

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

In the Matter of)
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OAH No. 13-1539-MDS
Agency No.

DECISION

I. Introduction

F J has been receiving services under the Older Alaskan or Adult with a Physical Disability waiver program, also known as the Choice Waiver program, since 2008. In 2013, the Division of Senior and Disabilities Services (division) re-assessed her nursing needs and functional abilities and concluded that Ms. J was no longer eligible to participate in the Choice Waiver program. Ms. J requested a hearing to contest that determination.

A hearing was held on February 11, 2014. Ms. J was assisted in the hearing by her care coordinator, E T, and by F Q, who is Ms. J’s caretaker at her assisted living home. The division was represented by its lay advocate, Shelly Boyer-Wood. 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 J was no longer eligible.¹ As discussed below, the division met its burden of proof, and its determination is affirmed.

II. Facts

Ms. J was 64 years old when she was re-assessed for the Choice Waiver program.² She has been diagnosed with multiple conditions, including dementia, depression, epilepsy, liver disease, neuropathy, and osteoporosis.³ She lives in an assisted living home operated by Ms. Q.⁴

Ms. J has some memory difficulties.⁵ She needs to be reminded to take her medications, and may not take them even with reminders if she is not actively supervised.⁶

¹ 7 AAC 49.135.
² Exhibit E1.
³ Exhibits C7 & E3
⁴ Testimony of Ms. Q; Exhibit E1.
⁵ Exhibit E4.
⁶ Testimony of Ms. Q.

In the past, she has had frequent seizures. She has had treatment for those seizures, and is on medication to control them.⁷ Her last seizure was in September of 2013.⁸

Registered Nurse Leann McGahan evaluated Ms. J on April 23, 2013, using the division’s Consumer Assessment Tool (CAT).⁹ Ms. McGahan had also conducted the prior evaluations of Ms. J, including the 2008 evaluation that found Ms. J eligible for the Choice Waiver program.¹⁰ The scoring for the 2013 CAT indicates that Ms. J is no longer eligible to participate in that program.¹¹

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 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).

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.¹⁶ For adults with disabilities, the qualified

⁷ *Id.*
⁸ *Id.*
⁹ Testimony of Ms. McGahan; Exhibit E.
¹⁰ Testimony of Ms. McGahan; Exhibit F.
¹¹ Exhibit E29.
¹² 7 AAC 130.205(d)(2).
¹³ 7 AAC 130.230.
¹⁴ 7 AAC 130.230(b)(2)(A).
¹⁵ 7 AAC 130.230(b).
¹⁶ AS 47.07.045(b)(1) – (3).

health professional must be a registered nurse licensed in Alaska and qualified to assess adults with physical disabilities.¹⁷ 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.^[18]

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.¹⁹ 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.²⁰

B. Eligibility for the Choice Waiver Program

There are a variety of ways in 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, items 1-8 (Nursing Services) 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?^[21]

A person who receives a “yes” answer to any one of these questions is presumed to be eligible for nursing facility level of care, and thus qualifies for the Choice Waiver program.

¹⁷ AS 47.07.045(b)(2)(B).

¹⁸ AS 47.07.045(b)(3)(C).

¹⁹ *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>.

²⁰ *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>.

²¹ Exhibit E, page 29. The “shaded ADLs” are bed mobility, transfers, locomotion, eating, and toilet use.

If a person does not qualify under section NF 1, scores are established in sections NF 2 (nursing services and therapies), NF 3 (cognitive ability), and NF 4 (inappropriate behavior). Section NF 5 states that if the total score for sections 2, 3, and 4 is zero, the individual does not qualify for nursing facility care. If the score is greater than zero, Section NF 6 is considered. Section NF 6 asks how many of the shaded ADLs were scored with a 2 or higher (limited assistance) in self-performance and given a support score of 2 or 3. In other words, it asks how many of these ADLs received a score of 2/2 or higher.

Under Section NF 7, the score in section NF 5 is added to the score in section NF 6. An individual with a total score of 3 or higher is eligible for the Choice Waiver program.

In this case, Ms. J and her witnesses focused on her memory problems. The testimony of both Ms. T and Ms. Q describe a woman who would have difficulty managing her own affairs without support. One of her doctors wrote

F is unable to handle her own finances, unable to choose adequate nutrition independently or cook safely, and needs supervision or assistance with all her activities of daily living. She is administered daily medications by ALF staff. She has an unsteady gait and could be at risk of falling. Her last seizure was 9/13.13

A recent “Mini-Mental” evaluation indicated that she has mild cognitive impairment and short term memory problems.^[22]

Ms. McGahan found that Ms. J’s cognitive problems were not sufficiently severe to warrant a score under section NF 3.²³ Assuming for purposes of this decision that Ms. J should have been scored with a “yes” under this section, she still would not qualify for the Choice Waiver program unless she also received a “yes” under one or more of the other sections, or was in need of at least limited physical assistance with two or more of the shaded ADLs.

The evidence does not support finding a need for nursing or therapy for section NF 2, or behavioral problems under NF 4. Thus, Ms. J would only qualify if she needed physical assistance with at least two of the shaded ADLs.

Based on her interview and observations, Ms. McGahan found that Ms. J was independent with bed mobility, transfers, locomotion, eating, and toilet use.²⁴ The testimony of Ms. Q supports that conclusion. While Ms. J needs supervision, and may

²² Exhibit C7.

²³ Exhibit E29.

²⁴ Exhibit E18.

occasionally need some physical assistance, she is able to perform these activities without limited physical assistance as defined by the CAT.²⁵ Because she does not need limited assistance with her ADLs, and has no other significant nursing needs, Ms. J no longer qualifies for the Choice Waiver program.

IV. Conclusion

Despite her memory problems and the apparent need to live in a supportive environment such as her assisted living home, Ms. J does not need skilled or intermediate nursing level of care as defined by the Choice Waiver program regulations. Accordingly, the division’s determination is upheld.

Dated this 12th day of February, 2014.

Signed _____
Jeffrey A. Friedman
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 26th day of February, 2014.

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

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

²⁵ Limited assistance is defined as nonweight-bearing assistance at least three times a week, and weight-bearing assistance no more than twice a week for each ADL. See Exhibit E 18.