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

In the Matter of	)	
	)	
S. M.	)	OAH No. 25-2424-MDS
	)	

DECISION

I. Introduction

S. M. is an elder who is under the guardianship of the Office of Public Advocacy (OPA). OPA applied for the Alaska Medicaid Alaskans Living Independently Waiver ("Waiver") on his behalf. The Division of Senior and Disabilities Services ("Division") assessed his eligibility and determined that Mr. M. did not demonstrate he needed the nursing facility level of care required for Waiver eligibility. OPA requested a fair hearing to challenge that decision, arguing that Mr. M.'s evaluation demonstrated significant cognitive deficiencies and a need for extensive assistance with activities of daily living (ADLs). While OPA established that the Division used an incorrect metric in part of its evaluation and underscored Mr. M.'s cognitive limitations, they did not meet their burden to demonstrate it was probable that Mr. M. met the stringent requirements to qualify for Waiver. The evidence presented demonstrates that it is more likely than not that while Mr. M. needs significant assistance, he does not meet the stringent requirements to qualify for Waiver. Accordingly, the Division's denial of his application is AFFIRMED.

II. Factual Background

Mr. M. is an 82-year-old[1] diagnosed with dementia with significant hearing and vision impairments.[2] In early 2025, Mr. M. was evicted from his apartment due to hoarding and severely unsanitary conditions.[3] Due to concerns regarding his health and safety, the superior court appointed OPA as a temporary guardian and conservator for Mr. M., and he was relocated to an assisted living home.[4] OPA attempted to obtain Mr. M.'s prior medical records but was unable to locate any.[5] A subsequent psychological evaluation concluded Mr. M. has "serious impairments in his ability to accurately register and learn information, reason rationally, and

[1] Ex. E at 2.
[2] *Id.* at 4, 5.
[3] Ex. G at 4.
[4] *Id*. Ex. C at 3 – 6.
[5] Ex. G at 4.

utilize good judgment," and that he likely has a mental illness "characterized by false beliefs, confusion, and paranoia."[6]

OPA applied for Waiver on Mr. M.'s behalf. On July 14, 2025, Mr. M. was assessed remotely by Katherine Pounds, an assessor for the Division, to determine his eligibility for Waiver.[7] Based on that assessment and a review of available medical and physical therapy records, the Division determined that Mr. M. did not have functional limitations or cognitive impairments that required a nursing facility level of care.[8] Accordingly, on July 18, 2025, the Division denied his Waiver application.[9] Mr. M. requested a fair hearing to challenge that determination.

After mediation efforts ultimately proved unsuccessful, a hearing was held on October 10, 2025. Mr. M. was represented by his OPA Public Guardian, Zachary Jacobson, with the assistance of Mr. M.'s caregiver, U. P., and his care coordinator, T. S.. The Division was represented by Victoria Cobo-George, and her witness, the assessor Ms. Pounds. At hearing, both the parties consented to an extension of the applicable deadlines in this case by thirty days.[10]

OPA argued at hearing that Mr. M.'s assessment was flawed and that he should have been scored as requiring greater assistance with toileting, dressing, and transferring.[11] In part, OPA argued this was because there was no requirement in the Consumer Assessment Tool (CAT) that a carer carry the majority of Mr. M.'s weight for it to count as weight-bearing assistance. OPA also contended that Mr. M.'s cognitive impairments were not adequately reflected in the scoring of the assessment and that he should receive a point towards Waiver because of his cognitive issues.

