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

In the Matter of	)	
	)	
C. D.	)	OAH No. 22-0153-MDS
	)	

DECISION

I. Introduction

C. D. applied for Medicaid Home and Community-Based Waiver program ("Waiver") services. The Division of Senior and Disabilities Services (Division) assessed her for eligibility on January 10, 2022. The Division subsequently notified Ms. D. that her application was denied.[1] Ms. D. requested a hearing.[2]

The evidence demonstrates that it is more likely true than not true that although Ms. D. has significant health issues and functional limitations, she does not meet the stringent requirements to qualify for Waiver services. The Division's denial of her application is therefore affirmed.

II. Facts

The following facts were established by a preponderance of the evidence.[3]

Ms. D. is currently 73 years old. She lives about 13 miles outside of City A with her disabled son, M. D.[4] and his partner S. H.. She has type 2 diabetes, hypertension, tachycardia/bradycardia, and psoriasis, and in June 2021 she suffered a thalamic stroke which left her with left-side weakness (hemiparesis).[5] In October 2021 she had a pacemaker implanted to treat her tachycardia, and in January 2022 she was hospitalized to address pacemaker malfunctions.[6]

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1 Exh. D.
2 Exh. C.
3 "Preponderance of the evidence" means that a disputed fact is shown to be more likely true than not true. *See* 2 AAC 64.290(e).
4 M. D. holds power of attorney for Ms. D..
5 Exh. E, p. 4; Exh. G, p. 2.
6 *Id.*

Ms. D. applied for Medicaid Waiver services, with the assistance of Care Coordinator U. T..[7] The Waiver application form can also be used to apply for Personal Care Services (PCS), but Ms. D. declined that option.[8]

The Division conducted a telehealth assessment of Ms. D. on January 10, 2022 to determine her eligibility for Medicaid Waiver services.[9] M. D. and Ms. H. were present during the assessment, which was performed by Division assessor Amanda Kelsey. The results of the assessment were recorded on the Consumer Assessment Tool ("CAT").

During the assessment, the assessor determined, based on her observations and Ms. D.'s statements, that Ms. D. was "independent" (score of 0) with the activity of bed mobility, because she slept in a regular bed and told the assessor that she can sit up in bed, lay down in bed and roll over in bed by herself, using her cane to assist herself.[10]

The assessor also determined, based upon Ms. D.'s statements and the assessor's observations, that although Ms. D. stated that most of the time she can stand up and sit down by herself, using her cane for support, she does need help "a few times a week" from M. D. or Ms. H. in getting up off of her bed. The assessor concluded therefore that she requires limited assistance (score of 2) with transfers.[11]

The assessment found, based upon Ms. D.'s statements and the assessor's observation, that most of the time Ms. D. was capable of locomoting (walking) in her home, without assistance, while using her cane. However, Ms. D. told the assessor she needs assistance with walking about twice a week, due to dizziness and her left-side weakness. Accordingly, she was scored as needing limited assistance in that activity (score of 2).[12]

The assessor determined that Ms. D. required limited assistance (self-performance code of 2) with toileting. She arrived at this conclusion based upon the following: her observations of Ms. D.'s functional abilities; Ms. D.'s report that she could use the bathroom by herself but she had difficulty with incontinence products and with pulling up her pants; and M. D.'s and Ms. H.'s reports that she frequently needs assistance cleansing herself.[13]

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7 Exh. G.
8 Exh. G, p. 1.
9 Ms. Kelsey's testimony; Exh. E.
10 Exh. E, p. 7; Ms. Kelsey's testimony.
11 Exh. E, p. 7; Ms. Kelsey's testimony.
12 Exh. E, p. 8; Ms. Kelsey's testimony. Ms. D. was also scored as needing extensive assistance (score of 3) with locomotion for medical appointments, where she stated she is pushed in a wheelchair. Exh. E, p. 8.
13 Exh. E, p. 9; Ms. Kelsey's testimony.

