

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

In the Matter of)
)
X L) OAH No. 13-1726-MDS
) Division No.

DECISION

I. Introduction

X L receives Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (Division) notified Mr. L that he was no longer eligible for Waiver services, and that they would be discontinued.¹ Mr. L requested a hearing.²

Mr. L’s hearing was held on January 14, 2014. Mr. L represented himself and was assisted by his care coordinator, J T. Anita Halterman represented the Division.

Mr. L’s condition has materially improved since he was initially approved for Waiver services, and as a result, the Division’s decision terminating his Waiver services is **AFFIRMED**.

II. Facts

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

Mr. L is 59 years old and resides in an assisted living home (ALH). He is a partial quadriplegic and incontinent of both bowel and bladder. He was found eligible for Waiver services in 2011, based upon his receiving therapy (physical therapy and occupational therapy) three days per week, a need for assistance with a left upper extremity brace, and a need for limited one person assistance with toilet use.³

Mr. L was reassessed on April 17, 2013 by Amanda McCrary, a registered nurse employed by the Division, to determine whether he continued to be eligible for Waiver services. Ms. McCrary documented the assessment on the Consumer Assessment Tool (CAT). The assessment found the following:

- Mr. L did not require physical assistance with bed mobility, transfers, locomotion, and eating. He continues to need limited physical assistance with toileting.⁴

¹ Ex. D.
² Ex. C.
³ Ex. F, pp. 3, 5, 9, 14 15, 29.
⁴ Ex. E, pp. 6 - 7, 9.

- Mr. L was not receiving professional nursing services or specialized treatment. He was not receiving physical therapy.⁵
- Mr. L was not cognitively impaired, nor did he exhibit any behavioral issues.⁶

Mr. L disagreed with the assessment of his physical care needs with regard to transfers, locomotion, and toileting.⁷

Ms. T has been Mr. L's care coordinator for four months and has seen him once each month. Her observation was that he needed physical assistance with transfers 50 percent of the time. She observed him being caught and his weight supported, not merely stabilized.⁸ Ms. B is the owner of the ALH where Mr. L has been residing since 2008. Ms. B described him as needing frequent weight bearing support approximately four times per week with transfers. She testified that he needed to be caught and his weight supported approximately four times per week.⁹ Mr. L, however, testified that he needs stabilization, but does not need to be pulled up when he transfers.¹⁰ It is therefore more likely true than not true that Mr. L does not require extensive assistance (weight bearing support 3 or more times per week) with transfers. Instead, he requires limited assistance (non-weight bearing physical assistance three or more times during the last seven days, or limited assistance plus weight bearing assistance one or two times during the last seven days) with transfers.

Ms. B's testimony regarding toileting was that Mr. L generally only required stabilizing support with toileting, and that he required weight bearing support (pulling him up) with transfers from the toilet possibly once per week. This is a description of limited assistance and is consistent with the April 2013 CAT. Mr. L has a bowel care regimen, where he requires assistance with a suppository.¹¹ However, this would not result in him being classified as requiring extensive assistance, because it does not involve weight bearing support. It is therefore more likely true than not true that Mr. L requires limited assistance with toileting, as found in the April 2013 CAT.

⁵ Ex. E, pp. 13 – 15.

⁶ Ex. E, pp. 16 – 17.

⁷ Ms. B testified at length regarding Mr. L's assistance needs for bathing. In essence, her testimony was that Mr. L was totally dependent for bathing. However, assuming *arguendo*, even if Mr. L was totally dependent for bathing, this would not assist him in retaining eligibility for Waiver services, because bathing is not one of the ADLs which are measured when determining eligibility. See Ex. E, p. 29, NF. 1 (e) and NF. 6.

⁸ Ms. T testimony.

⁹ Ms. B testimony.

¹⁰ Mr. L testimony.

¹¹ Ex. 1 (Dr. Samali letter of January 6, 2014).

Mr. L, despite his quadriplegia, is capable of walking for short distances while using forearm crutches, and uses a motorized wheelchair for longer distances.¹² Mr. L said his feet hurt, that his legs are weak, and he gets pretty wobbly. Ms. B described the ALH staff as assisting him to walk by holding his elbow, *i.e.* stabilization, not weight bearing support. Their testimony established that, at the most, it is more likely true than not true that Mr. L requires limited assistance with locomotion, not extensive assistance.¹³

Mr. L's testimony raised another point of disagreement with the April 2013 assessment. That assessment scored him as being independent with bed mobility. Mr. L testified that just about every morning he had to be physically pulled up from a lying position to a sitting position in bed. Mr. L was a credible witness, given the fact that he had an opportunity to inflate his testimony on transfers to conform to Ms. B's testimony, and did not. He therefore established that he required extensive assistance (weight bearing support three or more times per week) for bed mobility.

