

B. Medical Records

Ms. E's physical therapy records, provided as part of the application, dated October 13, 2020 – one day after hip surgery, provide that she was then independent with moving from side to side and moving from a lying to a sitting position, that she required supervision/cueing for transfers, and was independent with the operation of a wheelchair. Prior to her hip surgery, she was able to walk while using a quad cane.³ Occupational therapy notes from that same day provide that Ms. E needed contact guard assistance while scooting, but otherwise required supervised assistance with moving from her side, from supine to sitting positions, and for transfers.⁴

Physical therapy evaluation notes dated January 6, 2021 provided that sometime after November 19, 2020 “[patient] progressed to being able to walk with her narrow based quad cane to outside her front door to smoke,” and that she was currently “using a wheelchair for mobility.” Those same notes provide, under the “Objective” portion, that Ms. E required “[upper extremity] support at left [lower extremity] to stand independently.” She was noted as being able to transfer to and from her wheelchair to a “mat table” with supervision.⁵

Ms. F, the physical therapist working with Ms. E, wrote on February 8, 2021 that Ms. E required assistance with preparing meals, bathing, laundry, cleaning her apartment, and shopping, and that she was a fall risk.⁶ Dr. C wrote, on February 3, 2021, that Ms. E uses a wheelchair in her home and in the community, that she was unsafe to use a walker or cane, and required assistance for toileting and bathing transfers, and experienced incontinence and needed assistance with cleansing. Dr. C's letter also opined that Ms. E would face the possibility of institutionalization “if her situation becomes too severe.”⁷

C. The Assessment and Ms. Pounds' Testimony

Following Ms. E's application, Ms. Pounds, a Division assessor, assessed Ms. E via Zoom on December 17, 2020 to determine whether Ms. E qualified for Waiver benefits. That assessment, as recorded on the Division's Consumer Assessment Tool (CAT) found that Ms. E was independent with bed mobility, locomotion within the home, transfers, eating, and toileting.⁸

³ Ex. F, pp. 35 – 39

⁴ Ex. F, p. 42.

⁵ Ex. 1, January 6, 2021 Physical Therapy Notes, p. 3.

⁶ Ex. 2.

⁷ Ex. 2.

⁸ Ex. E, pp. 10 – 12.

The assessment also scored Ms. E with one point towards Waiver eligibility based upon her receiving therapy three or four days per week.⁹ Ms. Pounds testimony on this point was a bit equivocal, being that she may have counted Ms. E's need for periodic monitoring due to her coagulation disorder as part of the point provided for having therapy three or four days per week.¹⁰ Regardless, the result of the assessment was that Ms. E did not qualify for Waiver benefits.¹¹ Ms. Pounds' relevant findings, as reflected in the assessment, were as follows:

- Ms. E told her that she was able to turn and sit up in bed without assistance. While Ms. Pounds did not see Ms. E move in bed, she was able to observe her repositioning herself while seated in her wheelchair. Ms. E was scored as independent (score of 0/0) with bed mobility.
- Ms. E told her that she could transfer without help. Ms. Pounds observed her standing up and sitting down without help, by using the arm of her wheelchair for leverage and support. Ms. E was scored as independent (score of 0/0) with transfers.
- Ms. E reported that she can operate her manual wheelchair within her home by herself. However, she also reported that she needed assistance with it outside her home. Ms. E was observed self-propelling her wheelchair, although her PCA did help her maneuver it into place in front of the camera for the Zoom assessment. She was scored as being independent with locomotion within her home (score of 0/0).
- Ms. E was observed using her hands and told Ms. Pounds that she could feed and drink by herself. Her PCA stated that she had difficulty swallowing. She was scored as requiring setup assistance with eating (score of 1/0) because she requires help cutting up her food.
- Ms. E told Ms. Pounds that did not require any help with toileting, and that she could transfer on and off the toilet, adjust her clothing, and self-cleanse without assistance. She further reported that she has urinary incontinence at night, which can cause leakage through her briefs onto the bed. She needed help changing the sheets. Ms. Pounds observed Ms. E self-propelling her wheelchair, independently transferring, and being able to reach behind herself, and put a jacket on. She also reviewed physical therapy notes

⁹ Ex. E, p. 35, question NF. 2(b).