Lastly, the assessor found that Ms. D. was independent with the act of eating (score of 0).[14]

Based upon the assessor's observations, her review of medical records submitted with Ms. D.'s Waiver application, and the statements of Ms. D., M. D., and Ms. H., the Division found that Ms. D. did not qualify for Medicaid Waiver services.[15]

Ms. D. disagreed with the Division's decision and requested an administrative hearing on February 16, 2022 to contest the Division's determination.[16] On February 26, 2022 she and her son M. D. submitted an "Areas of Disagreement" letter, detailing their arguments regarding the assessor's scoring of Ms. D.'s need for assistance as to three of the activities that are critical to the Waiver eligibility determination - transfers, locomotion, and toileting.[17]

The February 16, 2022 letter stated, as to transfers:

> I disagree with the score 2.
> C. is observed on numerous occasions to be unable to transfer from bed surfaces and low chairs independently. Emergency services needed to be called in the past (most recently in January) due to physical inability to lift/transfer from M./ M. partner. This is not an unusual occurrence. C. is observed to call out to M. and M.'s partner in order to receive [aid] with transfers instead of independently transferring with bed/chairs. If M. or M.'s partner were unavailable and a transfer was needed in an immediate emergency C. would be unable to safely exit … situation without supervision/assistance. M. is unable to continue mild or verbal assistance due to recent amputation. M.'s partner is also unable to assist due to physical limitations. … C. states herself that she is unable to get herself out of her own bed without aid. She states that if there was an emergency that required an evacuation she would only be able to use her life alert. Currently her life alert is not functioning for safety needs and is often left uncharged.[18]

As to the activity of locomotion, the letter stated:

> I disagree with the score 2.
> C. is unable to make sound choices concerning her safety and health when walking/mobilizing herself. C. has been observed on daily occasions to refrain from making appropriate decisions when walking in dangerous weather conditions. She has been observed to choose to walk in icy situations knowing the natural consequences of her choice 'its slick out today'. Although C. is in possession of a quad cane, the cane is observed to rarely be in use by M./ M.'s partner and visitors to the home. C. continues to refrain from using her cane effectively. She will often hold it above the ground with opposition to use it for

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14 Exh. E, p. 9; Ms. Kelsey's testimony.
15 Ms. Kelsey's testimony; Exh. E, p. 33; Exh. D.
16 Exh. C.
17 Exh. 1.
18 *Id.*

> its given purpose of stability (observed outdoors). She requires the assistance of emergency services to help her get up weekly (most recently February 24th). C. falls in her home weekly as well. She requires physical assistance from visitors to get up more than 3x weekly as M./M.'s partner [are] not able to safely assist. C. chooses to ignore verbal encouragement to independently get herself off the floor of home/outdoors after she falls roughly 4-5 times out of the week. C. is observed in the home to have severe instability when choosing not to walk with her cane. She will bounce from wall to wall of hallways until she reaches her destination. Because M./M.'s partner are unable to give physical assistance (M. multiple amputations/ M.'s partner inability to lift) it remains dangerous due to inconsistency from visitors visiting. C. has verbalized that while she does have a life alert device she declines using it appropriately (broken clasp/ uncharged). C.'s phones are not within immediate reach should a fall occur. Despite multiple offers from residents in the home to acquire a cell phone or requests from them to utilize her life alert device C. declines. In an emergent situation with absence of household members C. would be unable to receive aid.[19]

The letter concludes with the following comments as to toileting:

> I disagree with the score of 2.
> C.'s bathroom usage is prolonged due to her limited mobility. She is observed to spend 45 minutes to an hour when completing bathroom necessities by M. and M.'s partner. … C. is observed to be unable to adequately wipe herself to comply with proper personal hygiene. It is often that C. is unable to make it to the bathroom in a timely [manner] which is observed through accidents in clothing. C. chooses not to clean accidents and has often been observed to leave fecal matter in her clothing with avoidance to clean independently. On a daily basis M.'s partner cleans all surfaces as well as accidents. C. is unable to consistently keep fecal matter in toilet and on toilet paper. C. is also observed to leave soiled adult diapers outside of proper and hygienic receptacles. Fecal matter is often found on and around toilet seat, on walls, light fixtures, and various other surfaces outside of bathroom within home. This proves major hassle as M. must be extremely cautious to avoid infection. Especially at this place in time as he has encountered his second amputation. When asked about her avoidance of cleaning C. dismisses any incontinence has occurred. With more focused assistance C. would be able to have a more hygienic environment with continued prompting or physical aides. This focused assistance is not available in home due to C.'s choice not to ask for assistance as well as M.'s physical inability to aid C. safely and effectively.[20]

Prior to the hearing, Ms. D. also submitted a single-page printout from the City A police department, showing "calls for EMS/Lift assistance" for the period March 1, 2021 through March 30, 2022. This document appears to show that during that 13-month period, emergency

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19 *Id.*
20 *Id.*

services were called out to Ms. D.'s home to assist her on nine separate occasions.[21] Based on testimony given later at the hearing, some of these emergency service visits may have been for incidents that took place outdoors near Ms. D.'s home.

