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

In the Matter of	)	
	)	
E. T.	)	OAH No. 23-0697-MDS
	)	

DECISION

I. Introduction

E. T. applied for Medicaid Home and Community-Based Waiver ("Waiver") services. The Division of Senior and Disabilities Services (the Division) assessed Mr. T. over video link on August 29, 2023.[1] The Division denied his application on October 19, 2023.[2] Mr. T. requested a hearing to appeal the denial of his Waiver application.[3]

Mr. T. has a complicated health history. He had multiple hospitalizations before he was assessed, and was hospitalized on the day of his assessment, August 29, 2023. However, the totality of the evidence demonstrates that Mr. T. did not prove, by a preponderance of the evidence, that he qualified for Medicaid Waiver services. Therefore, the Division's denial of his application is affirmed.

II. Background Facts

The following facts were established by a preponderance of the evidence.

Mr. T. is 69-year-old veteran, who has advanced chronic obstructive pulmonary disease (COPD).[4] His diagnoses also include acute cerebrovascular insufficiency, hemiplegia following cerebral infarction affecting his right dominant side, primary hypertension, and type 2 diabetes.[5] He is oxygen dependent.[6]

Prior to his assessment Mr. T. was hospitalized several times. On June 25, 2023 he was hospitalized due to right sided weakness and found to have bilateral diffuse strokes.[7] Mr. T. was discharged on June 29, 2023 to a swing bed.[8] After his discharge to the swing bed, he began receiving regular physical therapy (PT) and occupational therapy (OT).[9] On June 30, 2023 Mr. T. received an evaluation which found he needed physical assistance in several areas, and that he

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1 Ex. E.
2 Ex. D.
3 Ex. C, p. 1.
4 Ex. E, p. 26.
5 Ex. E, p. 3.
6 J. H.' testimony.
7 Ms. H.' testimony.
8 Ex. G, p. 15.
9 Ex. G, p. 29.

was appropriate for a skilled nursing facility.[10] However, Mr. T. was declined at two facilities, so he continued to receive PT and OT while in a swing bed. On July 25, 2023 a subsequent evaluation found that Mr. T. had made some progress with his ability to independently complete activities of daily living (ADL), but that he would benefit from additional outpatient PT.[11] Mr. T. was then prescribed PT five days a week until his goals were met.[12] On July 27, 2023 Mr. T. had improved enough to be discharged from the swing bed to an Assisted Living Home (ALH).[13] Mr. T. chose to be discharged to a private residence.[14] The discharge notes found that he required extensive assistance, to complete the ADLs of transferring and bed mobility.[15] After discharge, Mr. T. engaged in PT on August 10, 12, and 17.[16]

In August 2023 Mr. T. began experiencing additional difficulty breathing.[17] On August 19, 2023 Mr. T. fell in his home and was unable to get up his own.[18] EMS provided lift assistance, and transported Mr. T. to Military Base A where he was admitted to the hospital.[19] Once hospitalized at Military Base A Mr. T. was placed into isolation, for at least five days, which prevented him from engaging in physical therapy or occupational therapy.[20]

On August 24, 2023 Mr. T. received an inpatient PT evaluation which concluded that he would benefit from PT services 2-3 times a week "as able during hospital stay".[21] Consistent with this evaluation Mr. T. received PT at Military Base A on August 25 and 30, 2023.[22]

On August 29, 2023 Susan Kubitz, a nurse assessor who works for the Division, evaluated Mr. T. to determine if he was eligible for Waiver services.[23] Based upon her observations and discussions with Mr. T., and a review of some of his medical records, the assessor concluded that Mr. T. did not require extensive assistance with any of the five[24] ADLs, and that he did not have any scorable skilled nursing needs or therapies, nor was he experiencing cognitive impairment or

10 Ex. G, pp. 29-36.
11 Ex G, p. 54.
12 Ex. G, p. 56.
13 Provider A plan of care, pp. 28-30.
14 Provider A plan of care, pp. 28-30.
15 Provider A plan of care, p. 25.
16 PT Provider A Therapy Notes 8-12-23 to 9-26-23, pp. 2, 9, 17.
17 VA Hospital MRs 8-19-23 to 8-22, p.7.
18 VA Hospital MRs 8-19-23 to 8-22, p.7.
19 VA Hospital MRs 8-19-23 to 8-22, p.7.
20 Ex. E, p. 4.
21 Military Base A Medical Records 8-19-23 to 8-31-23, p. 13.
22 Military Base A Medical Records 8-19-23 to 8-31-23, p. 4.
23 Ex. E, p. 1.
24 These include bed mobility, eating, locomotion, transfers, and toileting.

