

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

In the Matter of)
)
 O P)
_____)

OAH No. 13-0054-MDS
Agency No.

DECISION

I. Introduction

O P has been receiving services under the Older Alaskan or Adult with a Physical Disability waiver program, also known as the Choice Waiver program. The Division of Senior and Disabilities Services (division) re-assessed her functional abilities, and concluded that Ms. P was no longer eligible to participate in the Choice Waiver program. Ms. P requested a hearing to contest that determination.

A hearing was held on February 11, 2013. The division was represented by its lay representative, Gerry Johnson. Ms. P represented herself, and was assisted by her care coordinator, D H, and her friend K H.¹ The record was left open at the conclusion of the hearing for the parties to submit additional documents.

Because this was a termination of benefits previously approved, the division had the burden at the hearing to show lack of eligibility. To carry this burden, the division relied on an assessment that proved to inaccurate in several respects. The evidence taken at the hearing indicates that Ms. P remains eligible for the waiver program.

II. Facts²

Ms. P lives in a 22 foot travel trailer. There is no shower or toilet in the trailer. Ms. P uses a nearby public shower and toilet most of the time, and also has a port-a-potty in the trailer to use when necessary.

Moli Atanoa, a registered nurse, assessed Ms. P on September 27, 2012.³ The assessment occurred outside, with Ms. P sitting on the seat of her walker. Ms. Atanoa concluded that Ms. P did not meet the functional requirements for the Choice Waiver

¹ Mr. H holds a power of attorney to act for Ms. P, but the scope of his authority was not fully defined during the hearing.

² These background facts were undisputed and, except where noted, are based on the testimony of Ms. P or Mr. H. Factual findings as to disputed facts are made in the Discussion section below.

³ Exhibit E 2.

program.⁴ She testified that her conclusion was largely based on Ms. P's functional ability to reach her hands over her head, touch her hands behind her back, and grip with both hands.

Ms. Atanoa's scoring of the CAT was subsequently compared to the scores given in Ms. P's 2006 assessment.⁵ The division's review concluded that the 2012 CAT showed a material improvement from the 2006 CAT. An independent third party review also concluded that the scores on the 2012 CAT showed a material improvement from the prior scores.⁶

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 facility.⁷ The program pays for services that allow an eligible person 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.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).¹¹

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

⁴ Exhibit E 29; testimony of Ms. Atanoa.

⁵ Exhibit F, pages 27 – 31.

⁶ Exhibit D, pages 3 – 4.

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 Adopting January 29, 2009 version of the CAT.

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. Scoring the CAT Assessment

There are a variety of ways in which the CAT may show that a person is eligible for the Choice Waiver program. This can be best seen by reviewing the summary page shown in Exhibit E at page 29. Section NF 1 of this page lists five questions:

- a. In Section A, items 1-8 (Nursing Services) did you code any of the responses with a 4 (i.e. services needed 7 days/wk)?
- b. In Section A, items 9 (Ventilator/Respirator) did you code this response with a 2, 3 or 4 (treatment needed at least 3 days/wk)?
- c. In Section A, item 10 (Uncontrolled seizure), did you code this response with a 1, 2, 3, or 4 (care needed at least once/wk)?
- d. In Section A, item 11 (Therapies), was the total number of days of therapy 5 or more days/wk?
- e. In section E, (Physical Functioning/Structural Problems), were 3 or more shaded ADLs coded with a 3 (extensive assistance) or 4 (dependent) in self performance?^[16]

A person who receives a “yes” answer to any one of these questions is presumed to be eligible for nursing facility level of care, and thus qualifies for the Choice Waiver program.

If a person does not qualify under section NF 1, scores are established in sections NF 2 (nursing services and therapies), NF 3 (cognitive ability), and NF 4 (inappropriate behavior). Section NF 5 states that if the total score for sections 2, 3, and 4 is zero, the individual does not qualify for nursing facility care. If the score is greater than zero, Section NF 6 is considered.

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).

¹⁶ Exhibit E, page 29. The “shaded ADLs” are bed mobility, transfers, locomotion, eating, and toilet use.

Section NF 6 asks how many of the shaded ADLs were scored with a 2 or higher in self-performance and given a support score of 2 or 3. In other words, it asks how many of these ADLs received a score of 2/2 or higher.

Under Section NF 7, the score in section NF 5 is added to the score in section NF 6. An individual with a score of 3 or higher is eligible for the Choice Waiver program.

