

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

In the Matter of)
)
 F C)
_____)

OAH No. 13-1528-MDS
Agency No.

DECISION

I. Introduction

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

A hearing was held on January 31, 2014. Both Mr. C and the division were represented by counsel. Because the division proposed terminating benefits that had previously been granted, it had the burden of proving by a preponderance of the evidence that Mr. C was no longer eligible.¹ As discussed below, the division met its burden of proof, and its determination is affirmed.

II. Facts

Mr. C's primary medical concern involves the aftereffects of a stroke. He is unable to use his left arm or hand, and has difficulty using or lifting his left leg. Mr. C lives in an assisted living home, and typically spends five days a week at the No Name adult day services facility.²

Registered Nurse Scott Chow evaluated Mr. C on August 5, 2013, using the division's Consumer Assessment Tool (CAT).³ Mr. Chow met with Mr. C, and asked him about his ability to perform a variety of tasks. He also had Mr. C demonstrate some of those abilities.⁴ Mr. C's caretaker at the assisted living home, M Q, was working that day but was

¹ 7 AAC 49.135.

² Testimony of O X; Exhibit E1 and E3.

³ Exhibit E1; testimony of Mr. Chow. That assessment process concluded on October 13, 2013, when the division issued its notification that Mr. C was no longer eligible for the Choice Waiver program. Exhibit D.

⁴ Exhibit E; testimony of Mr. Chow.

not asked to provide any information for the evaluation.⁵ The evaluation lasted a little more than one hour.⁶ During that time, Mr. C was observed transferring independently from his wheelchair to the bed, turning himself in bed, and propelling his wheelchair independently in the assisted living home.⁷

O X is a care coordinator for No Name.⁸ She previously drove for No Name and frequently took Mr. C on field trips. Since moving to her new position about one year ago, she continues to have interactions with him, and assists him at times when he is at the adult day care center.⁹

Both Ms. X and Ms. Q testified that Mr. C is a proud man who does not like to admit to weakness. He says he can do things that he is not capable of.¹⁰ According to both of these witnesses, Mr. C typically wears a gait belt, an assistive device that goes around a person's waist. Ms. Q and the staff at No Name use the gait belt to help lift Mr. C when he is standing or sitting.¹¹ Both Ms. X and Ms. Q testified that Mr. C is unable to get up out of his wheelchair or bed without weight-bearing assistance and needs weight-bearing assistance when using the toilet. Ms. X testified that Mr. C needs help with his wheelchair at No Name, particularly when he gets tired after moving longer distances, or if he is having trouble maneuvering around an object. He does, however, move independently from one room to another at No Name when there are no obstructions or the distance is shorter. Ms. Q testified that Mr. C sometimes needs help sitting up in bed.

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.¹² 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

⁵ Testimony of Ms. S; Exhibit E2. The home's administrator, U D, was present, as was Mr. C's care coordinator. *Id.* The record does not disclose whether either has knowledge of Mr. C's required level of care.

⁶ Testimony of Mr. Chow.

⁷ Exhibit E6 and E7; testimony of Mr. Chow.

⁸ Testimony of Ms. X.

⁹ *Id.*

¹⁰ Testimony of Ms. X; Testimony of Ms. S.

¹¹ *Id.*

¹² 7 AAC 130.205(d)(2).

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.¹³ For adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and .515,¹⁴ and incorporates the results of the CAT.¹⁵ 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).¹⁶

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.¹⁷ For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska and qualified to assess adults with physical disabilities.¹⁸ Material improvement for an adult with physical disabilities is defined as:

no longer [having] 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.^{19]}

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.²⁰

B. Eligibility for the Choice Waiver Program

There are several different ways in which the CAT can indicate that a person needs nursing facility level of care, and therefore is eligible for the Choice Waiver program. In this case, Mr. C does not have any specific nursing or therapy needs, but does need assistance with activities of daily living (ADL). He is eligible for the program if he needs at

¹³ 7 AAC 130.230.

¹⁴ 7 AAC 130.230(b)(2)(A).

