

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

In the Matter of)
)
 K T)
)
_____)

OAH No. 12-0393-MDS
Division No.

DECISION

I. Introduction

K T receives Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (Division) notified Ms. T that she was no longer eligible for Waiver services, and that they would be discontinued.¹ Ms. T requested a hearing.²

Ms. T’s hearing was held on October 24 and November 5, 2012. Mark Regan, of the Disability Law Center, represented Ms. T. Kimberley Allen, Assistant Attorney General, represented the Division. The parties completed post-hearing briefing on December 7, 2012.

The evidence in this case demonstrates that Ms. T’s condition has not materially improved and as a result, the Division’s decision terminating her Waiver services is REVERSED.

II. Facts

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

Ms. T is in her mid-60s. She was found eligible for Waiver services in 2005 after undergoing lumbar spine fusion and the insertion of a titanium rod in her back.³ That eligibility was determined by an assessment, documented by the Consumer Assessment Tool (CAT), which found that she required extensive one person physical assistance with her activities of bed mobility, transfers, and toilet use.⁴ At the time, Ms. T was recovering from surgery, had impaired physical and mental functioning, was subject to frequent falls, experienced continuous pain, and was being weaned down on her pain medications.⁵

Ms. T was reassessed on April 2, 2012 by Ms. Johns, a registered nurse employed by the Division, to determine whether or not she continued to be eligible for Waiver services. Ms.

¹ Ex. D.
² Ex. C.
³ Ex. F, pp. 1, 11.
⁴ Ex. F, pp. 3, 11.
⁵ Ex. F, p. 1.

Johns documented the assessment on the Consumer Assessment Tool (CAT) and determined that Ms. T no longer required extensive one person physical assistance with her activities of bed mobility, transfers, and toilet use, but instead required limited one person physical assistance with these activities.⁶ The assessor's conclusions were based, in part, upon her observation that Ms. T was able to "transfer independently, but slowly, on and off kitchen chair."⁷ The assessment also found Ms. T walked using a cane and required supervision while walking (locomotion) within the home.⁸ In addition, Ms. T does not require professional nursing services, therapy from a qualified therapist, or specialized treatment or therapies. Consequently, the scoring on her 2012 CAT found that she was no longer eligible for Waiver services.⁹ Ms. Johns did not testify.

Several registered nurses employed by the Division reviewed the CAT and underlying documentation. They concurred with the conclusion that Ms. T was not eligible for Waiver services.¹⁰

A registered nurse employed by Qualis Health, who was licensed in the state of Alaska at the time of the review, performed a third-party review of the Division's determination that Ms. T was no longer eligible for Waiver services. She concluded, based upon her review of the documents supplied by the Division, including the 2012 CAT, that its determination was correct.¹¹ 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 Ms. T 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.¹²

Ms. T, Mr. T, and Ms. T's PCA, C Q, all testified regarding Ms. T's need for physical assistance during her activities of bed mobility, transfers, and toilet use. Their testimony was consistent and credible.¹³ Ms. T did not dispute the fact that she could get in and out of her

⁶ Ex. E, pp. 6, 9, 12.

⁷ Ex. E, p. 9.

⁸ Ex. E, p. 7.

⁹ Ex. E, p. 29.

¹⁰ Sam Cornell testimony; Susan Findley testimony.

¹¹ Deon Westmorland testimony.

¹² Dr. Collins testimony.

¹³ This credibility determination is based, in part, upon the observation of the witnesses' demeanor during their in person testimony.

kitchen chair, but explained that was due to the chair having arms, which she could use to leverage herself in and out of that chair. However, Ms. T has limited mobility due to the rod in her back. She requires in-bed positioning that requires her to be lifted and repositioned within the bed. She is physically assisted in her transfers in and out of the bed. She is physically assisted in getting into and out of her recliner, in getting in and out of the shower, and she is physically assisted in her transfers on and off of the toilet. Each of these activities involves weight bearing assistance, not merely Ms. T holding onto someone for balance or stability purposes, or using someone as a grab bar while she does the actual physical work. For example, Ms. T testified that when she sits down in her recliner “they have to hold me up and gently set me down.”¹⁴ Similarly, to get out of the recliner, she has to be picked up from the recliner.

