

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

In the Matter of)	
)	
E P)	OAH No. 21-0752-MDS
<hr style="width: 40%; margin-left: 0;"/>)	Agency No.

DECISION

I. Introduction

E P applied for Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (“Division”) assessed him for eligibility and subsequently denied his application. Mr. P requested a hearing.

The evidence presented at the hearing demonstrates that it is more likely true than not true that he does not meet the stringent eligibility requirements to qualify for Waiver services. The Division’s denial of his application is affirmed.

II. Factual Background

Mr. P is 79 years-old and resides at Business A Assisted Living, an assisted living home, in City A, Alaska (Business A).¹ He has lived at Business A since January 29, 2021, after being transferred from the hospital in City B.² He was granted General Relief Assisted Living Home Care days before his arrival at Business A.³ One of the reasons for his move from City B to Business A was to better enable him to be with a robust team of medical providers and specialists.⁴

Mr. P experiences a variety of health issues, including a failure to thrive, emphysema/chronic obstructive pulmonary disease, acute and chronic heart failure, syndrome of inappropriate secretion of antidiuretic hormone and anemia. He may also be legally blind and, at the time of the assessment, was in the process of obtaining new glasses because his old ones were lost during his move from City B. He is generally ambulatory, and although Business A has multiple levels, it uses a stair glide, and has a ramp at the entrance. Since moving to Business A, he reports that his feet, legs and breathing have all gotten much better.⁵

¹ Ex. E, pp. 2, 4.
² Ex. G, pp. 2, 5.
³ Exs. H, I.
⁴ Ex. G, p. 5.
⁵ Ex. E, p. 4.

While it is believed that Mr. P may begin attending weekly physical and occupational therapies after residing at Business A for a longer period, as of the time of the assessment he had not begun doing so.⁶ However, within his application there are records from physical and occupational therapy sessions occurring in November 2020.⁷

Mr. P's cognition is reported as good. At the time of the assessment, he was able to draw a clock and could recall three out of three words without prompting.⁸ The records are somewhat contradictory on whether he is a veteran.⁹ However, they do report that he was drafted into the Army in 1968 and was a gunner in Vietnam.¹⁰ They also state that he suffers from nightmares and Post Traumatic Stress Disorder (PTSD).¹¹ He is a loner, nervous in large crowds, does not like to be touched, and is often reluctant to seek assistance.¹² However, no problem behaviors are reported.¹³

An application for Medicaid Waiver services was received from Mr. P on March 5, 2021.¹⁴ His application indicates that he has experienced a significant mental and physical decline over the past year. He has also experienced several falls and his ability to care for himself and live independently have become significantly impaired.¹⁵ The application states that he can self-ambulate to some extent but requires the use of a walker and staff assistance when balancing and transferring. It further indicates that he has very poor hearing and eyesight and has also shown an inability to comprehend his finances and medications. He is in the process of having an Office of Public Advocacy conservator and guardian appointed. He also can no longer take care of his hearing aids and dentures and frequently misplaces them. Finally, his application provides that he has had several trips to the hospital in City B in the past year, most recently having been discharged in January 2021 immediately before transferring to Business A.¹⁶ The

⁶ Ex. E, pp. 4, 6; Testimony of Katherine Pounds.

⁷ Ex. E, p. 8; Ex. G, pp. 59-70, 77-79, 86-90.

⁸ Ex. E, p. 5.

⁹ *Compare* Ex. G, p. 19 (Participate is a US Veteran: No) *with* Ex. G, p. 115 (Voting and Military Service: Branch of Military: Army)

¹⁰ Ex. G, p. 116.

¹¹ Testimony of N C Z.

¹² Ex. G., p. 5; Ex. G, p.

¹³ Ex. E, p. 16.

¹⁴ Ex. G.

¹⁵ Ex. G, p. 5.

¹⁶ Ex. G, p. 5.

medical records submitted with his application are from relatively brief periods of time on July 23, 2020, and November 14-18, 2020.¹⁷

Following his Waiver application, the Division assessed Mr. P on March 25, 2021, to evaluate his eligibility for Medicaid Waiver services. The assessment occurred at Business A, and because of COVID, it occurred via Zoom video conference.¹⁸ Participating during the assessment were Mr. P; B D, Mr. P's Care Coordinator; H U, the Assistant Administrator for Business A; and the Division's assessor, Katherine Pounds.¹⁹

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.²⁰ The assessor conducts the assessment using each of the five physical functional criteria for determining Waiver eligibility, namely bed mobility, transfers, locomotion, eating, and toileting.²¹