Ms. Atanoa determined that Ms. P's only needs were with ADLs. She found that Ms. P did not need more than limited assistance in any area, and thus did not receive a self-performance score of 3 or higher in any ADL. Because the assessor concluded that Ms. P did not have any other needs in sections NF 1 through NF 4, Ms. P did not qualify for the Choice Waiver program.¹⁷ Ms. P contested the accuracy of this assessment.

C. Seizures

Ms. P testified that she has had uncontrolled seizures for many years. She stated that these occur mostly in her sleep and that she has been prescribed medication for her seizures. Ms. Atanoa did not discuss seizures in her CAT assessment because seizures were not listed as a diagnosis by Ms. P's physicians, and not listed in the prior CAT.¹⁸

Ms. P testified that she was not asked about seizures during the assessment. Ms. H testified that Ms. P sometimes gets flustered during questioning and might forget to mention certain details. Ms. H further testified that care coordinators are not encouraged to make comments during the assessment, which sometimes means that not all of the information is discussed.

A recent neurological examination has resulted in a recommendation that Ms. P should begin taking Depakote.¹⁹ This medication is used for the treatment of seizure disorders.²⁰ Uncontrolled seizures will result in a finding of eligibility if the seizures require direct assistance from others at least once each week.²¹ There was no evidence that Ms. P needs direct assistance weekly. Accordingly, although Ms. P does have a seizure disorder, her seizures are not a factor that can be considered in deciding whether she is eligible for the Choice Waiver program.

¹⁷ Testimony of Ms. Atanoa; Exhibit E 29.

¹⁸ Testimony of Ms. Atanoa.

¹⁹ Documents submitted on February 15, 2013, page 1.

²⁰ February 15, 2013 document, page 3.

²¹ See Exhibit E 13 (professional nursing services codes); E 14 (item 10, seizures); and E 29 (scoring page, section NF 1 c).

D. Bed Mobility

The first relevant ADL in dispute is bed mobility which refers to “How person moves to and from lying position, turns side to side, and positions body while in bed.”²² Ms. Atanoa noted in the CAT that, in response to being asked about turning side to side in bed, Ms. P responded “not easily I have help.”²³ She also stated “K helps me at night” and “I can lay down but sitting up I have help.”²⁴ Ms. Atanoa did not observe Ms. P in bed, but did observe her make “slight positional changes while seated on her rolling walker.”²⁵

Ms. Atanoa concluded that Ms. P only needed supervision (a self performance score of 1) in this ADL.²⁶ She testified that this was because Ms. P was able to actively participate in this ADL and also because Ms. P had scored well in the functional assessment.²⁷ The functional assessment looks at a person’s ability to grip with both hands, touch their hands over their head, touch their hands behind their back, stand up with hands across their chest, and touch their feet from a sitting position. Ms. P was able to do most, though not all, of these activities.²⁸

As reflected in the notes on the CAT, Ms. P needs assistance sitting up in bed, and in turning from side to side. Mr. H testified that he helps Ms. P with turning in bed every night. He places an arm under her neck, and his hand on her hip, and physically rolls her onto her side. He also testified that he has to pull her when Ms. P wants to sit up in bed.

The relevant self performance scores are defined in the CAT as follows:

1. Supervision – Oversight, encouragement or cueing provided 3+ times during last 7 days – or – Supervision plus nonweight-bearing physical assistance provided only 1 or 2 times during last 7 days.
2. Limited Assistance – Person highly involved in activity, received physical help in guided maneuvering of limbs, or other nonweight-bearing assistance 3+ times – or Limited assistance (as just described) plus weight-bearing 1 or 2 times during last 7 days.

²² Exhibit E 6 (description contained in CAT). The January 29, 2009, version of the CAT is adopted by reference. 7 AAC 130.230(b)(2)(B); 7 AAC 160.900(d)(6).

²³ Exhibit E 6.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Testimony of Ms. Atanoa.

²⁸ Exhibit E 4. Ms. P testified that Ms. Atanoa was late for the assessment, cold because they were doing the assessment outside, and rushed to complete the assessment. She testified that the functional assessment was not performed. Ms. Atanoa testified that she did perform this functional assessment.

3. Extensive Assistance – While 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.
4. Total Dependence – Full staff/caregiver performance of activity during ENTIRE 7 days.^[29]

These definitions set up a continuum of assistance-need based on the amount and type of physical assistance provided.

In deciding what score to assign, Ms. Atanoa testified that she goes by what she is told by the recipient, and then asks for a demonstration.³⁰ However, Ms. P was not asked to demonstrate either of these bed activities.

