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

In the Matter of	)	
	)	
X. N.	)	OAH No. 22-0390-MDS
	)	

DECISION

I. Introduction

X. N. applied for Medicaid Waiver services. The Division of Senior and Disabilities Services (Division) denied the application finding he did not meet the level of care requirements for Waiver services. Mr. N. filed a timely appeal.

The hearing took place June 9, 2022. During the hearing, the Division re-assessed Mr. N.'s ability to carry out the qualifying activities of daily living and concluded he did require limited assistance from one person (performance score 2/support score 2) to perform Locomotion and Toileting. However, the Division maintained the denial of his Waiver application because the scores for his C4B Cognition and D4D Behavior capabilities remained insufficient to trigger eligibility. As discussed in detail below, the evidence at the hearing supported the Division's recalculation for ADL performance but did not support the score for C4B Cognition. To the contrary, Mr. N. met his burden to show that the Division erred.

The Division's decision is reversed with the 2022 CAT adjusted as set out below.

II. The Controlling Regulatory Framework

The Division provides access to long-term services and supports for low-income seniors and people with physical, intellectual, and developmental disabilities. Recipients are given the choice of nursing home care or a combination of home and community-based services to allow the individual to remain in place. Because individuals typically prefer to remain in their homes, if possible, most long-term services and supports are provided through Medicaid waivers.

Waiver programs allow the state to "waive" some of the federal rules governing Medicaid so that people can receive the services in place. Applicants are eligible to receive waiver benefits only if they qualify financially and meet the specified nursing facility level of care. Nursing facility level of care is defined in regulation as either skilled or intermediate, as measured by the Department's eligibility criteria.[1] Whether a person requires the necessary level

[1] 7 AAC 140.515 (skilled); 7 AAC 140.510 (intermediate).

of care is determined by the Consumer Assessment Tool ("CAT"), a federally approved, standardized nursing assessment tool.[2]

The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,[3] and whether an applicant has impaired cognition or displays problem behaviors.[4] 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, he or she would receive a score of 3.[5]

The CAT also records the degree of assistance an 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 personal hygiene care).[6] The CAT numerical coding system for ADLs has two components. The first component is the *self-performance code.* For ADLs, the possible self-performance codes relevant to determining a PCS level 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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> **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.[7]

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2 7 AAC 130.215(2).
3 Ex. E, pp. 12-14.
4 *Id.* at pp. 15-17.
5 *Id.* at p. 29-32.
6 *Id.* at pp.18-19.
7 *Id.*

The second component of the CAT scoring system is the *support code*. These codes rate the degree of assistance that a person requires for a particular ADL. For ADLs, the possible support codes used to determine a service level reflect the "most support provided" over each 24-hour period during the prior seven days. The support codes are:

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.[8]

To qualify for Waiver services based on need for physical assistance in the performance of these ADL, an individual must require extensive or complete assistance in at least three of the five scored ADLs. That is, he or she would need a self-performance code of 3 (extensive assistance) or 4 (total dependence) and a support code of 2 or 3 for three or more of the five specified activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting).

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.). Thus, a person may qualify for waiver if they score 14 points or more on the cognitive assessment component of the CAT and they require either limited or extensive assistance (self-performance 2 or 3) with a support code of 2 or 3 with any one of the five specified activities of daily living.[9] Similarly, a person may qualify for waiver if they score 15 points on the behavioral assessment component of the CAT and they require either limited or extensive assistance (self-performance 2 or 3) with a support code of 2 or 3 with any one of the five specified activities of daily living.[10]

III. Facts

A. Introductory Facts

X. N. is a fifty-five-year-old man diagnosed with schizoaffective disorder. His medical conditions include hypothyroidism and hyperlipidemia. Mr. N. has severe vision impairment which impacts his ability to perform daily activities.[11] In addition, he has traumatic brain injury from an automotive collision with a moose in his 30s that has reduced his neurological

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8 *Id.*

9 *Id.* at pp. 32-33.

10 *Id*.

