

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

In the Matter of: )  
 )  
 T S ) OAH No. 12-0911-MDS  
 ) Division No.

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**MODIFICATION AND ADOPTION OF PROPOSED DECISION**

The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(4), rejects, modifies or amends one or more factual findings as follows, based on specific evidence in the record described below. With this rejection, modification, or amendment, the proposed decision is revised to reflect the opposite result. More specifically, the evidence in this case demonstrates that Ms. S’s condition has materially improved and as a result, the Division’s decision terminating her Waiver services is **AFFIRMED**.

The Proposed Decision’s result is incorrect because it fails to give proper weight to the CAT assessment and third-party independent review while giving excessive weight to the testimony of Ms. S’s witnesses.

The Proposed Decision places substantial weight on the notion that the “only actual eyewitness testimonial evidence” concerning Ms. S’s need for assistance in the activities of transfers, locomotion, and toileting comes from Ms. S’s witnesses. *See* Proposed Decision at 9. This approach fails to account for the eye-witness observations and impressions of assessors recorded in the CAT assessment. The CAT assessment is a business record of observations recorded contemporaneously by a nurse who observes a waiver applicant or recipient in the person’s home.

In addition to administering the CAT Assessment, the Division had several of its own nurses review the termination, and there was a third-party independent review completed by a licensed nurse, as required by law. “All of the reviewers concurred that Ms. S was no longer eligible for Waiver services.” *Id.* at 11. The Proposed Decision asserts that all of the reviews cannot be used to support termination of Waiver Services because “those reviews were based entirely upon an erroneously scored CAT.” *Id.* This logic fails because the third-party independent review considers more than just the CAT scores in its review. *See* Final Decision OAH No. 12-0393-MDS (2013). This means that even if the CAT assessment was “erroneously scored,” as is maintained in the Proposed Decision, the third-party independent review and other reviews cannot be discounted as flawed because they consider more than just the scores from the CAT assessment.

Although there is dispute over the final result of the CAT assessment, there is no challenge to the methodology that was used in administering the assessment. After giving proper consideration and weight to the CAT assessment itself, to the fact that there is no dispute over how the assessment was conducted, and to the fact that a proper third-party independent

review—along with multiple internal reviews—concurred that Ms. S was no longer eligible for Waiver services, I conclude that the Division met its burden in this case and that it correctly concluded that Ms. S’s condition has materially improved to the point where she no longer qualifies for Medicaid Waiver services. Therefore, the Division’s decision to terminate Ms. S’s Waiver services was proper and is hereby AFFIRMED. The Proposed Decision for OAH No. 12-0911-MDS is revised and adopted accordingly.

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 31<sup>st</sup> day of May, 2013.

By: Signed \_\_\_\_\_  
Jared C. Kosin  
Executive Director  
Office of Rate Review

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

|                  |   |                     |
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**DECISION**

**I. Introduction**

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

Ms. S’s hearing was held on April 8 and 26, 2013. Robert Lynch, Alaska Legal Services Corporation, represented Ms. S. Kimberly Allen, Assistant Attorney General, represented the Division. The parties completed post-hearing briefing on May 6, 2013.

The evidence in this case demonstrates that Ms. S’s condition has not materially improved and, as a result, the Division’s decision terminating her Waiver services is REVERSED.

**II. Facts**

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

Ms. S is in her mid-sixties. In January 2005, the Division found her eligible for Waiver services, under the Older Alaskans/adults with physical disabilities category. At the time, her medical diagnoses included osteoarthritis and degenerative disk disease. Her medical history included a broken neck at C6, with nerve damage and chronic pain. She has severe degeneration/pain in four lumbar vertebrae, and experiences dual incontinence. Her eligibility was determined by an assessment conducted by R.N. Karen Mattson, documented by the Consumer Assessment Tool (CAT), which found that she was totally dependent for assistance with transfers, and required extensive one person physical assistance with bed mobility, locomotion, and toileting. The CAT documented that she complained of having no feeling in her right leg, could barely feel her left leg, and locomoted using a walker, which required weight bearing assistance. The CAT further documented that Ms. S was not then receiving any physical

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<sup>1</sup> Ex. D.

