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

In the Matter of	)	
	)	
S. N.	)	OAH No. 24-0305-MDS
	)	

DECISION

I. Introduction

S. N. applied for Medicaid Home and Community-Based Waiver (Waiver) benefits. Her application was denied because the Division of Senior and Disability Services (Division) concluded that she did not require a nursing facility level of care.

Ms. N. requested a hearing to challenge the denial of her application. A hearing was held on August 7, 2024, with Fair Hearing Representative Victoria Cobo- George representing the Division, and Robin Platt testifying for the Division. S. N. represented herself and testified on her own behalf.

A person is eligible for Waiver benefits if he or she accumulates enough points to establish the need for a nursing facility level of care. Ms. N.'s functional and cognitive limitations are insufficient to meet that threshold. The Division's denial of Ms. N.'s application is AFFIRMED.

II. Facts

A. Waiver Eligibility Overview

The Home and Community Based-Waiver program is an Alaska Medicaid program for older or physically disabled adults requiring "a level of care provided in a nursing facility."[1] The program pays for services that allow an eligible applicant to stay in his or her home (including an assisted living home) rather than move into a nursing facility.[2]

Whether an applicant requires a nursing facility level of care is determined in part by an assessment that is documented through the Consumer Assessment Tool (CAT).[3] The CAT records an applicant's needs for professional nursing services, special treatments, and therapies;

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1 7 AAC 130.205(d)(2), (d)(4).

2 7 AAC 130.200. The level of care that is provided in a nursing facility is described by regulation. Skilled nursing facility services are defined in 7 AAC 140.515. Intermediate care facility services are defined in 7 AAC 140.510.

3 7 AAC 130.213; 7 AAC 130.215(2), (4). The CAT is adopted by reference in 7 AAC 160.990(d)(6).

any cognitive impairment or problem behaviors; and the level of assistance the applicant requires for "activities of daily living" (ADLs), including the following five specific categories:

- bed mobility (how a person moves to and from lying position, turns side to side, and positions his or her body while in bed);
- transfers (how a person moves between surfaces – to and from bed, chair, wheelchair, and standing position);
- locomotion (how a person moves between a location in his or her room and other areas on the same floor. If the person is in a wheelchair, then the person's self-sufficiency is assessed once in a chair);
- eating (how a person eats and drinks regardless of skill); and
- toileting (how a person transfers on and off the toilet, adjusts clothing, and cleanses).[4]

The five ADLs are assessed based on the amount of assistance an applicant requires to perform each activity. The applicant receives a two-part score consisting of a self-performance code reflecting his or her ability to perform the activity, and a support code reflecting the degree of assistance required to do so. The self-performance codes are:

> **0 – "Independent."** This code is used if help or oversight was provided no more than twice in the prior seven days.
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> **1 – "Supervision."** This code is used if the person requires only "oversight, encouragement, or cueing" while performing the activity.
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> **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/caregiver performance of the activity during the entire prior seven days.[5]

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[4] Ex. E, pp. 7-12. These are referred to as the "shaded ADLs" because they are shaded on the CAT form adopted into regulation.

[5] Ex. E, pp. 6-7.

There are also codes that are not given a numerical score for self-performance: **5** (the person requires cueing), and **8** (the activity did not occur during the past seven days."[6]

The support codes concern the greatest amount of support provided over each 24-hour period during the last seven days, and range from **0** (no set up or physical help required) to **3** (physical assist from two or more people required).[7] As with self-performance, there are support codes that are not given a numerical score: **5** (cueing required), and **8** (the activity did not occur during the past seven days.)[8]

Each of the areas assessed in the CAT contribute to a final numerical score used to determine whether the applicant meets the threshold for Waiver eligibility.[9] To be eligible, an applicant's total score must be 3 or higher. This can be achieved in a variety of ways. For example, an applicant requiring professional nursing services such as therapies (physical, speech/language, occupational, or respiratory) seven days per week would receive a qualifying score of 3.[10] Similarly, an applicant requiring specialized treatments, such as chemotherapy, radiation, hemodialysis or peritoneal dialysis, five days per week would receive a score of 3.[11] And a person requiring extensive physical assistance or who is completely dependent on another person (self-performance code of 3 or 4) in three or more of the five specified ADLs would receive a score of 3.[12]

An applicant can also receive points towards eligibility for combinations of required nursing services, therapies, substantially impaired cognition (memory and reasoning difficulties), difficult behaviors, and needs for physical assistance with the five specified ADLs.[13]

