

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

In the Matter of)
)
 L S)
_____)

OAH No. 13-0097-MDS
Agency No.

DECISION

I. Introduction

L S has been receiving services under the Older Alaskan or Adult with a Physical Disability waiver program, also known as the Choice Waiver program or Waiver program, since 2010. The Division of Senior and Disabilities Services (division) re-assessed her functional abilities in 2012, and concluded that Ms. S was no longer eligible to participate in the Choice Waiver program. Ms. S requested a hearing to contest that determination.

A hearing was held on April 29 and 30, 2013. Because this was a termination of benefits previously approved, the division had the burden of proving by a preponderance of the evidence that Ms. S had materially improved. The division has met its burden and established that Ms. S is no longer eligible for the waiver program.

II. Facts

Because the facts in dispute center around the division's assessment of Ms. S's continuing eligibility in the Choice Waiver program, this section will provide an overview of the Waiver Program followed by a brief discussion of the assessment tool used by the division and how the division uses the tool to determine program eligibility.

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.¹ The program pays for services that allow an eligible person to stay in his or her home instead of moving into a nursing facility.

There are two "levels of care" that are eligible for the waiver program. The first is skilled nursing level of care facility services as defined at 7 AAC 140.515. The second is intermediate level of care facility services as defined at 7 AAC 140.510. The division

¹ 7 AAC 130.205(d)(2).

assesses an applicant's abilities and needs and then looks at the nursing level services, intermediate and skilled, defined in 7 AAC 140.510 and .515.² When assessing whether an applicant requires skilled or intermediate care, the division must incorporate the results of the Consumer Assessment Tool (CAT).³

An individual who has qualified to participate in the Choice Waiver program may only lose eligibility if the division finds that the individual has materially improved.⁴

Material improvement for an adult with physical disabilities is defined by statute as:

no longer [having] 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.^[5]

The same criteria used in making the first decision are used later when deciding whether the person has material improvement.⁶

B. *The CAT Assessment*

The CAT is an evaluative tool used by the division to assess whether a person is eligible. The CAT scores the applicant's abilities and needs in several areas.

C. *Scoring the CAT Assessment*

How the division uses the CAT to determine whether a person is eligible for the Choice Waiver Program is best explained by reviewing the scoring system and the summary page shown in Exhibit E at page 29.

During a CAT assessment the assessing nurse looks at an individual's nursing needs, cognitive skills, and functional limitations assigning scores to each area. Scoring is a way to numerically quantify the support required. Needs and limitations can be combined in a variety of different ways to meet the eligibility criteria. In this case the relevant issues revolve around Ms. S's functional ability with the five of the eight activities of daily living (ADLs). These are also referred to as "shaded ADLs" because on the CAT, they are shaded.⁷

- bed mobility (how a person moves to and from lying position, turns side to side, and positions body while in bed);

² 7 AAC 130.230(b)(2)(A).

³ 7 AAC 130.230(b). 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) (adopting January 29, 2009 version of the CAT).

⁴ AS 47.07.045(b)(1) – (3).

⁵ AS 47.07.045(b)(3)(C).

⁶ 7 AAC 130.230(g).

⁷ Exhibit E page 18. The three nonshaded ADLs are dressing, personal hygiene, and bathing.

- transfers (how a person moves between surfaces – to and from bed, chair, wheelchair, and standing position but excluding to and from bath tub and toilet);
- locomotion (how a person moves between a location in his or her room and other areas on the same floor. If the person is in a wheel chair, then the person’s self-sufficiency is assessed once in a chair);
- eating (how a person eats and drinks regardless of skill);
- toileting (how a person uses the toilet, transfers on and off the toilet, cleanses, changes pad, manages ostomy or catheter, adjusts clothing).⁸

A person receives two scores for each ADL: a self-performance score and a support score. Self-performance scores numerically quantify how involved a person is in performing an ADL by looking at how often the assistance involves of weight bearing support. Only five of the seven self performance scores are relevant to Ms. S:

- “0” A person is scored as “independent” when he or she needed help or oversight to perform the ADL no more than two days out of the past seven days.
- “1” A person is scored as requiring “supervision” when he or she needs oversight, encouragement or encouragement. “supervision” also encompasses nonweight-bearing physical assistance.
- “2” A person is scored as requiring “limited assistance” when he or she is highly involved in the ADL but receives physical nonweight-bearing assistance three or more times a week or weight-bearing assistance no more than two times in the past seven days.
- “3” A person is scored as requiring “extensive assistance” when he or she performs part of the ADL with weight-bearing support three or more times over the past seven days or full staff/caregiver performance part of the last seven days.
- “4” A person is scored as being “totally dependent” when he or she receives full staff/caregiver performance of the ADL during the entire week.⁹

The second score is the support provided score. This assigns a numerical value to the support provided by a caregiver during the performance of the ADL. Of the seven support sores only four are relevant to Ms. S. Those are:

- “0” A person performs the ADL with no set-up or physical assistance.