11 Exs 1, 2, and G.; WM Health Services A records submitted June 7, 2022 (Hereinafter "Health Services A").

functioning. He has limits on his executive functioning capacity and difficulty retaining information, according to his treating physician, Dr. N. H. at Health Services A.[12] His ability to care for himself has declined to the point where "he cannot manage simple tasks or remember to take medication. He requires prompting of his neighbors and case manager to eat."[13] He has been repeatedly psychiatrically hospitalized.[14] A guardian was appointed for him in 2021.[15]

Mr. N. applied for Medicaid Waiver services. He was assessed via Zoom on February 24, 2022.[16] The Division notified Mr. N. that he did not qualify for the Waiver program on April 12, 2022.[17]

Mr. N. appealed.[18]

The hearing took place June 9, 2022.

B. The Hearing

Teri Gagne represented the Division. David Chadwick, supervisor for the assessment unit who performed an updated review of the CAT, testified on behalf of the Division. Exhibits A through G were admitted.

Mr. N. was represented by his guardian, D. M.. Ms. M.; Mr. N.'s care coordinator, B. U.; and another provider, C. X., testified on his behalf. Exhibits 1 and 2 as well as six emailed submissions from June 7, 2022, were considered. Those records included:

- April 2022 medical records from Eye Center A (9 pages);
- Records from Health Services A (Health Services A)(149 pages);
- June 7, 2022 Letter of Disagreement from B. U., Care Coordinator;
- Undated Letter of Disagreement from D. M., Guardian (8 pages);
- June 7, 2022 Behavioral Assessment Letter from B. U., Care Coordinator (1 page); and
- Undated letter from C. X., Legal Rep. A (1-page).

1. <u>The Division's Presentation</u>

12 Ex. G., p. 14.
13 *Id.*
14 C. M. testimony; Health Services A, pp. 2-4, 61-67, 74, 90.
15 *Id.*
16 Ex. E.
17 Ex. D.
18 Ex. C.

Between the date of Mr. N.'s appeal and the date of the hearing, two important events took place. First, Mr. N. received and submitted copies of medical and other records that had been requested to accompany his application, but not received in time for Division review due to unexpected delay. Second, the assessor who originally conducted Mr. N.'s evaluation resigned from his position with the Division, and Mr. N.'s application was re-assessed by David Chadwick, the supervisor for the assessment unit.

Mr. Chadwick's reassessment incorporated the late-submitted medical records and other information submitted by Ms. M. and Ms. U. as part of the appeal process. Mr. Chadwick re-scored the five qualifying Activities of Daily Living (ADL) as follows:

ADL	**Score**	**Interpretation**
Bed Mobility	**0/0**	**Independent, no assistance needed**
Transfers	**0/0**	**Independent, no assistance needed**
Locomotion	**2/2**	**Limited Assistance, One person**
Toileting	**2/2**	**Limited Assistance, One person**
Eating	**1/1**	**Supervision, Set up only**[19]

Mr. Chadwick also re-assessed the behavioral and cognition scores for Mr. N..[20] The April 12, 2022, evaluation originally rated Mr. N.'s Total C4B Cognition Score as 2.[21] Mr. Chadwick's updated assessment modified that to a 7.[22] Mr. Chadwick testified that he scored the pertinent section as follows:

C4B Cognition	**Original CAT Score**	**Interpretation**	**Updated CAT Score**	**Interpretation**

[19] D. Chadwick testimony.
[20] *Id.*
[21] Ex. E., pp 15-16.
[22] D. Chadwick testimony.

Memory for Events	**1**	**Cannot recall details of recent events or names of meaningful acquaintances**	**2**	**Cannot recall entire events or names without prompting**
Memory and Use of Information	**1**	**Minimal difficulty, requires direction and reminding from others 1 to 3 times a day**	**1**	**Minimal difficulty, requires direction and reminding from others 1 to 3 times a day**
Global Confusion	**0**	**Appropriately responsive to environment**	**2**	**Periodic confusion during daytime**
Spatial Orientation	**0**	**Oriented, able to find and keep bearings**	**2**	**Gets lost when walking neighborhood**
Verbal confusion	**0**	**Speaks normally**	**0**	**Speaks normally**
C4B Total	**2**		**7**	

