

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

In the Matter of:	)	
	)	
J C	)	OAH No. 13-0533-MDS
_____	)	Agency No.

**REVISED DECISION**

**I. Introduction**

J C was a recipient of services under the Medicaid Home and Community-Based Waiver Services (Choice Waiver) program administered by the Division of Senior and Disability Services.<sup>1</sup> The division reassessed Ms. C’ functional abilities and determined that she was no longer eligible, on the ground that she did not need skilled or intermediate nursing care and had the ability to function in a home setting without waiver services.<sup>2</sup> Ms. C filed an appeal.<sup>3</sup>

The assigned administrative law judge conducted a telephonic hearing on September 10, 2013. Attorney Mark Regan represented Ms. C and Assistant Attorney General Kimberly Allen represented the division. The administrative law judge issued a proposed decision concluding that the division had failed to meet its burden of proof that Ms. C’ functional abilities meet the criteria established in the Consumer Assessment Tool to terminate payment for Choice Waiver services. Both parties filed proposals for action. Ms. C’ proposal asked that a revised decision be issued omitting discussion of two legal issues she had raised, on the ground that because the division had not met its burden of proof, the legal issues were moot. The division’s proposal asked that a revised decision be issued omitting reference to the regulations at 7 AAC 125.030, on the ground that this case concerns eligibility for the Choice Waiver program, rather than for personal care assistance, and that the discussion of bed mobility be omitted because it is immaterial.

The Commissioner’s delegate returned the case to the administrative law judge to issue a revised decision, taking into consideration the parties’ proposals. This revised decision retains discussion of the two legal issues raised by Ms. C because they are threshold issues that, if decided favorably to Ms. C, would have rendered it unnecessary to consider any factual issues.

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<sup>1</sup> See AS 47.07.045.  
<sup>2</sup> See 7 AAC 130.210(a); Ex. D, p. 1.  
<sup>3</sup> See 7 AAC 130.210(b); (*repealed 7/1/2013*); 7 AAC 130.219(f) (*effective 7/1/2013*).

Moreover, Ms. C' legal argument raised important issues that are likely to recur.<sup>4</sup> For this reason, the discussion and resolution of those issues is retained without change. The division's proposed changes do not alter the legal analysis or the outcome of the case, and have been incorporated into the revised decision.

## II. Facts<sup>[5]</sup>

J C has been receiving disability benefits from the Social Security Administration since 2004.<sup>6</sup> She was found eligible for Choice Waiver services in 2010. At that time she was a single woman, 49 years old;<sup>7</sup> she was about 5 feet 6 inches tall and weighed 265 pounds.<sup>8</sup> Ms. C had been twice hospitalized during the previous year for respiratory distress coupled with incoherence, and had five times had emergency room visits.<sup>9</sup> Her primary diagnosis was reactive airway disease; she also had diagnoses of asthma, hypertension and bipolar condition within the prior year,<sup>10</sup> as well as current diagnoses of diabetes, arthritis, anemia, fibromyalgia, hypothyroidism, herniated discs, allergies and migraine headaches.<sup>11</sup> At the time she was assessed, on April 19, 2010, she had been placed in an assisted living home for an indefinite period because she was unable to take care of herself.<sup>12</sup> In particular, facility staff were able to assist her in using a CPAP machine and nebulizer and in providing skin care.<sup>13</sup>

Two and a half years later, when she was reassessed on December 10, 2012, Ms. C was no longer single. She had married and was living with her husband, A C, in a one-bedroom log cabin at No Name.<sup>14</sup> Ms. C' son, E Z, was living in a recreational vehicle parked on the property, and acting as her personal care attendant. Ms. C was also receiving transportation, chore and respite worker services under the Choice Waiver program.<sup>15</sup> About a month prior to the hearing, Mr. Z moved to Washington, and Ms. C' stepson, K L (her husband's son) began helping her out in her home. Mr. L anticipated licensure as a personal care attendant.<sup>16</sup>

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<sup>4</sup> One of the issues raised by Ms. C has previously been decided by the commissioner in a case that is currently on appeal to the superior court. *See* note 73, *infra*.

<sup>5</sup> The facts as set forth in the portion of the revised decision are unchanged from the proposed decision. Neither party requested any change in these factual findings.

<sup>6</sup> Testimony of J. C.

<sup>7</sup> Ex. F, p. 1,

<sup>8</sup> Ex. F, p. 24.

<sup>9</sup> *See* Ex. F, pp. 3, 22.

<sup>10</sup> Ex. F, p. 3.

<sup>11</sup> Ex. F, pp. 3, 22.