Ms. D.'s administrative appeal hearing was held on April 8, 2022. The Division was represented by Terri Gagne. The Division presented sworn testimony from Amanda Kelsey, the Division's assessor for Ms. D.'s application, and David Chadwick, a Division manager who reviewed the assessment. Ms. D. appeared on her own behalf and testified under oath. M. D., his partner S. H., Ms. D.'s sister N. X., and Care Coordinator U. T. all appeared and provided sworn testimony in support of Ms. D..

III. Discussion

A. Method for Assessing Eligibility

The Alaska Medicaid program provides Waiver services to adults with physical disabilities who require "a level of care provided in a nursing facility."[22] The nursing facility level of care[23] requirement is determined by an assessment which is documented by the CAT.[24] The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,[25] and whether an applicant has impaired cognition or displays problem behaviors.[26] Each of the assessed items is coded and contributes 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.[27]

The CAT also records the degree of assistance the applicant requires for activities of daily living (ADL), which include five specific categories: bed mobility (moving within a bed), transfers (i.e., moving from the bed to a chair or a couch, etc.), 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 related personal hygiene care).[28]

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[21] Document entitled "Calls for EMS/Lift assistance to Address A," offered by Ms. D. and admitted into the hearing record.
[22] 7 AAC 130.205(d)(4).
[23] *See* 7 AAC 130.205(d)(4); 7 AAC 130.215.
[24] 7 AAC 130.215(4).
[25] Exh. E, pp. 12 – 14.
[26] Exh. E, pp. 15 - 18.
[27] Exh. E, pp. 32 – 33.
[28] Exh. E, pp. 18 - 19, 32 - 33.

For a person who only has physical assistance needs to score as eligible for Waiver services on the CAT, he or she would need a self-performance code of 3 (extensive assistance) or 4 (total dependence) for three or more of the five specified activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting).[29]

A person can also receive points for combinations of required professional nursing services, therapies, severely impaired cognition (memory/reasoning difficulties), or extensive difficult behaviors (wandering, abusive behaviors, etc.), and if they require either limited or extensive assistance with the five specified activities of daily living.[30]

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.[31]

B. Eligibility

Ms. D. applied for Waiver services. As an applicant, she has the burden of proof to establish that the Division's determination was incorrect.[32] As of both the date of the assessment and the date of the hearing, Ms. D. was not receiving any specialized treatments or therapies. As to this aspect of her scoring, M. D. testified that recently Ms. D. had been receiving physical therapy every week, but her physician directed her to curtail the therapy due to her recent stroke and other cardiovascular issues. He impliedly argued that she should receive a score for receiving physical therapy, notwithstanding the doctor's directive. In response, however, Ms. Kelsey and Mr. Chadwick both explained at the hearing that a person must be *actively participating* in the therapy or treatment in order to receive a qualifying score for purposes of Waiver eligibility. No evidence was presented to show that Ms. D. is participating in any other therapy or medical treatment that would add to her scoring for Waiver eligibility.

Regarding cognition, although Ms. X. testified that Ms. D. sometimes loses track of the time of day and has missed appointments, her cognitive abilities were not shown to be impaired to the degree required in order to receive a qualifying score for Waiver.[33] As to current behavioral issues, M. D. and Ms. H. provided testimony consistent with the Areas of

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29 Exh. E, p. 32.
30 Exh. E, p. 32 - 33.
31 Exh. E, p. 33.
32 7 AAC 49.135.
33 *See* Exh. E, pp. 15-16. To achieve a point towards eligibility based on cognition, Ms. D. would need to be **severely cognitively impaired** and require a minimum of limited assistance on at least one of the five scored ADLs. *See* Exh. E, pp. 32-33. The evidence did not show that she has cognitive impairment anywhere near the high threshold required for eligibility scoring.

