

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

In the Matter of)
)
Q H)
_____)

OAH No. 14-0104-MDS
Agency No.

DECISION

I. Introduction

Q H had previously been found eligible for the Medicaid Home and Community based Waiver (Choice Waiver) program. He was re-assessed, and the Division of Senior and Disabilities Services (division) found that he had materially improved and therefore was no longer eligible. Mr. H appealed and requested a hearing.

A hearing was held on March 27, 2014. Based on the evidence presented, the division's determination is upheld.

II. Facts

Mr. H is 82 years old, living in an assisted living home.¹ He has alcohol induced dementia and is hard of hearing.² The division determined that Mr. H was no longer eligible to participate in the Choice Waiver program, and notified him of that determination on January 2, 2014.³

III. Discussion

A. Medicaid Home and Community-Based Waiver Program

An adult with a physical disability is eligible to receive benefits under the Medicaid Home and Community-Based Waiver program, also called the Choice Waiver program, if he or she meets the eligibility requirements, including requiring the level of care that is normally provided in a nursing facility.⁴ If eligible, the program pays for services that allow the recipient to stay in his or her home – or in 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.

¹ Exhibit E1.
² Exhibit E3.
³ Exhibit D1.
⁴ 7 AAC 130.205(d)(2).

The division determines whether an applicant requires nursing facility level of care services by conducting an assessment.⁵ For adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and 515,⁶ and incorporates the results of the Consumer Assessment Tool (CAT).⁷ 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, certain requirements must be met before he or she can be removed from that program. Specifically, the individual must have had an annual assessment, the assessment must find that the individual has materially improved, and the assessment must have been reviewed by an independent qualified health professional.⁸ For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska and qualified to assess adults with physical disabilities.⁹ 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.^[10]

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.¹¹ 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.¹² Because the division seeks to terminate Mr. H’s participation in the program, it has the burden of proving material improvement.¹³

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⁵ 7 AAC 130.230.

⁶ 7 AAC 130.230(b)(2)(A).

⁷ 7 AAC 130.230(b).

⁸ AS 47.07.045(b)(1) – (3).

⁹ AS 47.07.045(b)(2)(B).

¹⁰ AS 47.07.045(b)(3)(C).

¹¹ *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>.

¹² *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>.

¹³ 7 AAC 49.135.

B. Mr. H's Assessment

As noted above, the division's assessment incorporates the results of the CAT evaluation. There are several different ways in which the scoring on the CAT will indicate that a person qualifies for the Choice Waiver program. The nurse's evaluation is summarized on the scoring page, which in this case was page E30. Mr. H contested the scoring for two portions of the CAT evaluation: cognition and transfers. Mr. H would be eligible for Choice Waiver if he receives one point under section NF3 for cognition and at least two points for assistance with activities of daily living (ADLs) under section NF5.

To receive a point in the cognition section, Mr. H must receive a "yes" answer to NF3 parts a, b, c, and d. The parties agree that he has sufficient memory problems to receive a yes on the first three, but disagree as to part d.

Part d asks:

[Is Section C4A coded with a 1] OR [in Section E, is at least one shaded ADL coded with a 2, 3, or 4 in self-performance and a 2 or 3 in support AND C4B (from page 3A Supplemental Screening Tool) is 13 or more]?¹⁴

Section C4A asks whether professional nursing assessment, observation, and management are required for cognition problems at least three times a week. Mr. Cornell scored this as a "no,"¹⁵ and that score is not in dispute.¹⁶ The second question asked in NF3, part d looks at the activities of daily living and the score in the supplemental screening tool, C4B. It is undisputed that Mr. H has at least one shaded ADL that meets the minimum requirement. Accordingly, Mr. H would receive a yes answer here if he scored at least 13 points in section C4B.

Mr. H's treating medical provider, T D, DNP,¹⁷ submitted a medical report discussing his cognition.¹⁸ She has been treating Mr. H for 12 years and states that his cognition is impaired due to long term alcohol induced dementia, and that his cognitive functioning has declined over the last year. She goes on to say

Mr. H suffers from cognitive limitations that pervade all aspects of his mental functioning. Mr. H struggles to remember events and people. He can neither recall names of those he meets nor the names of those who consistently

¹⁴ Exhibit E30.

¹⁵ Exhibit E16.

¹⁶ He likely needs assessment, observation, and management, but Mr. H does not need this from a licensed nurse or doctor.

¹⁷ The initials DNP indicate that Ms. D is a Doctor of Nursing Practice.

¹⁸ Exhibit 1.

interact with him. He cannot recall entire events that recently took place. Mr. H struggles to remember information vital to his daily needs and functioning. He requires constant reminding and cueing to fulfill his needs. Mr. H is usually confused when he enters my office. He doesn't understand the purpose or value of the appointment, or even that a health evaluation will ensue. Mr. H struggles to attain even a nominal level of learning, reasoning, or retention skills. His behaviors are disorganized and he remains restless at night.^[19]

Mr. Cornell acknowledged during his testimony that cognition is difficult to assess, and that scoring individuals with dementia can be tricky. Because Mr. H's ability to communicate is limited, Mr. Cornell relied on reports from his caretakers to evaluate Mr. H. He testified that people with alcohol induced dementia can improve when they stop drinking, and the reports from the assisted living home staff were that he has stopped.

