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

In the Matter of	)	
	)	
F. J.	)	OAH No. 23-0789-MDS
	)	

DECISION

I. Introduction

F. J. applied for Medicaid Home and Community-Based Waiver (Medicaid Waiver) benefits. Following an assessment that was conducted on November 1, 2023, the Division of Senior and Disabilities Services (the "Division") denied her application on December 7, 2023.

Ms. J. requested a hearing to challenge the denial of her application, which was held on February 8, 2024. Ms. J. attended the hearing, and her care coordinator, B. T., testified on her behalf. The Division was represented by Fair Hearing Representative Victoria Cobo-George. The Division's assessor in this case, Padraig Keohane, also testified.

The evidence in this case shows that Ms. J. has significant cognitive impairments that require her to be cued and supervised with many activities. However, she remains able to walk without difficulty, and can perform daily activities such as getting out of bed, showering, dressing, eating and toileting without assistance. While Ms. J. requires some supervision and cueing due to cognitive impairment, these needs are not sufficient to meet the very high threshold required to qualify for Waiver benefits. Consequently, the Division's denial of her application is AFFIRMED.

II. Facts

Ms. J. is 72 years old, and currently reside with friends in City A.[1] Ms. J.'s medical history includes past treatment for cervical cancer and a 2017 brain aneurysm, and numerous ongoing conditions including persistent cognitive impairment, bilateral sensorineural hearing loss, hypertension, hypothyroid, arthritis, and dysphagia.[2] Ms. J. applied for Medicaid Waiver benefits, and was assessed by Mr. Keohane. by video on November 1, 2023 to determine whether she met program requirements. Ms. J. was present for the assessment, as were Ms. T. and an elder advocate employed by Native Tribe A.[3]

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1 Ex. E, p. 3.
2 Ex. E, p. 4.
3 Ex. E, p. 3.

The Division's assessment showed that Ms. J. was physically capable of performing all five of the most essential activities of daily living (i.e., bed mobility, transfers, locomotion, eating, and toileting) without requiring any hands-on physical assistance.[4] The assessment also showed that Ms. J. does not presently suffer from any health conditions that require professional nursing services, special treatments, or ongoing therapies.[5]

While Ms. J. was noted as having some cognitive impairment, during her assessment she told Mr. Keohane that she was still making her own financial and medical decisions. Additionally, Mr. Keohane observed that Ms. J. appeared oriented to time and place during her assessment and consistently provided appropriate responses to his questions.[6] Taking all of this together, Mr. Keohane assigned Ms. J. a score of 4 for the cognition category.[7] The scale for this category goes from a low of 0 (for no impairment) to a high of 16 (for extreme impairment). Thus, a score of 4 is consistent with a moderate level of cognitive impairment that is not so severe as to require constant supervision.

Based on the final scoring of Ms. J.'s assessment, Mr. Keohane determined that she was not eligible for Waiver benefits.[8] The Division notified Ms. J. that her application was being denied on December 7, 2023.[9] In response, Ms. J. submitted a fair hearing request on December 20, 2023.[10]

In her hearing testimony, Ms. T. described Ms. J.'s cognitive impairments as more severe than Mr. Keohane observed during his assessment. In challenging the scoring on this category, Ms. T. first noted that Ms. J. had received a great deal of assistance during the assessment from an elder advocate who rephrased many of the questions asked by Mr. Keohane in a manner that Ms. J. was able to answer more easily. Without this assistance, Ms. T. believed that Ms. J. would have been unable to answer many of Mr. Keohane's questions.

Ms. T. went on to describe Ms. J. as unable to follow even basic instructions and directives. By way of example, Ms. T. explained how Ms. J. would turn on the kitchen stove in that house where she was living – notwithstanding repeated requests that she not do so – and

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4 Ex. E, pp. 6– 9; Mr. Keohane's testimony.
5 Ex. E, pp. 11– 13; Mr. Keohane's testimony.
6 Mr. Keohane testimony.
7 Ex. E, p. 15.
8 Ex. E, pp. 32 – 33.
9 Ex. D.
10 Ex. A, p. 1.

then walk away without recognizing the hazardous condition she had just created. Ms. T. additionally noted that Ms. J. needs assistance to access benefits and resources. As an example of this, Ms. T. described how Ms. J. was unable to make use of SNAP benefits for several months due to confusion over how her benefits card worked. Ms. T. also testified that Ms. J. would be unable to make and attend medical appointments without the assistance provided through a Tribal elder program.

Ms. T. also provided a report dated February 12, 2024, in which an occupational therapist assessed Ms. J. as suffering from "severe cognitive impairment" that left her "unable to attend to and follow through on verbal directives." The report concluded with the opinion that Ms. J. will require ongoing assistance with "complex safety tasks such as cooking, cleaning, medication management, attending to routine and hygiene."[11]

Aside from her strong disagreement with Mr. Keohane's assessment of Ms. J.'s cognitive abilities, Ms. T. largely concurred with the other conclusions that Mr. Keohane reached during his assessment. Of particular importance in this context, Ms. T. did not disagree with the conclusions regarding Ms. J.'s ability to perform any of the five scored ADLs (bed mobility, transfers, locomotion, toileting, and eating) without requiring hands-on physical assistance from another person.