As to bed mobility, Mr. P said during the assessment that he can turn in bed independently and sit up. He has a hospital bed and can adjust it on his own. While he denied bed sores, the assessor did note that he had a lump on his arm and inner thigh. The assessor also observed Mr. P lean forward and move in his chair independently. The assessor testified that there was nothing in his medical records, statements, or her observations during the assessment, demonstrating anything other than his being fully independent as to bed mobility.²²

As to transferring, during the assessment Mr. P did not answer the assessor's question regarding transfers.²³ However, Ms. U said that he is capable of transferring on his own, but requires a one-hand assist, once-in-a-while when he is feeling weak. That occurs approximately twice per week. Ms. U also said that while he is slow, he likes to do transfers on his own.²⁴ The assessor observed Mr. P stand from sitting by placing a hand on his walker and sitting back down

¹⁷ Ex. G, pp. 26 - 133.

¹⁸ Ex. E, pp. 1-2; Testimony of Katherine Pounds.

¹⁹ Testimony of Katherine Pounds.

²⁰ Testimony of Katherine Pounds.

²¹ Testimony of Katherine Pounds.

²² Ex. E, p. 7; Katherine Pounds Testimony.

²³ Ex. E, p. 7.

²⁴ Ex. E, p. 7.

in much the same manner.²⁵ The assessor also reported that there was nothing in the medical records indicating that Mr. P had any issues concerning transferring.²⁶

Regarding the issue of locomotion, it was reported by Ms. U that Mr. P uses his walker to ambulate and he himself indicated that he could go anywhere. He did say that he requires using the stair glide if he leaves the home and reported needing help using it.²⁷ The assessor also observed Mr. P walk independently using his walker. She saw him easily use his walker to move forward, backward and turn around. However, the assessor noted that the physical therapy records indicate he becomes easily fatigued and has shortness of breath after ambulation. They also suggest he needs supervision and set-up for locomotion. As such, as the assessor testified, this was accounted for in his assessment scoring.²⁸

As to eating, Mr. P reported being able to feed himself and swallow his medications. During the assessment, it was reported that he had gone into the hospital appearing malnourished but had stabilized since arriving at Business A. Mr. P was observed being able to drink water from a glass independently. The assessor testified that there was nothing in the medical records to indicate that he experiences any problems eating.²⁹

Finally, as to toileting, Mr. P stated that he can perform all aspects of toileting. He reported being able to get to and from the commode, on and off the commode, adjust his clothing, and clean himself. He does report occasional incontinence. Ms. U said that he wears pull-ups and can change them on his own. During the assessment, Mr. P was observed walking and transferring independently as well as being able to reach behind his back and grip the handles of his walker. The assessor noted that while medical records suggest that Mr. P is independent as to toileting, he does experience fatigue and shortness of breath associated with ambulation. Accordingly, she scored him for fatigue and shortness of breath as well as for supervision and set-up during toileting.³⁰

Based on the assessor's observations and discussions with Mr. P, as well as the input from Ms. U and Mr. D during the assessment, the assessor concluded that Mr. P was independent as to bed mobility and eating. She concluded that he requires supervision (self-performance

²⁵ Ex. E, p. 7; Katherine Pounds Testimony.

²⁶ Katherine Pounds Testimony.

²⁷ Ex. E, p. 8; Katherine Pounds Testimony.

²⁸ Ex. E, p. 8; Katherine Pounds Testimony.

²⁹ Ex. E, p. 8; Katherine Pounds Testimony.

³⁰ Ex. E, p. 9; Katherine Pounds Testimony.

code of 1), and set-up help only (support score of 1), for transfers, locomotion, and toileting.³¹ Based on these assessment scores, Mr. P was deemed ineligible for Waiver services.³² On April 12, 2021 the Division sent him notice that his application was denied.³³ Through his Care Coordinator, Mr. P disagreed with the Division's denial and requested a hearing.³⁴

In addition to the limited medical documentation submitted with his application, and the assessment occurring on March 25, 2021, Mr. P had three hospital visits since arriving at Business A.³⁵ The first occurred from March 15-18, 2021, at the Business B Medical Center.³⁶ The second was from March 29 – April 5, 2021, and was also at the Business B Medical Center.³⁷ The third occurred from May 18 – 26, 2021, and was at the Business C Medical Center in City C.³⁸

