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

In the Matter of	)	
	)	
E. T.	)	OAH No. 23-0202-MDS
	)	

DECISION

I. Introduction

E. T. applied for Medicaid Home and Community-Based Waiver (Medicaid Waiver) benefits. Following an assessment that was performed on January 26, 2023, the Division of Senior and Disabilities Services (Division) denied her application on February 6, 2023.

Ms. T. requested a hearing to challenge the denial of her Medicaid Waiver application.[1] Her hearing was originally scheduled for April 19, 2023. The hearing was then rescheduled multiple times at the request of one or both parties. The hearing was held on September 25, 2023. Sarah Catino with Alaska Legal Services Corporation represented Ms. T. Ms. T. only testified very briefly. N. B. E., Ms. T.'s daughter, testified on her behalf. N. H., a program coordinator at Adult Day Care Center A., the adult day care center Ms. T. attends, also testified on her behalf. Assistant Attorney General Paul Peterson represented the Division. Katherine Pounds, a Health Program Manager for the Division, who assessed Ms. T. for Medicaid Waiver eligibility, testified for the Division. All the parties' exhibits were admitted with the exception of Ms. T.'s exhibit 8. The record was held open after closing until October 2, 2023 for the parties to submit written closing arguments.

The preponderance of the evidence in this case shows that while Ms. T. undeniably has substantial care needs, she does not require the high level of assistance necessary to qualify for Medicaid Waiver benefits. Accordingly, the denial of her application is AFFIRMED.

II. Facts

[1] Ms. T. originally requested a hearing, via her Medicaid Care Coordinator, by email on March 2, 2023, who then inquired about the hearing request on March 21, 2023. *See* Ex. C. The Division then referred the case to the Office of Administrative Hearings for hearing on March 22, 2023.

Ms. T. is a 66-year-old woman who lives with family, which includes her daughter N. B. E. Her diagnoses include blindness, hypertension, type 2 diabetes, hypokalemia, and hypothyroidism.[2]

Ms. T. applied for Medicaid Waiver benefits. She was assessed on January 26, 2023 to determine her eligibility for Medicaid Waiver benefits, using the Consumer Assessment Tool (CAT). The assessment was performed while Ms. T. was at Adult Day Care Center A., not her home. The assessment was performed by video and the results were recorded on the CAT.

The assessor determined that Ms. T. did not require any professional nursing services, was not then receiving any therapies (physical therapy, speech/language therapy, occupational therapy, or respiratory therapy), and was not receiving any professional nursing treatments, or therapies (chemotherapy, radiation therapy, or dialysis).[3] The assessment showed that Ms. T. experienced a minor amount of cognitive issues, consisting of difficulties remembering recent events or the names of meaningful acquaintances, spatial confusion in the community, and minor difficulties with speech, for a cognitive impairment score of three.[4]

The assessor further determined that Ms. T. was independent with the activity of bed mobility and eating, required either supervision or cueing with the activity of transfers, and required limited assistance with locomotion in her home and toileting.[5] Ms. T.'s application was denied on February 6, 2023.[6]

Ms. T. disagreed with the assessor's determinations for bed mobility, transfers, locomotion, and toileting. These are each discussed below.

A. Bed Mobility

The Division's assessor did not view Ms. T. in bed. She did observe Ms. T. turning without assistance while seated in a chair. Ms. T. told her that she was able to sit up and turn in bed without assistance. The assessor concluded that Ms. T. was independent with bed mobility.[7]

Ms. E. testified that when her mother wakes, that she needs help some days in getting up from the bed, moving her legs, and putting her slippers on. She said that she makes sure that her mother is sitting upright in bed before she gets out of bed.

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2 Ex. E, pp. 2, 4.
3 Ex. E, pp. 12 – 14.
4 Ex. E, pp. 15 – 16.
5 Ex. E, pp. 7 – 9; Ms. Pounds' testimony.
6 Ex. D.
7 Ex. E, p. 7; Ms. Pounds' testimony.

B. Transfers

The Division's assessor observed Ms. T. being prompted to place her hand on the table, and then stand from a chair without physical assistance while being talked through the task. Ms. T. told her that she needed help transferring when she wasn't feeling well, and that she needed a one-handed assistance to transfer up from the couch. She did not see Ms. T. transfer without having a table nearby for support. The assessor then scored her as being able to transfer with supervision and setup assistance.[8]

Ms. E. testified that Ms. T. can sit down on the couch at home without requiring any physical help. She does this by holding onto the side of the couch. However, in order to transfer from the couch, she needs to be lifted up. The couch is low to the ground. Ms. E. also testified that Ms. T. needs help when transferring in and out of the bed. She described Ms. T. holding onto her for support when she stands up from the bed. She further testified that when Ms. T. gets into bed, that she has to lift Ms. T.'s legs up onto the bed.