<sup>2</sup> Ex. C.

therapy and did not require professional nursing services. Ms. S was found eligible for Waiver services based upon her need for physical assistance with bed mobility, transfers, locomotion, and toileting.<sup>3</sup>

The Division reassessed Ms. S in November 2005. That assessment, conducted by the same nurse, was substantially similar to the January 2005 assessment, except for two significant changes. First, Ms. S had become more mobile, and was beginning to develop some feeling in her lower right leg. Second, she was totally dependent for assistance with toileting activities instead of only requiring extensive assistance. That assessment found Ms. S continued to be eligible for Waiver services, based upon her physical assistance needs with bed mobility, transfers, locomotion, and toileting.<sup>4</sup>

The next time the Division assessed Ms. S was in March 2007. That assessment (likewise by Nurse Mattson) found Ms. S no longer qualified for Waiver services. The assessor stated that she watched Ms. S sit up in her bed, transfer independently using her quad cane, watched her ambulate “up/down a half story step with a limped gait,” and that Ms. S told her that she could “walk in the shower independently.” The assessor found Ms. S was independent with bed mobility, required limited assistance with transfers, required limited set up help with locomotion, and toileted independently with set up help.<sup>5</sup>

Although the 2007 and subsequent reassessments found her ineligible, Ms. S continued to receive Waiver services.

The Division reassessed Ms. S in April 2008. That assessment, conducted by R.N. Jan Bragwell, again found Ms. S did not qualify for Waiver services. That assessment, however, found that Ms. S, while independent with bed mobility, required limited assistance with transfers, locomotion, and toileting. That assessment specifically noted that Ms. S dragged her right leg.<sup>6</sup>

The Division reassessed Ms. S in July 2009. That assessment, Nurse Mattson, again found Ms. S did not qualify for Waiver services. On this occasion, the assessment found her to be independent with bed mobility and transfers, and to require supervision with locomotion and

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<sup>3</sup> Ex. F, pp. 1 - 3, 6, 11.

<sup>4</sup> Ex. M, pp. 1, 4, 12.

<sup>5</sup> Ex. K, pp. 1 - 2, 4, 11.

<sup>6</sup> Ex. G, pp. 3- 4, 7, 15.

limited assistance with toileting. However, that same assessment noted that a transfer was demonstrated whereby Ms. S's PCA lifted her under the arms.<sup>7</sup>

Nurse Mattson again assessed Ms. S for the Division in August 2010. She again found that Ms. S did not qualify for Waiver services. That assessment found Ms. S was independent with bed mobility, and required limited assistance with transfers, locomotion, and toileting. The assessment noted that Ms. S dragged her right foot when using her walker.<sup>8</sup>

An August 2011 assessment, again by Nurse Mattson, again found Ms. S did not qualify for Waiver services. That assessment found Ms. S was independent with bed mobility, and required limited assistance with transfers, locomotion, and toileting.<sup>9</sup>

The assessment centrally at issue in this case is one conducted by Nurse Mattson in July 2012. That assessment, as documented on the CAT, again found Ms. S did not qualify for Waiver services. That assessment found Ms. S was independent with bed mobility and required limited assistance with transfers, locomotion, and toileting. The assessment also found that Ms. S was not receiving physical therapy from a qualified therapist.<sup>10</sup>

Sam Cornell, who is a registered nurse with the Division, reviewed Ms. S's 2012 CAT, compared it to her January 2005 CAT, and determined, based upon his review of those CATS and other medical documents that he was provided, that Ms. S was no longer eligible for Waiver services. This was a document review, and he did not contact or speak to Ms. S or her doctor.<sup>11</sup> Ms. Mattson, who performed the two 2005 assessments and the 2007, 2009, 2010, 2011, and 2012 assessments, did not testify. Ms. Bragwell, who performed the 2008 assessment, also did not testify.

Qualis Health performed two third-party reviews of the Division's determination that Ms. S was no longer eligible for Waiver services. Both reviews were conducted by registered nurses who are licensed to practice in Alaska. Both of those reviews were document-only reviews (no contact/discussion with Ms. S or her caregivers) concluding that the Division's non-eligibility

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<sup>7</sup> Ex. G, pp. 21 – 22, 24, 31.