The April 12, 2022 CAT assessment originally rated Mr. N.'s Total D2B Behavior Score as 2.[23] Mr. Chadwick's updated assessment modified that to a 5. He testified that he did not change the scores for Wandering (0)(Does not Wander); Danger to Self or Others (0)(Is not Dangerous); or Awareness of Needs (2)[Frequently (4 or more times in the last 7 days) has difficulty understanding but will cooperate when given an explanation or direction]. Mr. Chadwick did raise the Sleep Pattern score from 0 (normal) to 1 (sleeps more or less than "normal"). He also raised the Behavioral Demands on Others score from 0 (do not limit living arrangements and companions) to 2 (do limit).[24]

Mr. Chadwick acknowledged that the evidence demonstrated Mr. N. suffered medical and mental health challenges which impact his quality of life and reduce his ability to participate in normal activities. However, according to his evaluation, Mr. N. did not yet require extensive assistance with three of the five activities of daily living that are considered for Waiver eligibility. Nor did his scores on the cognitive or behavioral components of the CAT trigger Waiver eligibility.[25]

2. Mr. N.'s Presentation

[23] Ex. E., pp. 16-17.
[24] D. Chadwick testimony.
[25] *Id.*

After hearing the Division's updated assessment concluding Mr. N. needed limited assistance from one person (self-performance score 2/support code 2) with two of the five qualifying ADL, Mr. N.'s presentation focused on whether his cognitive limitations or behavioral problems were sufficiently acute to trigger Waiver eligibility for reasons other than need for simple physical assistance. Extensive background on Mr. N.'s mental health disorders and cognitive deficiencies was presented through testimony from Ms. M. and Ms. U. as well as the written materials filed prior to the hearing. The information included:

- Mr. N. was diagnosed with schizoaffective disorder as an adolescent. He has been repeatedly committed for psychiatric hospitalization.[26]

- Mr. N. received a traumatic brain injury as an adult in an automobile collision with a moose.[27]

- He receives treatment at Health Services A (HEALTH SERVICES A). Mr. N. takes a number of prescription medications, including two psychotropic mood stabilizers.[28]

- Due to his cognitive deficiencies and mental health disorders, Mr. N. is not permitted to take his medication home, but is instead provided it daily in person by his medical provider who must cue Mr. N. to open his hand and then give it to him.[29]

- In the past Mr. N. has been a vulnerable adult due to his mental health disorders and cognitive deficiencies. The HEALTH SERVICES A records document theft of his medication, resulting in potential medical instability; theft of his food, resulting in weight loss; theft of the heater in his home which prompted Mr. N. to rely on a stove as his source of warmth and posed a danger to him; and other victimization of Mr. N.. The most significant victimization appears to have occurred when two or more people "moved in" with Mr. N. and one of them murdered the other in his home.[30]

- HEALTH SERVICES A records describe Mr. N. as a "poor historian" who cannot remember how many times he has been psychiatrically hospitalized, his sister's address, and other details of his personal history.[31]

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26 Exs. 1 and G; Medical Records.
27 C. M. testimony.
28 Ex. G, p. 4.
29 Ex. G; Health Services A.
30 Health Services A at 52-65. 82, 106; D. M. testimony; B. U. testimony; C. X. testimony.
31 *Id.* at 2-4, 13-14, 61-67, 74, 90; D. M. testimony; B. U. testimony; C. X. testimony.

- Mr. N. routinely sets off to walk someplace, but then forgets where it is or his purpose and wanders within the community. He is legally blind and has an unsteady gait, so he is regularly reported as intoxicated in public. He walks in the roadway when he wanders, posing a danger to himself and others. Often members of the community will guide him to HEALTH SERVICES A, to his care coordinator's office, or back to the boarding house where he lives.[32]

- Mr. N. does not provide basic care for himself such as personal hygiene or maintain a sanitary living space. He is regularly unkempt and malodorous from the aroma of sweat and dried urine on his person and clothes. His hands and feet are not adequately cared for and must be cleaned and disinfected during his medical visits.[33]