¹⁰ Ms. Pounds' testimony.

¹¹ Ex. E, p. 36.

from December 3, 2020, which stated that Ms. E was independent with toileting transfers. Ms. E was scored as independent (score of 0/0) with toileting.¹²

On December 29, 2020, the Division notified Ms. E that she was not eligible for Waiver benefits.¹³

D. Ms. E's Witnesses

Ms. E has difficulty speaking. She had her caregiving team testify on her behalf.

Ms. S has been Ms. E's PCA since November of 2020. Her testimony on the activities of bed mobility, locomotion, and eating was that Ms. E did not require hands-on physical assistance with these. She testified that Ms. E, however, did need physical assistance for toileting because the doorway to the bathroom was too narrow for her to propel her wheelchair through, and that she needed help cleansing herself about once weekly. She also initially testified that Ms. E did not require assistance with transfers. However, her testimony changed after Ms. F's testimony (discussed below) to state that Ms. E required hands-on physical assistance with transfers. Ms. S's justification for changing her testimony was that she overlooked the amount of physical help she gives to Ms. E because she is so used to providing it, not only to Ms. E, but to her own disabled spouse.¹⁴

Ms. F has known Ms. E since 2014. Ms. E is a former client of the personal care services agency, which Ms. F and Ms. S both work for, and to which Ms. E recently transferred back to. Ms. F sees Mr. E approximately twice weekly. She did not dispute that Ms. E was capable of bed mobility, locomotion, and eating without requiring hands-on physical assistance. However, she testified that Ms. E required assistance with toileting every time. She also testified that Ms. E required physical hands-on assistance to transfer, which she estimated as being at least 25% of the time but was required a minimum of twice per week.¹⁵

III. Discussion

A. Burden of Proof

Ms. E is an applicant for Waiver benefits. She therefore has the burden of proving by a preponderance of the evidence that she is eligible for Waiver benefits.¹⁶ The relevant date for

¹² Ms. Pounds' testimony; Ex. E, pp. 10 – 12.

¹³ Ex. D.

¹⁴ Ms. S's testimony.

¹⁵ Ms. F's testimony.

¹⁶ 7 AAC 49.135.

purposes of assessing the state of the facts is, in general, the date of the agency’s decision under review.¹⁷ The Division’s assessment was on December 17, 2020, and its decision was issued on December 29, 2020.

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.”¹⁸ The nursing facility level of care¹⁹ requirement is determined by an assessment which is documented by the Consumer Assessment Tool (CAT).²⁰

The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,²¹ and whether an applicant has impaired cognition or displays problem behaviors.²² 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 3.²³

The CAT also records the degree of assistance an applicant requires for Activities of Daily Living (ADLs).²⁴ 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.²⁵ For ADLs, the possible self-performance codes relevant to determining a PCS level are as follows:

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.

¹⁷ 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>).

¹⁸ 7 AAC 130.205(d)(4).

¹⁹ See 7 AAC 130.205(d)(4); 7 AAC 130.215.

²⁰ 7 AAC 130.215(4).

²¹ Ex. E, pp. 10, 15 - 17.

²² Ex. E, pp. 18 - 21.

²³ Ex. E, pp. 35 - 36.

²⁴ Ex. E, pp. 10 - 15.

²⁵ Ex. E, pp. 10 - 15.

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.²⁶

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.

3 – The person required a physical assist from two or more people.²⁷

C. Ms. E’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.²⁸ For instance, if Ms. E required nursing services seven days per week, or had therapy five or more times per week, or if she required extensive physical assistance with three or more of five specified ADLs (bed mobility, transfers, locomotion, toileting, and eating), she would qualify for Waiver benefits.²⁹ The facts show that Ms. E does not require nursing services seven days per week. She did not have therapy five or more times per week at the time of the Division’s denial of her application. Although there was some discussion of her cognitive impairments, those are not a factor in determining her eligibility – as shown by the fact that she was quite recently released from court-ordered guardianship. She undisputedly does not require extensive physical assistance with three or more of the five specified ADLs. She does not qualify for Waiver benefits based upon those needs.