Ms. H., who helps care for Ms. T. at Adult Day Care Center A., testified that Ms. T. occasionally needs assistance transferring to a recliner, but that she is usually guided in transfers to the recliner.

Ms. T. has very limited medical records which primarily discuss her diabetes and blood sugar control.[9] Her most recent annual exam records include those from a visit on June 20, 2022. That document does not address her physical functionality, except to note that Ms. T. reported that she did not have balance issues.[10] Progress notes from a May 25, 2023 doctor's visit reflect that she was complaining of leg weakness.[11]

Ms. T. engaged in physical therapy and occupational therapy for a short time in May – July 2023. Her physical therapy notes from her first visit on May 24, 2023 provide that she had lower extremity weakness, that her left knee had been bothering her more over the prior three months, and that she had decreased knee extension bilaterally, decreased knee and hip strength, and experienced decreased balance and was a fall risk. The objective findings indicate that she was able to perform four sit to stand repetitions while using her hands during a 30 second period.

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8 Ex. E, p. 7; Ms. Pounds' testimony.
9 Ex. 4.
10 Ex. 4, p. 1.
11 Ex. 6, p. 2.

Her goals included improving her lower extremity strength and doing six sit to stand repetitions during 30 seconds.[12]

C. Locomotion

Ms. T. is blind and requires assistance with walking. The Division's assessor observed Ms. T. walking while being guided by someone holding her arm. Ms. T. informed the assessor during the assessment that she gets one-handed assistance while walking in the home. Ms. H. informed the assessor that Ms. T. is guided around Adult Day Care Center A. by staff. The assessor concluded that Ms. T. required limited assistance for locomotion.[13] Ms. H., who has been assisting Ms. T. at Adult Day Care Center A. for two years, testified that Ms. T. is guided around Adult Day Care Center A. with staff holding onto her hand. Ms. E. testified that Ms. T. holds onto her arm when she walks. The assessor then concluded that Ms. T. required limited assistance with locomotion.[14]

D. Toileting

The Division's assessor observed Ms. T. being able to transfer with some setup help and cueing. She saw Ms. T. walk with guiding assistance. She was told by Ms. T. that she could transfer on and off the toilet and adjust her clothing unaided. Ms. H. told the assessor that Ms. T. was mostly able to cleanse herself after using the toilet, while Ms. E. told the assessor that Ms. T. needed help cleansing at home after bowel movements, because Ms. T. did not always perform that task well. The assessor concluded that Ms. T. required limited assistance with toileting due to her blindness, help getting to the toilet, and requiring assistance with cleaning.[15]

Ms. E. testified that she guides her mother to the bathroom, helps her adjust her clothing, helps cleanse her after bowel movements due to her blindness and difficulty reaching, and helps guide her off the toilet. Ms. H. testified that the bathroom at Adult Day Care Center A. has rails for support and that Ms. T. sometimes has to be helped with her clothing.

III. Discussion

A. Burden of Proof

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12 Ex.7, pp. 15 - 17.
13 Ex. E, pp. 7 – 8. Ms. Pounds' testimony.
14 Ex. E, pp. 7 – 8; Ms. Pounds' testimony.
15 Ex. E, pp. 8 – 9; Ms. Pounds' testimony.

Ms. T. 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 parties can meet their burden of proof using any evidence on which reasonable people might rely in the conduct of serious affairs,[17] 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.[18]

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."[19] The nursing facility level of care[20] requirement is determined by an assessment which is documented by the Consumer Assessment Tool (CAT).[21]

The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,[22] and whether an applicant has impaired cognition or displays problem behaviors.[23] 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.[24]

The CAT also records the degree of assistance an applicant requires for Activities of Daily Living (ADLs).[25] 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.

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16 7 AAC 49.135.
17 2 AAC 64.290(a)(1).
18 *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).
19 7 AAC 130.205(d)(4).
20 *See* 7 AAC 130.205(d)(4); 7 AAC 130.215.
21 7 AAC 130.215(4).
22 Ex. E, pp. 12 – 14.
23 Ex. E, pp. 15 – 18.
24 Exhibit E, p. 32.
25 Exhibit E, pp. 7 - 12.

The ADLs measured by the CAT are bed mobility, transfers, locomotion, dressing, eating, toilet use, personal hygiene, and bathing.[26] 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.
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> **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.[27]

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.[28]

C. Ms. T.'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.[29] For instance, if Ms. T. 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 specific ADLs (bed mobility, transfers, locomotion, toileting, and eating), she would

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26 Ex. E, pp. 7 - 12.
27 Ex. E, p. 7.
28 Ex. E, p. 7.
29 Ex. E, pp. 32 33.

qualify for Waiver benefits.[30] There is no evidence that she requires nursing services or that she received therapy at the time the Division denied her application.