At hearing, the following facts were demonstrated by a preponderance of the evidence. Mr. M. has significant cognitive difficulties. As demonstrated by his tendency to void where he sits without complaint and his need for a court appointed guardian, he is not capable of independence in daily decision making. Nonetheless, as OPA conceded when they only argued

[6] Ex. E at 4.
[7] *Id.* at 2, 4.
[8] Ex. C at 7.
[9] *Id.*
[10] 7 AAC 49.180.
[11] While Mr. M.'s team highlighted other alleged flaws as well, such as a low score for the ADL of dressing, that is not a shaded ADL that contributes to the Waiver calculation here.

he should have been scored as a 12 in cognition, he is not incoherent or always confused. Moreover, he has the ability to recall things after five minutes and thus did not demonstrate short term memory issues.[12]

As all parties agree, Mr. M. is capable of independently eating, but he has some difficulty completing the other shaded ADLs independently. Mr. M. is capable of repositioning himself in bed and sitting up with minor non-weight-bearing assistance.[13] Similarly, the tribunal finds that Mr. M. is capable of transferring and walking around his home with his cane and non-weight-bearing balance assistance.[14] However, Mr. M. does need some degree of weight-bearing assistance in toileting.[15]

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."[16] The nursing facility level of care[17] requirement is determined by conducting an assessment using the CAT.[18] Because the CAT is adopted by reference at 7 AAC 160.900(d)(6), it is itself a regulation.[19] The CAT records an applicant's needs for professional nursing services, therapies, and special treatments, and whether an applicant has impaired cognition or displays problem behaviors. [20] Each of the items is assessed and contributes to a final numerical score. For instance, if an individual required five days or more of therapies (physical, speech/language, occupation, or respiratory therapy) per week, he or she would receive a score of 3.[21]

The CAT also records the degree of assistance an applicant requires for ADLs, including five specific "shaded" ADL categories: bed mobility (moving within a bed), transfers (i.e., moving from the bed to a chair or a couch, etc.), locomotion within the home (walking or

[12] Pounds Testimony.
[13] Ex. E at 7.
[14] *Id.* at 7 – 8; Ex. G at 68, 72, 74.
[15] Ex. G at 72.
[16] 7 AAC 130.205(d)(4).
[17] *See* 7 AAC 130.205(d)(4); 7 AAC 130.215.
[18] 7 AAC 130.213.
[19] Adopting January 29, 2009, version of the CAT.
[20] Ex. E.
[21] *Id.*

movement when using a device such as a cane, walker, or wheelchair), eating, and toilet use (including transferring on and off the toilet, clothing management, and cleansing).[22]

For a person who only has physical assistance needs to score as eligible for Waiver services on the CAT, they 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 shaded ADLs (bed mobility, transfers, locomotion within the home, eating, and toileting).[23]

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 "shaded" activities of daily living.[24] 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.[25]

B. *Burden of Proof*

An initial applicant for Waiver has the burden of proof by a preponderance of the evidence.[26] A party can meet its burden of proof using any evidence on which reasonable people might rely in the conduct of serious affairs,[27] including such sources as written reports of firsthand evaluations and testimony of witnesses. The relevant date for purposes of assessing the state of facts is, in general, the date of the Division's decision under review.[28] For this case that date is July 18, 2025, the date the Division informed Mr. M. that his Waiver application was denied.

C. Mr. M.'s Eligibility

When the CAT is used to determine Waiver eligibility, the results from each of the relevant areas are entered into an algorithm that determines whether the applicant needs a nursing facility level of care. Waiver eligibility requires that an applicant have a total score of

[22] *Id.*
[23] *Id.*
[24] Ex. E. at 32 – 33.
[25] *Id*.
[26] 7 AAC 49.135.
[27] 2 AAC 64.290(a)(1).
[28] *See* 7 AAC 49.170; *In re T.C.*, OAH No. 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013) (available at https://aws.state.ak.us/OAH/Decision/Display?rec=2856).

three or more in that algorithm. That score can be reached through various scenarios, all of which are set out in the CAT itself.[29]

At hearing, OPA alleged two potential routes that Mr. M. qualified for waiver through at the time he was denied. First, OPA argued that he qualified because his evaluation demonstrated he needed extensive assistance with the shaded ADLs of toileting, transferring, and locomotion.[30] And second, he qualified because his evaluation demonstrated he had significant cognitive issues in addition to needing physical assistance in completing two or more shaded ADLs.[31]

