

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

In the Matter of	)	
	)	
M Q	)	OAH No. 12-0195-MDS
_____	)	Division No.

**DECISION AFTER REMAND**

**I. Introduction**

M Q receives Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Department of Health and Social Services, Division of Senior and Disabilities Services (Division) notified Mr. Q that he was no longer eligible for Waiver services, and that they would be discontinued.<sup>1</sup> Mr. Q requested a hearing.<sup>2</sup>

Mr. Q’s hearing was held on August 15, 2012. Mr. Q represented himself and testified on his own behalf. N J, Mr. Q’s care coordinator with No Name Foundation, helped represent him and testified on his behalf. V Q, Mr. Q’s wife, testified on his behalf.

Gerry Johnson represented the Division. Jan Bragwell, RN, Moli Atanoa, RN, Grace Ingram, RN, and Katherine Collins, MD, testified on the Division’s behalf. The hearing was recorded.

A proposed decision was issued finding that Mr. Q’s Waiver services should not be terminated. The basis for that decision was that the Division did not comply with AS 47.07.045(b)(2)(B), which requires that the third-party independent review of potential Waiver terminations be performed by an Alaska licensed registered nurse. The Division filed a proposal for action, arguing that the administrative law judge (ALJ) did not conduct an adequate factual inquiry into whether the requisite third-party independent review was performed by an Alaska licensed registered nurse. The Deputy Commissioner for Medicaid and Health Care Policy declined to adopt the ALJ’s proposed decision and, in accordance with AS 44.64.060(3), returned this case to the ALJ:

to take additional evidence about whether the nurse and physician third-party review conducted by Qualis, as testified to by Grace Ingram, included a review by a registered nurse who was licensed in Alaska at the time of the review. If the evidence demonstrates that the third-party review complied with the requirements

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<sup>1</sup> Ex. D.  
<sup>2</sup> Ex. C.

of AS 47.07.045(b)(2)(B) to include a registered nurse licensed in Alaska in the third-party review process, then the Administrative Law Judge shall, based upon the testimony in the record, make additional findings about the Department's finding of material improvement.

A supplemental hearing was held on November 7, 2012 to implement the Deputy Commissioner's instructions. Gerry Johnson again represented the Division. Mr. Q represented himself and was assisted in his representation by M T, a care coordinator with No Name Foundation. Deon Westmorland, the director of nursing at Qualis Health, was the only witness at the supplemental hearing.

As discussed below, the facts adduced at the supplemental hearing demonstrate that the Division complied with the third-party review requirements of AS 47.07.045(b)(2)(B). Given that, and the evidence presented at the original August 15, 2012 hearing, this decision concludes that Mr. Q's condition has materially improved and as a result, the Division's decision terminating his Waiver services is AFFIRMED.

## **II. Facts**

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

Mr. Q is a 51 year old man who was found eligible for Waiver services in 2007 after having been severely injured from a gunshot wound.<sup>3</sup> That eligibility was determined by an assessment, documented by the Consumer Assessment Tool (CAT), which found that he required colostomy care and limited one person physical assistance with locomotion within the home, and toileting.<sup>4</sup>

Mr. Q was reassessed on March 14, 2012 by Ms. Atanoa, a registered nurse employed by the Division, to determine whether or not he continued to be eligible for Waiver services. Ms. Atanoa documented the assessment on the Consumer Assessment Tool (CAT) and determined that Mr. Q no longer required colostomy care and no longer required physical assistance with his locomotion, within the home, and toileting. The CAT also stated that Mr. Q does not require physical assistance with bed mobility (turning and moving in bed), transfers, or eating. He does, however, require one person physical assistance with his bathing. In addition, Mr. Q does not require professional nursing services, therapy from qualified therapist, and specialized treatment

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<sup>3</sup> Ex. F, pp. 1 - 14.

<sup>4</sup> Ex. F, pp. 5 - 6, 13.

or therapies. Consequently, the scoring on his 2012 CAT found him no longer eligible for Waiver services.<sup>5</sup>

The 2012 CAT is, with the exception of recording Mr. Q's need for assistance of locomotion within the home, an accurate assessment of Mr. Q's nursing needs and physical condition. No evidence was presented showing that he needs colostomy care, physical assistance with bed mobility, transfers, toileting, or eating. The facts relative to Mr. Q's need for physical assistance with locomotion show that he is able to walk with a cane.<sup>6</sup> He has ongoing pain and muscle spasms in his left leg. His left leg will go out on him without warning. When he is at home, this happens approximately twice per week. He has more difficulty walking outside his home. When he is outside the home, his leg will go out on him several times per day. When his leg goes out, he grabs onto his wife to keep from falling. His wife also helps him take showers. She is essentially his unpaid personal care assistant and helps him with at home physical therapy.<sup>7</sup>

A registered nurse employed by Qualis Health, who was licensed in the State of the Alaska at the time of the review, performed a third-party review of the Division's determination that Mr. Q was no longer eligible for Waiver services. She concluded, based upon her review of the documents supplied by the Division, including the most current CAT, that its determination was correct.<sup>8</sup> Dr. Collins, a physician licensed in the State of Washington who is employed by Qualis Health as an assistant medical director, also performed a third-party review of the Division's determination that Mr. Q was no longer eligible for Waiver services. She concluded, based upon her review of the documents supplied by the Division, including the most current CAT, that its determination was correct.<sup>9</sup>

### **III. Discussion**

#### ***A. Method for Assessing Eligibility***

The Alaska Medicaid program provides services, known as Home and Community-Based Waiver services, to adults who experience physical disabilities and require "a level of care

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<sup>5</sup> Atanoa testimony; Ex. E, pp. 5 – 11, 13 – 15, 18, 29.

