

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

|                   |   |                     |
|-------------------|---|---------------------|
| In the Matter of: | ) |                     |
|                   | ) |                     |
| E.P.              | ) | OAH No. 22-0857-MDS |
| _____             | ) |                     |

**DECISION**

**I. Introduction**

E.P. applied for Medicaid Home and Community-Based Waiver (Medicaid Waiver) benefits. Following an assessment that was conducted on September 21, 2022, the Division of Senior and Disabilities Services (Division) denied his application on October 3, 2022.

E.P. requested a hearing to challenge the denial of his application. His hearing was held on December 6, 2022. E.P. attended and testified on his own behalf. O.B., E.P.’s Medicaid Care Coordinator, assisted E.P. with the hearing. I.W., the administrator and owner of the Assisted Living Home (ALH) where E.P. resides, testified for E.P. The Division was represented by its Fair Hearing Representative Terri Gagne. The Division’s assessor in this case, Padraig Keohane, testified for the Division.

The evidence in this case shows that E.P. has severe cognitive impairments, which require that he be cued and supervised with virtually all his physical activities. However, he is physically capable of performing those activities without requiring hands-on physical assistance, when cueing and supervision is provided. He is also receiving some limited nursing services. However, his needs for cueing and supervision and the limited nursing services he receives are not sufficient to meet the very high threshold required to qualify for Waiver benefits. Consequently, the Division’s denial of his application is AFFIRMED.

**II. Preliminary Facts**

E.P. is 65 years old. He lives in an ALH, where he has been since May 2022.<sup>1</sup> E.P. experiences several health conditions: schizoaffective disorder, traumatic brain injury, secondary parkinsonism, and urinary retention.<sup>2</sup>

E.P. applied for Medicaid Waiver benefits. The Division assessed E.P. by video on September 21, 2022 to determine whether he met the requirements to qualify for Medicaid

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<sup>1</sup> Ex. E, p. 1; Ex. 1, p. 3.

<sup>2</sup> Ex. E, p. 4.

Waiver benefits. E.P. was present for the assessment as were O.B., I.W., and Ms. F, an ALH staff member.<sup>3</sup>

The Division's assessment showed that E.P. was physically capable of performing the five activities of daily living of bed mobility, transfers, locomotion on a single level, eating, and toileting without requiring any hands-on physical assistance, but that he required supervision or cueing for bed mobility and toileting.<sup>4</sup> The assessment also showed that E.P. experiences a substantial degree of cognitive impairment, where he received a score of 12 for that category.<sup>5</sup> Further, E.P. at the time of the assessment was having a home health nurse visit him once weekly because of clogging issues with his suprapubic catheter.<sup>6</sup>

The final scoring on E.P.'s assessment found that he was not eligible for Waiver benefits.<sup>7</sup> The Division notified E.P. on October 3, 2022 that he was not eligible for Waiver benefits and that his application was denied.<sup>8</sup>

I.W. is the owner and administrator of the ALH where E.P. resides. She has known E.P. since he moved into her ALH in May 2022. She was a credible witness who testified about his day-to-day functioning. Her testimony did not dispute that E.P. was physically capable of performing his ADLs of bed mobility, transfers, locomotion, toileting, and eating without requiring any hands-on physical assistance. However, her testimony painted a clear picture of E.P.'s continuous and ongoing need for supervision, cueing, and reminders for virtually every activity that he undertakes. For example, he has to be cued to transfer and to perform toileting tasks such as emptying his catheter bag. At the time of the assessment and the Division's denial notice, he did not require any hands-on assistance with the catheter bag, but he since uses a larger bag at night which ALH staff changes for him. Staff will also check his adult diapers to see if his catheter has been leaking, but they do not change his adult diapers. In addition, E.P. has to be supervised when he eats because he does not have any teeth and will sometimes take too big a bite and will choke.<sup>9</sup>

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<sup>3</sup> Ex. E, p. 4.

<sup>4</sup> Ex. E, pp. 7 – 9; Mr. Keohane's testimony.

<sup>5</sup> Ex. E, pp. 15 -16; Mr. Keohane's testimony.

<sup>6</sup> Ex. E, p. 4.

<sup>7</sup> Ex. E, pp. 32 – 33.

<sup>8</sup> Ex. D.

<sup>9</sup> I.W.'s testimony. *Also see* Ex. 1, pg. 3 (I.W.'s written statement).