behavioral issues.[25] The assessor found Mr. T. required limited assistance with transfers and toileting, was independent as to eating and bed mobility, and he required supervision for locomotion.[26]

On August 31, 2023, Mr. T. was discharged from Military Base A to an ALH. At discharge Mr. T. required some physical assistance with transitioning from lying down to sitting in bed, and with transferring from sitting at the edge of the bed to standing.[27] He was able to use his walker to independently travel to the bathroom.[28] At discharge he was prescribed PT 2-3 times a week.[29] Mr. T. was not able to engage in therapy more than twice a week, with his medical records including notes for post-discharge PT visits on September 15, 19, 21, and 26.[30]

On October 19, 2023 the Division notified Mr. T. that his Waiver application was denied.[31] Mr. T. disagreed with the Division's determination that he did not qualify for Waiver services and requested a hearing to challenge its denial.

Mr. T.'s hearing was held telephonically on January 29, 2024 Mr. T. was assisted by his care coordinator, L.J. Mr. T. presented testimony from himself; the administrator of his ALH, S. Q.; and J. H., an advanced practice registered nurse (APRN) on Mr. T.'s care team. Terri Gagne represented the Division and presented testimony from the assessor, Susan Kubitz.

S. Q. is an administrator at the ALH where Mr. T. currently lives. He has been able to observe Mr. T. since he was admitted to the ALH on August 31, 2023.[32] Mr. Q. credibly testified that while Mr. T. needs someone to push him up the facility's steep driveway and wheelchair ramp, Mr. T. is usually able to move around the facility on his own. To transfer, Mr. T. is pulled by his hands from a sitting position to a standing position.[33] Without this assistance, Mr. T. is not able to transfer from the bed to his wheelchair.[34] Mr. T. is able to get himself to the bathroom and can raise and lower himself onto the toilet by utilizing the handrails.[35] However, Mr. T. requires

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25 Ex. E, pp. 34-37.
26 Ex. E, pp. 8-10.
27 Military Base A Medical Records 8-19-23 to 8-31-23, p. 13.
28 Military Base A Medical Records 8-19-23 to 8-31-23, p. 13.
29 "Treatment frequency: 2,3x/wk as able", Military Base A Medical Records 8-19-23 to
30 8-31-23, p. 13. PT Provider Therapy Notes 8-12-23 to 9-26-23, pp. 25, 36, 45, 51.
31 Ex. D.
32 Mr. Mr. Q.'s testimony.
33 Mr. Mr. Q.'s testimony.
34 Mr. Mr. Q.'s testimony.
35 Mr. Mr. T.'s testimony.

assistance to clean himself after utilizing the bathroom, this is accomplished by having him stand up and brace himself with the handrail while a staff member cleans him.[36]

J. H. is an APRN with the Veterans Health Administration (VA) who is part of Mr. T. care team. She began to work with him in early December of 2023, when Mr. T. qualified for a program that provide primary care to homebound veterans.[37] While she was not part of his care team prior to the Division's denial, she has reviewed his medical records from that time.[38] She testified that while Mr. T. had two strokes in June, his primary issue is COPD. Mr. T. is oxygen dependent but is also functionally stable.[39] Ms. H. could not speak to Mr. T. therapy needs during the relevant period, but she was aware that Mr. T. now gets PT twice a week and OT once a week through the VA.[40]

Mr. T. testified to his condition. His physical capabilities are the same now, as they were on the date of the denial.[41] He has a hospital bed, but still needs someone to pull him from seated position to a standing position as he is not strong enough to do so on his own.[42] He is able to propel his wheelchair to get around inside the ALH and use his walker to get to the bathroom and back. Once in the bathroom he uses a grab rail to sit down on and stand up from the toilet.[43] He requires assistance to clean himself, which is accomplished by standing up, holding onto the handrail, while a caregiver cleans him.[44] He can feed himself, but needs someone to help prepare his food, as he can only use one utensil at a time.[45]

Susan Kubitz is a registered nurse, who has worked in home health, as a traveling nurse, a rehab nurse, and is in her 5th year as a nurse with the Division.[46] She testified to her observations that are recorded in the Consumer Assessment Tool (CAT). She conducted Mr. T. evaluation on August 29, 2023 via video link.[47] She was able to observe Mr. T. transfer from the bed to his walker, this was accomplished by a nurse providing 30-40% assistance to pull Mr. T. to the standing position.[48] Mr. T. can walk to and from the bathroom with a walker, without any