<sup>8</sup> Ex. G, pp. 102 – 103, 105, 108, 114, 125.

<sup>9</sup> Ex. G, pp. 71 – 72, 74, 77, 83, 94.

<sup>10</sup> Ex. E, pp. 5 – 7, 9, 12, 14, 18, 29

<sup>11</sup> Sam Cornell testimony; Ex. F, pp. 17 – 21.

determination was correct.<sup>12</sup> The Division then notified Ms. S that her Waiver services would be terminated based upon her 2012 assessments results, which were recorded on the CAT.<sup>13</sup>

F T has been Ms. S's PCA for approximately ten years. She spends 5.75 hours per day assisting Ms. S. She arrives in the morning and leaves in the early afternoon. She testified as follows. She has to physically lift Ms. S for transfers to and from furniture (bed, chair, dining table) a minimum of six times per day. During those transfers, Ms. T places her arms underneath Ms. S's arms and around her, and physically lifts her up and down for transfers to and from furniture and transfers to and from the toilet. While Ms. S has good days, where she does not need as much assistance on transfers, she still requires some weight bearing assistance on the good days. Ms. S generally uses her walker for locomotion. During the walking, Ms. T will stand behind and cue her. However, Ms. S sometimes cannot feel or lift her leg and Ms. T will have to pick up Ms. S's leg and lift it for her, at least six times per week. With regard to toileting, Ms. T not only has to assist with transfers, but also needs to assist in cleansing, changing depends, and with her clothing. Ms. S requires this assistance at least six times per day due to her incontinence issues.<sup>14</sup> Ms. T was a credible witness.

Dr. Erickson has been Ms. S's medical doctor for over ten years. He testified as follows. Ms. S's primary disability is degenerative disc disease. It leads to neuropathic pain in her lower extremities and back. She has a neurogenic bladder and colon. Her condition has not improved since 2005; she has regressed and her ability to function has deteriorated. When Ms. S has been in the clinic, Dr. Erickson has witnessed her requiring weight-bearing assistance in getting up from chairs, couches, etc. He has seen her get up with difficulty using assistive devices and knows that she has fallen while using those devices. He has witnessed her instability and difficulty in walking from one side of the room to the other.<sup>15</sup> Dr. Erickson was a credible witness.

Dr. Erickson referred Ms. S for a physical therapy evaluation in January 2013.<sup>16</sup> In March 2013, she was prescribed physical therapy three times per week.<sup>17</sup> Dr. Erickson credibly testified that Ms. S's physical therapy needs would have been the same in July 2012.<sup>18</sup>

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<sup>12</sup> Grace Ingrim testimony.

<sup>13</sup> Ex. D.

<sup>14</sup> F T testimony.

<sup>15</sup> Dr. Erickson testimony.

<sup>16</sup> Ex. 3.

<sup>17</sup> Ex. 4.

### III. Discussion

#### A. Method for Assessing Eligibility

The Alaska Medicaid program provides services, known as Home and Community-Based Waiver services, to adults who experience physical disabilities and require “a level of care provided in a nursing facility.”<sup>19</sup> The purpose of these services is “to offer a choice between home and community-based waiver services and institutional care.”<sup>20</sup>

The nursing facility level of care<sup>21</sup> requirement is determined in part by an assessment which is documented by the CAT.<sup>22</sup> The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,<sup>23</sup> and whether or not an applicant experiences impaired cognition or problem behaviors.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup>

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 the total

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<sup>18</sup> Dr. Erickson testimony.

<sup>19</sup> 7 AAC 130.205(d)(1)(B) and (d)(2).

<sup>20</sup> 7 AAC 130.200.

<sup>21</sup> See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

<sup>22</sup> 7 AAC 130.230(b)(2)(B).

<sup>23</sup> Ex. E, pp. 13 - 15.

<sup>24</sup> Ex. E, pp. 16 - 17.

<sup>25</sup> Ex. E, p. 29.

<sup>26</sup> Ex. E, p. 18.