B. Background

Ms. N. is 48-years old. Since February 2024, she has resided at an Assisted Living Home, where her mother and aunt also live.[14] She lives in a single- story, ranch style residence.[15] Prior to that time, she lived in a different assisted living

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6 Ex. E, pp. 6-7.
7 Ex. E, p. 7.
8 Ex. E, pp. 6-7.
9 The results are scored in sections NF1 through NF 7 of the CAT. Ex. E, pp. 31-32.
10 Ex. E, p. 31, NF 1a.
11 Ex. E, p. 31, NF 1d.
12 Ex. E, p. 31 NF 1e.
13 Ex. E, p. 31, NF 2 through 7.
14 Ex. C, pp, 130 and 150. Ms. N. is currently receiving General Relief Assistance benefits. Ex. E, p. 4.
15 Ex. 2.

facility for several years, since she had back surgery in September 2021.[16] She is receiving a greater level of support at the Assisted Living Home than she received at her prior facility, which has improved her physical and mental well-being.[17]

Ms. N. fractured her humerus in 2023.[18] She has only one kidney, which is functioning at roughly 40% capacity.[19] She has multiple medical conditions, including chronic kidney disease, hydronephrosis, hypertension, fibromyalgia, moderate sleep apnea, morbid obesity, and an overactive bladder.[20] She suffers from recurrent urinary tract infections and was hospitalized several times in the past year for kidney or bladder-related issues.[21] She also has Type 2 diabetes, although she has made significant improvement in controlling her blood sugar levels, particularly since she started living at the Assisted Living Home.[22] She was born with deformed feet, which impacts her balance and makes her susceptible to falling.[23] She suffers from depression, anxiety, and trauma, in part due to her son's death from Covid-19 in 2021.[24]

On February 20, 2024, Ms. Platt assessed Ms. N. to determine her eligibility for Waiver services.[25] The assessment was conducted by videoconference, with Ms. N. present, as well as her friend, M. Z.[26]

Ms. Platt documented her observations and findings in the CAT. She determined that as of the date of the assessment, Ms. N. was not receiving any professional nursing services, therapies, or specialized medical treatments.[27] She found that Ms. N. is cognitively well-oriented, has no problematic behaviors, and has a good memory, although she has some difficulty making decisions about daily tasks in new situations (i.e., modified independence).[28]

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16 N. testimony.

17 Letter dated August 9, 2024 from J. T.-G.; letter dated July 22, 2024 from Dr. N. T.; Ex. 1; Ex. C, p. 120.

18 Ex. C, pp. 130 and 160.

19 N. testimony. Ms. N. is not yet a candidate for dialysis but has been told she will be soon. Ex. E, p. 4.

20 Ex. C, pp. 16, 18, 23, 32-39, 43, 60, 176-186; Ex. E, p. 4.

21 Ex. E, p. 4; N. testimony. Ms. N. has also been to the emergency room multiple times for kidney or bladder-related issues. Ex. E, p. 4.

22 Letter dated July 22, 2024 from Dr. T.

23 Ms. N. was born with "webbed feet," for which she had surgery, but it was unsuccessful. Ex. E, p. 4.

24 N. testimony.

25 Ex. E.

26 Ex. E, p. 4.

27 Ex. E, pp. 12-13.

28 Ex. E, pp. 16-17.

For the five ADLs that are assessed for Waiver eligibility, the CAT documented Ms. Platt's conclusion that Ms. N. can independently manage her bed mobility, transfers, locomotion, eating, and toileting activities.[29]

III. Discussion

Because Ms. N. applied for Waiver benefits, she bears the burden of proving by a preponderance of the evidence that she satisfies the eligibility requirements.[30] This burden can be met using any evidence on which reasonable people might rely in the conduct of serious affairs.[31] The relevant date for purposes of assessing the state of the facts the date of the agency's decision under review.[32]

A. Eligibility via professional nursing services or therapies – NF 1a

Under Section NF 1a of the CAT, Ms. N. would qualify for Waiver benefits if she were receiving professional nursing services seven days per week.[33] Because the evidence shows she is not receiving any such services, however, she is not eligible on that basis.