As discussed in more detail below, Mr. M.'s team cogently argued that the Division failed to fully account for Mr. M.'s cognitive difficulties and toileting needs, and that Ms. Pounds used an overly strict definition of weight-bearing assistance in her analysis. However, even properly scored no evidence in the record demonstrates that Mr. M.'s cognition was sufficiently impaired to meet the high standard for cognitive issues to contribute a point towards Waiver. Furthermore, while Mr. M.'s team also argued that he was underscored on the ADLs of transferring and locomotion, they failed to overcome the evidence provided by the physical therapy notes stating that Mr. M. could transfer and walk without extensive assistance. Accordingly, the Division correctly denied Mr. M.'s Waiver application since he failed to demonstrate his condition required a nursing facility level of care.

1. Cognitive Issues

Significant cognitive issues can be combined with other factors to meet Waiver eligibility requirements.[32] In order to receive a point in the nursing facility algorithm the requester must demonstrate short-term memory and recall problems as well as an impairment in their ability to make decisions in daily life. [33] Their CAT section C4B must also be scored at a 13 out of 16 or higher.[34]

[29] *Id.* at 32 – 33.
[30] *Id.* (NF.1.e) While they also argued that the extensive assistance Mr. M. allegedly required for dressing and bathing should contribute to Waiver eligibility, those are not shaded ADLs that could help Mr. M. qualify on their own and accordingly are not discussed in detail here.
[31] Id. at 32 – 33 (NF.3, NF.5, NF.6, NF.7).
[32] Ex. E at 32.
[33] *Id.* (NF.3).
[34] *Id.*

During her assessment, Ms. Pounds determined that Mr. M. did not have either short-term or long-term memory issues and was generally able to make decisions regarding daily tasks outside of new situations.[35] She scored Mr. M.'s C4B cognition section as a 6.[36]

At hearing, OPA persuasively argued that Mr. M. had been incorrectly scored during the analysis. Far from being capable of some independence in daily decision making, Mr. M. was found incompetent in court, has a court appointed guardian due to his inability to make decisions, and has to be taken to the bathroom every two hours or he will void where he sits without complaint. While the tribunal finds that those factors are strong evidence to demonstrate Mr. M. is unable to make decisions in daily life, that is only one of the factors that must be met to show sufficient cognitive issues to contribute a point to Waiver eligibility. Mr. M. also needed to demonstrate short-term memory problems. As Ms. Pounds credibly testified and as the record supports, Mr. M. was able to pass the short-term memory test and remembered the required words without prompting.[37] That renders him ineligible to receive a point towards Waiver for cognitive issues. Moreover, as his care team acknowledged by only arguing that Mr. M. should be scored as a 12 in section C4B, there is insufficient evidence in the record to demonstrate that Mr. M.'s cognition should have been scored as a 13 or above. Thus, while the tribunal finds it likely that Mr. M. was indeed underscored on the C4B section of cognition, it is immaterial here as that score still does not rise to the level necessary to contribute towards Waiver eligibility. For both of these reasons the Division correctly determined that Mr. M. could not receive any points towards qualifying for waiver due to cognitive issues.

2. Shaded ADLs

If a requester fails to demonstrate sufficient cognitive issues to receive a point towards waiver or gain points from another criteria not at dispute in this matter, eligibility for Waiver may still be established by demonstrating a need for extensive assistance with certain "shaded" ADLs. The "shaded" ADLs considered to determine eligibility are: (1) bed mobility; (2) transfers; (3) locomotion within the home; (4) eating; and (5) toileting. The applicant's ability to perform these ADLs over the 7 days prior to the evaluation is scored as follows:

0. INDEPENDENT - No help or oversight - or - Help/oversight provided only 1-2 times during last 7 days.

[35] *Id.* at 15.
[36] *Id*. at 16.
[37] Ex. E at 5.