The records reflect that on the first hospital visit since arriving at Business A, Mr. P was admitted to the Business B Medical Center due to shortness of breath and respiratory distress associated with chronic obstructive pulmonary disease (COPD).³⁹ Tests revealed that his heart was functioning at far less than normal and his body was producing excessive urine. He was prescribed Lasix, which is used to treat fluid retention, and recommended to follow-up with cardiology.⁴⁰

The second hospital admission was also at Business B Medical Center and was due to Mr. P's progressive shortness of breath related to his severe COPD and poor heart functioning.⁴¹ In the Emergency Room, he experienced respiratory failure. Upon his discharge, it was recommended that he follow-up with cardiology at the Business C Medical Center and with a scheduled COPD consult that was pending.⁴²

³¹ Ex. E, pp. 7-9; Katherine Pounds Testimony.

³² Ex. E, pp. 32-34; Ex. F, pp. 1-2; Katherine Pounds Testimony.

³³ Ex. D, pp. 1-3.

³⁴ Ex. C, p. 1.

³⁵ B D Testimony; These documents are not Bates Stamped. As such, they are referenced by the name and date they were input into ProLaw, the case management program used by the Office of Administrative Hearings, as well as by the page number of the electronic pdf document as opposed to the page number indicated on the page itself.

³⁶ DO BBMC records 3.15 to 3.18 (June 4, 2021), pp. 1-29.

³⁷ DO BBMC 3.29 to 4.5.21 (June 4, 2021), pp. 1-60.

³⁸ DO BBMC 5.18.21 to 5.26.21 (June 4, 2021), pp. 1-29.

³⁹ *See generally* DO BBMC records 3.15 to 3.18.

⁴⁰ DO BBMC records 3.15 to 3.18 at pp. 2-3.

⁴¹ *See generally* DO BBMC 3.29 to 4.5.21.

⁴² DO BBMC 3.29 to 4.5.21 at pp. 2-5.

During the third and most recent hospital visit, Mr. P was treated at the Business C Medical Center.⁴³ He was admitted because he was experiencing an increasing difficulty in breathing and leg swelling. Upon discharge, his breathing had improved substantially, and it was recommended that he follow-up with Foley catheterization to alleviate urine retention.⁴⁴

A telephonic hearing occurred on June 1, 2021. Participating were Mr. P; B D, his Care Coordinator; N C Z, LPN, Director of Business A; Terri Gagne, a Fair Hearing representative with the Division; and Katherine Pounds, the Division's assessor in this case. Following the hearing, the Division and Mr. D were both asked to supplement the record with documentation of Mr. P's hospital visits occurring since he has been at Business A. The parties were also given an opportunity to provide any further arguments they wished concerning the supplemented documentation.⁴⁵ In addition to the medical records as already referenced above, both sides submitted additional written arguments.⁴⁶

A major focus of Mr. D throughout the hearing and in the document filed on behalf of Mr. P post-hearing, was his steady decline in physical condition.⁴⁷ For example, Mr. D testified that Mr. P was so weak on the date of the mediation on May 18, 2021, that he was completely unable to ambulate on his own. Due to swelling and pain in his legs and feet, Ms. Z was required to push Mr. P around in a wheelchair.⁴⁸ Mr. D and Ms. Z's testimony also emphasized Mr. P's PTSD, the fact that he is legally blind and has very poor hearing. They also noted the three hospitalizations that have occurred since his arrival at Business A.⁴⁹ Finally, Mr. D suggests that by focusing on positive aspects of Mr. P's condition observed at the time of the assessment, the Division is inappropriately cherry-picking positive considerations while discounting or ignoring negatives.⁵⁰

As the Division emphasized both at the hearing and in its post-hearing written response, for purposes of Medicaid Waiver, Mr. P's condition must be determined at time of the assessment and denial.⁵¹ It argues that it is inappropriate to consider evidence outside of that

⁴³ See generally DO BCMC 5.18.21 to 5.26.21.

⁴⁴ DO BCMC 5.18.21 to 5.26.21 at pp. 4-7.

⁴⁵ Order for Supplementation of the Record (June 1, 2021).

⁴⁶ Division After Hearing Document Response (June 7, 2021); D Final Response (June 11, 2021).

⁴⁷ B D Testimony; D Final Response.

⁴⁸ B D Testimony; N C Z Testimony.

⁴⁹ B D Testimony; N C Z Testimony.

⁵⁰ B D Testimony; D Final Response.