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36 Mr. Mr. Q.'s testimony.
37 Ms. H.' testimony.
38 Ms. H.' testimony.
39 Ms. H.' testimony.
40 Ms. H.' testimony.
41 Mr. Mr. T.'s testimony.
42 Mr. Mr. T.'s testimony.
43 Mr. Mr. T.'s testimony.
44 Mr. Mr. T.'s testimony.
45 Mr. Mr. T.'s testimony.
46 Ms. Kubitz's testimony.
47 Ms. Kubitz's testimony.
48 Ms. Kubitz's testimony.

physical assistance. Once in the bathroom he was able to sit-down on the toilet by using the handrails.[49] A nurse in the room assisted Mr. T. off the toilet, but he would have been able to stand unaided if he had used the handrails.[50] Mr. T. then was able to use his walker to get back to his bed, sit on his bed, lay down, and put on his Nasal cannula for oxygen.[51] He was able to turn himself left and right in his bed, and he was able to eat and drink on his own.[52]

The record was held open to give Mr. T. additional time to submit records documenting his therapy needs, for the Division time to newly submitted records in writing, and to allow for the submission of written closings. The exhibits submitted by the Division and Mr. T. were admitted without objection.[53] The record closed on February 20, 2024.

III. Discussion

A. Method for Assessing Eligibility

The nursing facility level of care[54] requirement is determined by an assessment which is documented by the Consumer Assessment Tool (CAT).[55] The assessment measures both an applicant's needs for nursing or other professional medical services, and his or her ability to function physically: it records an applicant's needs for professional nursing services, therapies, and special treatments,[56] whether an applicant has impaired cognition or displays problem behaviors,[57] and the applicant's ability to perform specific measured ADLs, and what type of assistance they need, if any, with those activities.[58] Each of the assessed items is coded and contributes 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, they would receive a score of 3.[59] Alternatively, if a person requires extensive physical assistance (self-performance code of 3) or is completely dependent (self-performance code of 4) with three or

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49 Ms. Kubitz's testimony.
50 Ms. Kubitz's testimony.
51 Ex. E, p. 9.
52 Ms. Kubitz's testimony.
53 Some of the medical records submitted by Mr. Mr. T. were created well after the date of the Division's denial, those portions of the record were not considered. *See* 7 AAC 49.170; *In re T.C.,* OAH No. 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013) (Available at: http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf).
54 *See* 7 AAC 130.205(d)(4); 7 AAC 130.215.
55 7 AAC 130.215(4).
56 Ex. E, pp. 15 - 16.
57 Ex. E, pp. 16 - 19.
58 Ex. E, pp. 8 – 13, 20.
59 Ex. E, p. 35.

more of five specified ADLs (bed mobility, transfers, locomotion within the home, eating, and toileting), that person would also receive a score of 3.[60]

A person can also receive points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive behaviors, etc.), and if they require either limited or extensive assistance with the five specified activities of daily living.[61]

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.[62]

B. Eligibility

An applicant for Waiver services has the burden of proof by a preponderance of the evidence.[63] The relevant date for purposes of assessing the state of the facts is, in general, the date of the agency's decision under review.[64] Mr. T. argued that he qualifies for Waiver services due to his physical therapy needs and the support he requires with the five scored ADLs, each of these is addressed below.

1. *Physical Therapy*

Mr. T. was prescribed physical therapy and occupational therapy, at the time of his assessment.[65] However, as he was hospitalized and in isolation, Mr. T. was not fully engaging those therapies at the time. As the CAT only looks at an applicant's needs in the last seven days, Mr. T. did not receive any points for receiving PT.

However, after he was released from isolation, Mr. T. returned to receiving some PT and OT. In reviewing the records, Mr. T. engaged in PT a maximum of twice a week during this period. By October 19, 2023, the date of the Division's denial, Mr. T. was no longer engaged in any PT. If he had been engaged in PT five or more time per week, he would have qualified for Waiver.[66] If he had engaged in PT three or more times per week, then he would have received one point towards his Waiver eligibility score.[67]

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60 Ex. E, p. 35.
61 Ex. E, p. 33-36.
62 Ex. E, p. 31.
63 7 AAC 49.135.
64 *See* 7 AAC 49.170; *In re E.P.* OAH No. OAH No. 22-0857-MDS (Commissioner of Health 2023) (Available at: https://aws.state.ak.us/OAH/Decision/Display?rec=6873).
65 Ex. E, p. 4.
66 Ex. E, p. 35, § NF. 1(d).
67 Ex. E, p. 35, § NF. 2(b).