¹⁵ 7 AAC 130.230(b).

¹⁶ Adopting January 29, 2009 version of the CAT.

¹⁷ AS 47.07.045(b)(1) – (3).

¹⁸ AS 47.07.045(b)(2)(B).

¹⁹ AS 47.07.045(b)(3)(C).

²⁰ *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>.

least extensive assistance²¹ with at least three of the “shaded” ADLs.²² The shaded ADLs are Bed Mobility, Transfers, Locomotion, Eating, and Toilet use.²³ For these ADLs, extensive assistance is defined as

help of the following type(s) provided 3 or more times [in the past week]:
Weight-bearing support [or]
full staff/caregiver performance during part (but not all) of last 7 days.^[24]

Determining the level of assistance needed frequently requires more than just observing whether a person is capable of a particular activity during the assessor’s visit to the home. For extensive assistance, the question is whether the waiver recipient needed full staff or caregiver performance of the activity at least once in the last seven days, or weight-bearing support at least three times in the last seven days. This implicitly acknowledges that a person’s functional ability may vary over the course of a week. In this case, Mr. Chow apparently did not ask Mr. C’s caregiver or anyone from No Name whether what he observed during the home visit was typical of Mr. C’s functional ability.

Based on the evidence from Ms. X and Ms. Q, which was both credible and largely uncontradicted, the division did not meet its burden of proving by a preponderance of the evidence that Mr. C no longer needs weight-bearing assistance at least three times each week with transfers and toileting. Needing assistance with these two ADLs is not, however, sufficient to establish eligibility for the Waiver program. To be eligible, Mr. C must also need at least extensive assistance with one of the three other shaded ADLs.

There is no indication that Mr. C needs extensive assistance with the ADL of eating.

There was indeed some testimony that he needs help with the shaded ADL of locomotion, consisting of Ms. X’s testimony that he sometimes needs help with his wheelchair while at No Name, especially when moving longer distances. Locomotion, however, is defined as the way a person moves between locations in his or her own rooms, or between other areas on the same floor.²⁵ Thus, the question is whether Mr. C needs assistance at his assisted living home, not whether he needs assistance while at No Name.

²¹ The level of assistance is rated on a 0 – 4 scale, with 0 being independent, and 4 being total dependence.

²² Exhibit E29.

²³ Exhibit E18.

²⁴ See Exhibit E6.

²⁵ See Exhibit E7.

Mr. Chow observed Mr. C locomoting between rooms at the assisted living home. Ms. X testified that he could usually move independently between rooms at No Name. Mr. C did not previously need assistance with locomotion,²⁶ and on balance the evidence available suggests he did not need extensive assistance with locomotion at the assisted living home at the time of the 2013 CAT evaluation, nor at the time of the division's decision incorporating that CAT.

The final shaded ADL, bed mobility, looks at how a person lies down, sits up, and turns in bed.²⁷ Mr. Chow observed Mr. C doing this independently.²⁸ Ms. Q's testimony was inconsistent in this area. She initially stated that Mr. C usually could sit up in bed independently, and that when she did provide assistance, it was to swing him around. She later testified that he needed help moving to a sitting position in bed most of the time. According to the testimony from Ms. X, Mr. C has enough strength in his right arm to help propel his wheelchair, and to steady himself while he is standing to transfer. Based on the totality of the evidence, the division has met its burden of proving that Mr. C does not need weight-bearing assistance at least three times a week with the ADL of bed mobility. He likely needs limited assistance in this area, but not extensive assistance.

IV. Conclusion

Because Mr. C needs "extensive assistance" with no more than two of the shaded ADLs, the division's finding that Mr. C is no longer eligible to participate in the Choice Waiver program was correct when it was made. Accordingly, the division's determination is affirmed. Mr. C may reapply for that program at any time.

Dated this 10th day of February, 2014.

Signed _____
Jeffrey A. Friedman
Administrative Law Judge

²⁶ Exhibit F7.
²⁷ See Exhibit E6.
²⁸ Exhibit E6; testimony of Mr. Chow.

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 25th day of February, 2014.

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

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