

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

D [REDACTED] G [REDACTED],)
)
 Appellant,)
)
 vs.)
)
 STATE OF ALASKA,)
 DEPARTMENT OF HEALTH AND)
 SOCIAL SERVICES, DIVISION OF)
 SENIOR AND DISABILITIES)
 SERVICES,)
 Appellee.)
 _____)

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

ORDER

I. INTRODUCTION

D [REDACTED] G [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 finds that (1) the termination of Ms. G [REDACTED]'s Waiver program benefits does not violate due process and (2) there is substantial evidence to support the State's conclusion that Ms. G [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 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.¹ Individuals request waivers from the federal government Medicaid requirements.² An applicant is eligible to receive waiver benefits under this waiver program only if she meets the specified nursing facility level of care.³ Nursing facility level of care is defined in regulation as either skilled or intermediate, as measured by the Department's eligibility criteria.⁴ Whether a person meets this level of care is determined by the Consumer Assessment Tool ("CAT").⁵

Once a person is in the Waiver program, they must be reassessed every year to maintain eligibility.⁶ 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.⁷ Materially improved means that a recipient who has previously

¹ 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.).

² *See* 42 U.S.C. § 1396r(a),

³ 7 AAC 130.205; *see* AS 47.07.054.

⁴ 7 AAC 130.515 (skilled); 7 AAC 130.510 (intermediate).

⁵ 7 AAC 130.213.

⁶ AS 47.07.045(b)(1).

⁷ AS 47.07.045(b)(1).

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 home placement, and is able to demonstrate the ability to function in a home setting without the need for waiver services.”⁸

The State uses the CAT to determine whether a recipient meets the requisite level of care for continued participation.⁹ 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, changes in medications and therapies, changes in equipment, therapies and surgeries, and changes in diagnosis. The nurse also makes general observations regarding the recipient’s abilities and situation. The assessment is an interactive process and includes 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”). These scores are considered in conjunction with the stated observations of the nurse and the medical needs of the recipient to make a level of care determination. The level of care determination must incorporate the results of the CAT.¹⁰

⁸ AS 47.07.045(b)(3).

⁹ 7 AAC 130.215(4).

¹⁰ 7 AAC 130.213.

If the annual assessment determines that the person has “materially improved,”¹¹ 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 review concurs with the CAT material improvement finding, the CAT and all the documents reviewed by the State must be forwarded for a review by an independent qualified health professional under contract with the State.¹² Qualis Health utilizes a registered nurse licensed in Alaska to review the State’s decision.¹³ Qualis also requires a physician review before any termination decision can be approved.¹⁴ If this third-party review agrees that an applicant 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.

B. D. ██████ G. ██████’s Case

Ms. G. ██████ qualified for the Waiver program in February 2012 following an assessment that determined she needed extensive assistance with transfer, locomotive,

¹¹ AS 47.07.045(b)(1); *supra* note 8 (“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.”).

¹² AS 47.07.045(b)(1)-(3).

¹³ R. 87-90.

¹⁴ *Id.*

and bed mobility. The assessing nurse also considered that in previous twelve months Ms. G■■ had more than ten hospitalizations and over 24 emergency room visits. Ms. G■■ also had a letter from a primary care provider recommending her for waiver services.

In March 2013, the State reassessed Ms. G■■ as required. The 2013 nurse assessor conducted an in-home assessment using the CAT. The nurse assessor determined that Ms. G■■ had materially improved and no longer qualified for waiver services because she no longer needed extensive assistance with transfer, locomotive, or bed mobility. The nurse assessor also considered that Ms. G■■ had a pancreatic stent placed and significantly fewer hospital visits. The material improvement review nurse, third-party review nurse and physician, and Administrative Law Judge agreed that Ms. G■■ had materially improved. Ms. G■■ appeals the termination decision to this Court.

C. Issues Presented on Appeal

- (1) Whether due process requires the State to show actual and material improvement in the recipient's condition in order to terminate the recipient's waiver services?
- (2) Whether the State's determination that Ms. G■■ had materially improved is supported by substantial evidence?

III. DISCUSSION

A. Standards of Review

Ms. G■■■■'s constitutional due process argument is a question of law that the court reviews de novo.¹⁵ Ms. G■■■■'s argument that the State improperly terminated her Waiver program services is a factual determination which the court on appeal reviews for substantial evidence.¹⁶

Substantial evidence is evidence that a “reasonable mind might accept as adequate to support a conclusion.”¹⁷ When an agency “chooses between conflicting determinations and there is substantial evidence in the record to support either conclusion” the court will affirm.¹⁸ The Court does not reweigh conflicting evidence, but instead views conflicting evidence in favor of the agency’s findings, even if the court might have taken a contrary view.¹⁹ An appellate court may reverse an agency decision only if it cannot conscientiously find that the evidence supporting the agency’s decision is substantial.²⁰

¹⁵ *Berry v. Berry*, 277 P.3d 771, 774 (Alaska 2012).