<sup>12</sup> *See* Ex. F, p. 3.

<sup>13</sup> *See* Ex. F, pp. 4, 10; Testimony of J. Bragwell.

<sup>14</sup> Testimony of J. C; Ex. E, p. 1.

<sup>15</sup> Testimony of S. Cornell, I. C. *See* Ex. E, p. 2.

<sup>16</sup> Testimony of J. C.

At the time of the assessment, Ms. C' weight was down to 205 pounds.<sup>17</sup> Ms. C had a number of orthopedic conditions, including failed back syndrome,<sup>18</sup> and she was recuperating from rotator cuff surgery in September, 2012.<sup>19</sup> Within the prior year she had been diagnosed with cardiac dysrhythmia, lumbago, vitamin D deficiency, diabetes, and sleep apnea,<sup>20</sup> and she had been seen at the emergency room on multiple occasions for respiratory conditions.<sup>21</sup> She was regularly taking several dozen different medications for her various conditions, including pain medication, blood thinners and anxiety medication (*e.g.*, lidocaine, lorazepam, methadone, oxycodone, and topimate).<sup>22</sup> She continued to track her glucose level, but she considered herself to no longer be diabetic and she was no longer taking any diabetic medication.<sup>23</sup> Her most recent spirometric report showed normal results, and her asthma (characterized as moderate or moderate to severe persistent) had improved.<sup>24</sup> Ms. C is not cognitively impaired, but due to her functional limitations and the number of medications she takes, she requires assistance in picking up the medications (which are sent by mail) and organizing, recording, set-up and self-administering those medications.<sup>25</sup>

Ms. C is treated by physicians and other medical providers at a clinic in No Name and in No Name.<sup>26</sup> She is unable to transport herself to those providers without assistance. Her husband typically drives her to those appointments.<sup>27</sup>

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<sup>17</sup> Ex. E, p. 24. Ms. Ingram testified the weight loss might be associated with an improvement in Ms. C' diabetic condition.

<sup>18</sup> Testimony of S. Cornell. *See also* Ex. F, pp. 68 (post laminectomy syndrome, displacement of lumbar intervertebral disc) (J. Thomas Grissom, 2/14/12), 51 (lumbosacral spondylosis), 55 (disc degeneration disease), 74 (right shoulder rotator cuff tear, SLAP tear, AC arthritis) (Dr. Lapkass, 2/13/12).

<sup>19</sup> Ex. E, p. 3; Ex. F, pp. 61-64 (Dr. Lapkass, discharge report, Providence Medical Center, Anchorage).

<sup>20</sup> Ex. E, p. 3; Ex. F, pp. 69 (ICD-9 427.9, 780.57, 724.2) (Dr. Cullen, 11/7/12), 70 (ICD-9 780.39, 784.0) (Dr. Sponsler, 11/28/12); 71 (ICD-9 250.00, 272.4, 268.9) (Samuel Abbate, 11/28/12), 72 (ICD-9 724.2, chronic low back pain; 427.9 arrhythmia) (Dr. Cullen, 12/4/12). Other diagnoses noted at the time of her assessment include hypertension, arthritis, bipolar disease, asthma, and allergies. Ex. E, p. 22. *See also* Ex. F, pp. 49 (detailing allergies), 51 (also noting post-traumatic stress disorder, abnormal thyroid, polyneuropathy in legs, migraine), 55 (bipolar, asthma, chronic pulmonary obstructive disease), 73 (ICD-9 250.00, 272.2, 246.8, 244.9) (Samuel Abbate, 2/11/12).

<sup>21</sup> Testimony of J. C (bronchitis).

<sup>22</sup> Testimony of J. C. *See* Ex. E, p. 20 (29 listed medications); Ex. F, pp. 48-49 (36 listed medications), 59 (44 listed medications), 64 (24 listed medications).

<sup>23</sup> Testimony of J. C. Mr. Cornell's notes report that Ms. C was not tracking her glucose levels, because she lacked the necessary instrument. Ex. E, p. 22. Ms. C testified that she was not tracking her glucose level because she had lost the instrumentation, and that once she found it she tracked her glucose level.

<sup>24</sup> Testimony of J. Bragwell. *See* Ex. F, pp. 47, 60 ("spirometry improved and normal today"), 58 (asthma "not as bad as in the past"), 60 (asthma "Moderate to severe persistent").

<sup>25</sup> Testimony of J. C. *See* Ex. E, p. 31.

<sup>26</sup> Testimony of J. C. *See* Ex. F, pp. 47, 58-60 (Dr. Rathkopf, asthma and allergies, Anchorage), pp. 48-54 (Dr. Sponsler, neurologist, Anchorage); pp. 55-58 (psychiatrist and counselor, Valdez).