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.<sup>27</sup>

In order for a person, who only has physical assistance needs, to score as eligible for Waiver services on the CAT, he or she would need a self-performance code of 3 (extensive assistance) or 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).<sup>28</sup>

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.<sup>29</sup>

**B. Notice**

Ms. S makes the argument that the termination notice supplied to her is defective. That notice, in pertinent part, notified Ms. S that she had materially improved since she was first admitted to the Waiver program in January 2005 and compared her 2012 CAT with her January 2005 CAT.<sup>30</sup> Ms. S points out that the last time she was found eligible for Waiver services was instead her November 2005 CAT. She argued that the termination notice was defective because it should have compared her 2012 CAT with her November 2005 CAT, not with her January 2005 CAT.

The statute that discusses termination of Waiver services is AS 47.07.045. It requires that before a person may have his or her Waiver services terminated, the Division must first perform an assessment that documents material improvement since the "previous assessment."<sup>31</sup> For a person receiving Waiver services under the Older Alaskans/adults with physical disability category, "material improvement" is defined as occurring when the recipient "no longer has a functional limitation or cognitive impairment that would result in the need for nursing home place, and is able to demonstrate the ability to function in a home setting without the need for

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<sup>27</sup> Ex. E, p. 29.

<sup>28</sup> Ex. E, p. 29.

<sup>29</sup> Ex. E, p. 29.

<sup>30</sup> Ex. D.

<sup>31</sup> AS 47.07.045(b)(3).



waiver services.”<sup>32</sup> As discussed above, the results of the assessment for Waiver service eligibility is recorded on the CAT.

The Division’s October 22, 2012 termination letter discusses both the January 2005 CAT, which was when Ms. S was initially found eligible for Waiver services, and her July 2012 CAT. It did not discuss her most recent CAT where she was found eligible, which was November 2005.<sup>33</sup> As a result, Ms. S has argued that the notice does not comply with procedural due process requirements, and the termination should be reversed.

Ms. S’s argument is not persuasive. The purpose of pretermination notices is to provide a recipient with “timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend.”<sup>34</sup> A review of the Division’s termination letter shows that it meets this standard. It contains a discussion of the 2012 CAT, which is attached, and identifies the rationale behind the Division’s determination that Ms. S is no longer eligible for Waiver services.<sup>35</sup> The fact that the termination notice references the January 2005 CAT rather than the November 2005 CAT does not confuse the issue, which is squarely identified as eligibility as determined under the 2012 CAT.

**C. Eligibility**

The 2012 CAT coded Ms. S as requiring limited assistance with her activities of transfers, locomotion and toileting. That CAT did not provide Ms. S with a code for receiving physical therapy. Ms. S makes two arguments. The first is that she should be coded as requiring physical therapy three times per week. The practical import of this argument is that if Ms. S is coded as requiring physical therapy three times per week, she would qualify for Waiver services based upon the combination of her physical therapy and her assessed need for limited assistance with transfers, locomotion and toileting.<sup>36</sup> Ms. S’s second argument is that the CAT did not accurately reflect her need for assistance with her activities of transfers, locomotion, and

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<sup>32</sup> AS 47.07.045(b)(3)(C).

<sup>33</sup> Ex. D.

<sup>34</sup> *Baker v. State, Dept. of Health and Social Services*, 191 P.3d 1005, 1009 (Alaska 2008) quoting from *Goldberg v. Kelly*, 397 U.S. 254, 267 - 68 (1970).

<sup>35</sup> Ex. D.

<sup>36</sup> A person who is coded as receiving physical therapy three days per week receives an initial score of 1. (Question NF. 2 (b), Ex. E, p. 29). If a person has a score of 1 on NF 2 and is coded as requiring limited assistance with two or more of the activities of bed mobility, transfers locomotion, eating, and toileting, they would receive a qualifying score of 3 on the CAT. (Questions NF. 5, 6, and 7, Ex. E, p. 29).

toileting. The practical import of this argument is that if Ms. S had been coded as requiring extensive assistance with these activities, she would have qualified for Waiver services.<sup>37</sup>