¹⁶ *May v. State, Commercial Fisheries Entry Comm'n*, 175 P.3d 1211, 1216 (Alaska 2007).

¹⁷ *Id.*

¹⁸ *Morris v. State, Dep't of Admin, Div. of Motor Vehicles*, 186 P.3d 575, 577 (Alaska 2008).

¹⁹ *Suydam v. State, Commercial Fisheries Entry Comm'n*, 957 P.2d 318, 323 (Alaska 1998).

²⁰ *Williams v. Ketchikan Gateway Borough*, 295 P.3d 374, 376 (Alaska 2013).

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B. The State's termination decision did not violate Ms. G's due process rights.

Ms. G's due process argument is a question of law that the Court reviews de novo.²¹ Ms. G argues that this Court should follow a 1990 Colorado appellate court decision in *Weaver v. Colorado Dep't of Social Services*²² and hold that the State must do two things prior to terminating an individual's waiver benefits. First, the State must presume that the recipient's medical condition has not materially improved since the prior assessment.²³ Second, the State must compare the current assessment with the prior assessments to determine how the person's underlying condition has materially improved.²⁴ Although the State's decision compares the current and previous assessment and explains how Ms. G materially improved, the Court declines to follow the two-step approach in *Weaver*.

The CAT is a standard and non-arbitrary approach to decision making that explains the decision to recipients. The statutory standard is not whether a diagnosis has changed, but whether at the time of the annual review the recipient still has a "functional limitation or cognitive impairment that would result in the need for nursing home placement," and whether they now "demonstrate the ability to function in a home setting without the need for waiver services."²⁵

²¹ *Berry* 277 P.3d at 774.

²² 791 P.2d 1230 (Colo. App. 1990).

²³ Appellant's Brief, 12.

²⁴ Appellant's Brief, 12.

²⁵ AS 47.07.045(b)(3)(C).

To make this determination, Ms. G [REDACTED] was subject to four levels of review: (1) the reassessment using the CAT, which is conducted in-home by a registered nurse, (2) the material improvement review conducted by a registered nurse who compares the previous CAT to the current CAT (3) a review by an independent contractor, which uses a registered nurse and physician to determine whether the scoring was consistent with the narrative information and clinical diagnosis, and (4) a fair hearing conducted by an Administrative Law Judge. With the exception of the material review nurse, each level of review includes notes and observations supporting the material improvement finding. Without following *Weaver*, the Court finds that the State's complied with due process when making its determination to to terminate Ms. G [REDACTED]'s benefits.

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

Ms. G [REDACTED] had been living in her assisted living home for a couple of years when she qualified for the Waiver program in February 2012.²⁶ In February 2012, a registered nurse performed an assessment using the CAT and determined that Ms. G [REDACTED]'s need for extensive assistance with transfer, locomotive, and bed mobility qualified her for the waiver.²⁷ The 2012 nurse also considered that in the previous twelve months there were more than ten hospitalizations, over 24 emergency room visits, and that Ms. G [REDACTED] had a letter from a primary care provider recommending her for waiver services.²⁸ The State

²⁶ Tr. 143; R. 202

²⁷ R. 18.

²⁸ R. 3.

determined that Ms. G [REDACTED] was qualified to receive “residential supported-living services” to provide habilitation services above the standard level of custodial care for daily living assistance.²⁹

As required by law, the State reassessed Ms. G [REDACTED] in 2013 to determine if she was still qualified for the waiver program.³⁰ On March 26, 2013, the State’s nurse assessor, Michelle Russell-Brown, RN, conducted an annual assessment at Ms. G [REDACTED]’s assisted living home.³¹ Ms. G [REDACTED]’s care coordinator was present.³² Nurse Russell-Brown also reviewed critical incident reports, which documented that Ms. G [REDACTED] had a pancreatic stent placed and had been to the hospital only five times the previous year.³³ Based on the in-home assessment and review of Ms. G [REDACTED]’s records, Nurse Russell-Brown concluded that Ms. G [REDACTED] did not currently qualify for the waiver program because all of her needs can be met through staff at the assisted living home, without any extensive care needs or nursing observation or oversight.³⁴

After the assessment was completed, a supervising nurse, Jan Bragwell, RN, conducted a material improvement review.³⁵ Nurse Bragwell reviewed both the 2012 and 2013 assessments, compared the scores, narrative, and diagnoses and determined that Ms. G [REDACTED] had materially improved.

²⁹ *Id.*; 7 AAC 130.255(b)(2).

³⁰ AS 47.07.045(b).

³¹ R. 32-61.

³² Appellee Br. 17.

³³ Tr. 24-25; R. 34, 117-118.

³⁴ Tr. 45.

³⁵ R. 64-69.