⁸ Exhibit E pages 6 – 12. Number 4 on the CAT is designated as “total dependence.”

⁹ *Id.*

- “1” To perform the ADL, the person only needs set up assistance.
- “2” To perform the ADL a person needs a one person physical assist.
- “3” A person receives a score of 3 when he or she requires a two person physical assist.¹⁰

Using this scoring system, Ms. S is eligible for the Choice Waiver Program if she receives a score of three, extensive assistance, in three of the five shaded ADLs.¹¹

D. *Ms. S*

Ms. S is 62 years old and suffers from a variety of physical ailments. She was admitted to the choice waiver program on October 1, 2010. At the time of her 2010 assessment she weighed 355 pounds and was diagnosed as suffering from diabetes mellitus, congestive heart failure, arthritis, osteoporosis, depression, and bipolar disease.¹² It was also noted that Ms. S was frequently incontinent, had fallen in the months prior, had an unsteady gait, and balance problems when standing as well as skin and foot problems.¹³

However, at Ms. S’s 2012 annual assessment the division determined Ms. S no longer met the functional requirements for the Choice Waiver program even though her medical ailments had either not changed or she had more diagnoses.¹⁴ The assessor was Margaret Rogers, a registered nurse. Nurse Rogers assessed Ms. S on September 25, 2012 using the CAT.¹⁵ Nurse Rogers noted that Ms. S had improved functional ability and no longer required nursing facility level of care. Nurse Rogers attributed the improved functionality to the use of assistive devices (reclining chair, walker, raised toilet seat, cane, etc.), loss of weight, and knee replacement surgery.¹⁶

Ms. S argues that the division should have conducted a more extensive investigation into her needs by contacting health care providers and care givers. The division presented testimony establishing that it provided care givers the opportunity to comment either before or after the CAT but that none took advantage of the invitation. Additionally, because Ms. S was capable of answering the questions presented in the CAT, Nurse Rogers did not to seek out a care giver to provide answers.

¹⁰ *Id.*
¹¹ Exhibit E page 29.
¹² Exhibit F pages 26, 28.
¹³ Exhibit F pages 28, 29.
¹⁴ Exhibit E page 29.
¹⁵ Exhibit E page 2.
¹⁶ Testimony of Nurse Rogers.

N B has been Ms. S's care giver since July 2012. She provides 31.25 hours of assistance over five days, Monday through Friday. On the weekends Ms. S is on her own. Ms. B observed that unless she has a bout of incontinence, Ms. S is able to provide for herself those two days. She does not use her bed to sleep in. She prefers to sleep in her lift recliner finding it easier to get in and out of. Ms. S uses her bed for Ms. B to clean her and rub lotion on her. Ms. S can move around the apartment, toilet, and change her clothing.¹⁷

The division did contact Ms. S's primary care provider, K H, ANP, after the assessment, summarized its findings, and asked if ANP H thought Ms. S required skilled nursing level of care and whether ANP H would admit Ms. S to a skilled nursing facility.¹⁸ ANP H responded that she did not believe Ms. S required skilled nursing level of care.¹⁹ The division did not ask if Ms. S should receive intermediate nursing services.

Ms. S did ask ANP H about intermediate nursing facilities. ANP H responded March 8, 2013. The relevant portions read:

I am writing this letter to state my medical opinion that [Ms. S] needs intermediate nursing services as that is defined in 7 AAC 140.510(b). . . .

L requires, and is currently receiving PCA services for assistance with [a]ctivities of daily living and personal hygiene to prevent skin breakdown and further health issues. *She will continue to require professional medical and nursing care and supervision, assistance with ADL's and personal care for the duration of her life.* If L does not continue to receive services through the [M]edicaid waiver program, she will be at risk for future health problems, falls or hospitalizations.^[20]

III. Discussion

The division determined, based on the CAT, that Ms. S no longer required skilled nursing level of care. She argues that the division is incorrect because it failed to consider whether Ms. B required intermediate nursing level of care. The starting point for an assessment is whether the facts support the division's scoring of the ADLs in the most recent CAT.

A. *Activities of Daily Living*

1. Bed Mobility

¹⁷ Testimony of N. B.

¹⁸ Exhibit G page 2

¹⁹ *Id.*

²⁰ Exhibit 1. (emphasis added).

The first ADL in dispute is bed mobility. In 2010, Ms. S received a self performance score of 2 and a support score of 2 (score of 2/2).²¹ In 2012, Ms. S received a score of 0/0 indicating that she was independent in this activity.²² The change in scoring is attributable to Ms. S sleeping in her reclining lift chair.²³ The unchallenged evidence establishes that if Ms. S did not have her lift recliner she would require limited (score 2) to extensive (score 3) assistance in the area of bed mobility.²⁴ Ms. B established that Ms. S changes her position in the chair by adjusting pillows and that she can do this by herself but prefers to have Ms. B adjust the pillows. Ms. S does not require assistance to reposition herself and a CAT score of 0/0 is correct.

