

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RECVD  
26.NOV 2014 16.26

K [REDACTED] R [REDACTED],  
Appellant,  
vs.  
STATE OF ALASKA,  
DEPARTMENT OF HEALTH AND  
SOCIAL SERVICES, DIVISION OF  
SENIOR AND DISABILITIES  
SERVICES,  
Appellee.

Case No. 3AN-13-[REDACTED] CI

**ORDER**

**I. INTRODUCTION**

K [REDACTED] R [REDACTED] appeals the decision by the State of Alaska, Department of Health and Social Services, to terminate her Medicaid Choice Waiver program services. The Court heard oral argument on October 28, 2014. The Court concludes that there is substantial evidence to support the State's determination that Ms. R [REDACTED] materially improved pursuant to AS 47.07.045(b)(3)(C). The State's decision is AFFIRMED.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

**A. Medicaid Choice Waiver Program**

One of the purposes of the Medicaid Waiver program is to provide individuals, who otherwise would be in an institutional setting, such as hospitals and nursing homes,

health and medical services in their own homes.<sup>1</sup> An applicant is eligible to receive waiver benefits under this waiver program only if she meets the specified nursing facility level of care.<sup>2</sup> Nursing facility level of care is defined in regulation as either skilled or intermediate, as measured by the Department's eligibility criteria.<sup>3</sup> Whether a person meets this level of care is determined by the Consumer Assessment Tool ("CAT"), a federally approved, standardized nursing assessment tool.<sup>4</sup> Once a person is in the Waiver program, they must be reassessed every year to maintain eligibility.<sup>5</sup>

Before the department may terminate payment for services, the annual assessment must find that the recipient's condition has materially improved since the previous assessment.<sup>6</sup> Materially improved means that a recipient who has previously qualified for a waiver for "an older Alaskan or adult with a physical disability, no longer has a functional limitation or cognitive impairment that would result in the need for nursing

---

<sup>1</sup> 42 U.S.C. § 1396n; *see also*, *Hidden Heights Assisted Living, Inc. v. State*, 222 P.3d 258, 261 (Alaska 2009) ("The home and community-based waiver program offers 'a choice between home and community-based waiver services and institutional care in a nursing facility . . . to aged, blind, physically or developmentally disabled, or mentally retarded individuals who meet [certain] eligibility criteria.'"); AS 47.05.010 (The Waiver program is jointly administered by the U.S. Centers for Medicare and Medicaid Services and the State of Alaska.); AS 47.07.040 (The Department of Health and Social Services ("DHSS") is Alaska's Medicaid agency.); AS 47.07.040 (The Division of Senior and Disabilities Services is the administrator of the Waiver program.).

<sup>2</sup> 7 AAC 130.205; *see* AS 47.07.054.

<sup>3</sup> 7 AAC 130.515 (skilled); 7 AAC 130.510 (intermediate).

<sup>4</sup> 7 AAC 130.213; 42 U.S.C. §1396r(b)(3)(A) (stating requirements for assessments of nursing facility residents); 42 U.S.C. §441.353(c)(6) (requiring states to create an evaluation instrument for evaluation and reevaluation of waiver beneficiaries that is "the same or more stringent" as that used to evaluate nursing facility residents).

<sup>5</sup> AS 47.07.045(b)(1).

<sup>6</sup> AS 47.07.045(b)(3).

home placement, and is able to demonstrate the ability to function in a home setting without the need for waiver services.”<sup>7</sup>

The State uses the CAT to determine whether an applicant meets the requisite level of care for continued participation.<sup>8</sup> The CAT is a 31-page questionnaire that is filled out by a nurse assessor who visits with and interviews the applicant in his or her home. The visit is 60-90 minutes long, during which time the nurse and applicant discuss and assess the applicant’s medical conditions, functional and cognitive abilities, nursing needs, therapies and surgeries, changes in medications and therapies, and changes in equipment and diagnosis. The nurse assessor also makes general observations regarding the recipient’s abilities and situation. The assessment is an interactive process and includes performance of specific tasks and input from the care coordinator, who is responsible for acquiring all services the recipient needs and who drives the creation of the care plan.

