

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

In the Matter of)	
)	
N N)	OAH No. 12-0448-MDS
_____)	Division No.

DECISION

I. Introduction

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

Ms. N’s hearing was held on December 18, 2012 and February 4, 2013. Ms. N represented herself and testified on her own behalf. K J, Ms. N’s husband, helped represent her and testified on her behalf.

Gerry Johnson represented the Division. Susan Findley, RN, Claudia Eaves, Deon Westmorland, RN, and Eric Wall, MD, testified on the Division’s behalf.

Ms. N’s condition has materially improved since she was initially approved for Waiver services and as a result, the Division’s decision terminating her Waiver services is **AFFIRMED**.

II. Facts

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

Ms. N was found eligible for Waiver services in 2008 after having a malunion of a fracture in her right leg, which caused her an inability to bear weight on that leg. Her eligibility was determined by an assessment, documented by the Consumer Assessment Tool (CAT), which found that she required extensive one person assistance with her transfers, locomotion, and toileting.³

Ms. N was reassessed on April 18, 2012 by Lesley Johns, a registered nurse employed by the Division, to determine whether she continued to be eligible for Waiver services. Ms. Johns documented the assessment on the Consumer Assessment Tool (CAT) and determined that Ms.

¹ Ex. D.
² Ex. C.
³ Ex. F, pp. 2 – 4, 6, 14.

N no longer required physical assistance with her transfers, locomotion, or toileting. The CAT also stated that Ms. N does not require physical assistance with bed mobility (turning and moving in bed) or eating.⁴ In addition, Ms. N does not require professional nursing services, therapy from a qualified therapist, specialized treatment, or therapies.⁵ Consequently, the scoring on her 2012 CAT found that she was no longer eligible for Waiver services.⁶

The 2012 CAT is an accurate assessment of Ms. N's nursing needs and professional treatment needs. No evidence was presented that she has professional nursing needs, or is currently receiving physical or other therapies.

Ms. N has undisputed problems with her short term memory. However, no evidence was presented that her cognitive skills were seriously affected or that she required professional intervention to address memory or cognitive issues.⁷ Additionally, no evidence was presented that she displays any disturbed behavior patterns (acting socially inappropriately, or placing herself or others at risk), which require any professional intervention.⁸

Ms. N has a seizure disorder.⁹ Her husband came home once to find her unconscious on the floor as a result of a seizure. She also was robbed while having a seizure in a grocery store.¹⁰ Her seizures do not occur weekly, but are intermittent. Her most recent seizures consisted of two to three in September 2012 and another two to three in November 2012.¹¹

Ms. N is still unable to place any weight on her right leg. However, she is able to independently transfer.¹² She is also able to independently use a walker or wheelchair.¹³

There is a dispute as to what assistance, if any, Ms. N needs with toileting. Ms. Johns concluded that Ms. N is independent.¹⁴ However, it is very difficult for Ms. N to transfer from her wheelchair to the toilet by herself.¹⁵ She has to get out of her wheelchair and get on her

⁴ Ex. E, pp. 6 – 7, 9, 18.

⁵ Ex. E, pp. 5, 13 – 15.

⁶ Ex. E, p. 29.

⁷ Ex. E, p. 16.

⁸ Ex. E, p. 17.

⁹ Ex. E, p. 3.

¹⁰ Mr. J testimony.

¹¹ Ms. N testimony.

¹² Ms. N demonstrated her ability to transfer during the February 4, 2013 hearing, where she was observed transferring to and from her wheelchair to a chair without any physical assistance.

¹³ Ms. N appeared at her December 18, 2012 hearing using a walker and was observed using it without assistance. Ms. N appeared at her February 4, 2013 hearing in a wheelchair and was observed also using it without assistance.

¹⁴ Ex. E, pp. 9, 18.