III. Discussion

A. Burden of Proof

Ms. J. 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.[12] The parties can meet their burden of proof using any evidence on which reasonable people might rely in the conduct of serious affairs,[13] 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.[14] For this case, that date is December 7, 2023, the date of the notice informing Ms. J. that her Waiver application was denied.[15]

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[11] Report of Occupational Therapist T. K., submitted into the record as an unmarked exhibit. It should be noted that since this report has only limited relevance in this context since it postdates the Division's denial of Waiver benefits.

[12] 7 AAC 49.135.

[13] 2 AAC 64.290(a)(1).

[14] *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).

[15] Ex. D.

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."[16] The nursing facility level of care[17] requirement is determined by an assessment which is documented by the Consumer Assessment Tool (CAT).[18]

The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,[19] and whether an applicant has impaired cognition or displays problem behaviors.[20] Each of the assessed items are coded and contribute to a final numerical score. For instance, if an individual requires 5 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 essential Activities of Daily Living (ADLs).[22] 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, eating, toilet use, personal hygiene, dressing and bathing.[23] 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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16 7 AAC 130.205(d)(4).
17 *See* 7 AAC 130.205(d)(4); 7 AAC 130.215.
18 7 AAC 130.215(4).
19 Ex. E, pp. 14 – 16.
20 Ex. E, pp. 15 – 18.
21 Ex. E, p. 31.
22 Ex. E, pp. 6 - 10.
23 Ex. E, pp. 7 - 10.

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.[24]

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.[25]

In assessing cognitive impairment, the CAT requires the assessor to evaluate five distinct areas: (1) memory for events; (2) memory and use of information; (3) global confusion; (4) spatial orientation; and (5) verbal communication. Eligibility for Waiver benefits requires a minimum score of 13 on the 0 to 16 scale for cognition referenced above, which requires a showing of extremely limited memory on the applicant's part, along with limited capacity to recall and act on instructions, near constant confusion, getting lost even in familiar locations, and an inability to communicate beyond simple words and phrases. Even if an applicant has a cognition score of 13 or higher, Waiver benefits are unavailable unless the applicant is additionally unable to perform at least two of five specified ADL's (bed mobility, transfers, locomotion, toileting, and eating) without requiring limited or extensive physical assistance with those ADLs.[26]

C. Ms. J.'s Waiver Eligibility

Waiver eligibility requires that an applicant have an overall score of three or more on the CAT. That score can be arrived at through several different scenarios, all of which are set out in the CAT itself.[27] For example, if Ms. J. required nursing services seven days per week, had therapy five or more times per week, or required extensive physical assistance with three or more of the five specified ADLs reference above, she would be eligible for Waiver benefits.[28] Here,

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24 Ex. E, p. 6.
25 Ex. E, p. 6.
26 Ex. E., p. 31.
27 Ex. E, pp. 32 - 33.
28 Ex. E, p. 30 - 31, question NF 1.

however, there is no evidence that Ms. J. has need for any recurring nursing services or therapies, and the evidence was undisputed that she required little (if any) assistance with her ADLs.

While the testimony of Ms. T. indicates that Ms. J. suffers from a greater degree of cognitive impairment that Mr. Keohane noted during the assessment, nothing in the record demonstrates that Ms. J. suffers the severe level of memory loss and confusion that is required for a score of 13 in this category. Even if Ms. J.'s scoring was increased to reflect difficulty in remembering and using information, and periodic episodes of confusion during daytime hours, this would only raise her score to 8. The fact Ms. J. retains the ability to independently perform ADLs with limited assistance, and can engage in conversations with others, prevents her from being assigned a score that would make her eligible for Waiver benefits. Even if it were possible to find that Ms. J. was so cognitively impaired as to justify a score of 13, the fact she is able to perform each of the five scored ADLs (bed mobility, transfers, locomotion, toileting, and eating) without requiring limited or extensive physical assistance requires a denial of her application for Waiver benefits.

Ms. J. had the burden of proof in this case to demonstrate that she satisfied the stringent eligibility requirements for Medicaid Waiver benefits as of the relevant date of December 7, 2023. While there is no doubting that she is cognitively impaired, the severity of that impairment is not sufficient to make her eligible for Waiver benefits in light of her undisputed ability to perform any of the five scored ADLs without limited or extensive physical assistance.

IV. Conclusion

The Division's denial of Ms. J.'s application for Medicaid Waiver benefits is AFFIRMED.

Dated: March 13, 2024.

SIGNED
Max Garner
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 29th day of March, 2024.

By: SIGNED
Name: Max Garner
Title: Administrative Law Judge

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