

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

In the Matter of )  
 )  
 E H )  
\_\_\_\_\_ )

OAH No. 13-1000-MDS  
Agency No.

**DECISION**

**I. Introduction**

E H has been receiving services under the Older Alaskan or Adult with a Physical Disability waiver program, also known as the Choice Waiver program, since 2012. In 2013, the Division of Senior and Disabilities Services (division) re-assessed her functional abilities and concluded that Ms. H was no longer eligible to participate in the Choice Waiver program. Ms. H requested a hearing to contest that determination.

A hearing was held on October 25, 2013. Because the division proposed terminating benefits that had previously been granted, it had the burden of proving by a preponderance of the evidence that Ms. H was no longer eligible.<sup>1</sup> As discussed below, the division met its burden of proof, and its determination is affirmed.

**II. Facts**

Ms. H developed chronic pancreatitis about five years ago.<sup>2</sup> She has been hospitalized multiple times to treat her pancreatitis, and has lived in an assisted living facility for about four years.<sup>3</sup> Ms. H also has several mental health diagnoses, including bipolar disorder, borderline personality disorder, and PTSD.<sup>4</sup> Her pancreatitis causes her constant pain; about twice a month the pain flairs up, and she goes to the hospital emergency room for treatment.<sup>5</sup>

In 2012, Ms. H was assessed for the Choice Waiver program, and was found eligible.<sup>6</sup> Her eligibility was based on a determination that she needed extensive assistance with three activities of daily living (ADL):<sup>7</sup> bed mobility, transfers, and locomotion.<sup>8</sup>

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<sup>1</sup> 7 AAC 49.135.  
<sup>2</sup> Testimony of Ms. H; Exhibit E 3.  
<sup>3</sup> Testimony of Ms. H.  
<sup>4</sup> Exhibit E 3.  
<sup>5</sup> Testimony of Ms. H.  
<sup>6</sup> Exhibit F.

Ms. H was reassessed the following year, and the division determined that while she still needed extensive assistance with locomotion, Ms. H only required limited assistance with bed mobility and transfers.<sup>9</sup>

### **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>10</sup> The program pays for services that allow an eligible person to stay in his or her home (or an assisted living home) rather than move into a nursing facility. The level of care that is provided in a nursing facility is either “intermediate care” as defined by 7 AAC 140.510 or “skilled care” as defined in 7 AAC 140.515.

The division determines whether an applicant requires nursing facility level of care services by conducting an assessment.<sup>11</sup> For adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and .515,<sup>12</sup> and incorporates the results of the Consumer Assessment Tool (CAT).<sup>13</sup> 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).<sup>14</sup>

Once an individual has qualified to participate in the Choice Waiver program, the division must follow certain procedures before removing a recipient 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>15</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>16</sup> Material improvement for an adult with physical disabilities is defined as:

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<sup>7</sup> Exhibit F 29.  
<sup>8</sup> Exhibit F 18.  
<sup>9</sup> Exhibit E 18.  
<sup>10</sup> 7 AAC 130.205(d)(2).  
<sup>11</sup> 7 AAC 130.230.  
<sup>12</sup> 7 AAC 130.230(b)(2)(A).  
<sup>13</sup> 7 AAC 130.230(b).  
<sup>14</sup> Adopting January 29, 2009 version of the CAT.  
<sup>15</sup> AS 47.07.045(b)(1) – (3).  
<sup>16</sup> AS 47.07.045(b)(2)(B).

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>[17]</sup>

Based on this definition, a “material improvement” determination is focused on whether the individual currently qualifies for the Choice Waiver program rather than on any specific changes in functional limitation or cognitive impairment since the prior assessment. 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>18</sup>

***B. Material Improvement***

Ms. H testified credibly that her condition has not improved since the determination in 2012 that she qualified for the Choice Waiver program. There is information in the CAT assessments to support that testimony.

In 2012, Ms. H only needed set up assistance for walking around her own room, within her home, and outside.<sup>19</sup> The following year, she needed extensive assistance.<sup>20</sup> In 2012, Ms. H had occasional bowel incontinence,<sup>21</sup> while she had frequent incontinence problems the next year.<sup>22</sup> No problems with her balance or gait were noted in 2012,<sup>23</sup> while she did have difficulties the following year.<sup>24</sup> These changes are not consistent with someone who is experiencing an improved physical condition.

