

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

In the Matter of	)	
	)	
N. G.	)	OAH No. 23-0770-MDS
_____	)	

DECISION

I. INTRODUCTION

N. G. applied for a Medicaid Home and Community-Based Waiver (“Waiver”) benefits. The Division of Senior and Disabilities Services (“Division”) assessed her eligibility and determined that while she suffers from declining memory and incontinence, her needs do not rise to the level of a skilled or intermediate-level nursing home and she is therefore ineligible for a Waiver.

As an initial applicant, Ms. G. has the burden of showing that the Division erred in determining that she did not qualify for a Waiver. This is a heavy burden as Waiver benefits are intended for a particularly high level of care needs. While Ms. G. has demonstrated a need for assistance, the evidence falls short of the showing needed for a Waiver-level of care. Accordingly, the application denial is affirmed.

II. BACKGROUND

N. G. is a 70-year-old woman who has been staying with family members while homeless. As of October 23, 2023 when the Division assessed her for Waiver benefits, Ms. G. was staying with her daughter, N. C.¹ Ms. G. has been diagnosed with cardiac murmur, generalized anxiety disorder, age-related cognitive decline, age-related osteoporosis, depression, encephalopathy, and hypertension.²

Ms. G. applied for Waiver benefits and was assessed by the Division on October 23, 2023.³ Based on that assessment, the Division denied her application.⁴

Two of Ms. G.’s daughters, who hold power of attorney — Ms. C. and N. D. — appealed on her behalf. They submitted notations to the Division’s assessment by Ms. C., disputing

¹ Ex. E at 4.

² *Id.*

³ Ex. E.

⁴ Ex. D.

certain statements.⁵ They also submitted medical records related to Ms. G.’s cognitive decline, a vaginal prolapse, and a laceration⁶ and a CINA petition regarding former foster children of Ms. G.⁷

Ms. D., testified at the hearing. She lives out of state, but visited her mother in the summer and November 2023. Ms. D. was not present for the Division’s assessment. Much of her testimony was based on information relayed to her by her siblings and is therefore hearsay. While hearsay may be considered in an administrative matter such as this, it is generally afforded less weight. Ms. D. described the challenges her siblings have had providing in-home care for Ms. G. because of her issues with memory, cognition, and incontinence.⁸

III. DISCUSSION

The Alaska Medicaid program provides Waiver services to adults with physical disabilities who require “a level of care provided in a nursing facility.”⁹ The purpose of these services is to provide an “opportunity to choose to receive home and community-based waiver services as an alternative to institutional care.”¹⁰

The nursing facility level of care requirement is determined in part by an evaluation under the Consumer Assessment Tool (“CAT”).¹¹ The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments, whether an applicant has impaired cognition, and the degree of assistance an applicant requires for five particular activities of daily living (“ADL”): bed mobility (moving within a bed), transfers (*e.g.*, moving from the bed to a chair or a couch), locomotion (walking or movement when using a device such as a cane, walker, or wheelchair) within the home, eating, and toilet use, which includes transferring on and off the toilet and personal hygiene care.¹²

⁵ Ex. 1 at 4-60.

⁶ *Id.* at 61-213.

⁷ *Id.* at 214-23.

⁸ D. testimony. Ms. D. also provided testimony about Ms. G.’s current hospitalization and condition. This matter concerns whether Ms. G. was eligible as of the time of the assessment, so evidence of her condition after that is not relevant here.

⁹ 7 AAC 130.205(d)(4).

¹⁰ 7 AAC 130.200.

¹¹ 7 AAC 130.215(4).

¹² Ex. E.

As the applicant, Ms. G. as the burden of showing, by a preponderance of the evidence, that as of the October 23, 2023 assessment, Ms. G. qualified for Waiver benefits.¹³

To qualify, Ms. G. would need at least three points on the CAT. As of the time of the assessment, Ms. G. was not receiving any nursing services, so she would need points based on cognitive and behavioral issues and the need for assistance with ADLs. Points are awarded: (1) one point if three or more of the five ADLs score a 3 or 4 for self-performance (2) one point for each ADL for which a person scores both a 2, 3, or 4 for self-performance and a 2 or 3 for support; (3) one point if a person scores a 2 or 3 for problematic behaviors, scores a 14 for cognition-related behaviors, and, for at least one ADL, scores both a 2, 3, or 4 for self-performance and a 2 or 3 for support; and (4) one point for demonstrated need in all areas of cognition (short-term memory, memory recall, cognitive skills, and cognition).¹⁴

In documents and at the hearing, Ms. G.'s daughters focused largely on cognitive and behavioral issues, emphasizing Ms. G.'s memory challenges. But as the four point categories show, Ms. G. cannot qualify for Waiver benefits based on cognitive or behavior challenges alone. To receive a point in any of the first three categories, Ms. G. must require a certain level of assistance with one or more of the five key ADLs. Ms. G. has not demonstrated that level of need.

