

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

IN THE MATTER OF)
)
 Q J. T) OAH No. 13-1343-MDS
) Agency No.

DECISION ON REMAND

I. Introduction

Q T was receiving benefits from the Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (Division) performed a re-assessment and notified her she no longer qualified.¹ Ms. T requested a hearing.²

Ms. T represented herself at the hearing, but she was assisted by her friend, N A. Anita Halterman represented the Division. Angela Hanley, RN, testified for the Division. After the hearing, the record was left open, and then re-opened again.

A proposed Decision and Order was issued and sent to the parties. Ms. T timely filed a proposal for action. The Proposed Decision and Ms. T’s proposal for action were sent to the adopting authority, who then remanded the case with instructions to apply the correct burden of proof. The Proposed Decision had incorrectly placed the burden of proof on Ms. T, and the adopting authority appropriately determined that the burden of proof was on the Division in this appeal because ongoing Medicaid Waiver services were being terminated rather than denied after an initial application.

Unfortunately for Ms. T, placing the burden of proof on the Division does not change the outcome in this case. The findings in the proposed decision were made by a preponderance of the evidence. Even though the conclusion was that Ms. T had not met her burden on the ultimate question of whether she qualified for Waiver services, the evidence in the record shows that she is no longer eligible for those services. The Division met its burden, as the factual findings in the proposed decision reflect. That language in this Decision on Remand now applies the correct burden of proof, but reaches the same result as the proposed decision.

1 Exhibit A.
2 Exhibit C.

Ms. T experiences substantial physical impairments. However, those impairments do not rise to the level necessary to qualify her for Waiver services. As a result, the denial of continued eligibility for Waiver services is upheld.

II. Facts³

The following facts were established by a preponderance of the evidence in the record.

Ms. T was 63 years old on the date of the reassessment. Her disabilities are primarily caused by her Rheumatoid arthritis. This condition has led to severe deformities of her joints, especially in her hands, knees, neck and feet. This has also contributed to serious dental issues. Ms. T uses a walker and she has difficulty standing and sitting down. Ms. T has been diagnosed with cachexia, that is, weight loss and muscle wasting.

The assessor, Angela Hanley, RN, documented Ms. T's assessment on the Consumer Assessment Tool (CAT). She found the following:

- Ms. T has varying levels of energy and fatigue, which means her needs for assistance completing activities of daily living also vary from day to day.
- Ms. T did not require physical assistance with bed mobility or eating. The assessor noted that in 2012 her weight was only 90 pounds, but it had increased to 98 pounds in 2013, and that her BMI is now in the normal range.
- Ms. T was independent for transfers.
- Ms. T required limited assistance for locomotion (walking). She has balance issues and uses a walker. She has an unsteady gait, and her activities are limited due to her fear of falling.
- Ms. T is taking injectable Humira for her Rheumatoid arthritis every two weeks, but she gives herself these injections.
- Ms. T requires limited assistance with toileting. She has some bowel incontinence issues.
- Ms. T did not require professional nursing services or specialized treatments at the time of the assessment.
- Ms. T's memory, both long-term and short-term, were intact. She is independent in her daily decisionmaking. Ms. T did not display any behavior or mood issues, although she has some documented sleep cycle issues.⁴

3 These facts are based upon Exhibits D, E & F, & the testimonies of Ms. T, Ms. A. and Ms. Hanley.

4 Exhibit D-3 & D-4 & Exhibit E.

Ms. T was living at home with an adult child at the time of the re-assessment. Ms. T provided additional medical records from after the reassessment. These records show dental and jaw problems and some physical therapy needs. After the hearing, the Division provided a response to more recent medical records. Nurse Hanley reviewed these records and concluded they did not indicate that any change to her reassessment would be appropriate.

III. Discussion

Ms. T's disagreements with the Division's assessment of her physical functioning focus on her understandable concern that her ability to live independently is dependent on her continuing to receive the level of care she had in the past. N A, who is Ms. T's friend, explained that they do believe the reassessment's characterization of Ms. T's abilities is overoptimistic in the sense that it really does not take adequate account of her bad days, and seems to give too much weight to her having already made adjustments, such as getting a special chair and bed, to help her cope with her disabilities. Ms. A explained that cutting as much as 20 hours per week of services would be devastating to Ms. T's ability to live independently. Ms. A pointed out that Ms. T's health has gotten worse over the last ten years, which indicates that she needs more care, not less.