In assessing Ms. H’s ADLs in 2012, the assessor noted for bed mobility:

Unable to lay on the left side due to too much pain, sometimes when really weak staff helps to turn sides & sit up from a laying position. No decubs, EH sleeps in a regular bed.<sup>[25]</sup>

Also, the assessor noted that Ms. H made positional changes independently.<sup>26</sup> Based on the observations in 2012, Ms. H was scored as needing extensive assistance with bed mobility.<sup>27</sup>

In the 2013 CAT, Ms. H made the following statement regarding bed mobility:

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<sup>17</sup> AS 47.07.045(b)(3)(C).  
<sup>18</sup> 7 AAC 130.230(g).  
<sup>19</sup> Exhibit F 18.  
<sup>20</sup> Exhibit E 18.  
<sup>21</sup> Exhibit F 23.  
<sup>22</sup> Exhibit E 23.  
<sup>23</sup> Exhibit F 23.  
<sup>24</sup> Exhibit E 23.  
<sup>25</sup> Exhibit F 6.  
<sup>26</sup> *Id.*  
<sup>27</sup> *Id.*

“I can move from side to side, but it hurts to lay on my left side.” [“]I can sit up by myself, sometimes it hurts and when I’m really weak staff will help me sit up from laying.” “I had pancreatic stent placement surg. 3/5/13.”<sup>[28]</sup>

The assessor observed Ms. H:

to reposition & sit up in bed independently & with difficulty d/t abdominal pain. Significant facial grimacing, abdominal guarding, trembling extremities.<sup>[29]</sup>

As a result, the assessor scored Ms. H as needing only limited assistance with bed mobility in 2013.<sup>30</sup>

In regards to transfers, Ms. H was observed transferring independently during the 2012 assessment, but it was noted that she was “dizzy at times, she takes her time to stand & sit, on and off furniture on her own. EH sometimes needs help when her pain is bad.”<sup>31</sup> She was scored as needing extensive assistance with transfers.<sup>32</sup>

The 2013 CAT notes that Ms. H needs to be steadied by staff during transfers because of her severe pain. She was observed transferring from the bed with assistance, but she was clearly in pain based on her facial grimacing, abdominal guarding, and tremulous extremities. Unsteady balance was also noted.<sup>33</sup> Ms. H was scored as needing limited assistance with transfers.<sup>34</sup>

A comparison of the comments included in the two CATs supports Ms. H’s testimony that she has not improved since 2012. However, the actual scores given suggest she may have had some improvement. The difference between limited assistance and extensive assistance relates to whether weight bearing assistance is needed, and if so, how often. A person who needs weight bearing support for a particular ADL four or more times per week requires extensive assistance.<sup>35</sup> This highlights why a simple comparison of two different CAT evaluations will not always be helpful. The assessor did not specify that Ms. H needed weight bearing support in 2012, but the CAT score indicates she did. The CAT score in 2013 suggests she did not.

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<sup>28</sup> Exhibit E 6.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Exhibit F 6.

<sup>32</sup> *Id.*

<sup>33</sup> Exhibit E 6.

<sup>34</sup> *Id.*

<sup>35</sup> *See* Exhibit E 6 defining differences between limited and extensive support.

Rather than look at descriptions of a recipients' condition at two different points in time, the Choice Waiver statute defines material improvement as *no longer qualifying* for the Choice Waiver program.<sup>36</sup> By definition, a person who no longer qualifies for the program has materially improved regardless of the scores given or comments made in a prior evaluation.<sup>37</sup>

Ms. H 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.<sup>38</sup> More recently, the division determined that she needed extensive assistance only for locomotion.<sup>39</sup> She did not need extensive assistance with bed mobility or transfers. Ms. H confirmed that she only needed help with these tasks on the days her pancreatitis pain flared 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. H has materially improved as that term is defined by statute, and she no longer qualifies for the Choice Waiver program.

#### **IV. Conclusion**

Ms. H no longer qualifies for the Choice Waiver program. Accordingly, the division's determination terminating her participation in that program is affirmed.

Dated this 6<sup>th</sup> day of November, 2013.

*Signed*

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Jeffrey A. Friedman  
Administrative Law Judge

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<sup>36</sup> AS 47.07.045(b)(3)(C).

<sup>37</sup> The prior evaluation may contain relevant evidence as to the recipient's current condition, but the definition of material improvement is still based on that current condition as opposed to any measurable change between assessments. The prior assessment may not have fully documented the reason for finding eligibility, or may have simply been scored incorrectly.

<sup>38</sup> Exhibit F 18; F 29.

<sup>39</sup> Exhibit D 2; E 18. It is important to note that the assessment is a process that occurs over time, which concluded when the division reached a final decision to terminate Ms. H's participation in the program. That determination was made several months after the CAT was administered. *See In re T C*, OAH No. 13-0204-MDS (Commissioner of Health and Social Services 2013), available on line at <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf>.

## 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 21<sup>st</sup> day of November, 2013.

By: Signed  
Signature  
Jeffrey A. Friedman  
Name  
Administrative Law Judge  
Title

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