- During the winter of 2021 Mr. N. was living alone in a "dry cabin" in City A. He grabbed something hot from the stove, burning his hands. He went outside to cool the burns in the snow where he was found by passers-by. They took him to the emergency room. Mr. N. could not communicate that he burned himself, so the treating physicians mistakenly diagnosed his injuries as frostbite based on where he was found. It was not until one of Mr. N.'s regular care providers later checked on him that the mistake was discovered and corrected.[34] His ability to recall and communicate has not improved. Mr. N.'s inability to recall events or communicate them in an important setting on that occasion prompted the filing of an involuntary guardianship on his behalf.[35]

- The involuntary guardianship was granted in 2021.[36]

- Mr. N.'s guardian moved him from the dry cabin to the Boarding Home A Boarding House (Boarding Home A) in September 2021. At the time Mr. N. was so filthy and infested with bed bugs and other parasites that the owner of the boarding house would not permit him to enter until he had been bathed, treated, and his clothing replaced.[37]

- In the nine months since his move to the Boarding Home A, Mr. N. has bathed at most 3 or 4 times. On those occasions he was cued and supervised by the boarding house owner who also washed Mr. N.'s hair. The boarding house owner or other residents also repeatedly cue Mr. N. how to eat, drink, and perform other activities each day.[38]

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32 C. M. testimony; B. U. testimony,

33 C. M. testimony; B. U. testimony; Ex. 1, p. 8; Medical Records, pp. 28-45.

34 . C. M. testimony; B. U. testimony; Ex, G., p. 4.

35 C. M. testimony.

36 *Id.*

37 *Id.*

38 *Id.;* B. U. testimony; Ex. 1, p. 8.

- In February 2022, Mr. N. was taken to an appointment with the eye doctor to address his vision. The doctor and his assistants wore gloves to work with Mr. N. due to his unkempt, bug infested, and malodorous state. Without his guardian present, Mr. N. would not have been able to meaningfully participate in the examination.[39]

Ms. M. argued that the same information that justified Mr. N.'s guardianship also demonstrated he was eligible for Waiver under the C4B Cognition criteria. She, Ms. U. and Ms. X. testified that due to his brain injury and mental health diagnosis, Mr. N. has a poor memory for events and is unable to adequately use information. He lacks the cognitive ability to accurately remember and relay information as demonstrated by his past history. They argued that while Mr. N. may be physically capable of bathing, toileting, dressing, and other activities with assistance, he does not have the cognitive functioning to understand why he should do so, when it is time to do so, or how to do so without constant supervision and cueing.

They also testified Mr. N. cannot remember and use the information he is given on how to take care of himself. Thus, it is not enough to explain to him how to take his medication, change clothes, bathe, eat, or toilet (including how to clean properly). He must be supervised and re-cued multiple times a day because he cannot recognize the importance of doing so on his own or remember to do so independently.[40]

Ms. U. and Ms. X. described other aspects of Mr. N.'s lack of cognitive functioning, spatial orientation, and global functioning. In addition to getting lost in the community and walking in the street, they provided two specific, recent examples of Mr. N. lack of orientation and overall confusion. According to their testimony, during the February 2022 CAT assessment, Mr. N. needed to use the toilet, but could not remember the location of the bathroom despite his familiarity with the building; that is, he got lost in his present surroundings. In addition, Mr. N. has been unable to recognize and name one of his long-term care providers, including when she rescued him walking in the street after he became disoriented. He "knows" who she is, but he still cannot recall her name or recognize her face.[41]

Based on the foregoing information, they argued that Mr. N. remained underscored for his lack of cognitive capabilities even under Mr. Chadwick's updated CAT scoring. They argued

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[39] XN Eye Medical Records submitted June 7, 2022; C. M. testimony; C. X. testimony.

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[40] C. M. testimony; B. U. testimony; C. X. testimony; Ex. 1, p. 8.

