

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

In the Matter of)	
)	OAH No. 12-0850-MDS
J C)	Agency No.
_____)	

DECISION

I. Introduction

J C qualified for benefits under the Medicaid Home and Community-Based Waiver (Choice Waiver) program in 2011. She was re-assessed in 2012, and the Division of Senior and Disabilities Services (division) determined that she had materially improved and was therefore no longer eligible. Ms. C appealed and requested a hearing.

Ms. C, her care coordinator M J, and her personal care assistant U H all participated in the hearing. The division was represented by Shelly Boyer-Wood.

Based on the evidence presented at the hearing, the division’s determination is upheld.

II. Facts

Ms. C is 64 years old and diagnosed with diabetes mellitus II, polmyalgia rhuematica, and chronic bronchitis.¹ She was assessed by the division on August 28, 2011, and found to be eligible to participate in the Choice Waiver program.² This was based on her need for extensive assistance with transfers, locomotion, and toilet use.³ Ms. C was re-evaluated on August 21, 2012. On this evaluation, she was scored as only needing limited assistance in these three areas.⁴ Based on the 2012 evaluation, Ms. C was found to be no longer eligible for the Choice Waiver program.⁵

Between the first and the second assessment, Ms. C was able to complete hydro track physical therapy.⁶ She was not able to complete traditional, weight bearing physical therapy.

¹ Exhibit F 4.
² Exhibit F 46.
³ Exhibit F 34 and F 46.
⁴ Exhibit E 18.
⁵ Exhibit E 30.
⁶ Exhibit 1; testimony of Ms. C, Ms. J, and Ms. H.

III. Discussion

A. *Medicaid Home and Community-Based Waiver Program*

An adult with a physical disability is eligible to receive benefits under the Medicaid Home and Community-Based Waiver program, also called the Choice Waiver program, if he or she meets the eligibility requirements, including requiring the level of care that is normally provided in a nursing facility.⁷ If eligible, the program pays for services that allow the recipient to stay in his or her home – or in an assisted living 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.⁸ For adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and 515,⁹ and incorporates the results of the Consumer Assessment Tool (CAT).¹⁰ The CAT is an 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, certain requirements must be met before he or she can be removed from that program. Specifically, the individual must have had an annual assessment, the assessment must find that the individual has materially improved, and the assessment must have been reviewed by an independent qualified health professional.¹¹ For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska qualified to assess adults with physical disabilities.¹² 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.^[13]

⁷ 7 AAC 130.205(d)(2).

⁸ 7 AAC 130.230.

⁹ 7 AAC 130.230(b)(2)(A).

¹⁰ 7 AAC 130.230(b).

¹¹ AS 47.07.045(b)(1) – (3).

¹² AS 47.07.045(b)(2)(B).

¹³ AS 47.07.045(b)(3)(C).

The same criteria used in making the initial determination that he or she did have a limitation or impairment are used to determine whether a recipient no longer has a functional limitation or cognitive impairment.¹⁴

B. Review of CAT Assessment

1. Introduction

Marianne Sullivan is a registered nurse who works for the division. She was the assessor for both the 2011 and 2012 CATs.¹⁵ During a CAT assessment, the assessing nurse looks at an individual's nursing needs, cognitive skills, and functional limitations. Needs and limitations can combine in a variety of different ways to meet the eligibility criteria. In this case, the relevant issues revolve around Ms. C's functional ability with the activities of daily living (ADL) of transfers, locomotion, and toilet use. If she needs extensive assistance in each of these areas, she is eligible for the Choice Waiver program. If she needs only limited assistance in just one of these areas, she is not eligible.¹⁶

In scoring the CAT, limited assistance with an ADL is given a score of 2. Extensive assistance is scored as a 3. Extensive assistance is defined as

While a person performed part of activity, over last 7-day period, help of following type(s) provided 3 or more times:

Weight-bearing support

Full staff/caregiver performance during part (but not all) of last 7 days.^[17]

Limited assistance means the individual needed some help with performing the ADL, but did not receiving any actual weight-bearing support more than twice during the previous seven days.¹⁸ The difference between extensive and limited assistance is not how often any assistance is needed, but how often the assistance consists of weight bearing support.

2. Transfers

"Transfers" are the movement to or from a bed, chair, wheelchair, or standing, but do not include to or from a bath or toilet.¹⁹ In 2011, Ms. Sullivan's assessment notes state

Client reports PCA must assist her on/off couch, toilet, in/out of bed. Reports frequent falls r/t transfers and locomotion in bedroom and bathroom.

¹⁴ 7 AAC 130.230(g).

¹⁵ Testimony of Ms. Sullivan.

¹⁶ If Ms. C had nursing or therapy needs, or sufficient cognitive difficulties, she might have qualified with less need in her ADLs. See Exhibit E 30 (CAT scoring sheet).

¹⁷ See Exhibit E 7.

¹⁸ *Id.*

¹⁹ Exhibit E 6.

Observed client to attempt to stand unassisted unsuccessfully, PCA provided hands on assistance to hold onto UE and client pushing down on arm of couch to pull client to standing position. Observed client to stop ½ way thru task r/t dizziness.^[20]

In 2012, Ms. C told Ms. Sullivan that she was able to get in and out of her lift recliner without assistance, and demonstrated this to Ms. Sullivan.²¹ Ms. C did state that she continues to need “occasional assistance” in and out of bed and when seated on low furniture.²² Ms. J testified that Ms. C needs “heavy assistance” getting on and off the couch, and sometimes in and out of bed. She testified that the physical therapy was not intended to, and did not improve Mr. C’s ability to transfer.

