

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

In the Matter of)
)
 K T-Q)
_____)

OAH No. 13-0271-MDS
Agency No.

DECISION

I. Introduction

Mr. T-Q 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 his functional abilities, and concluded that Mr. T-Q was no longer eligible to participate in the Choice Waiver program. Mr. T-Q requested a hearing to contest that determination.

A hearing was held on May 8, 2013. The division was represented by Gerry Johnson. Mr. T-Q represented himself, and was assisted by his nephew, H N. A Spanish language interpreter was used to translate the proceedings for Mr. T-Q.

Because the division proposed terminating benefits previously granted, it had the burden of proving by a preponderance of the evidence that Mr. T-Q was no longer eligible.¹ As discussed below, the division met its burden of proof, and its determination is affirmed.

II. Facts

Mr. T-Q was assessed in 2008. At that time, he was found to qualify for the Choice Waiver program, based on his need for professional nursing services and the need for at least limited assistance with three activities of daily living.² He was re-assessed by Registered Nurse Moli Atanoa on October 23, 2012.³ The division concluded that Mr. T-Q was no longer eligible for this program.⁴ This conclusion was based on a finding that Mr. T-Q no longer needed professional nursing services, and did not need at least extensive assistance with three activities of daily living.⁵

¹ 7 AAC 49.135.
² Exhibit F, page 14.
³ Exhibit D, page 1.
⁴ Exhibit D, page 4.
⁵ Exhibit E, page 29.

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.⁶ 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.⁷ For adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and 515,⁸ and incorporates the results of the Consumer Assessment Tool (CAT).⁹ 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).¹⁰

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 the individual has materially improved.¹¹ For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska and 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]

⁶ 7 AAC 130.205(d)(2).

⁷ 7 AAC 130.230.

⁸ 7 AAC 130.230(b)(2)(A).

⁹ 7 AAC 130.230(b).

¹⁰ Adopting January 29, 2009 version of the CAT.

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 criteria used in determining whether a recipient no longer has a functional limitation or cognitive impairment are the criteria listed for making an initial determination of limitation or impairment.¹⁴

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?^[15]

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. Section NF 6 asks how many of the shaded ADLs were scored with a 2 or higher (limited assistance) 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.

In this case, there is no evidence in the record to suggest that Mr. T-Q should receive a score of 1 or higher in sections NF2, NF3, or NF4. Nor is there evidence to support a need for any of the nursing services listed in NF1 a, b, c, or d. Accordingly, he would only remain

¹⁴ 7 AAC 130.230(g).

¹⁵ Exhibit E, page 29. The “shaded ADLs” are bed mobility, transfers, locomotion, eating, and toilet use.

qualified for the Choice Waiver program if he needs at least extensive assistance with three or more of the relevant ADLs.¹⁶

C. Bed Mobility

Ms. Atanoa scored Mr. T-Q with a self-performance score of 1, indicating he only needed supervision. However, she wrote in her notes:

KT sleeps in a regular bed, no decubitus ulcers. KT reported he needs help to roll over in bed. Reported stroke is to the left so he has difficulties turning to the left side. Observed to make positional changes independently while seated on the couch.^[17]

Based on this note, Mr. T-Q needs at least limited assistance, which is a score of 2. Whether he should have been scored as needing extensive assistance depends on whether this assistance involved weight bearing support at least three times during the seven days prior to the assessment.¹⁸

Weight bearing assistance should be interpreted as supporting more than a minimal amount of weight. It does not require that the assistant bear most of the recipient's weight, but instead that the recipient could not perform the task without the weight bearing assistance.¹⁹ The testimony during the hearing was unclear as to whether the assistance Mr. T-Q receives in bed mobility is weight bearing. As discussed above, he must need extensive assistance in at least three of the relevant ADLs to qualify for the Choice Waiver program. It is assumed for purposes of this decision that Mr. T-Q does need weight bearing assistance to reposition in bed, and should have received a score of 3.

D. Transfers

Transfers are the movement from a bed to standing position, a chair to standing position, or moving from standing to a chair or bed. Ms. Atanoa's notes state:

KT reported he needs help to stand & sit, on & off furniture due to L. knee & lower back pain. KT can manage his lift recliner using the remote control on his own to get in & out of recliner in his room. Observed PCA to hold under the axillae to pull up as KT stood up, to help KT stand up, providing support while KT sat back down. Lift recliner in bedroom.^[20]

¹⁶ Exhibit E, page 29, NF1(e).

¹⁷ Exhibit E, page 6. The description here is similar to the description in the 2008 CAT, where he received a score of 2. Exhibit F, page 3.

¹⁸ See Exhibit E, page 6.

¹⁹ Prior decisions discuss weight bearing assistance without fully defining what that means, and the parties have not referred to any formally adopted definition.

²⁰ Exhibit E, page 6. The axillae is the armpit area. Testimony of Ms. Atanoa.

Mr. N confirmed this description, testifying that he had to help pull his uncle up by putting a hand under Mr. T-Q's arm pit, and sometimes had to tie a belt around him and lift him with the belt. The 2008 evaluation found that Mr. T-Q needed extensive, weight bearing assistance with transfers, and gave him a score of 3 in this ADL.²¹ This prior score is consistent with Ms. Altanoa's written notes, and with Mr. N's testimony. The division has not met its burden of proving that Mr. T-Q has improved in this area. Accordingly, he should continue to be scored with a 3.

E. Locomotion

Locomotion refers to moving around in one's own home or room. According to Ms. Atanoa, Mr. T-Q is able to walk using a cane in his home.²² This was not disputed at the hearing. Thus, Mr. T-Q was properly scored with a 0 in this ADL.

F. Eating

There was no dispute that Mr. T-Q is able to eat without assistance. Accordingly, he was properly scored with a 0 in this ADL.²³

G. Toileting

The recent assessment gave Mr. T-Q a score of 2. Her notes state:

Observed to walk to the restroom, used the restroom & walked back into the bedroom then into the living room, independently using his cane for support. PCA remained outside the bathroom, no physical assistance was provided.^[24]

Neither Mr. T-Q nor his nephew claimed that he needed more than limited assistance in this area. Mr. N testified that Mr. T-Q does need more help now, since his most recent stroke, but did not testify that more help was needed in October, when this assessment was conducted. Accordingly, he was properly scored with needing no more than limited assistance.

IV. Conclusion

As of the date of his assessment, Mr. T-Q needed extensive assistance in no more than two of the relevant Activities of Daily Living, and he no longer needs the nursing assistance that qualified him for the Choice Waiver program in the past. Accordingly, the division correctly determined that he is no longer eligible, and the division's determination is affirmed. However,

²¹ Exhibit F, page 3.

²² Exhibit E, page 7.

²³ He testified that he does require a special diet, but the type of food he needs is a different issue than whether he needs help consuming that food.

²⁴ Exhibit E, page 9.

Mr. T-Q's situation appears to be worse now than it was last October, and he is encouraged to reapply for this program.

DATED this 22nd of May, 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 21st day of June, 2013.

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

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