According to both the notes in the CAT and Mr. H's testimony, Ms. P needs physical assistance on a daily basis turning in bed and with sitting up in bed. Thus, she should not have been scored as needing only supervision, which only applies if non-weight bearing physical assistance is provided less than three times per week. In this case, Ms. P needs physical assistance daily.

The physical assistance provided is also weight bearing on a daily basis. Mr. H must pull Ms. P into a sitting position when she is lying on her back in bed. He also has to physically push her to turn her on her side. Accordingly, Ms. P needs extensive assistance – a score of 3 – for bed mobility.

E. Transfers

Transfers are how a person moves to and from a bed, chair, wheelchair, or standing position, but not to and from a bath or toilet.³¹ Ms. Atanoa only observed Ms. P stand up from her walker's seat. She did not need weight bearing support for that transfer. However, Mr. H testified that lifting her to a standing position from a regular chair or bed requires more assistance. He testified that he has to lift about 75% of Ms. P's weight each time she transfers to a standing position. Mr. H's testimony was credible, and since Ms. Atanoa did not observe Ms. P transfer from other types of furniture, there is no evidence to suggest his testimony was inaccurate. Because uncontroverted evidence shows that Ms. P requires extensive assistance in transfers, a score of 3 must be applied.

²⁹ See Exhibit E 6 (Code descriptions in CAT).

³⁰ Testimony of Ms. Atanoa.

³¹ Exhibit E 6 (bath and toilet transfers are covered elsewhere in the CAT).

F. Locomotion

Locomotion refers to how a person is able to move in his or her own home, on one floor.³² Ms. Atanoa gave her a self-performance score of 1, for needing supervision.³³ Ms. P uses the walls and furniture in her home to steady herself. Mr. H walks behind her to provide support and to catch her if she falls. Ms. P also wears a gait belt, which goes around her chest with a hand hold for Mr. H to hold onto. He uses this to help steady her as well. At most, this would be described as limited assistance, which is a self-performance score of 2.

G. Eating

This ADL refers to how a person eats and drinks regardless of skill.³⁴ Ms. P testified that she able to eat and drink without assistance once her meals were prepared, although she could not hold a knife very well and sometimes needed help cutting her food. She was properly scored as independent in this area.

H. Toileting

This ADL refers to how a person uses the toilet, including transfers.³⁵ Ms. P was given a score of 2 in self-performance, which means she requires weight bearing assistance no more than twice in a seven day period.³⁶ During the assessment, Ms. P stated that she needs help to sit down and stand up after using the toilet.³⁷ Although the notes in the CAT state that Ms. P was observed transferring, at the hearing it was undisputed that the transfer observed was standing up from Ms. P's walker; she was not observed sitting on or standing up from a toilet or her port-a-potty.

Ms. P testified that getting on and off of a toilet was like using a chair. She needs someone to help pull her up when she stands. While a higher toilet is easier for her to use, the toilet she normally uses is not high, and there are no grab bars. Ms. P needs weight bearing assistance for this ADL on a daily basis. Accordingly, she should have been scored with a 3 for extensive assistance.

³² Exhibit E 7.

³³ *Id.*

³⁴ Exhibit E 9.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

I. Corrected CAT Scoring

Section NF 1(e) of the CAT scoring page,³⁸ asks whether a score of 3 or 4 was given in three or more of the “shaded” ADLS. The shaded ADLs are bed mobility, transfers, locomotion, eating, and toileting. As discussed above, Ms. P should have been given a score of 3 in bed mobility, transfers, and toileting. Accordingly, she is presumed to need nursing facility level of care.³⁹

IV. Conclusion

In conducting the assessment of Ms. P, the nurse assessor did not have an opportunity to have Ms. P demonstrate the activities of daily living that she struggles with. Had she been given this demonstration, she would have seen that Ms. P actually needs daily weight bearing assistance in at least three of the ADLs. Had she observed this, the CAT would have been scored correctly. Based on the corrected CAT scores, Ms. P is eligible for the Choice Waiver program, and the division’s decision to terminate her from that program is reversed.

Dated this 20th day of February, 2013.

Signed

Jeffrey A. Friedman
Administrative Law Judge

³⁸ Exhibit E 29.

³⁹ *Id.*

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 12th day of March, 2013.

By: Signed
Name: Jared C. Kosin, J.D., M.B.A.
Executive Director
Office of Rate Review, DHSS

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