<sup>27</sup> Testimony of J. C.

Sam Cornell, a nurse employed by the division, conducted an in-person assessment of Ms. C' functional abilities at her home on December 10, 2012. He was present in the home for about an hour and a half to two hours and was able to observe Ms. C throughout that time.<sup>28</sup> Mr. Cornell recorded the results of his assessment on the Consumer Assessment Tool (CAT), the form created by the Department of Health and Social Services to evaluate an individual's ability to care for herself.<sup>29</sup>

Ms. C spends most of her day sitting or lying on a couch. Without assistance in lifting her legs, she cannot adjust her position from lying to sitting, or vice-versa. Because of her sleep apnea, Ms. C must use a CPAP machine to enable her to obtain adequate rest while sleeping. The CPAP machine has a facemask that is held in place by a harness. Without assistance, Ms. C is unable to fasten and unfasten the mask in order to get into and out of bed. Even without her difficulty with the mask, without assistance Ms. C would be unable to climb into and out of bed. Ms. C' orthopedic conditions and severe axonal neuropathy have a significant adverse effect on her ability to walk.<sup>30</sup> She generally needs a four-prong cane or, particularly on bad days, assistance with a gait belt to move about the house without falling. Absent assistance, she typically is able to avoid falling by grabbing onto an adjacent handhold; in the absence of a handhold or assistance, she is prone to falls. Outside the house she uses a walker, which she is unable to use inside the house because it is too cramped.<sup>31</sup>

Ms. C has good days and bad days,<sup>32</sup> typically with more bad days than good.<sup>33</sup> The day she was observed by Mr. Cornell was, she told him, a good day. At the time of the assessment, she was unable to toilet without assistance in cleansing due to limited range of motion resulting from her shoulder surgery. By the time of the hearing, however, her range of motion had

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<sup>28</sup> Testimony of S. Cornell.

<sup>29</sup> 7 AAC 160.900(d)(6) (adopting CAT by reference). *See generally*, <http://dhss.alaska.gov/dsds/Documents/docs/cat-pcatOnlineFlyer.pdf> (accessed June 19, 2013). In addition to being used in assessments for eligibility for, and termination from, the Choice Waiver program, the CAT is used in determining the amount of compensation that will be provided for personal care assistance (PCA) services under the Medicaid program. 7 AAC 125.010-.199.

<sup>30</sup> Testimony of S. Cornell, J. Bragwell, G. Ingram. *See* Ex. F, pp. 49 (9/6/2011 EMG lower extremities), 50 (9/7/2010 EMG lower extremities), 51 (10/17/2012 assessment "severe axon loss polyneuropathy in legs").

<sup>31</sup> Except as otherwise noted, the findings in this paragraph are based on Ms. C' testimony.

<sup>32</sup> This is consistent with a "waxing and waning" pattern mentioned in some other cases involving orthopedic issues. *See, e.g., Rivera v. Wal-Mart Stores, Inc.*, 247 P.3d 957, 961 (Alaska 2011); *Beauchamp v. Employers Liability Assurance Corporation*, 477 P.2d 993, 995 note 7 (Alaska 1970). The same pattern has been found to exist in cases involving mental conditions and pulmonary function, as well. *See, e.g., Witherspoon v. Illinois Workers' Compensation Commission*, 2013 WL 54240007 (Ill. App. 2013) (asthma); *Kuharski v. Colvin*, 2013 WL 3766576 (E.D. Cal. 2013) (mental illness).

<sup>33</sup> Testimony of J. C. Mr. Cornell testified that at the time of the assessment Ms. C stated she had three good days and four bad days a week.

improved to the point that she could cleanse herself, although she remained dependent on assistance in order to adjust her clothing if incontinent (she is often incontinent at night due to the difficulty she has in reaching her bathroom).<sup>34</sup>

Mr. Cornell's assessment of Ms. C' condition, as recorded on the CAT, was reviewed by Jan Bragwell, a registered nurse employed by the division. Ms. Bragwell compared the 2010 and 2012 assessments, reviewed the medical records on file, and prepared a report identifying the changes in Ms. C' condition based on those documents.<sup>35</sup> Based on the information she reviewed, Ms. Bragwell concluded that Ms. C was no longer eligible for the Choice Waiver program.

