

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

In the Matter of)	
)	
D H)	OAH No. 13-1437-MDS
_____)	Agency No.

DECISION

I. Introduction

For a number of years, D H 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. H was no longer eligible to participate in the Choice Waiver program. The assessment visit on which this termination was based was conducted by Nurse Sam Cornell in early April of 2013. After considering the assessment visit and other materials, the Division issued a decision letter to Mr. H (“Denial of Alaska Waiver Payment for Waiver Services”) that told him his Choice Waiver services would terminate. The decision letter was issued on September 27, 2013.¹

Mr. H, who is not represented by counsel, requested a hearing to contest that determination. He requested no continuances, and the case proceeded to hearing as scheduled on November 20, 2013. Administrative issues that were not the fault of either party caused a delay in issuance of a decision.

Because the Division proposed terminating benefits previously granted, it had the burden of proving at the hearing that Mr. H was no longer eligible.² Although this case is much closer than the Division’s assessor acknowledged, the Division did meet that burden in this case.

II. Background Facts

Mr. H was admitted to the Choice Waiver program in 2010 just before his 48th birthday, with a primary diagnosis of paraplegia and several secondary diagnoses, including vertebrogenic pain syndrome, neurogenic bladder, obesity, and depression.³ These diagnoses remain current,

¹ Ex. D.
² 7 AAC 49.135.
³ Ex. F.

with the exception of depression.⁴ A problem of frequent urinary tract infections was addressed in 2012 with the placement of a suprapubic catheter.⁵

In 2010, Mr. H had qualified for the program based on a need for “extensive assistance” with four key activities of daily living: bed mobility, transfers, locomotion, and toileting.⁶ The Division visited Mr. H on April 4, 2013 to begin a reassessment process. Based largely on a Consumer Assessment Tool (CAT) compiled from that hour-long visit by Sam Cornell, R.N., the Division concluded that Mr. H was no longer eligible for this program.⁷ This conclusion grew out of findings that Mr. H no longer needed “extensive assistance” with *any* key activities of daily living, and did not otherwise qualify for the program.⁸ The Division made its decision in late September of 2013, about six months after the assessment visit.

This case turns primarily on the accuracy of Mr. Cornell’s CAT assessment and scoring as a measurement of Mr. H’s care needs at the time of the decision. While other professionals reviewed the H case on behalf of the Division, they did not independently assess Mr. H, 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.⁹ 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.¹⁰ For adults with disabilities, this assessment looks

⁴ Ex. E, p. 3.

⁵ Ex. E, p. 4.

⁶ Ex. F.

⁷ Ex. D.

⁸ Ex. E at 29.

⁹ 7 AAC 130.205(d)(2).

¹⁰ 7 AAC 130.230.

at the nursing level services defined in 7 AAC 140.510 and 515,¹¹ and incorporates the results of the CAT.¹² 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),¹³ it is itself a regulation.

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.¹⁴ For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska and qualified to assess adults with physical disabilities.¹⁵ 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.^[16]

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.¹⁷

In the present case, Mr. H's condition has certainly improved in some respects since the comparison year of 2010:¹⁸ most notably, his mental health seems to have improved, and his problem with urinary tract infections has been addressed at least to some degree. However, to meet the above threshold for removal from the program, he must have improved to a point that he no longer requires and qualifies for Waiver services. Thus, for practical purposes, the essential question in this case is whether the Division has demonstrated that Mr. H no longer qualifies for the program.

¹¹ 7 AAC 130.230(b)(2)(A).

¹² 7 AAC 130.230(b).

¹³ Adopting January 29, 2009 version of the CAT.

¹⁴ AS 47.07.045(b)(1) – (3).

¹⁵ AS 47.07.045(b)(2)(B).

¹⁶ AS 47.07.045(b)(3)(C).

¹⁷ 7 AAC 130.230(g).