The nurse gives numerical self-performance and support scores to a variety of activities of daily living (“ADLs”). The relevant ADLs are eating, toileting, transfers, locomotion, and bed mobility. The numerical scores are based on the amount of assistance that an individual needs to complete each ADL, and they range from 0 (independent) to 4 (total dependence: full stall/caregiver performance during entire preceding 7 days). To make a level of care determination, these scores are considered in

---

<sup>7</sup> AS 47.07.045(b)(3)(C)

<sup>8</sup> 7 AAC 130.215(4).

conjunction with the stated observations of the nurse and the medical needs of the recipient.<sup>9</sup> The level of care determination must incorporate the results of the CAT.<sup>10</sup>

If the annual assessment determines that the person has “materially improved,”<sup>11</sup> another State nurse (not the nurse who performs the CAT) conducts a material improvement review. This reviewing nurse compares the current CAT with the previous CAT. This review looks at what has changed in the individual’s life to determine whether those changes support the results of the most recent CAT.

If the internal improvement review concurs with the CAT finding material improvement, the CAT and all the documents reviewed by the State are forwarded for a review by an independent qualified health professional under contract with the State.<sup>12</sup> The State’s third-party reviewer, Qualis Health, utilizes a registered nurse licensed in Alaska to review the State’s decision. Qualis Health also requires a physician review before any termination decision can be approved. If this third-party review agrees that an individual has materially improved, the State provides notice of denial of services. The individual may request a fair hearing, at which the State bears the burden of proving by a preponderance of the evidence that the individual has materially improved and is no longer Waiver program eligible.

---

<sup>9</sup> R. 92.

<sup>10</sup> 7 AAC 130.213.

<sup>11</sup> AS 47.07.045(b)(1); *see* AS 47.07.045(b)(3)(C) (“Materially improved” 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.”)

<sup>12</sup> AS 47.07.045(b)(1)-(3).

B. K██████ R██████'s Case

In 2010, Ms. R██████ qualified for the Waiver program as an Older Alaskan/Adult with physical disabilities.<sup>13</sup> Ms. R██████ received scores of 0 (eating), 2 (bed mobility), 3 (toileting), 3 (transfers), and 3 (locomotion).<sup>14</sup> Ms. R██████ weighed 355 pounds and was frequently incontinent.<sup>15</sup> She had an unsteady gait, had fallen in the past thirty days, and had problems with balance when standing.<sup>16</sup> She could not completely perform the cognition and function tests. The State determined that she needed several assistive devices, including a commode, an elevated toilet, a gait belt, grab bars, a hand held shower, and a lift.<sup>17</sup>

In 2012, the State's reassessment determined that Ms. R██████ had materially improved.<sup>18</sup> She received scores of 0 (eating), 0 (bed mobility), 3 (toileting), 2 (transfers), and 0 (locomotion).<sup>19</sup> Ms. R██████ had lost approximately 30 pounds and had not fallen in the past six months.<sup>20</sup> She had installed numerous assistive devices, including a bath bench, elevated toilet, hand held shower, grab bars, lifeline, walker, compression stockings, and a reclining lift chair.<sup>21</sup> Ms. R██████ had knee replacement

---

<sup>13</sup> R. 104.

<sup>14</sup> R. 92.

<sup>15</sup> R. 97.

<sup>16</sup> R. 97.

<sup>17</sup> R. 101.

<sup>18</sup> R. 66-67.

<sup>19</sup> R. 43-49.

<sup>20</sup> R. 60.

<sup>21</sup> R. 33-34; Tr. 240-41; Tr. 237, 331 (Ms. R██████ was able to get in and out of her reclining lift chair without assistance.).

surgery. Ms. R [REDACTED] was not exhibiting any cognitive care needs and the functional test showed improvement.<sup>22</sup>

The material improvement reviewer, third-party reviewer, and Administrative Law Judge all concurred that Ms. R [REDACTED] had materially improved. The State sent Ms. R [REDACTED] a termination notice and Ms. R [REDACTED] appeals the termination decision to this Court.

### III. DISCUSSION

#### A. Issues Presented on Appeal

1. Did the State give proper deference to ANP G [REDACTED]'s letters?
2. Is the State's determination that Ms. R [REDACTED] had materially improved supported by substantial evidence?

#### B. Standards of Review

Ms. [REDACTED]'s argument that the State improperly terminated her Waiver program services is a factual determination which the court on appeal reviews for substantial evidence.<sup>23</sup> Substantial evidence is evidence that a "reasonable mind might accept as adequate to support a conclusion."<sup>24</sup> When an agency "chooses between conflicting determinations and there is substantial evidence in the record to support either conclusion" the court will affirm.<sup>25</sup> The Court does not reweigh conflicting evidence, but instead views conflicting evidence in favor of the agency's findings, even if the court

---

<sup>22</sup> Tr. 134-35; Tr. 212-13.

<sup>23</sup> *May v. State, Commercial Fisheries Entry Comm'n*, 175 P.3d 1211, 1216 (Alaska 2007).