¹⁵ Ms. N testimony.

knees and then walk on her knees over to the toilet. She then leans on the toilet and lifts herself up onto the toilet.¹⁶ Ms. N also testified that she requires assistance cleansing herself after toilet use. However, Ms. N uses the toilet without assistance, by necessity, when she does not have a personal care assistant (PCA) available.¹⁷

There is also a dispute as to what assistance, if any, Ms. N requires with eating. Ms. Johns determined that she has issues with chewing and swallowing, but concluded that Ms. N is independent with eating.¹⁸ Ms. N is capable of eating on her own, despite hand pain from arthritis. However, she occasionally chokes when eating and requires physical assistance to dislodge the food.¹⁹

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 Ms. N 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.²⁰ Dr. Wall, 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. N was no longer eligible for Waiver services. He concluded, based upon his review of the documents supplied by the Division, including the most current CAT, that its determination was correct.²¹

III. Discussion

A. Method for Assessing Eligibility

The Alaska Medicaid program provides Waiver services to adults who experience physical disabilities and require "a level of care provided in a nursing facility."²² The purpose of these services is "to offer a choice between home and community-based waiver services and institutional care."²³

¹⁶ Ms. N testimony. During the February 4, 2013 hearing, Ms. N physically demonstrated how she got out of the wheelchair down onto her knees, and then walked on her knees to a piece of furniture and lifted herself up using that piece of furniture for support.

¹⁷ Ms. N testimony.

¹⁸ Ex. E, pp. 9, 18, 23.

¹⁹ Ms. N and Mr. J testimony.

²⁰ Ms. Westmorland testimony.

²¹ Dr. Wall testimony.

²² 7 AAC 130.205(d)(1)(B) and (d)(2).

²³ 7 AAC 130.200.

The nursing facility level of care²⁴ requirement is determined in part by an assessment which is documented by the CAT.²⁵ The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,²⁶ and whether or not an applicant experiences impaired cognition or problem behaviors.²⁷ 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 3.²⁸

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.²⁹

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 or 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.³⁰

In order for a person who only has physical assistance needs to score as eligible for Waiver services on the CAT, she or he would need a self-performance code of 3 (extensive assistance) or

²⁴ See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

²⁵ 7 AAC 130.230(b)(2)(B).

²⁶ Ex. E, pp. 13 – 15.

²⁷ Ex. E, pp. 16 - 17.

²⁸ Ex. E, p. 29.

²⁹ Ex. E, p.18.

³⁰ Ex. E, p. 29.

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).³¹

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.³²

B. Eligibility

The evidence in this case shows that Ms. N is not eligible for Waiver services. She does not require any professional nursing services, therapies from a qualified therapist, or special treatments. While she experiences a seizure disorder, her seizures are intermittent and do not qualify her for Waiver services because she does not require direct care for her seizure disorder at least once per week.³³ There is no evidence that she experiences impaired cognition other than an impaired short term memory, or that she displays difficult behaviors.

Ms. N would therefore only score as qualifying for Waiver services on the CAT if she 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) in 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, Ms. N does not require assistance with bed mobility, transfers, or locomotion. She does have occasional instances of choking, while eating, which require intervention. This would be coded on the CAT with a self-performance code of 1, because she would only require supervision and occasional nonweight-bearing physical assistance.³⁴ Ms. N has great difficulty in using the toilet by herself, as demonstrated by her physical demonstration of her transfers. Consequently, she could potentially be assessed as requiring extensive assistance (self-performance code of 3) in toileting. However, in order to qualify for Waiver services based solely on her need for physical assistance, Ms. N must require extensive assistance from another person with three of the specified activities of daily living. Because Ms. N, at the most, would only require extensive assistance with toileting, she does not satisfy the requirement that she receive extensive assistance with three out of the five specified activities of

³¹ Ex. E, p. 29.

³² Ex. E, p. 29.

³³ Ex. E, pp. 14, 29.

³⁴ See the explanation of self-performance codes for the ADL of eating contained on Ex. E, p. 9.

daily living (bed mobility, locomotion, transfers, eating, and toileting) within the home. She therefore does not score as qualifying for Waiver services on her 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 the Division must satisfy two conditions. First, it 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."³⁵ As discussed above, Ms. N's 2012 assessment demonstrates that her condition has materially improved. 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."³⁶ 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 Ms. N's condition had materially improved.

IV. Conclusion

Ms. N's condition has materially improved to the point that she no longer qualifies for Medicaid Waiver services. The Division's decision to terminate Ms. N's Waiver services is **AFFIRMED**.

DATED this 19th of February 2013.

Signed _____
Lawrence A. Pederson
Administrative Law Judge

³⁵ AS 47.07.045(b)(1) and (b)(3)(C).

³⁶ 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.*

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 5th day of March, 2013.

By: Signed
Name: Lawrence A. Pederson
Title: Administrative Law Judge

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