²⁶ Ex. E, p. 10.

²⁷ Ex. E, p. 10.

²⁸ Ex. E, pp. 35 - 36.

²⁹ Ex. E, p. 35, question NF 1.

The Division scored Ms. E with one point for having therapies three or four times per week.³⁰ Consequently, for Ms. E to qualify for Waiver benefits, she would need either limited or extensive physical assistance with two or more of the five specified ADLs. It should be noted that there was a significant amount of evidence to the effect that Ms. E has a considerable need for assistance with her ADLs, other than the five specified ADLs, and with her instrumental activities of daily living (meal preparation, house cleaning, shopping, and laundry). That need does not provide a path to eligibility for Waiver services. The only ADLs that factor in determining Waiver are bed mobility, transfers, locomotion, eating, and toileting. The instrumental activities of daily living do not factor in determining eligibility.³¹ Of the five applicable ADLS, it is undisputed that Ms. E does not require either limited or extensive assistance with bed mobility, locomotion, and eating. The two remaining ADLS, transfers and toileting, are addressed below.

1. Transfers

Transfers consists of how a person moves between surfaces, such as from a sitting to a standing position.³² The assessor determined that Ms. E was independent with transfers. The January 6, 2021 physical therapy notes provide that she can transfer to and from her wheelchair with supervision. Ms. S's initial testimony was that Ms. E could transfer without assistance. Only after Ms. F testified, did Ms. S change her testimony. Ms. S's explanation for changing her testimony is not persuasive. She is Ms. E's PCA and should know whether she provides Ms. E with assistance with her transfers. As a result, her initial testimony is more credible than her changed testimony. Ms. F's testimony, because she is not Ms. E's PCA, is given less weight than Ms. S's initial testimony. Consequently, it is more likely true than not true that Ms. E does not require either limited or extensive assistance with transfers. This means that Ms. E has not met her burden of proof on this limited issue and does not qualify to receive a point toward her Waiver eligibility based upon her need for assistance with transfers.

³⁰ Although the assessor's testimony suggested that Ms. E should not have received that point, the Division's findings on this point, as shown on the CAT, will not be disturbed. In addition, Ms. F's testimony corroborated Ms. E receiving physical therapy three times per week.

³¹ The scoring page for determining Waiver eligibility on the CAT is contained at exhibit E, pp. 35 – 36. See questions NF 1(e) and NF 6.

³² Ex. E, p. 10.

2. Toileting

Toileting is a complicated process. It involves getting to and from the bathroom (which may involve transfers from a chair, bed, etc., and locomotion), transfers to and from the toilet, cleansing, and adjusting clothing.³³ The evidence on this point is mixed. The assessment shows that Ms. E said she could toilet by herself. However, Dr. C's letter, albeit written one and one-half months after the assessment, provides that she needs assistance with toileting transfers, although it does not provide sufficient information to determine if merely supervisory assistance is required or physical hands-on assistance. More importantly, Ms. S's and Ms. F's uncontroverted testimony provided that Ms. E, who is wheelchair bound, cannot locomote to the bathroom because the bathroom doorway is too narrow for her to navigate with her wheelchair. This, in and of itself, constitutes a need for limited assistance because toileting includes getting to and from the toilet. Ms. E has therefore met her burden of proof on this limited issue and established that she should receive one point towards Waiver eligibility.

3. Scoring

Ms. E is required to have a score of three or more on the CAT to be eligible for Waiver benefits. She has one point due to her therapies. She also has one point because she requires limited assistance with toileting. This falls short of the three points required. Consequently, she has not met her burden of proof and does not qualify for Waiver benefits.

IV. Conclusion

The Division's determination that Ms. E did not qualify for Waiver benefits as of September 18, 2020 is upheld.

Dated: March 8, 2021

Signed _____
Lawrence A. Pederson
Administrative Law Judge

³³ Ex. E, p. 12.

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 25th day of March, 2021.

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

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