

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

In the Matter of)	
)	OAH No. 12-0757-MDS
F C)	Agency No.
_____)	

DECISION

I. Introduction

F C was receiving benefits under the Home and Community-Based Services Waiver Program, also known as the Choice Waiver Program. The Division of Senior and Disabilities Services (division) assessed his condition and determined that he was on longer eligible for the Choice Waiver program. Mr. C appealed.

A hearing was held on November 21, 2012. Mr. C appeared by telephone. The division was represented by Gerry Johnson. Based on the evidence in the record, the division's determination is upheld.

II. Facts

Mr. C has had his right leg amputated, and uses a wheel chair.¹ His care coordinator is Q K, who started working with him in August.² In August of 2012, Mr. C moved into an assisted living home in Anchorage.³ Since moving into the Anchorage home, Mr. C's overall health has improved.⁴

Mr. C was originally found eligible for the Choice Waiver Program in 2007.⁵ He was re-assessed by Susan Findley, RN, on May 17, 2012.⁶ This assessment determined that Mr. C was no longer eligible for this program.⁷

III. Discussion

A. Home and Community-Based Waiver Program

An adult with a physical disability is eligible to receive benefits under the Choice Waiver Program if he or she requires the level of care that is normally provided in a nursing

¹ Exhibit E 3; testimony of Mr. C.
² Testimony of Mr. K.
³ Testimony of Mr. J; Testimony of Mr. K.
⁴ Testimony of Mr. K.
⁵ Exhibit D 1.
⁶ Exhibit D 1.
⁷ Exhibit D 1 – 5.

facility.⁸ 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.⁹ For adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and .515,¹⁰ and incorporates the results of the Consumer Assessment Tool (CAT).¹¹ 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.¹² For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska qualified to assess adults with physical disabilities.¹³ 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.^[14]

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.¹⁵

B. The Division's CAT Assessment

Susan Findley conducted the CAT assessment for the division and testified at the hearing. Ms. Findley found that Mr. C had no short term or long term memory problems.¹⁶

⁸ 7 AAC 130.205(d)(2).

⁹ 7 AAC 130.230.

¹⁰ 7 AAC 130.230(b)(2)(A).

¹¹ 7 AAC 130.230(b).

¹² AS 47.07.045(b)(1) – (3).

¹³ AS 47.07.045(b)(2)(B).

¹⁴ AS 47.07.045(b)(3)(C).

¹⁵ 7 AAC 130.230(g).

He was not receiving any therapy at that time,¹⁷ and was not in need of any professional nursing services.¹⁸ In terms of his activities of daily living, Mr. C was scored as independent in bed mobility, transfers, locomotion, eating, and toilet use.¹⁹

The results of the CAT assessment can indicate the need for a nursing facility level of care based on the need for help in activities of daily living in two different ways. First, if a person needs extensive assistance or is totally dependent in three or more of the five specified activities (bed mobility, transfers, locomotion, eating or toilet use), he or she is eligible.²⁰ In the alternative, if a person scores a 1 in nursing services (section NF 2), memory issues (section NF 3), or behavioral issues (section NF4), and also needs a sufficient level of assistance with activities of daily living, then he or she is found to be eligible.²¹

According to the division's CAT assessment, the only area where Mr. C needed assistance was in bathing,²² which is not one of the activities of daily living that is used to determine eligibility for the Choice Waiver Program.

The evidence at the hearing suggests that the division may have scored Mr. C too low in transfers (moving from bed to chair) and in toileting. K J, one of Mr. C's care workers, testified that Mr. C needed help twice a day moving from his bed to his wheel chair.²³ This help included weight bearing assistance. Mr. C also needed help daily getting on and off the toilet. Mr. C also testified that he needed this assistance. According to both Mr. C and Mr. J, Mr. C did not need assistance with bed mobility,²⁴ locomotion, or eating.

Assuming Mr. C should have been scored with a 3 for extensive assistance or a 4 for total dependence in both transfers and toileting, his functional limitations would still not meet the minimum requirements to qualify for the Choice Waiver Program.²⁵

¹⁶ Exhibit E 4.

¹⁷ Exhibit E 5.

¹⁸ Exhibit E 13 – 14.

¹⁹ Exhibit E 18.

²⁰ Exhibit E 29, section NF 1.

²¹ Exhibit E 29.

²² Exhibit E 18 – 19.

²³ He got out of bed once in the morning, and again after a nap.

²⁴ According to Mr. J, Mr. C “very occasionally” needed help turning in bed. With that level of need, Mr. C would still be considered independent in regards to bed mobility.

²⁵ He appears to need some Personal Care Assistance, but it is not known whether he is otherwise eligible for PCA hours.

IV. Conclusion

Based on the testimony in this case, it appears that Mr. C is happy with his current living situation, and is well-cared for there. He has, however, materially improved since he was first eligible for the Choice Waiver Program. Because of these improvements, he no longer qualifies for the Choice Waiver Program. The division's decision that he is no longer eligible is affirmed.

Dated this 10th day of December, 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 26th day of December, 2012.

By: *Signed* _____

Name: Christopher M. Kennedy
Title: Administrative Law Judge

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