Disagreement letter quoted above. They testified that Ms. D. does not listen to suggestions and advice regarding how to stay safe while moving throughout her house or while walking outside, that she is stubborn to an almost self-destructive degree, particularly in her refusal to ask for help with walking or toileting, and that her toileting practices are unclean and unhealthy. These issues, however, do not rise to the level of behavioral problems that would be scored high enough to assist her in qualifying for Waiver services.[34]

Because Ms. D.'s scoring for cognitive impairment and behavioral issues did not rise to a level that can assist her in qualifying for Waiver services, she would therefore require extensive or complete assistance in at least three of the five scored ADLs. "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.[35] In a 2013 decision, the Commissioner reviewed the term "weight bearing" as it is used in the CAT, and held 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.[36]

The assessment found that Ms. D. did not require any assistance with bed mobility or eating, and she does not contest these determinations. As reflected in her Areas of Disagreement letter quoted above, she contests the assessor's determinations regarding the ADLs of transfers, locomotion, and toileting. Ms. D. would need to establish that she requires extensive assistance with all three of these ADLs in order to be eligible for Waiver services.

i. Transfers

Regarding the ADL of transfers, Ms. D. argues that the assessment's finding that she needs only limited assistance (self-performance score of 2) is inadequate because she frequently is unable to "independently" transfer from her bed or from low chairs, and because emergency services have had to be called in the past when M. D. and Ms. H. were either unavailable or physically incapable of lifting her up to effect a transfer. Ms. D. states in the Areas of

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[34] *See* Exh. E, pp. 17-18. To achieve a point toward eligibility based on behavioral issues, she would have to exhibit **severe behavior issues** and require a minimum of limited assistance on at least one of the five scored ADLs. *See* Exh. E, pp. 32-33. The evidence did not show that she has behavioral problems anywhere near the high threshold required for eligibility scoring.

[35] Exh. E, p. 7.

[36] *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 through this link: MDS130271 (state.ak.us).

Disagreement letter that she is "unable to get herself out of her own bed without aid," which is not entirely consistent with the assessor's notes regarding statements she made during the assessment.

The key question here is: has Ms. D. demonstrated, by a preponderance of the evidence, that she requires weight-bearing assistance with transferring at least three times per week? This is a close call. First, it must be emphasized that M. D. and Ms. H.'s physical challenges or availability to assist Ms. D. are not the appropriate focus – the focus must be on Ms. D.'s capabilities and need for assistance. In this context, Ms. D. argues that she cannot transfer from her bed or low chairs *independently*; but this assertion does not go far enough. A caregiver could assist her by providing "contact guard" assistance, meaning that they essentially guide her in effecting the transfer without bearing her weight. This type of assistance is contemplated by the limited assistance scoring category, which is defined to include "physical help in the guided maneuvering of limbs or other non-weight bearing assistance."[37]

According to the assessor's notes taken during the assessment, Ms. D. told her that a "few times a week" she needs "help getting up off her bed because it's harder for her to get up off 'softer surfaces.'"[38] The notes also indicate that M. D. and Ms. H. told the assessor that "they will hold onto her arm and support her elbow when they help her stand up off her bed."[39] Holding onto her arm and "supporting" her elbow are more than contact guard assistance, as they involve some measure of weight-bearing assistance. A "few times a week" is interpreted to mean more than twice, or at least three times a week. These notes, combined with the testimony of M. D. and Ms. H., are sufficient to establish by a preponderance of the evidence that Ms. D. requires extensive assistance with the ADL of transfers. Therefore, this Decision finds that Ms. D. met her burden of showing that her score for the ADL of transfers should be a 3.

ii. Locomotion

Regarding the ADL of locomotion, the assessment found that "most of the time" Ms. D. was capable of locomoting (walking) in her home, without assistance, while using her cane. Nonetheless, she was scored as needing limited assistance due to her occasional dizziness and her left-side weakness. Arguing that this score was insufficient, M. D. asserts that his mother "is

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37 Exh. E, p. 7.
38 *Id.*
39 *Id.*

unable to make sound choices concerning her safety ... when walking." He points out that she chooses to walk outside in icy conditions, she rarely uses her cane even though it is readily available, and that outdoors she has been observed to "often hold [the cane] above the ground with opposition to use it for its given purpose of stability."[40] He also asserts that Ms. D. "falls in her home weekly," needs "physical assistance from visitors to get up," and "chooses to ignore verbal encouragement to independently get herself off the floor" after falling in the home.[41] M. asserts that Ms. D. has "severe instability" when she walks inside the home without using her cane, and she "bounce[s] from wall to wall of hallways" until she gets where she's going.[42] He argues overall that her difficulties with walking, combined with his and Ms. H.'s physical limitations rendering them unable to pick Ms. D. up if she falls, make this a very dangerous scenario.