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 provided in a nursing facility.”¹⁵ The purpose of these services is “to offer a choice between home and community-based waiver services and institutional care.”¹⁶

The nursing facility level of care¹⁷ requirement is determined in part by an assessment which is documented by the CAT.¹⁸ The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,¹⁹ and whether or not an applicant experiences impaired cognition or problem behaviors.²⁰ 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, she would receive a score of 3.²¹

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

¹⁴ Ms. T testimony.

¹⁵ 7 AAC 130.205(d)(1)(B) and (d)(2).

¹⁶ 7 AAC 130.200.

¹⁷ See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

¹⁸ 7 AAC 130.230(b)(2)(B).

¹⁹ Ex. E, pp. 13 - 15.

²⁰ Ex. E, pp. 16 - 17.

²¹ Ex. E, p. 29.

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.²²

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 her 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.²³

In order for a person, who only has physical assistance needs, to score as eligible for Waiver services on the CAT, 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).²⁴

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.²⁵

B. Eligibility

Ms. T argues that the 2012 CAT did not accurately reflect her care needs, and that she should have been scored as requiring extensive assistance in her activities of bed mobility, transfers, and toileting. For her to qualify as requiring extensive assistance in these activities, she must require weight bearing support to conduct them. The facts, as discussed above, show that Ms. T requires weight bearing support for each of these activities. While this is different than what Ms. Johns reported when she initially scored the CAT, Ms. Johns did not testify and was not available for cross-examination. On the other hand, Ms. T presented witnesses who all

²² Ex. E, p. 18.

²³ Ex. E, p. 29.

²⁴ Ex. E, p. 29.

²⁵ Ex. E, p. 29.

testified credibly that she needs more assistance than was reflected in Ms. Johns' assessment. This testimony outweighs Ms. Johns' assertions in her assessment.²⁶

The Division argues that in order to qualify as needing extensive assistance (self-performance code 3), Ms. T would need complete weight bearing support by a caregiver, and not be able to assist in the activity in issue.²⁷ It should be noted that neither the CAT nor the Alaska Medicaid regulations define the term "weight bearing." "Bearing" is generally defined as "[s]omething that bears weight or acts as a support."²⁸ "Weight bearing" would therefore mean bearing or supporting a person's weight; the definition does not imply bearing 100% of the person's weight.

The Division presented two Division registered nurse witnesses who provided differing interpretations of the term "weight bearing." Ms. Matson testified that a person would be coded as requiring extensive assistance (self-performance code 3) if a caregiver "took on a person's weight in any capacity."²⁹ Ms. Findley, on the other hand, testified that "extensive assistance is a client who needs full caregiver support because the person is unable to participate meaningfully in the activity"³⁰ and that a recipient would receive an extensive assistance code of 3 if she "could not assist in the activity."³¹ She further testified that if a recipient could bear "some of her weight," it would be scored as limited assistance (code of 2).³² In order to address these conflicting interpretations, it is necessary to look at the exact definitions of limited assistance (self-performance code 2), extensive assistance (self-performance code 3), and total dependence (code 4) contained in the CAT.

Limited assistance (self-performance code 2) is defined as "Person highly involved in activity; recieved (sic) physical help in guided maneuvering of limbs, or other nonweight-bearing assistance 3+ times – or – Limited assistance (as just described) plus weight-bearing 1 or 2 times during last 7 days." Extensive assistance (self-performance code 3) is defined as "While person performed part of activity, over last 7-day period, help of following type(s) provided 3 or more

²⁶ The Division need not always call the assessor as a witness. The assessor's explicit and implicit statements in the CAT can be relied on. But when credible testimony is presented to contradict the assessment, the trier-of-fact may find that the testimony outweighs the assessor's statements.