Ms. S argued that because bed mobility refers to how a person moves while in bed, and because Ms. S does not sleep in a bed, the division has not established by a preponderance of the evidence that Ms. S is independent in the ADL of *bed* mobility. Ms. S sleeps in her lift recliner. That is her bed. She does not need assistance in repositioning herself in her bed.

2. Transfers

Transfers refer to how a person moves to and from a bed, chair, wheelchair, or standing position, but not to and from a bath or toilet.²⁵ By scoring Ms. S 2/2 for her functional ability to transfer, Nurse Rogers agrees that Ms. S is unsteady with transfers and needs a one person physical assist when moving to and from furniture other than her recliner.

Nurse Rogers did not observe Ms. B transfer from any furniture other than her recliner. Ms. S use of her bed is limited but she cannot get out of bed on her own.²⁶ The use of the bed is a regular occurrence but it was not every day. Ms. B could not be more specific. She assists Ms. S getting up from a couch or a regular chair by “yanking her up.” Ms. B provides weight bearing assistance to Ms. S in these situations but Ms. S has not established that she receives this kind of assistance three or more times a week as required for a score of three. The score of 2/2 is supported by the evidence.

²¹ Exhibit F Page 11.

²² Exhibit E Page 6.

²³ Exhibit E Page 6.

²⁴ Nurse Rogers did not observe Ms. S in bed. Ms. B has personal knowledge of Ms. S bed mobility ability.

²⁵ Exhibit E 6 (bath and toilet transfers are covered elsewhere in the CAT).

²⁶ Testimony of B.

3. Locomotion

Locomotion refers to how a person is able to move in his or her own home, on one floor.²⁷ Nurse Rogers gave Ms. S a score of 0/0 using what Ms. S self reported and her observation of Ms. S walking. It was reported that Ms. S walks in the home without assistance and has a slow and steady gait. Ms. B testified that she is always in fear of Mr. S falling. Ms. B does not provide weight bearing assistance to Ms. S when she walks, but challenges Nurse Rogers's assertion that Ms. S has a slow and steady gait. Rather Ms. B testified that Ms. S is very unsteady and must support herself as she moved throughout the house. Ms. B expressed great concern that Ms. S may fall but because of her size she would not be able to get up. What Ms. B describes is at most a 1/0. However, a Score of 0/0 is also supported by the evidence.

4. Eating

This ADL refers to how a person eats and drinks regardless of skill.²⁸ The record does not contradict the division's score of 0/1 in this area.

5. Toileting

This ADL refers to how a person uses the toilet, cleanses, changes pad, and includes transfers.²⁹ Ms. S was given a score of 3 in self-performance, which means she requires weight bearing assistance three or more times in a seven day period or full caregiver performance during part of the last seven days.³⁰ The division's self performance score is supported by the record.

B. *Scoring*

The CAT scoring page,³¹ asks whether a score of 3 or 4 was given in three or more of the "shaded" ADLs. If so, then Ms. S is eligible for skilled nursing facility level of care and she would continue to receive program benefits. The shaded ADLs are bed mobility, transfers, locomotion, eating, and toileting. As discussed above, Ms. S did not receive a

²⁷ Exhibit E 7.

²⁸ Exhibit E 9.

²⁹ *Id.*

³⁰ *Id.*

³¹ Exhibit E page 29.

score of three in three or more shaded areas. Accordingly, the CAT does not support a nursing facility level of care.³²

C. *Level of Care*

To participate in the Community Waiver Program, Ms. S must require either skilled care under 7 AAC 140.515 or intermediate care under 7 AAC 140.510. As discussed above, nursing facility level of care is not supported by the CAT or ANP H.³³ Therefore, to receive waiver services Ms. S must qualify for intermediate care facility services.

Ms. S was correct that the division focused its inquiry on whether Ms. S required skilled nursing facility level of care when it asked ANP H her opinion. The division should have also inquired about intermediate nursing level of care. On the record presented, this oversight has been cured by Ms. S inquiry to ANP H.³⁴

There are three elements that must be met before a person is eligible to participate in the waiver program under intermediate nursing service level of care. To qualify Ms. S: 1) must not require skilled nursing facility services, 2) must need services to treat a stable condition, and 3) the service must be ordered by and under the direction of certain health care providers

Ms. S's March 8, 2013 letter from ANP H lacks does not "order" intermediate care facility level of services. The letter is not specific enough to be considered a directive. The letter is a provider's opinion that Ms. S will continue to require assistance, but there is nothing in the letter that "directs the observation, assessment, and treatment" of Ms. S's illnesses. Ms. S's has not provided evidence that her continued participation in the Waiver Program is ordered by and under the direction of the appropriate health professional.

IV. Conclusion

Ms. S is not eligible for the Choice Waiver Program.

DATED this 28th of May, 2013.

By: Signed
Rebecca L. Pauli
Administrative Law Judge

³² *Id.*

³³ Exhibit G.

³⁴ Exhibit 1.

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 11th day of June, 2013.

By: Signed _____
Name: Rebecca L. Pauli
Title: Administrative Law Judge, DOA

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