Mr. T. argues that insurance issues during the relevant time-period made it difficult for him to engage in PT, and he was unable to get an assessment from the VA until late January, after which he was able to return to receiving PT. Understanding that Mr. T. faced real hurdles to get the care he needs, a Waiver application only addresses a discrete period and applies strict criteria. While Mr. T. may be receiving more therapy now than he was before the Division's denial, this is not sufficient to meet his burden. If Mr. T.'s therapy needs have changed since the denial, or he begins to engage in therapy five or more days a week, that may have an impact on his eligibility for Waiver in the future. However, because Mr. T. was receiving PT a maximum of twice weekly, he does not receive a point in this category.

2. ADLs (Transfers, Locomotion, Toileting, Bed Mobility, Eating).

As Mr. T.'s PT is not sufficient to independently qualify him for Waiver, or provide him with a point towards qualifying, his only remaining path to Waiver eligibility is if he requires a minimum of extensive assistance with three or more of the scored ADLs (bed mobility, eating, locomotion, transfers, and toileting). Each of these scored ADLs is addressed below.

a. Transfers

Transfers are defined as how a "person moves between surfaces," such as from a sitting to a standing position.[68] The assessor found Mr. T. required limited assistance with transfers, meaning non-weight bearing physical assistance or weight-bearing assistance less than three times weekly, based upon her observation of Mr. T. transferring, which consisted of the nurse pulling Mr. T. up from the seated position in bed to standing on August 29, 2023.[69]

Extensive assistance, as defined in the CAT, requires that a person receive weight bearing support three or more times per week in a specified ADL.[70] Ms. Kubitz testified that the nurse reported providing 30-40% assistance to Mr. T. Ms. Kubitz concluded, since the nurse was not providing 51% or more of the effort to accomplish the transfer, Mr. T. did not require extensive assistance. However, decisions from the Commissioner have repeatedly clarified that:

> 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.[71]

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68 Ex. E, p. 8.

69 Ms. Kubitz's testimony.

70 Ex. E, p. 8.

71 *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

30-40% certainly qualifies as "more than a minimal amount of weight". The remaining factual issue is, would Mr. T. have been unable to complete the transfer without weight bearing assistance, three or more times per week?

It was Ms. Kubitz's opinion that Mr. T. needed "a boost" from the nurse to complete the transfer and could not get from a sitting to a standing position without that assistance.[72] Mr. Q. testified that, every day, staff at the ALH pull Mr. T. up from his bed to transfer to his wheelchair. This, coupled with the PT notes indicating he required this assistance,[73] demonstrates that Mr. T. would not be able to transfer without weight-bearing assistance three or more times a week. Accordingly, Mr. T. has met his burden to prove that he requires extensive assistance with transfers.

b. Locomotion

Locomotion is the act of moving about inside the home. It may involve the use of an assistive device such as a cane, walker, or a wheelchair.[74] The assessor witnessed Mr. T. use his walker to move from his hospital bed to the bathroom, and then back. Based upon her observation of Mr. T. walking using a walker, with supervision assistance only, Ms. Kubitz concluded that he only required supervision.[75] This assessment is consistent with the PT notes that found, while it required significant effort, Mr. T. was able to ambulate using a walker.[76]

Mr. T. and Mr. Q. both testified that Mr. T. moves around his residence without assistance, but he needs assistance to exit and enter his residence. This activity, locomotion outside the home, falls outside the type of locomotion evaluated to determine Waiver eligibility which only focuses on the ability to move inside of the residence.[77] The totality of the evidence therefore demonstrates that Mr. T. has not met his burden of proof to establish that he required extensive assistance with locomotion.

c. Toileting

Toileting is a complex process that combines locomotion, transfers, dressing, and cleansing.[78] The assessor found that Mr. T. was able to complete of the ADL of toileting with

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72 Ms. Kubitz's testimony.
73 Provider A plan of care, p. 25.
74 Ex. E, p. 9.
75 Ex. E, p. 9; N. U.'s testimony.
76 Military Base A Medical Records 8-19-23 to 8-31-23, p. 5.
77 Locomotion outside the home may fall into the category of locomotion to access medical appointments. The CAT scored Mr. Mr. T. as requiring extensive assistance in this category. *See* Ex. E, p. 9.
78 Ex. E, p. 11.