[41] B. X. testimony; C. U. testimony.

the appropriate cognitive score was 15. They also argued that Mr. N. was underscored for his behavioral problems under the updated CAT score.[42]

Both Ms. U. and Ms. M. testified that in the past only extraordinary efforts by his care providers have kept Mr. N. from institutionalization; those efforts are no longer possible and without waiver assistance, he is certain, in their opinion, to lose his current housing and be returned to institutionalization.[43]

IV. Discussion

A. Burden of Proof

As an applicant for new services, Mr. N. bears the burden of proof by a preponderance of the evidence.[44] On appeal, the Division's determination is reviewed in light of all the evidence in the record.[45]

B. Eligibility

Mr. N. does not receive professional nursing services. Because he does not receive professional nursing services or therapy five times or more per week, he is not eligible for Waiver services based upon that criteria.[46]

Mr. N. did not meaningfully argue that he requires extensive physical assistance with any of the five specified activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting). The Division's updated coding of his needs as described by Mr. Chadwick during the hearing is therefore appropriate. He is not eligible for Waiver based solely on a need for physical assistance.[47]

However, because Mr. N. does require limited assistance with a support code of 2 on the qualifying ADLs of Locomotion and Transfer, he is eligible for Waiver if either his cognition or behavioral scores are sufficiently elevated.[48] In reviewing the evidence regarding Mr. N.'s cognition, the medical records from HEALTH SERVICES A and testimony from Mr. N.'s guardian and care coordinator were the most persuasive evidence. The evidence presented

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42 *Id.*

43 *Id.*; Ex. 1., p. 7

44 7 AA 49.135; *see also, Amerada Hess Pipeline v. Alaska Public Utilities Comm'n*, 711 P.2d 1170, n. 14 at 1179 (Alaska 1986)(party seeking a change in the status quo has the burden of proof by a preponderance of the evidence).

45 *See In Re F.M.*, at 3, OAH No. 13-1051-MDS (Commissioner of Health and Social Services 2014).

46 Ex. E, p. 31-32.

47 *Id.* .

48 *Id.*

demonstrated that it was more likely than not true that Mr. N.'s C4B Cognition evaluation should be adjusted.

Mr. N. has substantially impaired cognition. He demonstrated that it was more likely true than not true that he should have received a total impaired C4B Cognition score of 14. That score is appropriate as evidenced by his inability to remember entire events such as his prior hospitalizations, sister's address, or recognize a long-term care provider (Memory for Events: 3); he cannot remember or use information without continual verbal reminding (Memory and Use of Information: 4) as evidenced by Dr. H.'s letter,[49] his medication management at HOSPITAL A, and the description of his need for repetitive supervision and cueing to perform ADL; he is periodically confused in the daytime (Global Confusion: 2); he gets lost in his present surroundings as demonstrated by what happened when he sought to use the bathroom during the CAT assessment (Spatial Orientation: 3); and he can only carry out simple conversations (Verbal Communication: 2). This is sufficient for him to obtain a scoring point on questions NF3 and NF6 of the CAT.[50]

Because Mr. N. qualifies for Waiver services on this basis, it is unnecessary to address his claim that he is also eligible under the behavioral standard.

[49] Ex. G, p. 14.
[50] Ex. E., p. 32-33.

V. Conclusion

The evidence demonstrated Mr. N. suffers medical and mental health challenges which impact his quality of life and reduce his ability to participate in normal activities. At age 55, Mr. N. is legally blind and suffering from an array of mental health and cognitive challenges, including some that make impact his judgement and executive functioning to the degree he qualifies for waiver services.

As a result, the Division's denial of his application is reversed with the 2022 CAT adjusted as follows:

ADL	**Score**	**Interpretation**
Bed Mobility	**0/0**	**Independent, no assistance needed**
Transfers	**0/0**	**Independent, no assistance needed**
Locomotion	**2/2**	**Limited Assistance, one person**
Toileting	**2/2**	**Limited Assistance, one person**
Eating	**1/1**	**Supervision, set up help only**

C4B COGNITION	**Score**	**Interpretation**
Memory for Events	**3**	**Cannot recall entire events or names w/o prompt**
Use of Information	**4**	**Cannot remember; requires constant reminding**
Global Confusion	**2**	**Is periodically confused in the daytime**
Spatial Orientation	**3**	**Gets lost in his present surroundings**
Verbal Communication	**2**	**Able to carry out only simple conversations**

Dated: June 30, 2022

SIGNED
Carmen E. Clark
Administrative Law Judge

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 15th day of July, 2022.

By: SIGNED
Name: Cheryl Mandala
Title: Deputy Chief Administrative Law Judge

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