1. SUPERVISION - Oversight, encouragement or cueing provided 3+ times during last 7 days - or -Supervision plus nonweight-bearing physical assistance provided only 1 or 2 times during last 7 days.
2. LIMITED ASSISTANCE - Person 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 last 7 days.
3. EXTENSIVE ASSISTANCE - While person performed part of activity, over last 7-day period, help of following type(s) provided 3 or more times: Weight-bearing support and/or Full staff/caregiver performance during part (but not all) of last 7 days.
4. TOTAL DEPENDENCE - Full staff/caregiver performance of activity during ENTIRE 7 days.[38]

To qualify based on shaded ADL scores alone, an applicant must have a score of 3, extensive assistance, or 4, total dependence, in three shaded ADLs.[39]

Based on her observations and record review, Ms. Pounds determined that Mr. M. was independent at eating, but needed limited assistance with bed mobility, transfers, locomotion within the home, and toileting.[40] While Ms. Pounds has experience in conducting CAT evaluations and credibly testified to her observations during the assessment, her testimony regarding how those observations should be taken into account for CAT scoring was not credible. One of the ways of scoring points towards Waiver is demonstrating an applicant needs weight-bearing support. Ms. Pounds stated that to be found in need of weight-bearing support the carer had to need to bear a majority of the weight and that she evaluated Mr. M. with that understanding. She indicated that she had been trained on that assumption, however, in a 2013 decision, the Commissioner reviewed the term "weight bearing" as it is used in the CAT and held—

> 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.[41]

Since then, over a decade of decisions from the Office of Administrative Hearings, some involving Ms. Pounds, have repeatedly found that the standard for weight bearing support is less than 50 percent.[42] Accordingly, while Ms. Pounds factual observations are accorded due weight

[38] *Id.* at 7.
[39] *Id.* at 32.
[40] *Id* at 7 – 11.
[41] *See In re K T-Q,* OAH Case No. 13-0271-MDS, p. 4 (Commissioner of Health & Soc. Serv. 2013*)* (available at https://aws.state.ak.us/OAH/Decision/Display?rec=2857).
[42] *See, e.g.*, OAH Case No. 23-0451-MDS (Dec. 4, 2023) at 5.

here, the Division's scoring analysis is critically flawed because she used the wrong metric to determine whether extensive assistance was being provided.

Despite the Division's error, to meet his burden and demonstrate he qualifies for Waiver, Mr. M. still needed to demonstrate that he was scored incorrectly in at least three shaded ADLs. To do so, OPA argued that the narrative in the CAT supported their claims despite being improperly scored at the time. However, OPA did not argue that Mr. M. was incorrectly scored in bed mobility or eating. That means OPA attempted to make their case by arguing that Ms. Pounds scored Mr. M. incorrectly on transferring, toileting, and locomotion.[43]

As discussed in detail below, while Mr. M.'s care team persuasively argued that he was underscored in toileting, they failed to provide sufficient evidence to overcome Ms. Pounds' and the physical therapist's observations showing that Mr. M. did not require extensive assistance with transfers or locomotion.

i. Transfers

Transfers are defined as how a "person moves between surfaces," such as from a sitting to a standing position, but excluding toileting and bath transfers.[44] Both parties here agree that Mr. M. needs assistance with transfers—the question at issue is the extent of the assistance to be provided.

