

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

In the Matter of)
)
 E C)
_____)

OAH No. 12-0672-MDS
Agency No.

DECISION

I. Introduction

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

Mr. C’s hearing was held on July 9, 2012. He participated by telephone. Dr. D O, Mr. C’s physician, Z S-L,³ his care coordinator, and D B, his Personal Care Attendant (PCA), testified by telephone on his behalf.

Shelly Boyer-Wood participated in-person and represented the Agency. Jan Bragwell, a registered nurse employed by the Agency, appeared in person and testified on behalf of the Agency. Dr. Katherine Collins, an associate medical director with Qualis Health, testified by telephone on the Agency’s behalf. The hearing was recorded.

This decision concludes that Mr. C’s condition has not materially improved and that he continues to be eligible for Waiver services. The Agency’s decision terminating those services is REVERSED.

II. Facts

Mr. C is a 62 year old man who has medical diagnoses of coronary artery disease, hypertension, diabetes, cataracts, glaucoma, arthritis, asthma, bronchitis, chronic obstructive pulmonary disease, anxiety, and depression.⁴

Mr. C was found eligible for Waiver services in 2010 based upon his having a TENS⁵ unit and his need for limited one person physical assistance (a self-performance code of 2 with an assistance code of 2) in his toileting and transfers.⁶

¹ Ex. D.

² Ex. C.

³ Ms. S-L’s surname has changed. Some of the exhibits in the record contain her previous surname of C.

⁴ Ex. F, p. 44.

⁵ Transcutaneous electrical nerve stimulator.

⁶ Ex. F, pp. 22, 25, 36.

Mr. C was assessed on January 6, 2012 by Ms. Lane, a registered nurse employed by the Agency, to determine his continuing eligibility for Waiver services. Ms. Lane completed the Consumer Assessment Tool (CAT) and determined that Mr. C was no longer eligible for Waiver services for the following reasons:

- He did not require any professional nursing services.
- He was not on a ventilator or respirator.
- He did not have an uncontrolled seizure disorder.
- He was not receiving any therapies (occupational, physical, speech, respiratory).
- He did not have ongoing treatments for chronic conditions.
- He was not undergoing either chemotherapy or radiation therapy (hereinafter referred to as “professional nursing services, therapies, and special treatments”).
- He was not cognitively impaired, and did not engage in problem behaviors.⁷
- He did not require either limited assistance from one person (a self-performance code of 2 with an assistance code of 2) or extensive assistance from one person (a self-performance code of 3 with an assistance code of 2) in any of the five specified activities of daily living (bed mobility, transfers, locomotion, eating, and toilet use, which includes transferring on and off the toilet).⁸

Ms. Lane did not testify.

Dr. Collins, who is a physician employed by Qualis Health as an assistant medical director, performed a third-party review of the Agency’s determination that Mr. C was no longer eligible for Waiver services. She concluded based upon her review of the CAT that the Agency’s determination was correct.⁹

Mr. C’s care coordinator¹⁰ and his PCA¹¹ testified that the CAT inaccurately scored his needs for assistance. They both testified, based on their personal experience, that Mr. C required weight-bearing assistance in his transfers, locomotion, and toileting, and should have been scored as requiring extensive assistance from one person (a self-performance code of 3 with an assistance code of 2) in these three areas. They also testified that he needed extensive assistance with bathing.

⁷ Wandering, verbal or physical abuse, or socially inappropriate behaviors. Ex. E, p. 29.

⁸ Ex. E, pp. 29 - 30.

⁹ Dr. Collins testimony.

¹⁰ Z S-L.

¹¹ D B.

Dr. O is Mr. C's primary care physician. He opined that Mr. C's condition has improved but that he continues to need assistance. His personal observation, from his exam room, is that Mr. C can walk for short distances but that he is very wobbly and requires stabilization, not lifting, with his transfers and locomotion.¹² Dr. O did not observe Mr. C toileting. Dr. O has prescribed physical therapy for Mr. C three days per week.¹³ The physical therapist comes to his home three days per week.¹⁴

On his 2010 CAT, Mr. C received one point towards his Waiver services eligibility scoring because he had a TENS¹⁵ unit.¹⁶ His 2012 CAT does not provide him with that one point.¹⁷ The Agency agreed that he should receive that point.¹⁸ The Agency also agreed that his prescription for physical therapy three days per week entitled Mr. C to receive an additional point towards his Waiver services eligibility.¹⁹

III. Discussion

A. Method for Assessing Eligibility

The Alaska Medicaid program provides Home and Community-Based Waiver (Waiver) services to adults who experience physical disabilities and require "a level of care provided in a nursing facility."²⁰ The purpose of these services is "to offer a choice between home and community-based waiver services and institutional care."²¹

The determination as to whether a person requires a nursing facility level of care²² incorporates the results of the CAT.²³ The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,²⁴ and whether or not an applicant experiences impaired cognition or problem behaviors.²⁵ Each of the assessed items is given a 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 3.²⁶

¹² Dr. O testimony.

¹³ Ex. G, p. 4.

¹⁴ C testimony.

¹⁵ Transcutaneous electrical nerve stimulator.

¹⁶ Ex. F, pp. 22, 36.

¹⁷ Ex. E, pp. 15, 29.

¹⁸ Bragwell testimony.

