

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

In the Matter of )  
 )  
 O D )  
\_\_\_\_\_ )

OAH No. 13-0856-MDS  
Agency No.

**DECISION**

**I. Introduction**

For a number of years, O D has been receiving services under the Older Alaskan or Adult with a Physical Disability Waiver program, also known as the Choice Waiver program. Recently, the Division of Senior and Disabilities Services (Division) re-assessed his functional abilities, and concluded that Mr. D was no longer eligible to participate in the Choice Waiver program. The assessment visit on which this termination was based was conducted by Nurse Susan Findley in January of 2013. The Division issued a letter to Mr. D, titled “Denial of Alaska Waiver Payment for Waiver Services,” on May 17, 2013.<sup>1</sup>

Mr. D, who is represented by counsel, requested a hearing to contest that determination. After an agreed delay, the evidentiary hearing in this case was held in two sessions on September 4 and 6, 2013. The parties requested an opportunity for post-hearing briefing, with the record closing on September 30, 2013.

Because the Division proposed terminating benefits previously granted, it had the burden of proving at the hearing that Mr. D was no longer eligible.<sup>2</sup> The Division met that burden in this case.

**II. Background Facts**

Mr. D was admitted to the Choice Waiver program in 2005 at the age of 34. His admission followed a traumatic brain injury in 2004.<sup>3</sup> In addition to limitations stemming from his brain injury, Mr. D has been treated in the last two years for colon cancer. As of June of 2013, he appeared to be free of recurrent or metastatic cancer and was simply on six-month followup.<sup>4</sup>

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<sup>1</sup> Ex. D.  
<sup>2</sup> 7 AAC 49.135.  
<sup>3</sup> Ex. F.  
<sup>4</sup> Ex. 4 at 1-2.

The Division visited Mr. D on January 23, 2013 to begin a reassessment process. Based largely on a Consumer Assessment Tool (CAT) compiled from that hour-long visit by Susan Findley, R.N., the Division concluded that Mr. D was no longer eligible for this program.<sup>5</sup> This conclusion grew out of findings that Mr. D still did not need professional nursing services (as had been the case in 2005), and that he was no longer wholly dependent nor in need of extensive assistance with at least three activities of daily living.<sup>6</sup> The Division made its decision in May of 2013, about four months after the assessment visit.

This case turns primarily on the accuracy of Ms. Findley's CAT assessment as a measurement of Mr. D's care needs at the time of the decision. While other professionals reviewed the D case on behalf of the Division, they did not independently assess Mr. D, instead relying upon the observations recorded in the CAT.

### **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.<sup>7</sup> The program pays for services that allow an eligible person to stay in his or her home (which may be an assisted living 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.<sup>8</sup> For adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and 515,<sup>9</sup> and incorporates the results of the CAT.<sup>10</sup> The CAT is an evaluation tool in the nature of a questionnaire and scoring mechanism. Because it is adopted by reference in 7 AAC 160.900(d)(6),<sup>11</sup> it is itself a regulation.

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<sup>5</sup> Ex. D.

<sup>6</sup> Ex. E at 29.

<sup>7</sup> 7 AAC 130.205(d)(2).

<sup>8</sup> 7 AAC 130.230.

<sup>9</sup> 7 AAC 130.230(b)(2)(A).

<sup>10</sup> 7 AAC 130.230(b).

<sup>11</sup> Adopting January 29, 2009 version of the CAT.

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.<sup>12</sup> For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska and qualified to assess adults with physical disabilities.<sup>13</sup> 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.<sup>[14]</sup>

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.<sup>15</sup>

In the present case, Mr. D's condition has certainly improved in some respects since the comparison year of 2005:<sup>16</sup> most notably, his cognition is dramatically better.<sup>17</sup> However, to meet the above threshold for removal from the program, he must have improved to a degree that he no longer requires and qualifies for Waiver services. For practical purposes, therefore, the essential question in this case is whether the Division has demonstrated that Mr. D no longer qualifies for the program.

## ***B. The CAT***

### **1. Review of the CAT Assessment**

The steps listed in the preceding section that are required for removal from the Choice Waiver program include “review by an independent qualified health professional.”<sup>18</sup>

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

<sup>13</sup> AS 47.07.045(b)(2)(B).

<sup>14</sup> AS 47.07.045(b)(3)(C).

<sup>15</sup> 7 AAC 130.230(g).

<sup>16</sup> 2005 was the assessment to which Mr. D's current condition was compared for purposes of determining whether he had material improvement. Direct exam of Bragwell. This apparently grows out of court orders in effect during the interim; the use of 2005 as the comparison year has not been challenged in this case.

<sup>17</sup> *E.g.*, direct testimony of Bragwell.