Ms. Bragwell's report, along with the completed CAT form and the medical documentation, was provided to Qualis Health, which reviews assessments under contract to the division. Grace Ingram, a registered nurse employed by Qualis Health, reviewed the materials provided by the division in accordance with Qualis Health's standard procedures and did not communicate with Ms. C or Mr. Cornell.<sup>36</sup> Ms. Ingram looked for consistency and completeness in the documentation submitted and for consistency between the medical documentation and the reported level of care and functioning.<sup>37</sup> Ms. Ingram concluded that the assessment supported the service level determination made by the division. Using a Qualis Health template, she prepared a report documenting her analysis of the changes in Ms. C' condition and submitted it to a physician employed by Qualis Health, who concurred with her conclusions.<sup>38</sup> Following receipt

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<sup>34</sup> Testimony of J. C. See Ex. E, p. 24 (noting frequent urinary incontinence).

<sup>35</sup> Testimony of J. Bragwell. See Ex. F, pp. 35-39, 45 (2/18/2013), 40-44, 46 (3/27/2013). Ms. Bragwell did this twice, on February 18 and March 27. The second review corrected the prior report by including Ms. C' toileting scores, which, as she had been informed by Ms. Ingram, had been omitted from the initial report. Testimony of J. Bragwell, G. Ingram. Compare Ex. F, p. 38, with Ex. F, p. 43. Ms. Bragwell used the reporting form as revised effective July 2, 2012. The regulations in effect at that time did not require use of any particular report form. The department has since mandated use of the May 2, 2013, version. See 7 AAC 130.219(e)(4)(A)(iv), effective 7/1/2013; 7 AAC 160.900(d)(38) effective 7/1/2013 (adopting 5/2/2013 version). That version of the form may be reviewed online. See [dhss.alaska.gov/dsds/Documents/SDSforms/MI-01MaterialImprovementALI-APDD.pdf](http://dhss.alaska.gov/dsds/Documents/SDSforms/MI-01MaterialImprovementALI-APDD.pdf) (accessed October 17, 2013). The two versions are virtually identical, although it may be that the current version's request for entry of "a statement about PCA services and whether this service will adequately meet the client's needs" (at p. 5) was lacking on the prior version, inasmuch as no such specific statement was made in Ms. Bragwell's report. See Ex. F, p. 44.

<sup>36</sup> Ex. G, p. 6. See Ex. F, pp. 33-34, Ex. G, p. 3, ¶6 (Affidavit of D. Westmorland); Testimony of J. Bragwell, G. Ingram.

<sup>37</sup> Testimony of G. Ingram.

<sup>38</sup> See Ex. G, p. 3, ¶7-8, pp. 5-8; Testimony of G. Ingram.

of the Qualis Health template, on April 19, 2013, the division issued its decision finding Ms. C no longer eligible for the Choice Waiver program.<sup>39</sup>

### III. Discussion

An adult with a physical disability may be found eligible to receive services under the Choice Waiver program if she requires the level of care that is provided in a nursing facility.<sup>40</sup> The purpose of the program is to enable eligible persons to choose to receive home and community-based waiver services as an alternative to institutional care.<sup>41</sup> Under the Choice Waiver program an adult with a physical (and not a developmental) disability<sup>42</sup> may be provided transportation,<sup>43</sup> assistance with household chores,<sup>44</sup> respite for unpaid caregivers,<sup>45</sup> and adult day services,<sup>46</sup> as well as (if pre-authorized and included in a plan of care) specialized medical equipment,<sup>47</sup> physical modifications to the home,<sup>48</sup> and meals.<sup>49</sup>

The division determines whether an applicant requires nursing facility level of care services by conducting an assessment.<sup>50</sup> For an adult with a physical disability, the division determines whether the applicant requires skilled<sup>51</sup> or intermediate<sup>52</sup> nursing care based on the results of the CAT.<sup>53</sup> Payment for Choice Waiver services may be terminated if a subsequent assessment finds that she:

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>[54]</sup>

<sup>39</sup> Testimony of J. Bragwell; Ex. D. The division's decision incorporated the Qualis Health template verbatim. Compare Ex. D, pp. 2-3, with Ex. G, pp. 5-8.

<sup>40</sup> See 7 AAC 130.205(d)(2), effective 2/1/2010 ("based[d] on the level-of-care assessment under 7 AAC 130.230(b)"); 7 AAC 130.205(d)(2)(C), effective 7/1/2013 ("as determined under 7 AAC 130.215").

<sup>41</sup> See 7 AAC 130.200; [www.dhss.alaska.gov/dsds/Documents/pdfs/SDS\\_MedWaiverBrochure.pdf](http://www.dhss.alaska.gov/dsds/Documents/pdfs/SDS_MedWaiverBrochure.pdf) (accessed October 17, 2103).