1. Physical Therapy

It is undisputed that Ms. S was not prescribed physical therapy three or more times per week in 2012, when her assessment was performed. She was prescribed physical therapy three times per week in 2013. Ms. S argues that since her need for physical therapy was the same in July 2012 as it was when she was prescribed it in 2013, that she should receive a physical therapy scoring point. This is a misreading of the scoring process contained in the CAT. The portion of the CAT that codes a person with a physical therapy point reads as follows:

**11. Therapy – Therapies provided by a qualified therapist**

*Indicate the number of days per week for each therapy required. Enter 0 if none*

a. Physical therapy<sup>[38]</sup>

The CAT therefore only provides a point if there are “[t]herapies provided by a qualified therapist” not merely whether the therapy is required or needed.”<sup>39</sup> Although Ms. S might have needed physical therapy at the time of her 2012 assessment, she was not prescribed or receiving it then.

In furtherance of her argument, Ms. S argues that her eligibility should be determined as of the hearing, not the date of the assessment. This argument is not persuasive. First, continued Waiver eligibility is determined through an assessment completed by the Division.<sup>40</sup> A hearing allows a recipient to challenge the assessment. It is not a reassessment. At a *de novo* evidentiary hearing, as required by 7 AAC 49.120, Ms. S can bring in new evidence that bears on her condition at the time of the assessment and whether the assessment correctly reflected her condition/eligibility. However, a change in her prescriptions or conditions after the assessment would not be relevant to the underlying issue of whether she qualified as of the date of the assessment.<sup>41</sup> Consequently, Ms. S’s 2013 prescription for physical therapy is not relevant to the

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<sup>37</sup> Ex. E, p. 29, Question NF 1(e).

<sup>38</sup> Ex. E, p. 14, question 11.

<sup>39</sup> Ex. E, p. 14, question 11; p. 29, question NF. 2(b).

<sup>40</sup> AS 47.07.045(a)(1).

<sup>41</sup> *In the Matter of V. D. M.*, OAH Case No. 12-0612-MDE (Office of Administrative Hearings 2012) (<http://aws.state.ak.us/officeofadminhearings/Documents/MDE/MDE120612.pdf>); *See Parker v. New Hampshire Department of Health and Human Services*, 969 A.2d 322, 329-30 (N.H. 2009); *Carter v. New Mexico Human Services Department*, 211 P.3d 219, 222-23 (N.M. App. 2009) (citing several prior cases); *Maryland Department of Health and Mental Hygiene v. Brown*, 935 A.2d 1128, 1144-46 (Md. App. 2007); *Albert S. v. Department of Health*

underlying issue in this case, which is whether the 2012 CAT accurately recorded her eligibility for continued Waiver services.

## 2. Transfers, Locomotion, and Toileting

In order for Ms. S to qualify as requiring extensive assistance in her activities of transfers, locomotion, and toileting, she must require weight-bearing support to conduct them. The only actual eyewitness testimonial evidence regarding her need for assistance in each of these activities comes from Dr. Erickson and Ms. T.

Ms. T was a credible witness who has been assisting Ms. S with these activities for ten years. Her testimony provided a description of actual weight bearing assistance for transfers and toileting, and weight bearing assistance on locomotion, which exceeded the extensive assistance requirement that the weight bearing assistance be need three or more times per week. Physically lifting Ms. S's leg, a dead weight, at least six times per week while locomoting, meets the requirement of weight-bearing assistance. The "bear hug" lift required to transfer Ms. S both to and from furniture and to and from the toilet meets the requirement of weight bearing assistance for transfers and toileting.

Dr. Erickson was also a credible witness, who has been caring for Ms. S for over ten years. Dr. Erickson, while not as strong a witness on Ms. S's need for weight-bearing assistance as Ms. T, testified as to her difficulty in getting up and walking. His testimony, due to the fact that he is Ms. S's physician who only sees her in clinical setting, is generally supportive of Ms. T's testimony and does not undermine it. Dr. Erickson also pointed out that Ms. S's condition has not improved since she was approved for Waiver services in 2005, and that she has in fact regressed. The logical conclusion is that Ms. S still requires at least extensive assistance with her activities of transfers, locomotion, and toileting, much as she did in 2005.

