

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

In the Matter of)	
)	OAH No. 12-0483-MDS
S J)	Agency No.
_____)	

DECISION

I. Introduction

S J has been receiving Medicaid benefits under the Home and Community-Based waiver program since 2001. In 2012, Mr. J was reassessed, and the Division of Senior and Disabilities Services (division) determined that Mr. J had materially improved and, therefore, no longer qualified for this waiver program. Mr. J appealed that determination.

A hearing was held on November 13, 2012. Mr. J appeared in person, and his care coordinator assisted him in presenting evidence and questioning witnesses. The division was represented by Shelly Boyer-Wood, who also appeared in person. Mr. Garrett Parks appeared by telephone and represented two Qualis Health employees who provided testimony.

Based on the evidence presented, Mr. J has materially improved because his functional limitations, while significant, are not sufficient to result in his placement in a nursing facility but for the services provided by the Home and Community-Based Waiver Program.

II. Facts

Mr. J has cerebral palsy and lives in an assisted living home. As discussed in more detail below, he is wheel chair bound when not in bed. He is able to manipulate his wheel chair on his own with some assistance. He also needs assistance with turning in bed, and transferring between his bed and wheelchair. Mr. J testified that he has had cerebral palsy since he was a child, and that he has little muscle strength below his waist level.

III. Discussion

A. *Home and Community-Based Waiver Program*

An adult with a physical disability is eligible to receive benefits under the Home and Community-Based waiver program, also called the choice waiver program, if he or she

requires the level of care that is normally provided in a nursing facility.¹ If eligible, the program pays for services that allow the recipient to stay in his or her home rather than move into a nursing facility. The level of care that is provided in a nursing facility is described by regulation. Skilled nursing facility services are defined in 7 AAC 140.515. Intermediate care facility services are defined in 7 AAC 140.510.

The division determines whether an applicant requires nursing facility level of care services by conducting an assessment.² For adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and 515,³ and incorporates the results of the Consumer Assessment Tool (CAT).⁴ The CAT is a evaluation tool created by the Department of Health and Social Services, and is adopted by reference in 7 AAC 160.900(d)(6).

Once an individual has qualified to participate in the choice waiver program, there are additional protections before he or she can be removed from that program. Specifically, the individual must have had an annual assessment, the assessment must have been reviewed by an independent qualified health professional, and the assessment must find that the individual has materially improved.⁵ For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska qualified to assess adults with physical disabilities.⁶ Material improvement for an adult with physical disabilities is defined as

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.^[7]

The same criteria used in determining whether a recipient no longer has a functional limitation or cognitive impairment are used in making the initial determination that he or she did have the limitation or impairment.⁸

¹ 7 AAC 130.205(d)(2).

² 7 AAC 130.230.

³ 7 AAC 130.230(b)(2)(A).

⁴ 7 AAC 130.230(b).

⁵ AS 47.07.045(b)(1) – (3).

⁶ AS 47.07.045(b)(2)(B).

⁷ AS 47.07.045(b)(3)(C).

⁸ 7 AAC 130.230(g).

B. The Division's CAT Assessment

Laurie Vandenberg, a registered nurse employed by the division, visited Mr. J and assessed him using the CAT.⁹ The scores from the CAT indicated that Mr. J did not need nursing facility level of care.¹⁰ Mr. J did not dispute the scores for most of the CAT, except those in the sections covering activities of daily living (ADL). To qualify for waiver services based only on ADLs, a recipient must need sufficient assistance in the areas of bed mobility, transfers, locomotion, eating, and toilet use. Ms. Vandenberg scored Mr. J as needing no assistance in any of these areas.¹¹ Ms. Vandenberg did not testify at the hearing, so she could not be questioned about the basis for her conclusions.¹²

C. The Independent Review

As noted above, before a recipient can be terminated from the waiver program, the division's determination must be reviewed by an independent registered nurse. The division has a contract with Qualis Health to perform those reviews. Deon Westmorland testified that she works for Qualis as the Director of Alaska and Idaho Medicaid services. She testified that she reviewed Qualis' records and was able to confirm that a nurse employed by Qualis did conduct the independent review in this case, and did determine that the termination of services was proper. Ms. Westmorland testified that she verified that the nurse who conducted the review was a registered nurse in Alaska. Ms. Westmorland also testified that the review is a paper review; the Qualis nurse did not actually see Mr. J or speak to any of his caregivers.

Ms. Westmorland's testimony is sufficient to establish that the independent review required by statute actually occurred and that the review supported termination of services.¹³ However, the nurse who conducted the review did not testify and, therefore, could not be questioned about the basis for his or her decision. Accordingly, this review is given little weight on the issue of whether Ms. Vandenberg correctly administered and scored the CAT or on whether the division's determination was correct.

⁹ Exhibit D, page 1.

¹⁰ Exhibit E, page 30.

¹¹ Exhibit E, page 18.

¹² Ms. Vandenberg no longer works for the division.