<sup>42</sup> Other services are restricted to adults with a developmental disability. See 7 AAC 130.260-.275.

<sup>43</sup> 7 AAC 130.290.

<sup>44</sup> 7 AAC 130.245.

<sup>45</sup> 7 AAC 130.280.

<sup>46</sup> 7 AAC 130.250.

<sup>47</sup> 7 AAC 130.305.

<sup>48</sup> 7 AAC 130.300.

<sup>49</sup> 7 AAC 130.295.

<sup>50</sup> 7 AAC 130.230(b)(2), repealed 7/1/2013; 7 AAC 130.215(4), eff. 7/1/2013.

<sup>51</sup> See 7 AAC 140.515(b).

<sup>52</sup> See 7 AAC 140.510(b).

<sup>53</sup> 7 AAC 130.230(b)(2), repealed 7/1/2013 ("level-of-care determination...must incorporate the results of the department's *Consumer Assessment Tool (CAT)*") (emphasis added). The current regulation is worded slightly differently. See 7 AAC 130.215(4), eff. 7/1/2013 ("the department will determine [the level of care] based on the results of the department's *Consumer Assessment Tool (CAT)*.")) (emphasis added).

<sup>54</sup> AS 47.07.045(b)(3)(C).

One section of the CAT covers the individual's physical abilities with respect to specified self-care tasks (activities of daily living),<sup>55</sup> such as getting in and out of bed, moving about, dressing, eating, bathing, using a toilet, and grooming.<sup>56</sup> Individuals are given two scores reflecting their ability to perform these activities, one for their ability to perform the activity (self-performance), and the other for the degree of assistance they require (support). A score of two zeros indicates the individual performs the activity independently (self-performance) with no setup or physical help (support). Increasing inability to perform and need for assistance result in progressively higher scores of one to four.<sup>57</sup>

A person, who like Ms. C does not need the services of a registered professional nurse,<sup>58</sup> may still be found to need nursing care facility level of care services, using the CAT, based on the person's scores for five specific activities of daily living: bed mobility, transfers, locomotion, eating, and toileting.<sup>59</sup> The CAT states that a recipient is considered to need of nursing facility level of care services for purposes of the Choice Waiver program if the person is scored at three or higher on at least three of those activities.<sup>60</sup> In effect, under the CAT, the specified scores create a presumption that the recipient requires a nursing facility level of care.<sup>61</sup>

In her prior assessment, in 2010, Ms. C was scored at two (limited assistance) for each of three activities: bed mobility, transfers, and toileting.<sup>62</sup> In 2012, she was scored at one (supervision) for bed mobility, and at two (limited assistance) for transfers, locomotion and toileting.<sup>63</sup> The central factual issue raised by Ms. C at the hearing was whether the 2012 scores

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<sup>55</sup> For purposes of the assisted living home program, "activities of daily living" are defined as "walking, eating, dressing, bathing, toileting, and transfer between a bed and a chair." AS 47.33.990(1). For purposes of compensation for personal care assistance provided under the Medicaid program, specific types of activities are described as activities of daily living (ADL). See 7 AAC 125.030(b)(1)-(8).

<sup>56</sup> See Ex. E, pp. 6-12, 18-19. The CAT terminology does not in every case precisely track the regulatory language used to describe ADL in 7 AAC 125.030(b)(1)-(8). For one example, the ADL of "body mobility" concerns how a nonambulatory person positions or turns in a bed or a chair, while the CAT uses the term "bed mobility", omits any reference to a chair, and includes ambulatory persons. Compare, 7 AAC 125.030(b)(1), with Ex. E, p. 6. For another, for the ADL of "toileting", the CAT expressly includes how the recipient "adjusts clothes", and the regulation does not mention that action. See *In Re V.W.* at \*2, OAH No. 12-0957-MDS (Commissioner of Health and Social Services 2013); compare 7 AAC 125.030(b)(6) with Ex. E, p. 9. Regardless of these differences, it is the CAT, not the regulations at 7 AAC 125.030(b)(1)(8), that governs eligibility for the Choice Waiver program.

<sup>57</sup> A score of five indicates verbal assistance is provided; a score of eight indicates the activity did not occur within the past seven days.

<sup>58</sup> See Ex. H, p. 3 (Dr. Grissom, 5/2/13).

<sup>59</sup> See Ex. E, p. 30.

<sup>60</sup> See Ex. E, p. 30 (NF.1e).

<sup>61</sup> See *In Re O.P.*, OAH No. 13-0054-MDS (Commissioner of Health and Social Services 2013), at 8.

<sup>62</sup> Ex. F, p. 38.