The Division attempted to discredit Ms. T's testimony, pointing out that she provides Ms. S with PCA services only 5.75 hours per day, and speculating that Ms. S was capable of performing her activities of transfers, locomotion, and toileting without requiring extensive assistance the remainder of the day. The Division's argument is not persuasive. Ms. T is Ms. S's PCA, *i.e.* her services are subject to authorized time limits. The fact that Ms. S is forced to

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*and Mental Hygiene*, 891 A.2d 402 (Md. App. 2006); *see also* 42 C.F.R. § 431.242(c), (e); *cf. Murphy v. Curtis*, 930 N.E.2d 1228, 1235-36 (Ind. App. 2010) (noting limits on scope of *de novo* inquiry).

function without Ms. T's assistance the majority of the time does not mean that she does not require it.

While Ms. S presented credible witnesses who testified about Ms. S's need for assistance, the Division's assessor did not testify and could not be cross-examined. The Division seeks to bolster the assessor's credibility by arguing that she assessed Ms. S numerous times, and "included a statement in 2007 that she had seen Ms. S walking in the store several times throughout the year without any assistive devices."<sup>42</sup> This argument overstates the evidence. The 2007 assessment states that "[i]t was noted that client was seen in the community stores several times this past year, grabbing things off shelves and walking independent of an assistive device, pushing a cart. She was noted to be walking very quickly."<sup>43</sup> The 2007 assessment, as quoted above, does not say who "noted" Ms. S's activity. Similarly, the fact that the same assessor (Ms. Mattson) assessed Ms. S repeatedly and found her not eligible (2007, 2009, 2010, 2011) does not support an inference that the prior assessments prove the 2012 CAT is correct, because this case is the first time the Division has sought to terminate Ms. S's eligibility, and consequently, it is the first time Ms. S has had an opportunity to challenge the assessments at a hearing. Ms. S's witnesses' testimony is therefore more probative than the assessor's conclusions contained in the 2012 CAT.<sup>44</sup> The evidence therefore shows that it is more likely true than not true that the 2012 CAT incorrectly coded Ms. S as requiring only limited assistance with regard to her activities of transfers, locomotion, and toileting, and that these should have been coded as requiring extensive assistance instead.

When the 2012 CAT is corrected to reflect that Ms. S requires extensive assistance with her activities of transfers, locomotion, and toileting, she qualifies as eligible for Waiver services.

#### **D. Termination of Waiver Services**

Before the Division may terminate Waiver services for a person who was previously approved for those services, it must satisfy two conditions. First, the Division 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

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<sup>42</sup> Division Post-hearing brief at 15.

<sup>43</sup> Ex. K, p. 2.

<sup>44</sup> Ms. S has argued that under the Superior Court Decision in *Bogie v. State*, Case No. 3AN-05-10936, that deference must be given to Dr. Erickson's medical opinion in this case. It is not necessary to address this argument, because as stated above, this decision finds that Ms. S's witnesses' testimony (which includes that of Dr. Erickson) is more probative

need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for waiver services.”<sup>45</sup> As discussed above, Ms. S’s 2012 assessment, when the scoring is adjusted to reflect her need for extensive assistance with her activities of transfers, locomotion, and toileting, demonstrates that she continues to qualify for Waiver services.

The second condition that the Division must comply with is a third-party independent review to determine whether the Division’s decision to terminate Waiver services is appropriate.<sup>46</sup> The Division complied with this requirement. It also had several of its own nurses review the termination. All of the reviewers concurred that Ms. S was no longer eligible for Waiver services. However, those reviews were based upon the 2012 CAT, which scored Ms. S as not requiring extensive assistance in her activities of bed mobility, transfers, and toileting. Because those reviews were based entirely upon an erroneously scored CAT, they cannot be used to support termination of Waiver services.

#### **IV. Conclusion**

The Division has the burden of proof in this case. It did not meet it. It did not establish that Ms. S’s condition has materially improved to the point where she no longer qualifies for Medicaid Waiver services. The Division’s decision to terminate Ms. S’s Waiver services is reversed.

DATED this 10th day of May, 2013.

*Signed*

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Lawrence A. Pederson  
Administrative Law Judge

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

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<sup>45</sup> AS 47.07.045(b)(1) and (b)(3)(C).

<sup>46</sup> AS 47.07.045(b)(2)(B).