Under Section NF 1d, Ms. N. would qualify for Waiver services if she were receiving specialized treatments or therapies, such as physical or occupational therapy, five days per week.[34] Ms. N.'s testimony, as supported by medical documentation in the record, shows that she has been receiving physical therapy two times per week since February 26, 2024.[35] She testified that when she started the physical therapy, she received an order for occupational therapy, which she has been getting twice per week since then, to help improve her range of motion and physical skills to dress and care for herself.[36] Thus, the evidence shows that Ms. N. was receiving physical therapy four times per week, which falls short just short of the threshold of five days per week of therapies that would automatically qualify her for Waiver benefits.

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29 Ex. E, pp. 7-11.
30 7 AAC 49.135.
31 2 AAC 64.290(a)(1).
32 *See* 7 AAC 49.170; *In re T.C.,* OAH No. 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013) https://aws.state.ak.us/OAH/Decision/Display?rec=2856.
33 Ex. E, p. 32.
34 Ex. E, p. 32.
35 N. testimony; Ex. C.
36 N. testimony; July 22, 2024 letter from Dr. N. T.

B. Eligibility via ADLs – NF 1e

Under NF 1e of the CAT, Ms. N. would automatically qualify for Waiver services if she required extensive assistance or was totally dependent on others (i.e., self- performance score of 3 or 4) - in three of the five scored ADLs.[37] As discussed below, the evidence does not show that she meets this standard. Thus, she is not eligible for Waiver on that basis.

1. Locomotion

The ADL of locomotion concerns how a person moves between areas in her home and other areas on the same floor, with or without an assistive device. Ms. N. uses her four-wheel seated walker to move from one part of her home to another.[38] Ms. Platt observed her walk while holding onto her walker during the assessment. Although she walks slowly, she is able to go for short walks outside.[39] She was rated as independent for the ADL of locomotion.

The evidence presented at the hearing does not contradict this conclusion. Although Ms. N. testified that she had fallen three times in the past 31 to 180 days prior to the assessment, and that her depression impacts here motivation to "get up and go," the rating in the CAT is based on the level of physical supervision and support provided in the last seven days. No evidence was presented that Ms. N. received assistance with walking during that timeframe. The evidence supports the self-performance score of 0 for the ADL of locomotion.

2. Transfers

The ADL of transfer concerns how a person moves between surfaces and rooms in the home. Ms. N. places one hand on her walker and one hand on her knee to push herself up into a standing position. She was rated in the CAT as independent in the ADL of transfers. Although she testified that her feet, back, and shoulder are in near constant pain, the evidence does not establish that she requires assistance for transfer. The evidence supports the self-performance score of 0 for this ADL.[40]

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37 Ex. E, p. 32.
38 Ex. E, pp. 7-8. There are no internal stairs in Ms. N.'s residence. Ex. E, p. 8.
39 Platt testimony.
40 Ex. E, p. 7.

3. Bed mobility

The ADL of bed mobility concerns how a person moves to and from the lying position, turns side to side, and positions her body while in bed. Ms. N. sleeps in a hospital bed.[41] Although she did not lie down in her bed during the assessment to demonstrate her bed mobility skills, she was observed sitting on a four-wheel seated walker during the assessment and shifting her weight side-to-side on the walker, suggesting that her bed mobility is good. Although the CAT notes that there is some skin breakdown on Ms. N.'s stomach from belly folds, and that she often has to think things through first before trying to roll over, Ms. N. was rated as independent (a self-performance score of 0) for the ADL of bed mobility.[42]

The other evidence in the record is consistent with this score. The evidence indicates that Ms. N. uses the side rails on her hospital bed to help her pull herself up from the supine position and lower herself into bed. This bed feature helps Ms. N. perform the ADL of bed mobility herself. It does not establish that she requires the assistance of others to perform this task. The self-performance score of 0 is supported for this ADL.

4. Eating

The ADL of eating concerns how a person eats and drinks regardless of skill. Ms. N. reported during the assessment that she is able to feed herself, using utensils and a mug to bring food and water to her mouth, and she takes her medications whole.[43] Her self-sufficiency with eating is consistent with Ms. Platt's observations during the assessment that Ms. N. has unimpaired range of motion and grip strength.[44] She was rated as independent in the ADL of eating. This determination was not disputed.