<sup>63</sup> Ex. F, p. 38.

on these four activities were in error.<sup>64</sup> Ms. C contends that they are, in that she requires extensive assistance in all four activities.<sup>65</sup>

Before turning to these factual issues, it is necessary to address two legal arguments made by Ms. C. Ms. C argues, first, that the division may not terminate waiver services without comparing a recipient's current condition with their condition at the time of a prior assessment.<sup>66</sup> It is not enough, according to Ms. C, to show that a recipient does not presently have a functional limitation or cognitive impairment that results in a need for nursing home placement. In addition, she contends, the division must show that the recipient's condition has materially improved by comparison to a prior assessment.<sup>67</sup> Ms. C' second legal argument is that the Qualis Health review was not an "independent" review within the meaning of AS 47.07.045(b), and in the absence of such a review Ms. C' waiver services may not be terminated.<sup>68</sup>

A. Material Improvement

AS 47.07.045(b)(3) provides that the department may not terminate payment for waiver services until it has conducted an assessment and found:

that the recipient's condition has materially improved since the previous assessment; for purposes of this paragraph, 'materially improved' means that a recipient who had previously qualified for a waiver for . . .(C) 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 home placement, and is able to demonstrate the ability to function in a home setting without the need for waiver services.

Ms. C argues that in order to satisfy this requirement, the department may not simply assess the recipient's current condition, but must also compare the recipient's current condition with her condition at the time of a prior assessment.<sup>69</sup> Ms. C asserts that such a comparison is consistent with the language of the statute,<sup>70</sup> the division's practice,<sup>71</sup> and federal law relating to eligibility for Social Security.<sup>72</sup>

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<sup>64</sup> Closing Statement, pp. 6-11.

<sup>65</sup> Closing Statement, p. 7.

<sup>66</sup> Closing Statement, pp. 3-5.

<sup>67</sup> Closing Statement, p. 5.

<sup>68</sup> Closing Statement, pp. 5-6.

<sup>69</sup> Closing Statement at 3-5. Ms. C suggests that the comparison should be to the most recent assessment finding the recipient eligible. *Id.*, at 4, note 1.

<sup>70</sup> Closing Statement at 3-4.

<sup>71</sup> Closing Statement at 4.

<sup>72</sup> Closing Statement at 4-5. *See* 42 U.S.C. §1382(c)(4)(A)(i)(I) ("medical improvement in the individual's impairment or combination of impairments").



While it may be that, in the absence of any specific statutory definition, to show a material improvement it would be necessary to compare a recipient's current condition with her previous condition, AS 47.07.045(b)(3) includes a specific definition of the term "materially improved." That definition does not require finding that the recipient's condition has changed in comparison to a prior assessment. In making a finding with respect to the recipient's current condition, evidence with respect to the recipient's condition at a prior time may be relevant, and, as Ms. C points out, in practice the division typically considers evidence in the form of a prior assessment. But there is no requirement under state law that the division must compare a recipient's current condition (medical or functional) to her prior condition as a prerequisite to terminating waiver services.<sup>73</sup> Nor has Ms. C asserted that federal law mandates such a comparison. For these reasons, her legal argument is not persuasive.<sup>74</sup>

B. Independent Review

AS 47.07.045(b)(2) provides that before terminating payment for waiver services, the department must conduct an assessment, and the assessment "must have been reviewed by an independent qualified health care professional under contract with the department." Ms. C argues that the Qualis Health review did not meet this requirement, because it was based entirely on the documents provided to it by the division.<sup>75</sup>

AS 47.07.045(b)(2) does not state that an independent party must conduct an assessment. Rather, it states that an independent party must review the assessment. Ms. C's objection is not that Qualis Health is not independent, but rather, that its review was dependent on the information provided by the division. In short, it is the nature of the review that is at issue, not Qualis Health's independence.

In that regard, nothing in AS 47.07.045(b)(2) states or implies that the review by an independent health care professional must consist of anything more than a review of the documentation obtained or prepared by the division. The reviewer may request additional information or clarification from the division, the recipient, or a medical provider, but is not required to do so. Following a review of the existing documentation by an independent qualified health care professional, waiver services recipients have the opportunity for a hearing at which

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<sup>73</sup> In Re E.D., OAH No. 12-0658-MDS (Commissioner of Health and Social Services 2013), at 4-5, *appeal pending*, No. 3AN 13-05178 CI (Superior Court). *See also*, In Re J.C., OAH No. 12-0850-MDS (Commissioner of Health and Social Services 2013), at 6.