Mr. L has no nursing needs. The suppository administration does not need to be done by a nurse.¹⁴ While he has a hand splint he wears at night, there was no indication in the record that it had to be placed by a nurse or required specialized administration. Mr. L is not receiving any therapy services. At the time of hearing, he was scheduled to go in for a physical therapy assessment the next week, but had no appointments for physical therapy scheduled.

A registered nurse employed by Qualis Health, who was licensed in the State of the Alaska at the time of the review, performed a third-party document review of the Division's determination that Mr. L was no longer eligible for Waiver services. That review concurred with the Division's determination.¹⁵

III. Discussion

A. Method for Assessing Eligibility

The Alaska Medicaid program provides Waiver services to adults with physical disabilities who require "a level of care provided in a nursing facility."¹⁶ The purpose of these services is "to offer a choice between home and community-based waiver services and institutional care."¹⁷

¹² Ex. 1.

¹³ Ms. B's testimony stressed safety concerns. It could also be interpreted as showing that Mr. L really only required supervision for locomotion, and that the hands on support was provided in an excess of caution.

¹⁴ Ms. McCrary testimony.

¹⁵ Ex. D, p. 2.

¹⁶ 7 AAC 130.205(d)(1)(B) and (d)(2).

The nursing facility level of care¹⁸ requirement is determined in part by an assessment which is documented by the CAT.¹⁹ The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,²⁰ and whether an applicant has impaired cognition or displays problem behaviors.²¹ 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 3.²²

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.²³

If a person has a self-performance code of 2 (limited assistance, which consists of non-weight bearing physical assistance three or more times during the last seven days, or limited assistance plus weight bearing assistance one or two times during the last seven days) or 3 (extensive assistance, which consists of weight bearing support three or more times during the past seven days, or the caregiver provides complete performance of the activity during a portion of the past seven days), plus a support code of 2 (physical assistance from one person) or 3 (physical assistance from two or more persons), that person receives points toward his or her total eligibility score on the CAT. 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 required assistance with the five specified activities of daily living.²⁴

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

¹⁷ 7 AAC 130.200.

¹⁸ See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

¹⁹ 7 AAC 130.230(b)(2)(B).

²⁰ Ex. E, pp. 13 – 15.

²¹ Ex. E, pp. 16 - 17.

²² Ex. E, p. 31.

²³ Ex. E, p.18.

²⁴ Ex. E, p. 31.

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).²⁵

The results of the assessment portion of the CAT are then scored. If an applicant's score is 3 or higher, the applicant is medically eligible for Waiver services.²⁶

B. Eligibility

Mr. L is not cognitively or behaviorally impaired. He does not require professional nursing services, therapy from a qualified therapist, specialized treatment, or therapies. While he has been referred to physical therapy as of the hearing date and was awaiting an appointment to assess his needs for physical therapy, he was neither actually receiving physical therapy nor had he been scheduled for upcoming physical therapy. Accordingly, the only method he would have for retaining his eligibility for Waiver services is if he is either totally dependent (self-performance code of 4) or requires extensive one person physical assistance (self-performance code of 3, support code of 2) with any three of the five specified activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting).

As discussed above, Mr. L requires extensive one person physical assistance with only one of his ADLs, bed mobility, and requires limited one person physical assistance with transfers, locomotion, and toileting. This does not satisfy the requirement that he require a minimum of extensive assistance with three ADLs to maintain his eligibility for Waiver services.

C. Termination of Waiver Services

Before the Division may terminate Waiver services for a person who was previously approved for those services, Alaska Statute 47.07.045, enacted in 2006, requires that the Division must demonstrate that the recipient's condition has materially improved to the point that the recipient "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."²⁷ As discussed above, Mr. L's 2013 assessment shows that he is no longer eligible for Waiver Services, *i.e.*, his condition has materially improved, as the term is defined by statute.²⁸

²⁵ Ex. E, p. 31.

²⁶ Ex. E, p. 31.

²⁷ AS 47.07.045(b)(1) and (b)(3)(C).

²⁸ AS 47.07.045 also requires that the Division's assessment showing material improvement must be "reviewed by an independent qualified health care professional under contract with the department." This was done. *See* Ex. D, p. 2.

IV. Conclusion

Mr. L's condition has materially improved to the point that he no longer qualifies for Medicaid Waiver services. The Division's decision to terminate Mr. L's Waiver services is upheld.

DATED this 27th day of January, 2014.

Signed _____
Lawrence A. Pederson
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 11th day of February, 2014.

By: *Signed* _____
Name: Lawrence A. Pederson
Title/Agency: Admin. Law Judge, DOA/OAH

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