The assessment indicates that Ms. T. has a minor degree of cognitive impairment (score of 3). If Ms. T. has a high cognitive impairment score (13 or higher) and she requires limited or extensive assistance in two or more of the five scored ADLs (bed mobility, transfers, locomotion, eating, and toileting), then she would qualify for Waiver benefits.[31] However, despite Ms. T. displaying a fair amount of confusion during the hearing, to the point that her testimony was curtailed, she did not assert that the cognitive impairment scoring should be higher than that provided in the assessment.

Ms. T. therefore has one potential path to eligibility. For her to qualify, she requires extensive assistance with at least three of the five scored ADLs: body mobility, transfers, locomotion, toileting, and eating. As stated above, she did not contest the assessor's findings that she did not require either limited or extensive assistance with eating. This therefore leaves only four ADLS at issue: bed mobility, transfers, locomotion, and toileting. To qualify for Waiver benefits, she will need require extensive assistance with three of these.

In reviewing the facts of this case, it is important to note that all the witnesses were credible. There was nothing in the record to form a basis for an opinion that they were misstating the facts or that they were exaggerating.

The first ADL to review is bed mobility, which is the activity of turning and sitting up in bed.[32] The evidence shows that Ms. T. told the assessor that she did not need help with this task. Ms. E.'s testimony on this point was not really directed to Ms. T.'s ability to turn in bed or sit up in bed. Instead, it focused on her transfers out of bed. Given the very limited evidence on this point, Ms. T. has not met her burden to show that she requires assistance with bed mobility, rather than being independent with this task.

The second ADL to review is transfers. The evidence shows that Ms. T. requires some assistance. If she requires weight-bearing assistance three or more times per week with transfers, this would be classified as extensive assistance. In a 2013 decision, the Commissioner reviewed the term "weight bearing" as it is used in the CAT and held that:

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30 Ex. E, p. 23, question NF 1.
31 *See* Ex. E, pp. 15 – 16, 32 – 33.
32 See Ex. E, p. 7.

> 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.[33]

Utilizing the test developed in this prior Commissioner's decision, having to lift someone to accomplish an ADL would constitute extensive assistance, even if the person was able to participate in the activity to some degree.

The weight of the evidence shows that Ms. T. requires extensive (weight-bearing assistance) with transfers. Ms. E.'s testimony established that she has to be lifted up from her low couch at home, and that her legs had to be lifted to allow her to finish transferring onto the bed. While Ms. T.'s physical therapy records show that she was able to perform 4 six to stand transfers within 30 seconds on May 24, 2023, the records do not address transfers from a low object or transfers that involve the lifting of legs to get into bed. Accordingly, the preponderance of the evidence shows that Ms. T. requires extensive (weight-bearing – score of 3) assistance with this task.[34]

The third ADL to review is locomotion. The extensive weight of the evidence is that Ms. T. requires physical hands-on guidance with walking due to her blindness, not weight-bearing assistance. The assessor's conclusion was that Ms. T. required limited assistance, not extensive (weight-bearing) assistance. Her conclusion was corroborated by both Ms. H.'s and Ms. E.'s testimony. Accordingly, the assessor's finding that Ms. T. requires limited, not extensive, assistance with locomotion is unchanged.

The fourth and last ADL to review is toileting. It is a complex ADL, which includes multiple tasks: locomotion to and from the bathroom, transfers on and off the toilet, adjusting clothing, and cleansing after toileting.[35] The assessor found that Ms. T. required limited assistance. The testimony provided by Ms. H. and Ms. E. showed a need for physical assistance being guided to the toilet, with adjusting her clothing, and with cleansing. Their testimony did not support a finding that she required extensive (weight-bearing) assistance with these tasks.

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[33] *See In re K T-Q*, OAH Case No. 13-0271-MDS, p. 4 (Commissioner DHSS June 21, 2013). This decision is available at the OAH website: http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130271.pdf.

[34] While the physical therapy occurred dated months after the Division's denial, the records are still considered probative given that no evidence was presented that Ms. T.'s physical condition had appreciably changed since the assessment.

[35] *See* Ex. E, p. 8.

Consequently, the assessor's finding that Ms. T. requires limited, not extensive, assistance with toileting is unchanged.

Ms. T. had the burden of proof in this case to demonstrate her eligibility for Medicaid Waiver benefits. To meet that burden, she needed to demonstrate that she requires extensive assistance with three out of the five scored ADLs: bed mobility, transfers, locomotion, eating, and toileting. As discussed above, Ms. T. only requires extensive assistance with one of those ADLs, which is transfers. She requires limited assistance with locomotion and toileting, and is independent with bed mobility and eating. She therefore did not meet her burden to demonstrate that she qualifies for Medicaid Waiver benefits.

IV. Conclusion

The denial of Ms. T.'s application for Medicaid Waiver benefits is AFFIRMED.

Dated: November 16, 2023

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 30th day of November, 2023.

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

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