<sup>74</sup> From a medical perspective, moreover, the evidence indicates that in a variety of respects, Ms. C's condition had changed for the better since her prior assessment in 2010. *See supra*, notes 9, 10, 14, 20, 21.

<sup>75</sup> Closing Statement at 6.

they may challenge the accuracy or relevance of the documentation provided to the professional, submit additional evidence, call witnesses, and generally obtain a full and fair airing of any issues they may have with the division's assessment. In light of that opportunity, it is apparent that a review of the existing documentation is sufficient for purposes of AS 47.07045(b)(2).

C. Factual Issues

The record in this case includes some limited medical records, but the primary evidence consists of the CAT and the testimony at the hearing. Because this case involves the termination of Choice Waiver services, the division had the burden of proof, that is, it was required to show by a preponderance of the evidence that Ms. C does not require extensive assistance in at least three of the specified activities.<sup>76</sup> The division presented testimony from the nurse who conducted the assessment, Sam Cornell, as well from Jan Bragwell and Grace Ingram. Ms. C testified on her own behalf.

1. *Transfers*

The CAT describes transfers as “[h]ow a person moves between surfaces – to-from bed, chair, wheelchair, standing position ([e]xclud[ing] to-from bath/toilet.”<sup>77</sup> Mr. Cornell scored Ms. C as needing limited assistance with transfers.<sup>78</sup>

Mr. Cornell's notes record Ms. C' report that, as with bed mobility, she has good days and bad days.<sup>79</sup> He noted and testified that he observed her stand with a pulling assist from her stepson, Mr. L, with additional “minimal assist to move feet/legs.”<sup>80</sup> He also noted and testified that he observed Ms. C using her left hand to push and pull herself to a standing position using her quad cane for leverage, with good balance while standing.<sup>81</sup> His notes and testimony do not record what assistance, if any, she required in order to sit down.

Ms. C testified that in order to get up out of bed, she needs assistance in order to remove her CPAP machine. The assistance provided in that regard consists of guiding her limbs in order to avoid tangling the machine in her hair and to reach the device's straps, and it therefore does not constitute weight-bearing assistance. However, Ms. C also testified that on bad days, in order to get up off of the couch, she requires weight-bearing assistance to pull her to a standing

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<sup>76</sup> 7 AAC 49.135.

<sup>77</sup> See Ex. E, p. 6 (CAT, p. 6).

<sup>78</sup> Ex. E, p. 6.

<sup>79</sup> Ex. E, p. 6.

<sup>80</sup> Testimony of S. Cornell; Ex. E, p. 6.

<sup>81</sup> *Id.*

position.<sup>82</sup> Moreover, she testified, when she lies down in bed she requires assistance in lifting her legs onto the bed.<sup>83</sup> These are forms of weight-bearing assistance.

Mr. Cornell reported observing both physical assistance (“1 hand push-pull from pca”) and self performance (“Able to push/pull self”) in getting to a standing position from the couch.<sup>84</sup> However, he testified that Ms. C needed weight-bearing assistance for transfers,<sup>85</sup> and nothing in his notes or testimony is inconsistent with Ms. C’ report that she cannot lift her legs onto a bed without assistance. The medical evidence, in the form of diagnoses of arthritis and severe lower extremity neuropathy, supports Ms. C’ testimony that she cannot transfer into bed without assistance in lifting her legs onto the bed. Mr. Cornell’s notes and testimony are consistent with a finding that on a good day Ms. C can reach a standing position from a sitting position without assistance, but that on a bad day she requires weight bearing assistance to climb into bed and to reach a standing position from a lying position (*i.e.*, assistance in moving her legs off a bed or couch and pulling assistance in standing).

On balance, the preponderance of the evidence is that on bad days Ms. C requires weight bearing assistance to get into bed and to stand from a reclining position. Because Ms. C gets up out of bed every day, and has at least three bad days a week, the preponderance of the evidence is that she requires weight bearing assistance for transfers at least three days a week. This constitutes extensive assistance as defined in the CAT.

## 2. *Toileting*

The CAT calls for assessment of “[h]ow [the] person uses the toilet room” as well as cleansing and adjusting clothing.<sup>86</sup>

At the time of the assessment, the plumbing in Ms. C’ cabin was frozen, and she was using a honey bucket. Normally, however, she is able to use the bathroom, and her service level should reflect that type of use. Moreover, at the time of the assessment Ms. C’ limited range of motion prevented her from cleansing herself, but that is no longer the case. Because at the time of the assessment Ms. C was using a honey bucket and could not cleanse herself, Mr. Cornell’s notes and hearing testimony (which reflect that she needed weight-bearing assistance to transfer

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<sup>82</sup> Testimony of I. C.  
<sup>83</sup> Testimony of I. C.  
<sup>84</sup> See notes 77, 78, *supra*.  
<sup>85</sup> Testimony of S. Cornell.  
<sup>86</sup> Ex. E, p. 9 (CAT, p. 9).

on and off a honey bucket, which, as he testified, is “pretty low”) shed little light on the extent of Ms. C’ current need for assistance.