<sup>18</sup> AS 47.07.045(b)(2).

It is undisputed that such a review occurred in this case.<sup>19</sup> However, in a post-hearing brief, Mr. D’s counsel included the following two sentences in his introduction:

In this case the review was not done properly. As explained below, the “independent health care professional” did not in fact conduct an independent review, relying almost entirely on material submitted by SDS and limiting the review to rewording that material.<sup>20</sup>

This passage is puzzling in two respects. First, there is no explanation “below” in the brief—the issue is simply dropped, with no portion of the argument section of the brief devoted to the adequacy of review. Second, the parties had stipulated on the oral record at the beginning of the hearing that there were “no issues” and “no legal deficiencies” with the review, and on the basis of that stipulation, the reviewer was not called to testify. In light of this history, the administrative law judge believes he has no basis on which to find the review procedurally deficient. Most likely, the quoted passage in counsel’s introduction was a stray argument from a template brief, not intended to be pursued in this case.<sup>21</sup> The sole issue for decision in this case is a substantive one: whether Mr. D should be found to qualify for Waiver services under the CAT methodology.

## **2. Scoring the CAT Assessment**

There are two routes by 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, Nursing Services, items 1-8 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?

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<sup>19</sup> See, e.g., Ex. D at 2-3.

<sup>20</sup> Claimant’s Initial Post-Hearing Brief at 3.

<sup>21</sup> The argument section has a part 1 but no part 2, which suggests that a second argument had been deleted.

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?<sup>[22]</sup>

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

The second route for qualification is through a combination of scores given under sections NF 2 (nursing services and therapies), NF 3 (cognitive ability), and NF 4 (inappropriate behavior), and NF 6—with the last only being examined if a score of at least one was found somewhere in NF 2-4. Section NF 6 returns to the key ADLs, asking how many of them were scored with a two or higher (limited assistance) in self-performance and given a support score of two or three. In other words, it asks how many of these ADLs received a score of 2/2 or higher in the body of the assessment. The number of such raw scores becomes the single numerical score in NF 6. Under Section NF 7, the total score in sections NF 2-4 and 6 are added. An individual with a grand total of three or higher is eligible for the Choice Waiver program.

In this case, it is undisputed that Mr. D has none of the qualifying conditions or therapies in NF-1a, NF-1b, NF-1c, or NF-1d, nor any of the threshold scores in NF 2, NF 3, or NF 4. *The sole route for potential qualification is NF-1e, whereby a patient can be in the program if he or she has a score of 3 (extensive assistance) or 4 (dependent) in self performance in three of the five “shaded” activities of daily living (ADLs), which are bed mobility, transfers, locomotion, eating, and toilet use.*

The CAT numerical scoring codes for self-performance codes rate how capable a person is of performing a particular ADL. The possible codes are **0** (the person is independent<sup>23</sup> and requires no help or oversight); **1** (the person requires supervision<sup>24</sup>); **2** (the person requires limited assistance<sup>25</sup>); **3** (the person requires extensive assistance<sup>26</sup>); **4** (the person is totally

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<sup>22</sup> Ex. E at 29. The “shaded ADLs” are bed mobility, transfers, locomotion, eating, and toilet use.

<sup>23</sup> A self-performance code of 0 is classified as “[i]ndependent – No help or oversight – or – Help/oversight provided only 1 or 2 times during last 7 days.” Ex. E at 18.

<sup>24</sup> This means only oversight, encouragement, or cueing were provided in the last 7 days, or “supervision plus nonweight-bearing physical assistance provided only 1 or 2 times during last 7 days.” Ex. E at 18.

<sup>25</sup> According to 7 AAC 125.020(a)(1), limited assistance with an ADL “means a recipient, who is highly involved in the activity, receives direct physical help from another individual in the form of guided maneuvering of limbs, including help with weight-bearing when needed.”

<sup>26</sup> According to 7 AAC 125.020(a)(2), extensive assistance with an ADL “means that the recipient is able to perform part of the activity, but periodically requires direct physical help from another individual for weight-bearing support or full performance of the activity.”

dependent<sup>27</sup>). There are also codes which are not used in calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).<sup>28</sup>

As a threshold matter, Mr. D's counsel has argued quite specifically in his post-hearing reply brief that Ms. Findley used the wrong threshold for the difference between self performance score of 2 (limited assistance) and 3 (extensive assistance). Counsel contends that Ms. Findley incorrectly believes that anyone who can bear some of his weight is receiving only limited assistance, with extensive assistance requiring that the caregiver bear all of the client's weight. He supports his argument with specific quotes from Ms. Findley's testimony.<sup>29</sup>

If it were true that Ms. Findley held this view, there could be a fundamental problem with her judgments in the assessment, since the weight-bearing that must be considered in this aspect of scoring encompasses partial weight-bearing and is *not* limited to bearing all of the client's weight.<sup>30</sup> However, the quotes counsel has attributed to Ms. Findley simply did not occur in this case; nothing in the record in this case supports the contention that Ms. Findley made her assessment on the basis counsel has attributed to her.