¹³ In this case, Mr. J did not dispute that this review actually occurred. His primary contention was that the CAT was improperly administered or scored. In a case where the independent review is challenged, due process might require that the reviewing nurse be available for cross-examination. That issue need not be decided in this case.

Another Qualis employee, Dr. Eric Wall, also testified. He did not conduct the independent review in this case, but he testified that he agreed with the nurse who conducted the review. Without the testimony of the nurse who conducted the review, Dr. Wall's testimony that he agrees with that review does little to prove that the division's determination was correct.

D. Review of ADL Scores on CAT

1. Bed Mobility

Ms. Vandenberg gave Mr. J a self-performance score of 0 and a support score of 0. In the consumer report section, she wrote

Client stated ["no I can't, the only thing I can't do I can turn over towards the door but I can't turn over towards the wall..." Will lay on side or back. Client also "I'm pretty independent but when I need help I need help. That's basically why I'm here."^[14]

At the hearing, one of Mr. J's caretakers, W G, testified that Mr. J needed assistance in turning in bed every two hours. Specifically, she testified that a staff person had to push him on to his right side. This is consistent with Mr. J's report to Ms. Vandenberg that he can't turn towards the wall, and "when I need help I need help." Pushing Mr. J on to his right side is weight bearing support.

Because Ms. Vandenberg was not available to testify, the factual findings are primarily based on the testimony of those who were present. Based on Ms. G's testimony, Mr. J needs extensive assistance with bed mobility, requiring weight bearing assistance to turn him in bed three or more times in a 7 day period. It appears that this only requires the assistance of one person. Accordingly, Mr. J should have received a self-performance score of 3 and a support score of 2.

2. Transfers

Transfers refer to the consumer's movement to or from a bed, chair, wheel chair, or standing position. Ms. Vandenberg gave Mr. J scores of 0 in this area. In the consumer note section she wrote

Client stated "no I'm able to [do] that myself, unless I don't feel good or something ... then I'll [ask] somebody for help." Unable to recall last time needed help.^[15]

¹⁴ Exhibit E, page 6.

¹⁵ Exhibit E, page 6.

Ms. G testified that Mr. J needs one person to help him get out of bed. Exhibit 1 describes the assistance he receives with transfers, and notes that on days when Mr. J is not feeling well, staff provides hands on assistance with transfers. They hold onto his arms and pull him into position, which is weight bearing support. Staff perform a majority of transfers two or three days each week.¹⁶ Based on this evidence, Mr. J should have received a self-performance score of 3 and a support score of 2.

3. *Locomotion*

Locomotion refers to how Mr. J moves within his own room or in other areas on the same floor. He received scores of 0 in this area. Mr. J is fairly independent once in his wheelchair. Ms. G testified, however, that he does need help getting over transitions between rooms. He also gets stuck or is tired, and asks staff to help him five or six times a week.¹⁷ This constitutes limited assistance, so he should have received a self-performance score of 2 and a support score of 2.

4. *Eating*

Mr. J needs extensive cuing to eat. In addition, his meals are set up for him, but he is otherwise able to eat independently.¹⁸ He should receive a self-performance score of 1 and a support score of 1.

5. *Toilet Use*

The final ADL that is relevant to the choice waiver program analysis is toileting. Mr. J is incontinent and needs hands on assistance to change his diapers, and needs someone standing by to assist with transfers on and off the toilet, but not weight bearing support for those transfers. He also needs assistance with cleaning after a bowel movement.¹⁹ He should have received a score of a 2 for self-performance and a 2 for support.

E. Revised CAT Scores

Based on the evidence presented at the hearing, Mr. J's correct CAT scores are different than what was scored by Ms. Vandenberg. On the CAT scoring sheet, Exhibit E, page 29, to qualify based only on ADLs, the claimant must have a self-performance score of a 3 or 4 in at least three of the applicable ADLs (bed mobility, transfers, locomotion, eating,

¹⁶ Exhibit 1, page 2.

¹⁷ Exhibit 1, page 2.

¹⁸ Testimony of Ms. G.

¹⁹ Testimony of Ms. G; Exhibit 1, page 2.

and toilet use). Mr. J only had scores of 3 in two of these ADLs. Thus, he cannot qualify based only on his need for assistance in his daily living activities.²⁰

IV. Conclusion

Although the corrected CAT score shows a greater need for assistance, he still does not qualify for waiver services. Mr. J has materially improved as material improvement is defined by statute. Accordingly, the division's determination to terminate payment for waiver services is affirmed.

Dated this 27th day of November, 2012.

Signed _____
Jeffrey A. Friedman
Administrative Law Judge

Adoption

The undersigned, by delegation from of 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 11th day of December, 2012.

By: *Signed* _____
Name: Jeffrey A. Friedman
Title: Administrative Law Judge

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

²⁰ If Mr. J had scored a one in section NF 5 (total nursing needs), then the scoring would have proceeded to section NF 6. Under NF 6, the number of ADLs with a score of 2, 3 or 4 are counted. His total nursing needs and ADL needs would have been sufficient to qualify for the waiver program. But without the nursing needs, he does not qualify for the waiver program.