M. D. expressed his concern that Ms. D.'s problems with walking could become life threatening issues for her. Based on the testimony presented at the hearing, these certainly are legitimate concerns for Mr. D. to have regarding his mother's health and physical well-being. The problem here, however, is that many of these concerns do not translate directly to an increased score for Ms. D.'s need for assistance with locomotion. First, Ms. D.'s issues with locomotion *outside of her home* do not fall within the parameters of scoring for the ADL of locomotion for Waiver eligibility purposes, which are limited to walking *within the home*. Second, Ms. D.'s poor decision-making regarding the use of her cane and life alert device, and her apparent lack of willingness to ask for assistance, relate more to her cognitive and behavioral issues, rather than her actual, physical need for assistance with walking. Third, although the Areas of Disagreement letter states that Ms. D. "requires physical assistance from visitors to get up [after falling] more than 3x weekly," that statement is preceded by "C. falls in her home weekly." Thus it is unclear from the context of the letter if the "3x weekly" assists take place inside the home or outdoors. The letter also states that Ms. D. "chooses to ignore verbal encouragement to independently get herself off the floor of home/outdoors after she falls." This comment blurs these issues by both (a) adding to the lack of clarity as to how often this typically happens indoors versus outdoors, and (b) implying that with encouragement she would be

40 Exh. 1.
41 *Id.*
42 *Id.*

physically able to get herself up. All of this evidence appears to indicate a situation where Ms. D. may need weight-bearing assistance after she refuses less strenuous assistance, falls down, and then does not make independent efforts to get herself up.

Taking into account all of the testimony and other evidence presented, this Decision finds that Ms. D. has not established that she requires extensive assistance with the ADL of locomotion. Therefore, her score of 2 for the ADL of locomotion is affirmed.

iii. Toileting

Regarding the ADL of toileting, the assessor determined that Ms. D. required limited assistance with toileting. She arrived at this conclusion, notwithstanding her findings that Ms. D. could independently walk to the bathroom, transfer on and off the toilet, and pull down her lower body clothing and "Depends" undergarments, because she needs assistance with pulling up her lower body clothing, changing her Depends, and "cleansing after a BM."[43]

Ms. D. and M. D. dispute the limited assistance determination, arguing primarily that she is "unable to adequately wipe herself," is "unable to make it to the bathroom in a timely [manner]," "chooses not to clean accidents," is often "observed to leave fecal matter in her clothing with avoidance to clean independently, and "is unable to consistently keep fecal matter in toilet and on toilet paper," resulting in fecal matter being found on walls, light fixtures and other surfaces away from the toilet.[44] These issues cause Ms. H. to have to clean the home very frequently, including cleaning the bathroom up to six times per day.

Ms. D.'s issues with toileting certainly pose hygiene issues in the home, and she clearly needs assistance to address these challenges. For purposes of Waiver eligibility, however, the focus must be on whether she requires extensive assistance - a self-performance score of 3. The testimony and other evidence presented at the hearing did not indicate that Ms. D. requires weight-bearing assistance with her toileting at least three times per week. With toileting, weight-bearing assistance is often needed in transferring on and off the toilet. As noted above, the assessor found that Ms. D. is able to transfer without assistance for toileting. The finding in this Decision above that Ms. D. requires extensive assistance with the ADL of transfers was in part based on the fact that she needs help getting up from soft surfaces such as her bed or a couch, so it does not lead to a conclusion that she also requires that level of assistance with toileting. In

43 Exh. E, p. 9.
44 Exh. 1.

addition, M. D.'s and Ms. H.'s testimony regarding Ms. D.'s toileting primarily relates to problems with cleansing and does not go to the question of her need for weight-bearing assistance.

Based on the foregoing discussion, Ms. D. did not meet her burden of establishing that the determination that she requires only limited assistance with the ADL of toileting was incorrect. The score of 2, therefore, is affirmed.

IV. Conclusion

To qualify for Waiver services, Ms. D. would need to require extensive assistance with three of the five scored activities of daily living. She requires extensive assistance with only one of those activities. Consequently, the Division's denial of her application is affirmed.[45]

Dated: May 3, 2022

SIGNED
Andrew M. Lebo
Administrative Law Judge

[45] Ms. D. is encouraged to reapply for personal care services (PCS); if found eligible, the availability of PCS assistance may allay some of Ms. H. and M. D.'s concerns regarding Ms. D.'s care.

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, 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 17th day of May, 2022.

By: SIGNED

Name: Andrew M. Lebo

Title: Administrative Law Judge

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