¹⁹ Bragwell testimony.

²⁰ 7 AAC 130.205(d)(1)(B) and (d)(2).

²¹ 7 AAC 130.200.

²² See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

²³ 7 AAC 130.230(b)(2)(B).

²⁴ Ex. E, pp. 13 – 15.

²⁵ Ex. E, pp. 16 - 17.

²⁶ Ex. E, p. 29.

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 walker or a wheelchair), eating, and toilet use (which includes transferring on and off the toilet and personal hygiene care).²⁷ These are rated by self-performance codes and support codes as explained below:

The self-performance codes rate how capable a person is of performing a particular ADL:

- 0 Independent, no help/oversight, or help/oversight provided two times or less during the last seven days.
- 1 Supervision, which consists of encouragement/oversight/cueing provided three or more times during the last seven days or supervision plus non-weight-bearing physical assistance provided one or two times during the last seven days.
- 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.
- 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.
- 4 Total Dependence, which consists of the caregiver performing the activity for the applicant during the entire previous seven day period.
- 5 Cueing, which is spoken instruction or physical guidance for a particular activity required seven days per week.
- 8 Activity did not occur during the previous seven days.²⁸

The support codes rate the amount of assistance a person receives for each ADL:

- 0 None.
- 1 Setup assistance only.
- 2 One person physical assistance.
- 3 Physical assistance from two or more people.
- 5 Cueing required seven days per week.

²⁷ Ex. E, p.18.

²⁸ Ex. E, p. 18.

8 Activity did not occur during the previous seven days.²⁹

If an applicant receives a self-performance code of 3 (extensive assistance required) or 4 (total dependence) in three or more of five specified activities of daily living (bed mobility, transfer, locomotion, eating, and toileting), and a support code of 2 or 3 (physical assistance provided by one or more people), the applicant receives a score of 3 on the CAT.³⁰ Alternatively, a person can 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.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

In order for the Agency to terminate Waiver services for a Waiver services recipient, the Agency 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."³³ The assessment must be reviewed by an independent registered nurse, who is licensed in the state of Alaska, under contract with the Department of Health and Social Services.³⁴

B. Eligibility

There is a sharp disparity between the CAT and the evidence presented on Mr. C's behalf. The nurse who performed Ms. C's assessment and completed the CAT did not testify and could not be questioned by Mr. C. As a result, the testimony presented by Mr. C's witnesses is more probative than the CAT. Because Dr. Collins's conclusion was based solely upon her review of the CAT,³⁵ the testimony presented by Mr. C's witnesses is also more probative than Dr. Collins' testimony.

Mr. C's witnesses presented slightly differing testimony. His care coordinator and PCA testified that he required extensive assistance (self-performance code of 3 with an assistance code of 2) with his

²⁹ Ex. E, p. 18.

³⁰ Ex. E, p. 29.

³¹ Ex. E, p. 29.

³² Ex. E, p. 29.

³³ AS 47.07.045(b)(3)(C).

³⁴ AS 47.07.045(b)(2)(B).

³⁵ It must be noted that Dr. Collins, a physician, conducted the independent review of the CAT. However, the applicable statute requires that the independent review be conducted by a registered nurse who is licensed in the state of Alaska. See AS 47.07.045(b)(2)(B).

transfers, toileting, and locomotion. His physician testified that he needed stabilization assistance with his transfers and locomotion. This would fall under limited assistance (self-performance code of 2 with an assistance code of 2). However, his physician's observations were based upon limited interaction in the exam room, whereas the care coordinator and PCA had more interaction with Mr. C. As a result, it is more likely than not that Mr. C requires extensive assistance with his transfers, toileting, and locomotion, and that the CAT's scoring of his needs in these areas was inaccurate.

The Agency agreed at hearing that Mr. C was entitled to receive a scoring point on the CAT for his TENS unit, and that he was also entitled to receive a scoring point on the CAT for his three times per week physical therapy treatments.

When the CAT is rescored, Mr. C qualifies for Waiver services based solely upon his requirement for extensive assistance with his transfers, toileting, and locomotion.³⁶ Alternatively, even if Mr. C only requires limited assistance with his transfers and locomotion, as testified to by Dr. O, he would still qualify for Waiver services. This is because he would receive one point apiece for his TENS unit and his physical therapy and one point apiece for the limited assistance with his transfers and locomotion.³⁷ This is a total of four points, which exceeds the three point total required to establish eligibility.³⁸

Before the Agency can terminate a recipient's Waiver services, his condition must have materially improved to the point 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."³⁹ The facts of this case demonstrate that Mr. C's condition has not materially improved and that he continues to qualify for Waiver services.

IV. Conclusion

Mr. C's condition has not materially improved. As a result, the Agency's decision to terminate his Waiver services is REVERSED.

DATED this 21st day of August, 2012.

Signed

Lawrence A. Pederson
Administrative Law Judge

³⁶ See section NF 1(e) of the CAT. Ex. E, p. 29.

³⁷ See sections NF2 (b), (c), and NF6 of the CAT. Ex. E, p. 29.

³⁸ See section NF7 of the CAT. Ex. E, p. 29.

³⁹ AS 47.07.045(b)(3)(C).

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 4th day of September, 2012.

By: Signed _____

Name: Lawrence A. Pederson

Title: Administrative Law Judge

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