<sup>24</sup> *Id.*

<sup>25</sup> *Morris v. State, Dep't of Admin, Div. of Motor Vehicles*, 186 P.3d 575, 577 (Alaska 2008).

might have taken a contrary view.<sup>26</sup> An appellate court may reverse an agency decision only if it cannot conscientiously find that the evidence supporting the agency's decision is substantial.<sup>27</sup>

C. The State gave appropriate deference to ANP G [REDACTED]'s letters.

ANP G [REDACTED] provided two written statements to the State. In the first statement, ANP G [REDACTED] stated that Ms. R [REDACTED] does not need skilled nursing care.<sup>28</sup> In the second, she stated that Ms. R [REDACTED] needs intermediate nursing services.<sup>29</sup>

At the fair hearing, Nurse Cornell opined about the value of ANP G [REDACTED]'s statements.<sup>30</sup> The ALJ explicitly considered and weighed ANP G [REDACTED]'s statements.<sup>31</sup> The Court finds that the State gave ANP G [REDACTED]'s two statements appropriate deference. The Court will not reweigh conflicting evidence when applying the substantial evidence standard.<sup>32</sup>

D. The State's determination that Ms. R [REDACTED] materially improved is supported by substantial evidence.

In 2010, Ms. R [REDACTED] qualified for the Waiver program as an Older Alaskan/Adult with physical disabilities.<sup>33</sup> She qualified with a minimum eligibility score, receiving ADL scores of 0 (eating), 2 (bed mobility), 3 (toileting), 3 (transfers), and 3

---

<sup>26</sup> *Suydam v. State, Commercial Fisheries Entry Comm'n*, 957 P.2d 318, 323 (Alaska 1998).

<sup>27</sup> *Williams v. Ketchikan Gateway Borough*, 295 P.3d 374, 376 (Alaska 2013).

<sup>28</sup> R. 135.

<sup>29</sup> R. 161.

<sup>30</sup> Tr. 269-72.

<sup>31</sup> R. 317-18, 320-21.

<sup>32</sup> *Suydam*, 957 P.2d 318, 323 (Alaska 1998).

<sup>33</sup> R. 104; *see generally* R. 075-105 (2010 CAT).

(locomotion).<sup>34</sup> At the time of the 2010 assessment, Ms. R [REDACTED] weighed 355 pounds and was frequently incontinent.<sup>35</sup> She had an unsteady gait, had foot and skin problems, and had balance problems when standing, and had fallen in the past thirty days.<sup>36</sup> She could not completely perform the cognition and functionality tests.<sup>37</sup> The State determined that she needed several assistive devices.<sup>38</sup>

In 2012, the State's reassessment determined that Ms. R [REDACTED] had materially improved.<sup>39</sup> On the 2012 CAT, Ms. R [REDACTED] received self-performance scores of 0 (eating), 0 (bed mobility), 3 (toileting), 2 (transfers) and 0 (locomotion).<sup>40</sup> Ms. R [REDACTED] successfully completed the cognitive test and improved on the functionality test. She had lost approximately 30 pounds and not fallen in the past six months.<sup>41</sup> Ms. R [REDACTED] had installed a bath bench, elevated toilet, hand held shower, grab bars, lifeline, walker, compression stockings, and a reclining lift chair.<sup>42</sup> Ms. R [REDACTED] had knee replacement surgery.<sup>43</sup> Nurse R [REDACTED] determined that Ms. R [REDACTED] was not exhibiting any cognitive care needs.<sup>44</sup> Nurse R [REDACTED] was aware of Ms. R [REDACTED]'s many medical diagnoses.<sup>45</sup>

---

<sup>34</sup> R. 92.

<sup>35</sup> R. 97.

<sup>36</sup> R. 97.

<sup>37</sup> R. 075-105.

<sup>38</sup> R. 101.

<sup>39</sup> R. 66-67;

<sup>40</sup> R. 43-49.

<sup>41</sup> R. 60.

<sup>42</sup> R. 038-068 (2012 CAT).

<sup>43</sup> Tr. 144.

<sup>44</sup> Tr. 134-35.

<sup>45</sup> Tr. 133.