limited assistance.[79] The bathroom Mr. T. used during the assessment had extended grab bars/rails, and Mr. T. was able to use a grab bar to lower himself onto the toilet, although actual toileting was not observed.[80] While Mr. T. was assisted off the toilet by a nurse, it was the assessor's conclusion that Mr. T. could transfer on and off the toilet without extensive assistance if he utilized a grab bar.[81]

At the time of the denial Mr. T. residence had handrails in the bathroom.[82] Mr. T. testified that he is able to get himself to the bathroom with his walker and raise and lower himself from the toilet by using the handrail. However, Mr. T. and Mr. Q. testified that he needs a staff member's assistance after utilizing the bathroom to clean himself. This is accomplished by having Mr. T. stand up and brace himself with the handrail while a staff member cleans him. However, this assistance does not involve bearing any of Mr. T.'s weight and is appropriately categorized as limited assistance. As a result, Mr. T. has not met his burden of proof to establish that he required extensive assistance with toileting during the relevant time.

d. Bed Mobility

Bed mobility is defined as how a "person moves to and from lying position, turns side to side, and positions body while in bed."[83] The assessor scored Mr. T. as independent based on his statements and the assessor's observation that he could turn himself in bed, shift his weight.[84] At the hearing Mr. T. agreed that he is able to turn himself in bed and shift his weight.

However, bed mobility also involves the ability to go from lying down to sitting up in bed. The day after the assessment, August 30th, Mr. T.'s PT notes indicate that, in addition to his hospital bed, he required maximum assistance to go from lying down (supine) to sitting up.[85] Mr. T. testified, that he needs someone to physically pull him up into a seated position, even with the use of a hospital bed. Mr. Q. concurred that this type of assistance is required for Mr. T. to come from a lying position to a seated position.[86] Even with a hospital bed, Mr. T. is not strong enough to fully sit up without someone physically pulling him up.

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79 Ex. E, p. 10.
80 Ex. E, p. 10; Ms. Kubitz's testimony.
81 Ms. Kubitz's testimony.
82 Mr. Mr. T.'s testimony.
83 Ex. E, p. 8.
84 Ex. E, p.8; Ms. Kubitz's testimony.
85 "Sup to sit: _Max assist and brought head of bed all the way up" Military Base A Medical Records 8-19-23 to 8-31-23, p. 3.
86 Mr. Mr. Q.'s testimony.

As a result, the totality of the evidence demonstrates that Mr. T. has met his burden of proof to establish that he required extensive assistance with bed mobility.

e. Eating

Eating is defined as how a "person eats and drinks regardless of skill".[87] The assessor scored Mr. T. as independent based on his statements and the assessor's observation of Mr. T. taking a drink of water from a cup and making adjustments to his N/C.[88] Mr. T. testified that while he is able to eat with a spoon, he requires assistance preparing and cutting up the food, as he can only use one utensil at a time.

While it is clear Mr. T. needs assistance in preparing his food, the ADL of eating is very narrow. It only addresses how a person physical eats and drinks, regarding of skill. In other words, it only addresses whether a person is physically capable of feeding themselves. It does not address how easily that can be done, or what prep work must occur. As a result, Mr. T. has not met his burden of proof to establish that he required extensive assistance with bed mobility during the relevant time.

IV. Conclusion

While Mr. T. certainly faces physical limitations and requires assistance in his day-to-day life, to qualify for Waiver applicants must meet a minimum score on the CAT. In determining if an applicant qualifies the CAT evaluates a narrow subset of ADLs and has strict scoring requirements within them. In this case Mr. T.'s condition during the qualifying period did not meet the criteria necessary to qualify for Waiver services. While he has engaged in PT and OT, Mr. T. did not engage in enough therapy to earn a point towards Waiver. Additionally, while Mr. T. did require extensive assistance with bed mobility and transfers, he did not meet his burden to show he required extensive assistance in three or more of the scored ADLs. Accordingly, the Division's denial of his application for Waiver is Affirmed. If Mr. T.'s condition has changed since the Division's denial, or changes in the future, he may reapply for the program.

DATED: March 11, 2024.

By: *Signed*
Eric M. Salinger
Administrative Law Judge

[87] Ex. E, p. 10.
[88] Ex. E, p. 10.

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 26th day of March, 2024.

By: *Signed*
Name: Eric M. Salinger
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.]