The CAT scores the ADLs for self-performance and support using the following scale for self-performance:

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

¹³ 7 AAC 49.135.

¹⁴ Ex. E at 31-32. There are additional ways to earn points if a person is receiving nursing services.

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.¹⁵

The CAT scores support as follows:

0. No setup or physical help from staff
1. Setup help only
2. One-person physical assist
3. Two+ persons physical assist¹⁶

For bed mobility, the CAT assessor observed Ms. G. lay down, rotate side to side, and sit up independently.¹⁷ The assessor scored her with a zero for both the self-performance and support categories.¹⁸ Ms. G. did not provide evidence in documents or at the hearing that contradicts these observations. The evidence does not support a higher CAT score for bed mobility.

For transfers, the CAT assessor observed Ms. G. stand from her bed and a chair without complication and scored her with a zero for both self-performance and support.¹⁹ In the CAT notations, Ms. C. noted that Ms. G. experiences pain when sitting up.²⁰ The CAT does not score transfers based on pain, but on how a person moves between surfaces, such as from a bed to a chair. The evidence does not support a higher CAT score for transfers.

For locomotion, the assessor observed Ms. G. walk between rooms without assistive devices or holding onto furniture or walls and with a quick pace and steady gait.²¹ The assessor thus scored Ms. G. with a zero for both self-performance and support. Ms. D. testified that Ms. G. sometimes faints, but acknowledged that the medical records do not indicate this. There is no evidence that Ms. G. was suffering fainting spells at or around the time of the assessment. Thus overall, the evidence does not support a higher CAT score for locomotion.

For eating, the assessor observed Ms. G. move her hands towards her mouth and pass a bottle between her hands, mimicking the motions of feeding herself. The assessor thus scored

¹⁵ Ex. E at 7.

¹⁶ *Id.* The CAT also scores for cuing, but only support scores of 2 or 3 are relevant to the point categories noted above.

¹⁷ *Id.*; Earhart testimony.

¹⁸ Ex. E at 7.

¹⁹ Ex. E at 7.

²⁰ Ex. 1 at 14.

²¹ Ex. E at 8; Earhart testimony.

Ms. G. with a zero for both self-performance and support. Ms. D. raised concerns with Ms. G. preparing meals or remembering to eat, but acknowledged that she can lift a fork to her mouth and feed herself.²² The eating ADL looks at the physical motions of eating, not food preparation or memory related to eating. The evidence indicates Ms. G. can physically feed herself and therefore does not support a higher CAT score.

For toilet use, Ms. G. reported using the bathroom independently. Ms. C. agreed that Ms. G. uses the toilet without assistance.²³ In a notation submitted later, Ms. C. noted that the bathroom is “often left with messes.”²⁴ Ms. D. stated that Ms. G. has experienced incontinence and sometimes hides soiled clothes to conceal this.²⁵ The assessor observed Ms. G. sit on and stand up from a toilet, reach behind her back as one would to clean oneself, and touch her toes as one would to pull up one’s pants.²⁶ The assessor thus scored Ms. G. with a zero for both self-performance and support.²⁷ The assessor explained at the hearing that the toileting ADL looks at the physical ability to transfer to and from the toilet and clean oneself, not incontinence or hygiene related to clothing, which might be relevant to different parts of the CAT.²⁸ The evidence shows Ms. G. has challenges with continence, but not with the physical movement necessary to transfer to and from the toilet, clean herself after, and pull her clothes up. The evidence does not support a higher CAT score.

With zero scores for all of the five key ADLs, Ms. G. does not qualify for a point in the first three of the four categories listed above. The fourth category (cognition) is worth only one point, so without higher ADL scores, Ms. G. does not reach the three points necessary to qualify for Waiver benefits. Her scores for cognitive and behavioral issues need not be addressed because without nursing services or ADL scores above zero, Ms. G. does not qualify for Waiver benefits.

There is no question Ms. G. faces many challenges, particularly as her memory declines. In documents and testimony, her daughters described their own challenges with providing her

²² D. testimony.

²³ Ex. E at 9.

²⁴ Ex. 1 at 18.

²⁵ D. testimony.

²⁶ Ex. E at 9.

²⁷ *Id.*

²⁸ Earhart testimony.

care. But Waiver benefits are reserved for a very high level of need. Ms. G. has not met her burden to show that she met that threshold as of the October 2023 assessment.

IV. CONCLUSION

Ms. G. needs assistance due to her declining memory and cognition and issues with incontinence, but these needs do not rise to the level of skilled or intermediate-level nursing home care. Accordingly, as of the time of her assessment, Ms. G. does not qualify for Waiver benefits. The Division's denial is affirmed.

Dated: January 30, 2024

Signed

Rebecca Kruse
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 13th day of February, 2024.

By: Signed

Name: Rebecca Kruse

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.]