did not demonstrate eating.<sup>49</sup> She uses weighted silverware to eat which helps her due to Parkinson's.<sup>50</sup> Ms. D testified that Ms. S needs assistance to prepare food and to cut up her food for her, and she testified that Ms. S makes a mess.<sup>51</sup> She also testified that Ms. S occasionally needs assistance physically to eat.<sup>52</sup> However, Ms. J testified that she sometimes needs physical help eating because she makes a mess, and Mr. U testified that he prepares meals and delivers food already cut up for Ms. S. He did not say that he helps to physically feed her. Therefore, it is most likely true that Mr. S does not receive assistance eating, and that if she does occasionally, the assistance is likely more for convenience than necessity. Therefore, the Division's decision that Ms. S is independent with eating (a self-performance score of 0) is affirmed.

#### 5. *Toileting*

The ADL of toileting is how a person uses the type of toilet (or urinal etc) present in their home, how they transfer onto and off of the toilet, and their ability to clean themselves and perform other personal hygiene tasks associated with toileting. Ms. S uses briefs, but said at her assessment that she can cleanse herself.<sup>53</sup> This was contradicted by Ms. D's statement at the

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<sup>46</sup> CAT, page 8.

<sup>47</sup> Exhibit 1 ("She does need assistance with a wheelchair/walker to ambulate and must be prompted regularly to use them. She is considered a fall risk, having an unstable gait, right leg and foot weakness. She neglects the right side of her body since having a stroke and occasionally runs into walls. She can only go short distances before becoming short of breath." This description appears to describe standby assistance, not physical hands-on assistance.

<sup>48</sup> CAT, page 9.

<sup>49</sup> CAT, page 9. Testimony of Ms. Platt.

<sup>50</sup> CAT, page 9; Testimony of Ms. D.

<sup>51</sup> Testimony of Ms. D.

<sup>52</sup> Testimony of Ms. D.

<sup>53</sup> CAT, page 9.

assessment that she has “track marks,” and Ms. Platt’s mobility assessment which found that Ms. S cannot reach behind herself.<sup>54</sup> The Division determined that Ms. S needs limited assistance to assist with toileting.<sup>55</sup>

Ms. D testified that Ms. S cannot get her own diaper on, nor change her own diaper.<sup>56</sup> She said that she had purchased devices to assist her in cleaning herself, but that Ms. S has been unable to successfully use them.

Mr. U testified the generally Ms. S wants to have a female assist with toileting, but that recently he has been providing some assistance.<sup>57</sup> He also testified that he is aware of the assistance provided. Ms. S cannot wipe herself because she has pain in her arms and is unable to reach. Female staff assist with wiping, Mr. U said that he then assists her off the toilet by physically lifting her up. Based on this decision’s finding related to transfers, and the overwhelming weight of the evidence specific to toileting, this decision finds that Ms. S requires extensive assistance with toileting, or a self-performance score of 3.

#### **IV. Conclusion**

Based on the evidence presented, including the Division’s observations during the assessment, this decision finds that Ms. S needs more assistance than found by the Division. Specifically, Ms. S requires weight bearing assistance with bed mobility, transfers, and toileting at least three days per week. Therefore, under the CAT scoring used by the Division, Ms. S is eligible for Waiver services and the Division’s decision is overturned.

Dated: March 12, 2021

*Signed* \_\_\_\_\_  
Elizabeth Smith  
Administrative Law Judge

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<sup>54</sup> CAT, page 9.  
<sup>55</sup> CAT, page 9.  
<sup>56</sup> Testimony of Ms. D.  
<sup>57</sup> Testimony of Mr. U.



## 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 23<sup>rd</sup> day of March, 2021.

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.]