5. Toileting

The ADL for toileting concerns how a person uses the toilet room, transfers on and off the toilet, cleanses, changes pads, and adjusts clothes. During the assessment, Ms. N. denied that she uses disposable briefs or incontinence products.[45] She reported that she had approximately 30 surgeries on her bladder, and that "there is no holding it," but she is able to get to and from the bathroom, transfer on and off the toilet, and cleanse herself

41 Ex. E, p. 7.
42 Ex. E, p. 7.
43 Ex. E, p. 9; Platt testimony.
44 Ex. E, p. 9; Platt testimony.
45 Ex. E, p. 9; Platt testimony.

without assistance.[46] Ms. Platt noted in the CAT that she observed Ms. N. to have sufficient bilateral range of motion and grip strength to be able to adjust her clothes and clean herself independently.[47] She was rated as independent in the ADL of toileting.

At the hearing, Ms. N. testified that she is sometimes incontinent, and her depression affects her motivation to go to the bathroom. She intends to ask her physician to fit her for incontinence products in the near future. But she provided no evidence that she needs the assistance of others to get to or get off the toilet, cleanse herself, change pads (which she apparently was not yet using as of the hearing date), or adjust her clothing. The evidence supports the conclusion that she performs toileting activities herself and is independent (self-performance score of 0) in the ADL of toileting. Even if she were underscored in this area to some degree, her need for assistance with toileting activities is not so extensive that it warrants a self-performance score of 3 or higher.

Because Ms. N. does not require the extensive assistance of others (a self-performance score of 3 or 4) in at least three of the five specified ADLs, she does not qualify for Waiver on that basis.[48]

C. Eligibility via combination of scores for therapies, cognition, problem behaviors and need for physical assistance with ADLs

Ms. N. could potentially be eligible for Waiver another way: if her combined score from sections NF 2 of the CAT concerning therapies, NF 3 concerning cognition, and NF 4 concerning problem behaviors was at least a 1, and she had a score of 2 or higher on a requisite number of the specified ADLs.

NF 2 of the CAT makes clear that Ms. N. would receive a point towards eligibility if she were receiving therapies at least three times per week. She meets this standard, based on the physical therapy she is receiving twice per week, plus the occupational therapy she is receiving twice per week. Thus, she is entitled to a point under NF 2.

Ms. N. would be entitled to a point under NF 3 if she had severe cognition issues. But the evidence shows that Ms. N. only has minor cognition limitations - i.e., some

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[46] Ex. E, p. 9; Platt testimony.

[47] Ex. E, p. 9.

[48] Ms. N. testified that she receives assistance taking her medication at her current assisted living facility. *See also* Ex. 1. This type of assistance is akin to cueing, which would not impact her ADL scores.

difficulty with decision-making in new situations. This is not severe enough to afford her a point towards Waiver eligibility. [49]

Ms. N. would be entitled to a point under NF 4 if she had severe problem behaviors. Ms. N. clearly suffers from depression, anxiety and trauma. She testified that she has cut herself thirteen times, suggesting she is a potential danger to herself.[50] But to obtain a point towards Waiver eligibility, her problematic behaviors would need severe.[51] Ms. N.'s problematic behaviors to rise do not rise to this extreme level.

Under NF 5, Ms. N.'s total number of points from NF 2, NF 3, and NF, collectively, is 1. Under NF 7, she would be entitled to Waiver benefits if her score on NF 5 (which is 1), plus her score on NF 6 regarding the number of the specified ADLs coded with self-performance and support scores of at least a 2, adds up to 3.[52] This means that to qualify for Waiver, she would need have two ADLs with self-performance and support scores of at least a 2. As explained previously, however, Ms. N.'s self-performance score on each of the five ADLs is 0. Accordingly, her self-performance scores on the ADLs are not high enough to qualify her for Waiver services through this eligibility pathway.[53]

IV. Conclusion

Although Ms. N. has significant medical conditions, she has not met her burden of showing that she meets the exacting threshold required to be eligible for Waiver services. Thus, the Division's denial of her application for Medicaid Waiver benefits is AFFIRMED.

DATED: August 20, 2024.

Signed

Lisa M. Toussaint
Administrative Law Judge

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[49] *See* Ex. E, pp. 15 - 16 and pp. 31 - 32: question NF 3 (cognitive impairment plus scored ADL), questions NF 5 - 7.

[50] Ms. N. did not specify when these cutting incidents allegedly occurred. N. testimony.

[51] Ex. E, pp. 17-18 and 32.

[52] Ex. E, pp. 32-33.

[53] This would be the case even if she were underscored on one or more of the ADLs, as she would only be entitled to very minor scoring adjustment -i.e. from a 0 to a 1, at best.

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 4th day of September, 2024.

By: *Signed*
Name: Cheryl Mandala
Title: Deputy Chief Administrative Law Judge

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