<sup>6</sup> Atanoa testimony.

<sup>7</sup> Mr. and Mrs. Q testimony.

<sup>8</sup> Deon Westmorland testimony.

<sup>9</sup> Dr. Collins testimony.

provided in a nursing facility.”<sup>10</sup> The purpose of these services is “to offer a choice between home and community-based waiver services and institutional care.”<sup>11</sup>

The nursing facility level of care<sup>12</sup> requirement is determined in part by an assessment which is documented by the CAT.<sup>13</sup> The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,<sup>14</sup> and whether or not an applicant experiences impaired cognition, or problem behaviors.<sup>15</sup> 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 would receive a score of 3.<sup>16</sup>

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.<sup>17</sup>

If a person has a self-performance code of 2 (limited assistance, which consists of non-weight bearing physical assistance three or more times during the last seven days, or limited assistance plus weight-bearing assistance one or two times during the last seven days) or 3 (extensive assistance, which consists of weight-bearing support three or more times during the past seven days, or the caregiver provides complete performance of the activity during a portion of the past seven days) plus a support code of 2 (physical assistance from one person) or 3 (physical assistance from two or more persons), that person receives points toward his total eligibility score on the CAT. 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 required assistance with the five specified activities of daily living.<sup>18</sup>

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<sup>10</sup> 7 AAC 130.205(d)(1)(B) and (d)(2).

<sup>11</sup> 7 AAC 130.200.

<sup>12</sup> See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

<sup>13</sup> 7 AAC 130.230(b)(2)(B).

<sup>14</sup> Ex. E, pp. 13 – 15.

<sup>15</sup> Ex. E, pp. 16 - 17.

<sup>16</sup> Ex. E, p. 29.

<sup>17</sup> Ex. E, p.18.

<sup>18</sup> Ex. E, p. 29.

In order for a person, who only has physical assistance needs, to score as eligible for Waiver services on the CAT, he 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).<sup>19</sup>

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.<sup>20</sup>

***B. Eligibility***

The evidence in this case shows that Mr. Q does not score as eligible for Waiver services on his 2012 CAT. He no longer requires colostomy care, and the evidence does not show that he requires any professional nursing services, therapies from a qualified therapist, or special treatments. There is no evidence that he experiences either impaired cognition or difficult behaviors. Consequently, he would only score as qualifying for Waiver services on the CAT if he required either extensive assistance (self-performance code of 3) or is totally dependent for assistance (self-performance code of 4) from one or more persons (support code of 2 or 3) with regard to at least three of the five specified activities of daily living (bed mobility, transfer, locomotion within the home, eating, and toileting).

As stated in the facts above, Mr. Q does not require assistance with bed mobility, transfers, eating, or toileting. Bathing, where he was scored as needing assistance is not one of the activities of daily living which would contribute toward his eligibility score on the CAT.

Mr. Q did show that he requires some assistance with locomotion because his left leg goes out on him. This happens frequently when he is outside his home. However, this only happens approximately twice a week when he is within his home, and he has to grab onto his wife for support to keep from falling. At the very most, this would be scored with a self-performance code of 2 (limited assistance, which consists of non-weight bearing physical assistance three or more times during the last seven days, or limited assistance plus weight-bearing assistance one or two times during the last seven days) and a support code of 2 (one personal physical assistance). However, in order to qualify for Waiver services based solely on his need for physical assistance, he must require extensive assistance from another person with three of the specified activities of

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<sup>19</sup> Ex. E, p. 29.

<sup>20</sup> Ex. E, p. 29.

daily living. Because Mr. Q, at most, only requires limited assistance from another person with one of the five specified activities of daily living, locomotion within the home, he does not score as qualifying for Waiver services on his 2012 CAT.

**C. Termination of Waiver Services**

Before the Division may terminate Waiver services for a person who was previously approved for those services, Alaska Statute 47.07.045, enacted in 2006, requires that it must satisfy two conditions. First, the Division must conduct an assessment that shows the recipient's condition has materially improved to the point that the recipient "no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for waiver services."<sup>21</sup> As discussed above, Mr. Q's 2012 assessment, as reflected by the scoring on his 2012 CAT, even when adjusted for his need for assistance for locomotion within the home, demonstrates that his condition has materially improved where he "no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for waiver services."

Second, the Division's assessment showing material improvement must be "reviewed by an independent qualified health care professional under contract with the department; for purposes of this paragraph [in the present context], 'independent qualified health care professional' means, . . . a registered nurse licensed under AS 08.68."<sup>22</sup> The Division satisfied this condition by having an Alaska registered nurse, employed by Qualis Health, perform a third-party review. The reviewer agreed with the Division's conclusion that Mr. Q's condition had materially improved.

**IV. Conclusion**

Mr. Q's condition has materially improved to the point that he no longer qualifies for

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<sup>21</sup> AS 47.07.045(b)(1) and (b)(3)(C).

<sup>22</sup> AS 47.07.045(b)(2). AS 08.68 is the portion of the Alaska Statutes which requires that a person who practices professional nursing in the State of Alaska be licensed by the Alaska Board of Nursing. *See* AS 08.68.160 *et. seq.*

Medicaid Waiver services. The Division's decision to terminate Mr. Q's Waiver services is AFFIRMED.

DATED this 23rd day of November, 2012.

*Signed*  
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Lawrence A. Pederson  
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 26<sup>th</sup> day of November, 2012.

By: *Signed*  
\_\_\_\_\_  
Name: Kimberli Poppe-Smart  
Title: Deputy Commissioner  
Agency: DHSS

[This document has been modified to conform to the technical standards for publication.]