We will now turn to the state of the proof regarding the five shaded ADLs. If the evidence shows that Mr. D should have less than a qualifying self-performance score (3 or 4) in three or more of these ADLs, the agency has met its burden of demonstrating that he needs to be terminated from the Choice Waiver program.

a. Bed Mobility

The first of the five "shaded ADLs" relevant to qualification under NF-1e is bed mobility (how a person changes positions in bed). The parties agree that Mr. D does this independently.<sup>31</sup> This results in a self-performance score of 0.

b. Locomotion

Another of the five shaded ADLs is locomotion, how a person moves from one location to another. Nurse Findley observed Mr. D to move around completely independently with a walker, requiring no hands-on assistance and appearing to have no trouble controlling the

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<sup>27</sup> According to 7 AAC 125.020(a)(3), dependent as to an ADL, or dependent as to an IADL, "means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity."

<sup>28</sup> Ex. E, p. 18.

<sup>29</sup> Claimant's Post-Hearing Reply Brief at 3-4.

<sup>30</sup> *In re K. T-Q*, OAH No. 13-0271-MDS (Commissioner of Health & Soc. Serv. 2013).

<sup>31</sup> Ex. E at 18; Claimant's Initial Post-Hearing Brief at 8.

assistive device. The owner of Mr. D's assisted living home, K B, agreed that Mr. D can get around on his own with a walker, but she said that if allowed to ambulate on his own he would "bang everywhere" due to lack of good control, and therefore staff must support or guide the walker. When taken as a whole, her testimony did not indicate that any true weight-bearing assistance is needed as Mr. D moves from place to place. While this testimony could support a self-performance score of 2 (higher than the score of 1 assessed by Nurse Findley), it could not justify a self-performance score of 3 or 4.

c. Eating

A third shaded ADL is eating. The testimony in this case shows that although Mr. D feeds himself and thus is highly involved in the activity, he needs to be supervised closely while he is eating to be sure he does not eat too fast.<sup>32</sup> The staff has to cut up his food and is seated next to him at every meal.<sup>33</sup> This equates to "limited assistance." The CAT explains that "extensive assistance" in this area would entail "[f]ull staff/caregiver performance during part (but not all) of last 7 days", while "total dependence" would entail "[f]ull staff/caregiver performance of activity during ENTIRE 7 days."<sup>34</sup> There is no evidence in this case to indicate that staff ever has to feed Mr. D, and thus self-performance scores of 3 (extensive assistance) or 4 (total dependence) are unavailable to him for this ADL.

d. Transfers and Toilet Use

There are two additional shaded ADLs in the CAT methodology: one is transfers—moving from one surface to another, such as from chair to bed—and the other is toilet use. For both of these ADLs, there is some testimony in the record that could justify a self-performance score of 3. At the same time, Nurse Findley, who came across as a capable, thoughtful, and fair assessor, stood by personal observations from her visit that would support a score of only 2. It is unnecessary to resolve these differing impressions because the agency has already demonstrated that a score of less than 3 is merited in three of the five shaded ADLs. Even if Mr. D were to be awarded self-performance scores of 3 in these two ADLs, he would still fall short of qualification under NF-1e.

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<sup>32</sup> Direct exam of B.

<sup>33</sup> *Id.*

<sup>34</sup> Ex. E at 18.

**C. Factors Beyond the CAT**

The CAT has been incorporated into the Department’s regulations, and as the Department interprets those regulations, a non-qualifying CAT score creates at least a presumption that the recipient is ineligible for Choice Waiver services.<sup>35</sup> It may be that in exceptional cases there are factors outside the CAT that might override a qualifying CAT score, but none have been suggested in this case.

**V. Conclusion**

Because Mr. D had a non-qualifying CAT score as of the time of the decision under review, the decision was correct. The decision to terminate him is affirmed. The date on which Mr. D shall be deemed to have fallen below level of care is the date of the adverse action letter, May 17, 2013.

DATED this 1<sup>st</sup> day of November, 2013.

*Signed*  
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Christopher Kennedy  
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 13<sup>th</sup> day of November, 2013.

By: *Signed*  
\_\_\_\_\_  
Name: Christopher M. Kennedy  
Title: Administrative Law Judge

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

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<sup>35</sup> Cf. *In re O.P.*, OAH No. 13-0054-MDS (Comm’r of Health & Soc. Serv., adopted Feb. 20, 2013), at 8 (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130054.pdf>).