Based on her assessment and a review of month-old physical therapy notes, Ms. Pounds determined that Mr. M. did not need weight bearing assistance for transfers. Ms. Pounds noted in the CAT that she observed Mr. M. standing with caretaker assistance, with both the carer's hands involved in assisting Mr. M. to stand, but only from one side. She also reviewed physical therapy notes that stated Mr. M. required caregiver assistance in transferring—but at a minimal level of providing merely a contact guard assist—and finding him capable of making sit-to-stand transfers safely with only caretaker stand-by-assistance.[45]

Mr. M.'s caregivers have significant lived experience with Mr. M.'s care. They argue that they provide some level of weight-bearing support in every transfer. They also argue he needs

[43] While OPA also argued Mr. M.'s demonstrated need for extensive assistance with bathing, and arguable need for extensive assistance with dressing would contribute to his eligibility for Waiver, neither of those ADLs are "shaded" ADLs considered as part of this analysis and they are irrelevant to the Waiver question at issue here.
[44] *Id.*
[45] Ex. G at 68.

extensive support because he loses his cane, has a fear of falling, and has a sense of vertigo when he stands.

The perspective of Mr. M.'s carers is understandable. However, the standard for extensive assistance here is not merely that Mr. M. has valid concerns about the quality of his performance without weight bearing support or that he might misplace his cane, but that he needs weight bearing assistance to perform the task. The physical therapy notes indicate that—just weeks before his assessment—Mr. M. could sit and stand with only stand-by assistance, meaning without a carer's hands on him in any way. As no suggestion was made that Mr. M. deteriorated between that physical therapy and the assessment, it is probable that Mr. M. could transfer from sitting to standing at the time of the assessment without needing weight-bearing assistance. That said, weight-bearing assistance only needs to be necessary three times a week to qualify as extensive assistance. OPA argued that Mr. M. gets more fatigued as the day goes on and needs more assistance in the evenings and it is believable that a full day of transfers may be more draining than a physical therapy appointment.

This is a close call, but OPA presented insufficient evidence to demonstrate that the Division underscored Mr. M. in the ADL of transferring. While it is very believable that Mr. M. gets more fatigued as the day goes by, Mr. M. was doing 30 sit-to-stand transfers in a short time during physical therapy along with other exercises.[46] OPA's bald assertion of fatigue is not sufficient to overcome that proven ability to repeatedly transfer with merely standby assistance. No evidence was presented in an attempt to explain this discrepancy or show that Mr. M.'s furniture is significantly more difficult to transfer from than his seat at physical therapy. Accordingly, OPA did not meet their burden to demonstrate why someone who can stand up independently in physical therapy would deteriorate all the way to needing weight bearing assistance at home. Thus, the Division was correct in finding that Mr. M. did not require extensive assistance with transfers.

ii. Locomotion

The shaded ADL of locomotion is defined as how a person "moves between locations in their room and other areas on the same floor."[47] If a person uses an assistive device such as a cane, walker or wheelchair, self-sufficiency in using these devices can establish self-performance

[46] Ex. G at 72.
[47] Ex. E at 7.

for this ADL.[48] At the evaluation, Ms. Pounds observed Mr. M. using a cane to get around his home with a carer holding him under the armpit and by the hand. Mr. M.'s care team reported the same capabilities, and added that they sometimes assist him in balancing by holding him up by the back of his pants as well. [49]

The physical therapy notes Ms. Pounds reviewed stated Mr. M. could walk with hand holding assistance and progressed during physical therapy from needing assistance to balance while simply standing up, to sometimes being able to remain standing without needing upper-extremity assistance at all.[50] During physical therapy weeks before his assessment Mr. M. walked 600 feet with only handholding assistance and did various other stepping exercises.[51]

As above, the Division's analysis of weight bearing assistance was flawed here and the care team's concern regarding Mr. M.'s balance is reasonable. However, balance assistance is not the same thing as weight-bearing assistance. As the physical therapy notes indicate, Mr. M. can remain standing independently for short periods and only needs hand holding assistance to ambulate. While fatigue may be a factor in OPA's argument that extensive assistance is necessary, such an allegation alone is insufficient to meet Mr. M.'s burden and overcome the disinterested observations of a physical therapist and evaluator. Accordingly, it is more likely than not that Mr. M. does not need extensive assistance in locomotion, and that the Division's determination that Mr. M. should not receive any points towards Waiver for locomotion was correct.