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.⁵ 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.⁶ For adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and 515,⁷ and incorporates the results of the Consumer Assessment Tool (CAT).⁸

5 7 AAC 130.205(d)(2).

6 7 AAC 130.230.

7 7 AAC 130.230(b)(2)(A).

8 7 AAC 130.230(b).

B. Method for Assessing Ongoing Eligibility

The CAT records an applicant's needs for professional nursing services, therapies, and special treatments, and whether an applicant has impaired cognition or displays problem behaviors.⁹ Each of the assessed items is coded and contributes to a final numerical score. For instance, if an individual required 5 days or more of therapies (physical, speech/language, occupation, or respiratory therapy) per week, he or she would receive a score of 3.

The CAT also records the degree of assistance an applicant requires for activities of daily living (ADL), which include five specific categories: bed mobility (moving within a bed), transfers (i.e., moving from the bed to a chair or a couch, etc.), locomotion (walking or movement when using a device such as a cane, walker, or wheelchair) within the home, eating, and toilet use, which includes transferring on and off the toilet and personal hygiene care.

In order for a person who only has physical assistance needs to score as eligible for Waiver services on the CAT, he or she would need a self-performance code of 3 (extensive assistance) or 4 (total dependence) and a support code of 2 or 3 for three or more of the five specified activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting).

A person can also receive points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive behaviors, etc.), and if they require either limited or extensive assistance with the five specified activities of daily living.

The results of the assessment portion of the CAT are then scored. If an applicant's score is a 3 or higher, the applicant is medically eligible for Waiver services.¹⁰

C. Eligibility

Once an individual like Ms. T has qualified to participate in the Choice Waiver program, there are additional protections before she can be removed from that program. Specifically, she must have had an annual assessment, the assessment must have been reviewed by an independent qualified health professional,¹¹ and the assessment must find that the individual has materially improved.¹² The qualified health professional must be a

9 The CAT is found at Exhibit E.

10 Exhibit E, page 29.

11 There was testimony that this review did occur; whether the review occurred was not disputed at the hearing.

12 AS 47.07.045(b)(1) – (3).

registered nurse licensed in Alaska qualified to assess adults with physical disabilities.¹³

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.^[14]

The same criteria used in determining whether a recipient no longer has a functional limitation or cognitive impairment are used in making the initial determination that he or she did have the limitation or impairment.¹⁵ 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 a prior assessment.¹⁶ In deciding whether a person is eligible, the division looks at the recipient’s level of care needs as of the date the Division notified the person of its determination.¹⁷ The Division has the burden of proof in this appeal because the Division has determined that it needs to terminate Ms. T’s participation in the program.¹⁸

Ms. T no longer requires professional nursing services, specialized treatment, or therapies. She does not have behavior problems, nor does she have impaired cognition. She requires limited physical assistance with toileting. She requires limited physical assistance with locomotion.

Ms. T’s need for limited assistance with toileting and her need for limited assistance with locomotion do not by themselves qualify her for Waiver services. This means that she was not entitled to receive a scoring point on the CAT. Ms. T’s total score on the CAT was 0. The minimum scoring necessary to be found eligible on the CAT is a 3.¹⁹ As a result, unfortunately, Ms. T is not eligible for Waiver services.

13 AS 47.07.045(b)(2)(B).

14 AS 47.07.045(b)(3)(C).

15 7 AAC 130.230(g).

16 *In re E H*, OAH No. 13-1000-MDS (Commissioner of Health and Social Services 2013), page 3, available at <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS131000%20Superior%20Court%20appeal%20pending.pdf>.

17 *In re T C*, OAH No. 13-0204-MDS (Commissioner of Health and Social Services 2013), page 7, available at <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf>.

18 7 AAC 49.135.

19 Scoring Question NF 7. *See* Exhibit E, page 29.

IV. Conclusion

The Division had the burden of proof to demonstrate that Ms. T no longer qualified for Waiver services. The division met its burden of proof to show that she did not. The Division's decision to deny her continued eligibility is upheld.

DATED this 7th day of August, 2014.

Signed _____

Mark Handley

Administrative Law Judge

Adoption

The undersigned, by delegation from 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 26th day of September, 2014.

By: *Signed* _____

Signature

William J. Streur

Name

Commissioner

Title

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