¹⁸ 2010 was the assessment to which Mr. H's current condition was compared for purposes of determining whether he had material improvement. This grows out of a court order in effect during the interim that prevented termination. 2011 and 2012 assessments were performed, and they would have resulted in denials in those years as well, had the court order not been in effect. *See* Ex. F, p. 38.

B. *The CAT*

1. 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?
- 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?^[19]

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. H could not qualify for any of the threshold scores in NF 2, NF 3, or NF 4, and hence the second route to qualification is unavailable. There is also no contention that he had any of the qualifying conditions or therapies in NF-1a, NF-1b, or NF-1c.

¹⁹ Ex. E at 29. The “shaded ADLs” are bed mobility, transfers, locomotion, eating, and toilet use.

With respect to NF-1d, there are likewise no qualifying therapies. At the time of the decision, Mr. H had a current prescription for only one therapy, which was range of motion exercises to be given seven days a week, 30 minutes per day.²⁰ The Division failed to consider this therapy in making its decision,²¹ and it certainly must be considered now.²² When incorporated into the CAT methodology, however, it does not yield a “yes” answer under NF-1d, nor change the outcome in any way. The only therapies counted in NF-1d are the therapies listed “In Section A, item 11.”²³ To be listed in Section A, item 11, a therapy has to be physical, speech/language, occupational, or respiratory therapy and be “provided by a qualified therapist.”²⁴ Range of motion exercises are handled in a different section of the CAT, and are not deemed to require a “qualified therapist.”²⁵ Indeed, Mr. H’s prescription for range of motion exercises calls for them to be performed by his personal care assistant (PCA).²⁶

With the second route to qualification entirely off the table, and NF-1a through NF-1d also unavailable, *the sole route for potential qualification for Mr. H is NF-1e, whereby a patient can be in the program if he 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 remainder of this decision will focus on whether Mr. H should receive ADL scores at that level.

2. ADL Scores for Mr. H

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 and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited

²⁰ Testimony of Cornell; PCA Program Prescribed Task Form dated April 17, 2013 (added to record Nov. 20, 2013).

²¹ Testimony of Cornell.

²² Mr. Cornell believed that the agency could not consider a prescription written on April 17, two weeks after the assessment visit, even though the Division’s decision was not rendered until September 27. Commissioner decisions have made it clear that when such pre-decision information has been disregarded, it must be considered during the hearing process and the CAT score must be adjusted to account for it. *See, e.g., In re T.C.*, OAH No. 13-0204-MDS (Commissioner of Health & Soc. Serv. 2013), Final Decision at 7-9 (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf>).

²³ Ex. E, p. 29.

²⁴ Ex. E, pp. 5, 14.

²⁵ Ex. E, p. 5.

²⁶ PCA Program Prescribed Task Form dated April 17, 2013 (added to record Nov. 20, 2013). Mr. H’s care coordinator, Ms. Z, agreed during the hearing: “I do understand and D does understand that that . . . is nothing in regards to physical therapy for the Waiver.”

assistance²⁷); **3** (the person requires extensive assistance²⁸); **4** (the person is totally dependent²⁹). 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).

We will now turn to the state of the proof regarding the five shaded ADLs. If the evidence shows that Mr. H 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). Mr. Cornell gave Mr. H a self-performance score of 0 in bed mobility, judging him to be fully independent in moving around in bed using his trapeze. Ms. Z, Mr. H’s care coordinator, testified that Mr. H has upper body strength to use a trapeze bar and hold himself up, but cannot hold himself with one arm while repositioning his legs with the other. As a result, he “still requires assistance with his legs while he’s holding up on the bar.” She pointed out that he also needs assistance with repositioning the mattress and pillows while he is holding onto the trapeze. Her testimony was wholly credible in the context of Mr. H’s medical condition, and the Division neither impeached it nor provided any contrary testimony.