Both Ms. D and Mr. Cornell have only limited opportunities to observe and assess Mr. H's cognitive ability. Mr. H's appointments with Ms. D are likely shorter than the time spent by Mr. Cornell,²⁰ However, she has been seeing him for 12 years. According to the CAT, he has two appointments with Ms. D each year.²¹ Although Mr. Cornell's testimony is relevant, Ms. D's description is given greater weight since she is Mr. H's treating medical professional.

The first area examined in section C4B is Memory for Events. Mr. H was scored as not recalling details or sequences of recent events or names of meaningful acquaintances.²² This gives him one point towards the 13 required. His caretaker at the assisted living home, Irene F, testified that he cannot remember her name even though she has been taking care of him for several years. After going to a doctor's appointment, Mr. H will know he went somewhere, but won't know where. This is consistent with Ms. D's evaluation. Based on the evidence presented at the hearing, he should have been scored with a two, which indicates he cannot recall entire events or names of close friends or relatives.

The next section of C4B addresses Memory and Use of Information. Mr. Cornell gave him a score of 3 which indicates "Has difficulty remembering and using information. Requires direction and reminding from others for or more times per day. Cannot follow

¹⁹ Exhibit 1. Although written approximately three months after the division's notice, Ms. D's description is evidence of Mr. H's condition as of the date of that notice.

²⁰ He testified that a typical evaluation takes from 90 to 120 minutes.

²¹ Exhibit E5.

²² Exhibit E17.

written instructions.” Ms. F testified that Mr. H can follow simple written instructions when they are given to him, so he wouldn’t qualify for the next higher score. However, he also wouldn’t qualify for the next lower score because he needs direction and reminding more than three times a day.

The third section of CB4 looks at Global Confusion. Mr. H has more than confusion on awakening and more than periodic confusion during the daytime. He should have been scored with a three, indicating that he is nearly always confused.

The fourth section looks at Spatial Orientation. Mr. H does not get lost in the assisted living home but, because of his general confusion, he gets lost when walking in the neighborhood.²³ He should have received a score of two instead of a one.

The final section of CB\$ addresses Verbal Communication. Mr. Cornell scored Mr. H with a two, indicating the ability to carry out only simple conversations. Ms. F testified that Mr. H is not able to understand what is said to him. However, she also stated that when Mr. H was with another Yupik speaking individual, they were able to talk to each other. This suggests that there is a language barrier rather than a cognition barrier. A score of two is appropriate.

The scores in these five sub-parts total to 12 points. This is one point short of what is required to receive a point in section NF3 part d, on the CAT scoring summary.²⁴ Without a higher score in this area, Mr. H does not qualify for the Choice Waiver program. However, in order to avoid the need for a re-hearing if this decision is reversed or revised on the cognitive scoring issue, Mr. H’s functional ability will also be addressed.

There is no dispute that Mr. H needs at least limited assistance with the ADL of toileting.²⁵ The parties do disagree as to whether Mr. H needs limited assistance with transfers. Transferring is how a person moves between surfaces. This includes getting out of bed or standing up from a chair, or sitting back down in a chair. A person needs limited assistance if he or she needs some form of hands on physical assistance with the task at least three times during a typical week.²⁶ Mr. H is generally able to transfer without physical assistance. He can stand up from the couch using the couch arm for support, and he can

²³ Testimony of Ms. F.

²⁴ Exhibit E30.

²⁵ Exhibit E9.

²⁶ See Exhibit E7 (description of self-performance levels).

stand up from the dining room chair using the table for support.²⁷ About seven times during a week, however, Mr. H sits in the middle of the couch or in a chair that is pulled back from the table.²⁸ In those situations, he needs hands on physical assistance to stand.²⁹

The division raised two arguments as to why this should not be considered limited assistance. First, the division notes that Mr. H transfers about 100 times a week. He only needs assistance seven times. Although he only needs help for a small fraction of his transfers, the CAT is not scored on percentages. If he needs physical assistance three or more times in a week, it is scored as limited assistance regardless of how many other times he can do the activity with no help.

Second, the division asserted that sitting away from the table or sitting in the middle of the couch is a choice, and Mr. H could choose to sit where he does not need help. This argument might be accepted for some individuals and for some choices. In this case, however, Mr. H is cognitively impaired. He is generally confused, and has memory problems. He needs constant cueing and reminders when making choices. Given his condition, it is likely that he does not remember to sit in the “right” place. He is not choosing to sit where he will require help getting back up. He should have been scored with needing limited assistance for transferring.

IV. Conclusion

Mr. H has cognitive impairments and functional limitations, but they are not sufficiently severe to meet the eligibility requirements of the Choice Waiver program. Accordingly, the division’s finding of material improvement is affirmed.

Dated this 7th day of April, 2014.

Signed

Jeffrey A. Friedman
Administrative Law Judge

²⁷ Testimony of Ms. F.

²⁸ *Id.*

²⁹ *Id.*

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 30th day of April, 2014.

By: Signed
Signature
William J. Streur
Name
Commissioner
Title

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