Ms. H described the frequent assistance she provides to Ms. C in the home and when they travel to stores, restaurants, or doctor visits. In describing this assistance, she stated that she might hold Ms. C’s hand, or Ms. C might put her hand on her shoulder for balance. When getting out of bed, Ms. H will guide Ms. C’s legs as she swings them off the bed. She did not describe providing weight bearing assistance three or more times a week during transfers.

The 2011 assessment focused on the need for weight bearing assistance when getting up from the couch. Ms. C is able to get out of the lift recliner with only limited assistance. While she likely still needs weight bearing assistance in getting up from the couch or other low furniture, it is not clear from the record how often this occurs. In addition, while Ms. C needs assistance getting out of bed, that assistance was described as non-weight bearing. Ms. C was correctly scored as needing limited assistance with transfers.

3. *Locomotion*

Locomotion is how a person moves in his or her room and in other areas of the home on the same floor.²³ The notes in the 2011 CAT say

Client reports uses forearm crutches or wheeled walker with seat when inside, uses scooter when available in store/shopping. Reports unable to locomote extended distances r/t dizziness, decreased endurance shortness of breath. Frequent falls reported.^[24]

The 2012 CAT notes say

²⁰ Exhibit F 22.

²¹ Exhibit E 6.

²² *Id.*

²³ Exhibit E 7.

²⁴ Exhibit F 23.

Participant reports independent to locomote w/forearm crutches or wheeled walker w/seat inside, uses scooter when available in store/shopping. PCA reports stand by assistance/supervision r/t hx dizziness. No falls reported. Reports unable to locomote extended distances r/t dizziness, decreased endurance shortness of breath. Observed participant to locomote from living room to bathroom, to bedroom and back to living room w/ stand by assistance by PCA and occasional hands on assistance from PCA.

The main difference between these two descriptions relates to the frequency of falls. However, the fewer falls reported in the 2012 CAT may be due to the assistance provided by Ms. C's PCA.

The testimony from Ms. C and Ms. H was that standing or walking for any period of time was extremely painful because her knee joints were both "bone on bone." Ms. C testified that she could only walk a short distance at a time. However, for the distance she can walk, Ms. C is able to do so with only hands on assistance and not weight bearing assistance from her PCA. The 2012 assessment correctly concluded that Ms. C needed limited assistance.

4. Toilet Use

Toilet use is how a person uses the toilet room or commode, transfers on and off the toilet, cleanses himself or herself, and adjusts clothing.²⁵ The 2011 CAT notes state

Client reports incontinence bowel/bladder, wears depends. Reports wears multiple depends at night to assist w/incontinence. Assistance on/off toilet, cleansing, changing depends, adjusting clothing. Reports frequent falls in bathroom r/t transfers on/off toilet. Not observed. BSC in bedroom, assistance to empty and clean.^[26]

For 2012, the CAT notes say

Participant reports incontinence urine r/t urgency, wears depends, some control. Reports bowel incontinence less weekly r/t lactose intolerance unable to tolerate milk products. Reports occasional assistance w/cleaning, adjusting clothing. Participant locomoted to bathroom during assessment, while in bathroom, participant called out for assistance from PCA. Participant reported assistance w/cleansing and changing incontinence supplies/depends and clothing. Elevated toilet w/safety rails.^[27]

Ms. H testified that she had to provide hands on assistance with transfers on and off the toilet when Ms. C was in stores or restaurants that did not have high toilets. She did not

²⁵ Exhibit E 9.

²⁶ Exhibit F 25.

²⁷ Exhibit E 9.

describe this as weight bearing assistance, however. Nor is it clear from the record that this occurs three or more times per week. In the home, the assistance provided appears to be frequent, but is limited to non-weight bearing help. Ms. C was correctly scored for limited assistance in toilet use.

5. *Material Improvement*

A major concern raised by Ms. C and her witnesses is that her functional ability has declined since 2011, and at a minimum has not actually improved. Thus, she cannot be said to have “materially improved” and should remain eligible for the Choice Waiver program.

The legislature has provided a specific definition of material improvement to be used in this proceeding. A person has materially improved if he or she

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.^[28]

The focus is on the existing limitations or impairment, and not on whether there was an actual change from the prior year. The CAT assessment is scored primarily on what is observed by and reported to the assessor during the home visit. Especially in close cases, subtle differences in how the need for assistance is reported can result in changes in the scoring of an ADL. In this case, it is possible that Ms. Sullivan was slightly more lenient when scoring the 2011 CAT, or slightly less lenient when scoring the 2012 CAT. Some variation in how individuals will be scored is inevitable, but errors in scoring that work against the recipient can be corrected through the appeal process.²⁹ It is also possible, even though Ms. C’s conditions overall may not have improved, that she has learned adaptive behaviors that enable her to complete her activities of transferring, locomotion, and toileting with less assistance than she previously required.

As stated above, the legislative definition of material improvement is whether the individual remains eligible for the Choice Waiver program. The CAT is used to make that determination. Based on her 2012 CAT assessment, Ms. C is not eligible.³⁰

²⁸ AS 47.07.045(b)(3)(C).

²⁹ An error in the recipient’s favor will not be appealed.

³⁰ In order to qualify for this program, Ms. C must have scored a three or more in all three of the ADLs discussed. If only two have been incorrectly scored, she would still not be eligible for the Choice Waiver program.

IV. Conclusion

The 2012 CAT assessment correctly indicated Ms. C's need for assistance with her activities of daily living. Although she needs frequent assistance, she does not need extensive assistance in the relevant activities as the term "extensive assistance" is defined. Accordingly, the division's determination is upheld.

Dated this 14th day of January, 2013.

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 29th day of January, 2013.

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

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