Ms. C did not describe any need for assistance in the toilet room other than that needed for transfers on and off the toilet. In that regard, her testimony was that she requires weight-bearing assistance to get onto and off of the toilet.<sup>87</sup> While Mr. Cornell’s notes and testimony suggest that on good days Ms. C does not need weight-bearing assistance in order to get in and out of a chair, this does not necessarily preclude needing weight-bearing assistance in order to get on and off a toilet, which is typically lower than a chair.<sup>88</sup> On balance, the preponderance of the evidence is that Ms. C, at least on bad days, needs weight-bearing assistance to get on and off a toilet. Thus, because she has more bad days than good and toilets multiple times each day, she needs extensive assistance, as defined in the CAT, for toileting.

### 3. *Locomotion*

The CAT describes locomotion as how a person moves “between locations in his/her room and other areas on the same floor” or “in a multi-level house” and “[h]ow a person moves outside to access medical appointments.”<sup>89</sup>

Mr. Cornell’s notes and testimony indicate that he observed Ms. C move about, using her quad cane while holding on to another person to maintain her balance but not for weight-bearing assistance.<sup>90</sup> Ms. C testified that, absent assistance, she is highly prone to falls but that she can generally catch herself on a nearby surface to avoid falling.<sup>91</sup> She stated that on bad days she uses a gait belt and that outside of the cabin, she uses a walker.

A gait belt is a belt that goes around the user’s waist, while another person holds on to it to assist in ambulation and transfers. Use of a gait belt does not necessarily reflect weight-bearing assistance, as it can be used to assist in maintaining balance rather than to bear weight. Ms. C testified that when using a gait belt, she is provided weight bearing assistance. In light of her testimony and her propensity to fall, the preponderance of the evidence is that Ms. C requires weight-bearing assistance for locomotion inside the house on her bad days, that is, at least three times a week. This constitutes extensive assistance as defined in the CAT.

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<sup>87</sup> Testimony of J. C.

<sup>88</sup> At the assisted living home, Ms. C was using an elevated toilet. Ex. F, p. 9.

<sup>89</sup> Ex. E, p. 7 (CAT, p. 7).

<sup>90</sup> Ex. E, p. 7 (“no wt. bearing assist”). Mr. Cornell testified the assistance provided was not support, but “standby assist” or “contact guard”.

<sup>91</sup> See also Ex. E, p. 7 (“catch self on furniture/walls”).

#### IV. Conclusion

The division did not prove by a preponderance of the evidence that Ms. C does not require extensive assistance with the activities of transfers, toileting and locomotion.<sup>92</sup> Therefore the division's decision is reversed and it must continue to pay for any Choice Waiver services available and provided to her.<sup>93</sup>

DATED December 4, 2013.

Signed  
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Andrew M. Hemenway  
Administrative Law Judge

#### Adoption

The undersigned by delegation from the Commissioner of Health and Social Services, adopts this decision as final under the authority of AS 44.64.060(e)(1).

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED December 5<sup>th</sup> 2013.

Signed  
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Jared Kosin  
Executive Director, Office of Rate Review

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

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<sup>92</sup> Because the division failed to meet its burden of proof with respect to transfers, toileting, and locomotion, it is not necessary to consider whether Ms. C requires extensive assistance for bed mobility. The evidence on that issue was indefinite.

<sup>93</sup> Because the division did not meet its burden of proof regarding the scores on the CAT, it is not necessary to inquire into whether Ms. C can function in a home setting without waiver services, since under AS 47.05.045(b)(3), the division may not terminate payment for services provided to her under the Choice Waiver program absent a showing that she does not require a nursing facility level of care and that she can function in a home setting without those services. Whether the division may, or must, continue to provide Choice Waiver services to a person who can function in a home setting without Choice Waiver services is a different question. See 7 AAC 130.205(b)(2) (“[Choice Waiver] services are not available to an individual...if the individual’s need for [Choice Waiver services] may be provided for entirely by services under 7 AAC 105-7 AAC 160 without services identified under 7 AAC 130.200-7 AAC 200-7 AAC 130.319.”), *eff.* 2/1/2010). See also 7 AAC 130.205(b)(2), *am.* 7/1/2013).