The State then sent its decision to Qualis Health, the State's third party reviewer. The Qualis review was conducted by a nurse licensed in Alaska and was secondarily reviewed by a Qualis physician, both of whom evaluated the material to determine whether the scoring was consistent with the narrative information and the clinical diagnoses.³⁶ Qualis determined that Ms. G■■■■ had materially improved, noting her improved functioning in activities of daily living and other areas of functioning such as ability to manage her own medications and legal affairs and a slight increase in weight.³⁷

After receiving her termination notice letter explaining the State's determination to terminate her waiver benefits, Ms. G■■■■'s Care Coordinator, K■■■■ S■■■■, requested a fair hearing on her behalf to appeal the June 20, 2013 termination notice. After Ms. G■■■■ requested a hearing, Nurse Bragwell sought medical records from Ms. G■■■■'s provider, R■■■■ C■■■■, PA-C, to see if there was any information that would either confirm or contradict the finding of material improvement.³⁸ Both Nurse Bragwell and Nurse Russell-Brown reviewed the records and concluded that the records supported the material improvement decision.³⁹ Unlike Ms. G■■■■'s 2012 provider, PA-C C■■■■ indicated that Ms. G■■■■'s care needs were custodial and did not advocate for nursing facility level care.⁴⁰ Also, Ms. G■■■■'s mental health worker discussed

³⁶ Tr. 103-137; R. 166-202.

³⁷ R. 177.

³⁸ Tr. 76-77.

³⁹ Tr. 39-40, 44.45 (Russel-Brown); Tr. 77, 80-81 (Bragwell).

⁴⁰ R. 97.

medication changes and commented that Ms. G [REDACTED] was feeling better and able to attend to her own personal care.⁴¹

A fair hearing was held on October 25, 2013.⁴² Each of the nurses listed above testified as to their decisions. Each nurse testified about specific functional improvements they found in Ms. G [REDACTED]'s assessment, but the ALJ did not cite any testimony about these functional improvements.⁴³ The Administrative Law Judge determined that Ms. G [REDACTED] does not meet the requisite level of care for the Waiver program as defined in the statute.⁴⁴ The ALJ stated,

[r]ather than look at descriptions of a recipient's condition at two different points in time, the Choice Waiver statute defines material improvement as no longer qualifying for the Choice Waiver program. By definition, a person who no longer qualifies for the program has materially improved regardless of the scores given or comments made in the prior evaluation.⁴⁵

Without comparing the numbers from the two CATs, the ALJ explained all the ways Ms. G [REDACTED] had improved and why those improvements resulted in a material improvement so that she no longer qualified for the Waiver program.⁴⁶ The ALJ stated:

Ms. G [REDACTED] has no specific nursing needs or therapy needs. She does need assistance with her Activities of Daily Living. She previously qualified for the Choice Waiver program because she needed extensive assistance with bed mobility, transfers, and locomotion. More recently, the division determined that she needed extensive assistance only for locomotion. She did not need extensive assistance with bed mobility or transfers. Ms. G [REDACTED]

⁴¹ Tr. 102.

⁴² R. 76.

⁴³ R. 76-81.

⁴⁴ *Id.*

⁴⁵ R. 80.

⁴⁶ *Id.*

confirmed that she only needed help with these tasks on the days her pancreatitis flaired [*sic*] up, which she said occurred about twice per month. This does not meet the minimum frequency for demonstrating a need for extensive assistance (weight bearing support at least four times in the last seven days). Accordingly, Ms. G■■■■ has materially improved as that term is defined by statute, and she no longer qualifies for the Choice Waiver program.⁴⁷

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. G■■■■'s waiver benefits because she had materially improved. Ms. G■■■■ used to need extensive assistance with three areas: transfers, locomotion, and bed mobility. Ms. G■■■■ now only needs extensive assistance with one area, locomotion, approximately twice a month. In her 2012 assessment, Ms. G■■■■ had ten hospitalizations, over 24 emergency room visits, and a recommendation from her primary care provider. In her 2013 reassessment, Ms. G■■■■ had a pancreatic stent placed and only five hospital visits. As the ALJ acknowledged, Ms. G■■■■ still has on-going medical issues, which is why she continues to qualify for other Medicaid benefits. The State's decision to terminate Ms. G■■■■'s Waiver program benefits is supported by substantial evidence.

IV. CONCLUSION

The Court finds that the State's conclusion that Ms. G■■■■ materially improved is supported by substantial evidence. The State's decision to terminate Ms. G■■■■'s Waiver services is AFFIRMED.

⁴⁷ *Id.*
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IT IS SO ORDERED.

DATED at Anchorage, Alaska this 25th day of NOV 2014.

[REDACTED]

CATHERINE EASTER
Superior Court Judge

I certify that on 11/26/14
a copy of the above was mailed to: D. Coons
K. Allen

Jamie Trivette, Judicial Assistant