⁵¹ Terri Gagne Testimony; Division After Hearing Document Response.

timeframe. While the Division does not disagree that Mr. P’s condition is worsening, instead, it contends that the solution for that is for him to potentially reapply for Waiver services as legally allowed. However, the Division contends that it is required to assess Mr. P’s condition as it existed during the assessment and at time of denial. It argues that it accurately did so and based on that assessment, Mr. P is ineligible for Medicaid Waiver as of the date of the denial.⁵²

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.”⁵³ The nursing facility level of care⁵⁴ requirement is determined by an assessment which is documented by the Consumer Assessment Tool (CAT).⁵⁵ The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,⁵⁶ and whether an applicant has impaired cognition or displays problem behaviors.⁵⁷ 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 3.⁵⁸

The CAT also records the degree of assistance an applicant requires for activities of daily living (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 (including transferring on and off the toilet and personal hygiene care).⁵⁹

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 ADLs (bed mobility, transfers, locomotion within the home, eating, and toileting). A person can also receive points for combinations of required professional nursing services, therapies, severely

⁵² Terri Gagne Testimony; Division After Hearing Document Response.

⁵³ 7 AAC 130.205(d)(4).

⁵⁴ See 7 AAC 130.205(d)(4); 7 AAC 130.215.

⁵⁵ 7 AAC 130.215(4).

⁵⁶ Ex. E, pp. 12 - 14.

⁵⁷ Ex. E, pp. 15 - 18.

⁵⁸ Ex. E, pp. 32 - 33.

⁵⁹ Ex. E, pp. 7-9, 18-19, 32-33.

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.⁶⁰

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.⁶¹

B. Determining Eligibility

As an initial applicant, Mr. P bears the burden of proof by a preponderance of the evidence.⁶² There are several considerations in analyzing Mr. P's Waiver eligibility in this instance. These include the timing of the denial of eligibility given the evidence in the record and that Mr. P has experienced a marked worsening of his condition over time. It also includes how his Waiver eligibility is impacted by his lack of receipt of professional nursing services or therapy. These considerations and how they factor into this decision are addressed below.

1. Eligibility and Timing of Evidence

As the record reflects, Mr. P has experienced a decline in his condition over the past year and that condition has continued to decline even since the assessment and denial in this case.⁶³ However, applicants for Medicaid Waiver frequently possess medical conditions that are changing and evolving. It is somewhat rare for their conditions to be static. As a practical matter, for purposes of analyzing and determining Medicaid Waiver eligibility, it is necessary to avoid a moving target. A point in time must be chosen to assess and apply the Medicaid standards as of that date.

Medicaid Waiver benefits are required to be assessed as of an applicant's condition at the time of denial of eligibility.⁶⁴ Here, that was April 12, 2021.⁶⁵ Accordingly, Mr. P's medical records from after the denial of eligibility are only somewhat helpful to the analysis. This is because they do not necessarily causally demonstrate what his condition was on the date of denial. Medical records and assessments from immediately before a denial are generally more helpful. If it can be shown that Mr. P's condition was not substantially changed from the date of

⁶⁰ Ex. E, p. 32-33.

⁶¹ Ex. E, p. 33.

⁶² Ex. G; 7 AAC 49.135.

⁶³ Ex. G, p. 5; D Final Response; B D Testimony.

⁶⁴ 7 AAC 49.170; *In re T.C.*, OAH 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013), available at: <https://aws.state.ak.us/OAH/Decision/Display?rec=2856>.

⁶⁵ Ex. D, p. 1.

that documentation to the date of denial, records from days or weeks prior to the denial can prove helpful. Again, what is relevant is Mr. P's condition at, and just before, the denial of Waiver eligibility on April 12, 2021, including records having a bearing on his condition as of that denial date.

As Ms. Pounds testified, Medicaid does allow an applicant to reapply for Waiver services after a year has passed from the initial application.⁶⁶ As she further confirmed and the regulations support, if an applicant's condition continues to rapidly deteriorate so as to constitute a "material change in the applicant's condition after submission of the initial application," the applicant may reapply *at that time*.⁶⁷ A "material change in the applicant's condition" means an alteration in the applicant's health, behavior, or functional capacity of sufficient significance that the department is likely to reach a different decision regarding the applicant's need for home and community-based waiver services."⁶⁸