The material improvement review affirmed that the CAT scores were supported<sup>46</sup> and the third-party review concurred.<sup>47</sup> The material improvement reviewer noted that Ms. R█████'s assistive devices improved her independence.<sup>48</sup> Qualis Health noted that Ms. R█████ lost weight, had not fallen in six months, and improved functionally in the ADLs.<sup>49</sup>

Ms. R█████ requested a fair hearing, which was conducted on April 29-30, 2013 by the Office of Administrative Hearings on behalf of the DHHS Commissioner.<sup>50</sup> The State presented testimony of the 2012 CAT nurse assessor, M█████ R█████, R.N. (no relation), the 2012 improvement review nurse, Sam Cornell, R.N., and a letter from Ms. R█████'s Advanced Nurse Practitioner, J█████ G█████, stating that Ms. R█████ does not need skilled nursing care.<sup>51</sup> In addition to cross-examination of the R.N. witnesses, Ms. R█████ offered testimony of Ms. R█████'s Personal Care Attendant, M█████ A█████, and a second letter from ANP G█████, in which she states that Ms. R█████ needs immediate nursing care.<sup>52</sup> Both sides submitted post-hearing briefing.<sup>53</sup>

The ALJ noted that the State presented testimony establishing that it provided health care providers the opportunity to comment before or after the CAT but that none

---

<sup>46</sup> R. 070-074 (2012 Material Improvement Reporting).

<sup>47</sup> R. 031-036.

<sup>48</sup> R. 32.

<sup>49</sup> R. 32-34.

<sup>50</sup> Tr. Vol. 2, p. 97-383.

<sup>51</sup> R. 135.

<sup>52</sup> R. 161.

<sup>53</sup> R. 167-289 (Claimant's Post-Hearing Brief); R. 292-306 (State's Reply to Claimant's Post-Hearing Brief).

took advantage of the invitation.<sup>54</sup> In her decision, the ALJ explicitly considered ANP G■■■■'s two letters, one stating Ms. R■■■■ does not need skilled nursing level care and another stating that Ms. R■■■■ does need intermediate nursing level care.<sup>55</sup> The State considered evidence that although Ms. R■■■■ has diabetes, she is now able to manage and administer her own medication, which she was not able to do in 2010.<sup>56</sup> Unlike in 2010, Ms. R■■■■ did not have ulcers or bedsores in 2012.<sup>57</sup> The ALJ heard the testimony from PCA A■■■■, including that she started working with Ms. R■■■■ approximately two months before the 2012 CAT<sup>58</sup> and that she thought Ms. R■■■■'s health had declined.<sup>59</sup>

Looking the entire record and viewing conflicting evidence in favor of the agency's findings, the Court finds that a reasonable mind can accept the evidence presented as adequate to support the State's decision to terminate Ms. R■■■■'s waiver benefits because she had materially improved. The State considered the 2012 CAT, including all current recorded diagnosis and medications and items of durable medical equipment, the 2012 Material Improvement Review, which incorporated the 2010 CAT, the independent third-party review, the testimony of the 2012 CAT assessor, M■■■■ R■■■■, R.N., the testimony of the 2012 Material Improvement Reviewer, Sam Cornell, R.N., the testimony of M■■■■ A■■■■, Ms. R■■■■'s personal care attendant, a letter

---

<sup>54</sup> R. 317

<sup>55</sup> R. 317-18, 320-21.

<sup>56</sup> Tr. 267-68.

<sup>57</sup> Tr. 158-59.

<sup>58</sup> R. 346.

<sup>59</sup> R. 325.

from J ■ G ■, ANP, stating that Ms. R ■ does not need skilled level nursing care, and a letter from ANP G ■ stating that Ms. R ■ does need intermediate level nursing care. The results of the cognitive and functional tests show improvement from 2010 to 2012.

The Court notes that Ms. R ■ will still be eligible for PCA services, which are a regular Medicaid service, not a Waiver service.<sup>60</sup> Also, given that Ms. R ■ sleeping in her lounge was a point of contention, the Court notes that even if the bed mobility score was the same in 2012 as in 2010, Ms. R ■ would still not qualify for Waiver services. The Court finds that the State's determination is supported by substantial evidence.

#### IV. CONCLUSION


The Court finds that the State followed its regulations and complied with State and federal law in providing an objective measure of Ms. R ■'s level of care needs. The Court finds that the State's conclusion that Ms. R ■ materially improved is supported by substantial evidence. The State's decision to terminate Ms. R ■'s waiver services is AFFIRMED.


**IT IS SO ORDERED.**

---

<sup>60</sup> Tr. 211.  
R ■ v. State  
3AN-13 ■ CI  
Page 11 of 12

DATED at Anchorage, Alaska this 25<sup>th</sup> day of NOV 2014.

  
CATHERINE EASTER  
Superior Court Judge

I certify that on 11/26/14  
a copy of the above was mailed to: J. Davis  
 K. Vogel  
\_\_\_\_\_  
Jamie Trivette, Judicial Assistant