²⁷ See, e.g., "she bears part of her weight and is fully involved in the activity. This means she needs assistance, but not extensive assistance." Division's December 7, 2012 Reply Brief at 5.

²⁸ *Webster's II New Riverside University Dictionary* 160 (Riverside Publishing 1988).

²⁹ Matson October 24, 2012 testimony at 58:44.

³⁰ Findley November 5, 2012 testimony at 1:35.

³¹ Findley November 5, 2012 testimony at 1:36.

³² Findley November 5, 2012 testimony at 1:37.

times: Weight-bearing support[,] Full staff/caregiver performance during part (but not all) of last 7 days.” Total dependence (self-performance code 4) is defined as “Full staff/caregiver performance of activity during ENTIRE 7 days.”³³ Based on these definitions, extensive assistance as used in the CAT does not require “complete” weight bearing support, as argued by the Division, for two separate reasons. First, the definition does not include the term “complete.” Second, the definition allows the recipient to have “performed part of the activity.”

Ms. Matson’s interpretation is closer to the correct interpretation. While “weight bearing” is probably something more than the slightest possible amount, it does not mean 100% of a person’s weight. The interpretation urged by the Division for extensive assistance, “complete” weight bearing support, is actually far closer to the definition for total dependence than it is for extensive assistance. For purposes of scoring the CAT, weight bearing means more than a minimum amount of support but may be less than 100% of a person’s weight.

Ms. T’s need for weight bearing support in her activities of bed mobility, transfers, and toileting should have been coded as her requiring extensive assistance (self-performance code of 3) on her 2012 CAT instead of limited assistance (self-performance code of 2). Consequently, the rescored 2012 CAT shows that Ms. T continues to be eligible for Waiver services.

C. Termination of Waiver Services

Before the Division may terminate Waiver services for a person who was previously approved for those services, 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.”³⁴ As discussed above, Ms. T’s 2012 assessment, when the scoring is adjusted to reflect her need for extensive assistance with her activities of bed mobility, transfers, and toileting, demonstrates that she continues to qualify for Waiver services.

The second condition that the Division must comply with is a third-party independent review to determine whether the Division’s decision to terminate Waiver services is appropriate.³⁵ The Division complied with this requirement. It also had several of its own nurses review the termination. All of the reviewers concurred that Ms. T was no longer eligible

³³ Ex. E, p. 18.

³⁴ AS 47.07.045(b)(1) and (b)(3)(C).

³⁵ AS 47.07.045(b)(2)(B).

for Waiver services. However, those reviews were based upon the 2012 CAT, which scored Ms. T as not requiring extensive assistance in her activities of bed mobility, transfers, and toileting. Because those reviews were based upon an erroneously scored CAT, they cannot be used to support termination of Waiver services.

IV. Conclusion

The Division did not establish that Ms. T's condition has materially improved to the point where she no longer qualifies for Medicaid Waiver services. The Division's decision to terminate Ms. T's Waiver services is REVERSED.

DATED this 21st day of December, 2012.

Signed _____
Lawrence A. Pederson
Administrative Law Judge

Non-Adoption Options

Under the authority delegated to me from the Commissioner of Health and Social Services in accordance with AS 44.64.060(e), I conclude that the Proposed Decision in OAH No.12-0393-MDS must be revised to reflect the opposite result. More specifically, the evidence in this case demonstrates that Ms. T's condition has materially improved and as a result, the Division's decision terminating her Waiver services is AFFIRMED.