2. Relevant Evidence

It is undisputed that, at the time of the assessment on March 25, 2021, and the Division's denial on April 12, 2021, Mr. P was not receiving *any* professional nursing services, or therapies, nor did he possess severely impaired cognition (memory/reasoning difficulties), or exhibit extensive problem behaviors (wandering, abusive behaviors, etc.).⁶⁹ It is noted that Mr. P has a multitude of issues that impact him on a daily basis, including possessing very poor hearing, extremely poor eyesight, and suffers from PTSD. He is also afflicted with numerous medical conditions as already described. However, as of the date of the assessment and the Division's denial, none of these issues were significant enough to be scored under the very stringent Medicaid standards as measured by the CAT.⁷⁰

Specifically, Mr. P does not require nursing services for injections or IV feeding, the use of feeding tubes, suctioning/tracheostomy care, treatment of dressings, oxygen, assessment/management, catheter, comatose care, ventilator/respirator use, or uncontrolled seizures.⁷¹ While it was recommended at the time of his discharge from his last hospital stay on

⁶⁶ Katherine Pounds Testimony; 7 AAC 130.211(a).

⁶⁷ 7 AAC 130.211(c); Katherine Pounds Testimony.

⁶⁸ 7 AAC 130.211(c).

⁶⁹ *See generally* Ex. E; B D Testimony.

⁷⁰ Ex. E, pp. 31-34.

⁷¹ Ex. E, pp. 12-14, 33.

May 26, 2021, that he begin using a Foley catheter,⁷² he was not using one as of the time of the assessment or denial.⁷³ Further, even if he had been, such a fact is unlikely to have changed the outcome here. Instead, he would have been required to prove needing daily nursing services associated with the Foley catheter.⁷⁴ No such proof was provided.

As noted further noted, Mr. P is afflicted with hearing and eyesight difficulties, suffers from respiratory issues, swelling in his feet and legs, and PTSD. But none of these issues rise to the level of scoring under the CAT. He is not currently receiving therapy for any of these things. Consequently, this would not contribute towards his eligibility scoring per the CAT.⁷⁵ His PTSD is also not so severe as to warrant scoring for any of the types of problem behaviors assessed by the CAT.⁷⁶ While there is certainly no doubt that as a Vietnam veteran, and someone who is afflicted with the various medical issues he is experiencing, Mr. P may well benefit from physical, occupational, respiratory therapies. However, as of the date of the assessment and denial, those were not occurring, and as such, no score is justified in this instance.

Finally, there was no evidence that Mr. P was experiencing any significant cognition issues. Consequently, no points were warranted based on his possessing a lack of cognition and certainly not for the type of severe cognition challenges which must be experienced to justify scoring under the CAT.⁷⁷

Based on the lack of therapies, severe cognition issues, problem behaviors, or need for professional nursing services, Mr. P would therefore require extensive or complete assistance in at least three of the five scored ADLs. “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.⁷⁸ 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

⁷² DO BCMC 5.18.21 to 5.26.21 at pp. 4-7.

⁷³ Ex. E, p. 13.

⁷⁴ Ex. E, p. 32.

⁷⁵ Ex. E, pp. 13, 14, 32.

⁷⁶ Ex. E, pp. 15-18, 32.

⁷⁷ Ex. E, pp. 15-16, 32. Further, impaired cognition in and of itself will not qualify an applicant for Waiver services. It, however, may be a factor in determining eligibility. However, here, there were no cognition difficulties referenced that are near the high threshold required for eligibility scoring based upon cognitive impairment.

⁷⁸ Ex. E, p. 7.

recipient's weight, but instead that the recipient could not perform the task without the weight bearing assistance.⁷⁹

Here, the assessment found that Mr. P did not require any assistance with bed mobility or eating. As to transfers, locomotion, and toileting, the assessment concluded that he only required supervision (self-performance code of 1), and set-up help (support score of 1).⁸⁰ According, to the Division, he lacked the extensive assistance required, in any of the five ADLs to qualify for Medicaid Waiver benefits.⁸¹

The factual issue requiring resolution is therefore whether, at time of the denial, Mr. P requires weight bearing assistance three or more times per week with transfers, locomotion, and toileting. If he does, then he will be eligible for Medicaid Waiver benefits. If he does not require extensive assistance with all three of these tasks, he will not be eligible for Medicaid Waiver benefits.

At the hearing, and as indicated above, much of the focus by Mr. D and Ms. Z was on Mr. P's condition as of the date of the mediation, or following the date of the denial, rather than on his condition during the assessment or as of the date of denial.⁸² But as already explained, the timing of the evidence concerning Mr. P's condition plays a significant factor in this decision. Simply stated, evidence of his condition following the denial is not generally useful or relevant in determining his condition as of the date of denial.