I.W. was also asked about E.P.'s cognitive issues. The cognitive scoring on the assessment was reviewed with her, and her testimony did not dispute the scoring contained on the assessment for that item.<sup>10</sup>

### III. Discussion

#### A. *Burden of Proof*

E.P. is an applicant for Waiver benefits. He therefore has the burden of proving by a preponderance of the evidence that he is eligible for Waiver benefits.<sup>11</sup> The parties can meet their burden of proof using any evidence on which reasonable people might rely in the conduct of serious affairs,<sup>12</sup> including such sources as written reports of firsthand evaluations of the patient. The relevant date for purposes of assessing the state of the facts is, in general, the date of the agency's decision under review.<sup>13</sup> For this case, that date is October 3, 2022, the date of the notice informing E.P. that his Waiver application was denied.

#### 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."<sup>14</sup> The nursing facility level of care<sup>15</sup> requirement is determined by an assessment which is documented by the Consumer Assessment Tool (CAT).<sup>16</sup>

The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,<sup>17</sup> and whether an applicant has impaired cognition or displays problem behaviors.<sup>18</sup> 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.<sup>19</sup>

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<sup>10</sup> I.W.'s testimony.

<sup>11</sup> 7 AAC 49.135.

<sup>12</sup> 2 AAC 64.290(a)(1).

<sup>13</sup> 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>).

<sup>14</sup> 7 AAC 130.205(d)(4).

<sup>15</sup> See 7 AAC 130.205(d)(4); 7 AAC 130.215.

<sup>16</sup> 7 AAC 130.215(4).

<sup>17</sup> Ex. E, pp. 6, 12 – 14.

<sup>18</sup> Ex. E, pp. 15 – 18.

<sup>19</sup> Ex. E, p. 32.

The CAT also records the degree of assistance an applicant requires for Activities of Daily Living (ADLs).<sup>20</sup> 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.<sup>21</sup> For ADLs, the possible self-performance codes relevant to determining an applicant's level of need 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.

**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.<sup>22</sup>

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.<sup>23</sup>

*C. E.P.'s Waiver Eligibility*

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<sup>20</sup> Ex. E, pp. 7 - 10.

<sup>21</sup> Ex. E, pp. 7 - 10.

<sup>22</sup> Ex. E, p. 7.

<sup>23</sup> Ex. E, p. 7.

Waiver eligibility requires that an applicant have a total 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.<sup>24</sup> For instance, if E.P. required nursing services seven days per week, or had therapy five or more times per week, or if he required extensive physical assistance with three or more of five specific ADLs (bed mobility, transfers, locomotion, toileting, and eating), he would qualify for Waiver benefits.<sup>25</sup> There is no evidence that he required nursing services seven days per week at the time of the assessment and denial decision, only once. There is no evidence that he receives therapy five or more times per week. The undisputed evidence does show that E.P. experiences a severe cognitive impairment. However, the undisputed scoring for his cognitive impairment is 12, whereas to help him establish eligibility, that score would need to be 13.<sup>26</sup>

E.P.'s only path to eligibility would therefore require him to need extensive assistance with at least three of the five specified ADLs: body mobility, transfers, locomotion, toileting, and eating. The assessment reflects that E.P. is for the most part physically independent with the five specified ADLs (bed mobility, transfers, locomotion, toileting, and eating). However, I.W.'s credible testimony demonstrated that he is not truly independent but rather requires constant cueing and supervision (self-performance code of 1) with all these activities. Regardless, the evidence is undisputed that he did not, during the relevant time period, require any degree of hands-on physical assistance with the five specified ADLs. This means that he does not qualify for Waiver benefits based solely upon his need for physical assistance with the five specified ADLs.

E.P. had the burden of proof in this case to demonstrate that he satisfied the stringent eligibility requirements for Medicaid Waiver benefits as of the relevant date of October 3, 2022. The undisputed evidence in this case is that although he is certainly cognitively impaired, his medical care needs and physical care needs are not sufficient to qualify him for Waiver benefits. While the information provided at hearing shows that he has increased nursing catheter care issues and also requires some physical assistance with his nighttime catheter bag change, the increase in his care needs occurred after October 3, 2022, the date of the Division's denial notice. As such, those changes cannot be considered in arriving at this decision.

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<sup>24</sup> Ex. E, pp. 32 - 33.

<sup>25</sup> Ex. E, p. 32, question NF 1.

<sup>26</sup> See Ex. E, pp. 15- 16 and pp. 32 – 33: question NF 3 (cognitive impairment plus scored ADL), and questions NF 5 - 7.

#### IV. Conclusion

The Division's denial of E.P.'s application for Medicaid Waiver benefits is AFFIRMED.

Dated: December 15, 2022.

*Signed* \_\_\_\_\_

Lawrence A. Pederson  
Administrative Law Judge

#### Adoption

The undersigned, by delegation from the Commissioner of Health, 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 3<sup>rd</sup> day of January, 2023.

By: *Signed* \_\_\_\_\_

Name: Lawrence A. Pederson

Title: ALJ/OAH

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