iii. Toileting

Toileting is a complex process that combines transfers, dressing, and cleansing.[52] During her assessment, Ms. Pounds determined that caregivers were only providing limited assistance with toileting. Her narrative in the CAT is somewhat limited, stating merely that Mr. M. can put his hands behind his back and grip and that he gets assistance with cleaning, transferring, and changing.[53] Her testimony was similarly conclusory, merely stating that he was receiving limited assistance with cleaning, dressing, and transferring onto the toilet. She stated that she had been told Mr. M.'s circumstances could not qualify as extensive or full caregiver

[48] *Id.*
[49] *Id.* at 8.
[50] Ex. G at 74.
[51] *Id.*
[52] Ex. E at 9.
[53] *Id.*

support because Mr. M. could still bear his own weight—again using the flawed definition of weight bearing assistance only being provided if a carer was holding most of Mr. M.'s weight.

In contrast to other transfers where the physical therapist indicated Mr. M. was capable of sitting and standing with only standby assistance, the physical therapy notes indicate some level of assistance was necessary for toilet transfers.[54] This seems a reasonable distinction as the potential consequences of sitting heavily on a toilet seem more severe than on other furniture.

In contrast to Ms. Pounds' limited testimony, Mr. M.'s caregivers persuasively argued that they complete every step of the toileting process for Mr. M. and have to have both hands under his armpits to transfer him onto the toilet and bear some of his weight. In contrast to the ADLs of transferring and locomotion, nothing in the physical therapy notes or Ms. Pounds' observations contradicts this alleged need for some level of weight bearing assistance in toileting. Accordingly, I find it more likely than not that Mr. M. needs weight bearing assistance in toileting. As toileting occurs every two hours, this repeated weight-bearing assistance is more than sufficient to meet the criteria for extensive support. Accordingly, Mr. M. did meet his burden to demonstrate that he needs extensive support for toileting.

iv. *Overall ADL Eligibility Picture*

However, toileting is only one ADL and Mr. M. needed to demonstrate that he needs that level of assistance in three ADLs. While Mr. M.'s care team argued that Mr. M. needs extensive assistance in transferring and locomotion as well—and they successfully argued that Ms. Pounds was applying the wrong standard for weight bearing assistance—they failed to demonstrate why the physical therapy notes stating that Mr. M. did not need weight-bearing assistance were unreliable. Because those physical therapy notes and Ms. Pounds' observations during the CAT demonstrate that Mr. M. does not need extensive assistance in at least three ADLs, Mr. M. cannot qualify for Waiver on the basis of ADL limitations alone.

IV. Conclusion

Mr. M. was required to demonstrate he was eligible for Waiver and he failed to meet that burden. Despite correctly arguing the Division assessor used a flawed metric to score the CAT, Mr. M.'s care team failed to demonstrate that Mr. M. needed extensive assistance in locomotion and transferring. This is due largely to the plain statements in the physical therapy notes that show Mr. M. can stand and walk without assistance or with merely hand-holding assistance. Mr.

[54] Ex. G at 72.

M.'s team was also unable to demonstrate that Mr. M.'s cognitive issues meant he should be awarded a point towards Waiver given his short-term recall ability and inability to meet the high standard for sufficient cognitive impairment. Mr. M. appears to be a borderline case, and if he deteriorates his care team is encouraged to reapply and ensure he is evaluated using the proper metric for weight bearing assistance at a time of day where his difficulties may be more apparent. But at this point, because he failed to demonstrate he meets the high standard for a nursing facility level of care, the Division's decision to deny Mr. M.'s Waiver application is AFFIRMED.

Dated: November 13, 2025

SIGNED
Garrison A. Todd
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 12th day of December, 2025.

By: SIGNED
Name: Daniel R. Phelps II
Title: Process Improvement Manager
Office of the Commissioner
Alaska Department of Health

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