Further, much of the testimony also focused on issues such as his PTSD, his poor eyesight, poor hearing, etc. While these issues undoubtedly pose major concerns for and health limitations upon Mr. P, they do not rise to the level of scoring for purposes of stringent standards imposed for Medicaid Waiver eligibility. As such, they simply do not rise to the level required for consideration here.

In this instance, it is noteworthy that Mr. D participated in the Zoom assessment.⁸³ During the hearing, he was specifically asked to identify *any* discrepancies or mischaracterizations in the assessor's testimony and the findings and observations from the CAT regarding each of the five scored ADLs. In other words, he was asked to address any instances

⁷⁹ See *In re K T-Q*, OAH Case No. 13-0271-MDS, p. 4 (Commissioner DHSS June 21, 2013), available at: <https://aws.state.ak.us/OAH/Decision/Display?rec=2857>.

⁸⁰ Ex. E, pp. 7-9; Katherine Pounds Testimony.

⁸¹ Ex. E, pp. 7-11; Ex. E, pp. 32-34.

⁸² B D Testimony; N C Z Testimony.

⁸³ B D Testimony.

were Ms. Pounds testimony or the findings and observations identified in the CAT differed from what he heard, saw, or witnessed during the assessment itself. Mr. D was unable to do so.⁸⁴ Instead, in response, he suggested that Mr. P is a very private person and may have overstated his abilities to some extent. He also emphasized that Mr. P's condition at the time of the assessment was not representative of his condition at other times or following the assessment.⁸⁵

But as Ms. Pounds addressed both in her testimony and in the assessment itself, she did take into consideration not only what she observed, and what Ms. U confirmed during the assessment, but she also took into consideration the medical records provided with the application and from his first hospital visit since arriving at Business A.⁸⁶ It was based on this information, rather than simply the observations of Mr. P, that he was actually scored for supervision and set-up help for toileting,⁸⁷ locomotion⁸⁸ and transfers.⁸⁹ As such, contrary to what was argued, this additional information was properly taken into consideration and account. He was in fact scored as requiring supervision and set-up help for transfers, locomotion, and toileting. However, he was not scored as requiring either limited or extensive assistance for these ADLs. This is because, and as Ms. Pounds testified, there was no evidence to suggest that extensive assistance was required.⁹⁰

As of the date of the assessment and denial, the preponderance of the evidence indicates that Mr. P only required supervision and set-up help for transfers, locomotion, and toileting. However, even if limited assistance⁹¹ had been required for all three of these ADLs, it still would have been insufficient for Medicaid Waiver eligibility. This is because, as indicated above, Mr. P is not receiving therapies three or more times a week, nor does he display severe cognition issues, problem behaviors, or require the professional nursing services. Therefore, for eligibility to occur, he was required to demonstrate a need for extensive or complete assistance in at least

⁸⁴ B D Testimony.

⁸⁵ B D Testimony.

⁸⁶ Katherine Pounds Testimony.

⁸⁷ Ex. E, p. 9 (“Scored for fatigue after ambulation and occasional shortness of breath and needing supervision and setup to toilet safely.”).

⁸⁸ Ex. E, p. 8 (“Scored for fatigue after ambulation and occasional shortness of breath and needing supervision and setup to walk safely in the home.”).

⁸⁹ Ex. E, p. 7 (“Scored for occasional pain and weakness in lower extremities and needing supervision and setup to transfer safely.”).

⁹⁰ Ex. E, pp. 7-9; Katherine Pounds Testimony.

⁹¹ Limited assistance is described as “[p]erson highly involved in activity; received physical help in guided maneuvering of limbs, or other nonweight-bearing assistance 3+ times -or- Limited assistance (as just described) plus weight-bearing 1 or 2 times during the last 7 days.”). Ex. E, p. 7.

three of the five scored ADLs.⁹² The preponderance of the evidence demonstrates, that as of the date of denial in this case, his needs did not rise to that level.

IV. Conclusion

To qualify for Waiver services on the facts here, Mr. P would need to require extensive assistance with three of the five scored ADLs. As of the date of the assessment and denial, he does not require extensive assistance with any of the five scored ADLs. As a result, he does not qualify for Waiver services. Consequently, the Division's denial of his application is affirmed.

Dated this 9th day of July 2021.

Signed

Z. Kent Sullivan
Administrative Law Judge

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 23rd day of July, 2021.

By: Signed

Name: Z. Kent Sullivan

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.]

⁹² Ex. E, pp. 32-34.