As discussed on pages 6-7 of the Proposed Decision, a third-party independent review is a condition required by statute that must be satisfied before the Division may terminate Waiver services for a person who was previously approved for those services. See *Proposed Decision* at 6-7; AS 47.07.045(b)(2). The Proposed Decision's result is incorrect because it provides no weight to the evidence pertaining to the third-party independent review in this matter, while giving excessive weight to the testimony of Ms. T and her witnesses. The Proposed Decision relies on the testimony of Ms. T and her witnesses to conclude that the CAT was "erroneously scored." *Proposed Decision* at 7; See Also *Proposed Decision* at 5 ("This testimony outweighs Ms. Johns' assertions in her assessment."). Under this logic, the Proposed Decision then concludes that the results of the third-party independent review are of no consequence because "those reviews were based upon . . . an erroneously scored CAT[.]" *Id.* at 7. This logic is incorrect because it fails to account for the comprehensiveness of the third-party independent review.

The record in this case includes the Denial of Alaska Waiver Payment for Waiver Services that was sent by certified mail to Ms. T and dated August 24, 2012. See *Record* at Exhibit D. The second page of this letter explains the third-party independent review process. *Id.* It states, "Qualis reviews documentation provided by SDS, including medical and functional records and assessment findings to conduct reviews to formulate a conclusion." *Id.* This explanation is supported by the facts in the Proposed Decision. See *Proposed Decision* at 2. In an effort to see the entire process of the third-party independent review, as specified in the record, I am providing a long narrative from the facts section of the Proposed Decision.

Several registered nurses employed by the Division reviewed the CAT and underlying documentation. They concurred with the conclusion that Ms. T was not eligible for Waiver services.

A registered nurse employed by Qualis Health, who was licensed in the state of Alaska at the time of the review, performed a third-party review of the Division's determination that Ms. T was no longer eligible for Waiver services. She concluded, based upon her review of the documents supplied by the Division, including the 2012 CAT, that its determination was correct. 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 Ms. T 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. *Proposed Decision* at 2.

These facts are significant because they demonstrate two important points that support the conclusion that the third-party independent review should receive more weight as evidence than it did in the Proposed Decision. First, three different parties, all of whom are licensed professionals in the medical field, reviewed Ms. John's assessment of Ms. T and all came to the same conclusion as Ms. Johns. Second, the facts and Exhibit D in the record clearly indicate that the third-party independent review considers more than just the CAT scores in its review. See *Proposed Decision* at 2 ("She concluded, based upon her review of the documents supplied by the Division, including the 2012 CAT, that its determination was correct."). This means that even if the CAT assessment was "erroneously scored," as is maintained in the Proposed Decision, the third-party independent review cannot be discounted as flawed because it considers more than just the scores from the CAT. This is further supported by testimony in the record indicating that in past cases, the third-party independent review has disagreed with and rejected findings from the Division that Waiver services should be terminated. *Testimony October 24* at 3:17:50-3:18:15.

Since the third-party independent review was conducted properly, and since it considered both the CAT scores and other documents to reach its conclusion, there is no reason to give more weight to the testimony of Ms. T and her witnesses over the professional reviews of Division nurses, an independent licensed nurse, and an independent licensed physician. Additionally, there is no reason to attempt to define or interpret the meaning of "weight bearing." See *Proposed Decision* at 5. Ms. T and her witnesses testified to their interpretation of the assessment and the Division offered its interpretation of the assessment along with the interpretation of a third-party independent review. After weighing both sets of interpretations along with the over evidence in this case, a conclusion can be reached without attempting to create new meanings for terms and scores.

Consequently, after properly weighing the evidence in the record, I conclude that the CAT assessment is valid and correct. Accordingly, the Division did establish that Ms. T's condition has materially improved to the point where she no longer qualifies for Medicaid Waiver services. Therefore, the Division's decision to terminate Ms. T's Waiver services was proper and is hereby AFFIRMED. The Proposed Decision for OAH No. 12-0393-MDS is revised and adopted accordingly.

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 30th day of January, 2013.

By: Signed
Jared C. Kosin, J.D., M.B.A.
Executive Director
Office of Rate Review, DHSS

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