Against this background, the score of 0 is a baffling choice by the assessor. The real question is whether Mr. H’s situation corresponds to a score of 2 or 3. The full definition given in the CAT for the “limited assistance” meant by a score of 2 is:

Person highly involved in activity; received physical help in guided maneuvering of limbs, or other nonweight-bearing assistance 3+ times or Limited assistance (as just described) plus weight-bearing 1 or 2 times during last 7 days.^[30]

The CAT’s full definition of the “extensive assistance indicated by a score of 3 is:

While person performed part of activity, over last 7-day period, help of following type(s) provided 3 or more times:

²⁷ 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.”

²⁸ 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.”

²⁹ 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.”

³⁰ *Id.*

Weight-bearing support

Full staff/caregiver performance during part (but not all) of last 7 days.^[31]

In choosing which definition fits the typical bed mobility situation for Mr. H, wherein he holds his torso up while someone moves his legs on around the bed, the question is whether a person lifting and moving another person's legs should be said to be providing "weight-bearing support." This question has been answered in the affirmative in several commissioner decisions, including *In re J.C.*³² (lifting legs is weight-bearing assistance) and *In re K. T.-Q.*³³ (anything more than minimal weight is weight-bearing; need not bear most of recipient's weight). Accordingly, a self-performance score of 3 is the correct one to apply to this activity under the CAT methodology.

b. Transfers

The second shaded ADL is transferring, or how a person moves between surfaces, such as from bed to wheelchair. Mr. Cornell gave Mr. H a score of 2 in this area. Again, a score of 3 is in fact the appropriate score, on account of the partial weight-bearing that routinely occurs when Mr. H performs this activity. The testimony of Ms. Z and of Gina West, the caregiver, credibly explained that Ms. West has to lift Mr. H's legs into position, without bearing his main weight. Even though the full weight is not borne, the definition of weight-bearing has been met.

c. Locomotion

Another of the five shaded ADLs is locomotion, how a person moves from one location to another. For a person using a wheelchair, it rates the person's self-sufficiency once in the chair. Mr. Cornell gave a self-performance score of 0 in this area, assessing Mr. H as fully independent in his chair. Ms. Z's testimony showed that some assistance is indeed required, such as to carry his wheelchair up or down stairs when he uses his stair lift and then set it up for him at the other end. However, this would equate to a score of 1 or 2 at most. No testimony suggested that a score of 3 could be appropriate.

³¹ *Id.*

³² OAH No. 13-0533-MDS (Commissioner of Health & Soc. Serv. 2013), Revised Decision at 10-11 (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130533.pdf>).

³³ OAH No. 13-0271-MDS (Commissioner of Health & Soc. Serv. 2013), Decision at 3 (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130271.pdf>). *See also In re L.D.*, OAH No. 13-0306-MDS (Commissioner of Health & Soc. Serv. 2013), Commissioner's Decision at 10-11 (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/PCA/MDS130306.pdf>).

d. Eating

A fourth shaded ADL is eating. The self-performance score of 0 awarded by Mr. Cornell was not challenged at the hearing.

e. Toilet Use

Mr. Cornell gave a score of 2 in the area of toileting. The only testimony at the hearing on this subject, that of Ms. West, made it clear that there is no physical assistance or weight-bearing of any kind by the caregiver in this area (although help is certainly needed because the waste must be taken away). The testimony does not support a score above 2.

3. Scoring Summary

Given the lack of any skilled therapies, there is only one route by which Mr. H could achieve a qualifying score for the Waiver program: scoring 3 or more on three of the five above ADLs. This is a much closer case than Mr. Cornell acknowledged, because Mr. H does have a score of 3 on two of the ADLs. However, insofar as one can tell from the evidence presented, his condition at the time of the termination decision would not support a score of 3 on any of the remaining ADLs. Accordingly, Mr. H would not qualify for waiver services under the CAT methodology.

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.³⁴ 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. H 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. H shall be deemed to have fallen below level of care is the date of the adverse action letter, September 27, 2013.

³⁴ 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>).

If Mr. H's condition has changed since that date, he may reapply for the program.

DATED this 7th day of May, 2014.

Signed _____
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 21st day of May, 2014.

By: *Signed* _____
Name: Christopher Kennedy
Title: Administrative Law Judge

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