

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

In the Matter of)	
)	OAH No. 14-0151-MDS
T J)	Agency No.
_____)	

DECISION

I. Introduction

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

A hearing was held on February 18, 2014. Ms. J's care coordinator, E R, assisted her during the hearing. The division was represented by a lay advocate, Angela Ybarra. Prior to the hearing, the division submitted exhibits A – G. Ms. R also submitted exhibits for Ms. J. On February 10, she submitted exhibits labeled A – Z,¹ 1A – 1N, & 1 – 12. On February 14, she submitted exhibits labeled 10 – 29.²

Because the division has proven that Ms. J is no longer eligible to participate in the Choice Waiver program, its determination is upheld.

II. Facts

Ms. J is 56 years old. Her medical records document a history of severe health problems, including hypertension, diabetes, coronary artery disease, and osteoarthritis. She has a pacemaker, and has undergone several surgeries.

On June 26, 2013, registered nurse Moli Atanoa visited Ms. J and evaluated her nursing needs and functional abilities.³ Ms. J did not have any nursing or therapy needs that would have qualified her for the Choice Waiver program.⁴ Ms. J does need some assistance with ADLs, but according to Ms. Atanoa's evaluation, her needs were not sufficiently severe to meet the eligibility requirements of the Choice Waiver program. Ms. Atanoa

¹ Ms. J's exhibits A – G are different than the division's exhibits labeled with those same letters.

² Exhibits 10 – 12 were different than the prior exhibits of using those same numbers.

³ Division's Exhibit E.

⁴ Division's Exhibit E30.

found she needed no assistance with bed mobility and eating, supervision with transfers and locomotion, and limited assistance with toileting.⁵

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.⁶ 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.⁷ For adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and .515,⁸ and incorporates the results of the Consumer Assessment Tool (CAT).⁹ 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).¹⁰

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.¹¹ For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska and qualified to assess adults with physical disabilities.¹² Material improvement for an adult with physical disabilities is defined as:

⁵ Division’s Exhibit E18.

⁶ 7 AAC 130.205(d)(2).

⁷ 7 AAC 130.230.

⁸ 7 AAC 130.230(b)(2)(A).

⁹ 7 AAC 130.230(b).

¹⁰ Adopting January 29, 2009 version of the CAT.

¹¹ AS 47.07.045(b)(1) – (3).

¹² AS 47.07.045(b)(2)(B).

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.^[13]

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.¹⁴

B. Eligibility for the Choice Waiver Program

There are several different ways in which the CAT can indicate a person is eligible for the Choice Waiver program. In this case, Ms. J does not have any specific nursing or therapy needs, but does need assistance with activities of daily living (ADL). She is eligible for the program if she needs at least extensive assistance¹⁵ with at least three of the “shaded” ADLs.¹⁶ The shaded ADLs are Bed Mobility, Transfers, Locomotion, Eating, and Toilet use.¹⁷ 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.^[18]

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 from day to day, and highlights the importance of inquiring into the recipient’s functional abilities over the past seven days.

C. Ms. J’s Functional Ability

Ms. R was present during the evaluation, and testified that Ms. J was only asked about what assistance she needed, and not what assistance she needed during the past week. Ms. Atanoa disagreed. She testified that while she may not have asked with the precise words Ms. R was looking for, her method of asking questions draws out information about

¹³ AS 47.07.045(b)(3)(C).

¹⁴ *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>.

¹⁵ The level of assistance is rated on a 0 – 4 scale, with 0 being independent, and 4 being total dependence.

¹⁶ Division’s Exhibit E30.

¹⁷ Division’s Exhibit E18.

¹⁸ See Division’s Exhibit E6.

the last seven days when a person's need for assistance is variable. Because there is no audio recording of the CAT interview, it is difficult to assess whether the questions asked would elicit the required information. However, the ultimate issue for this hearing remains the same, and whether Ms. J remains eligible for the waiver program can be determined from the evidence presented at the hearing, even if that information was not asked for during the CAT evaluation.

To qualify for the program based on functional ability needs, Ms. J must need at least extensive (weight bearing) assistance three or more times a week in three or more of the shaded ADLs. She testified that it is difficult for her to turn herself in bed, but that she is able to do so by holding on to the side rails of her hospital bed. This is similar to the statements Ms. Atanoa recorded in the CAT.¹⁹ While she may regularly need some help, she does not need extensive assistance with this ADL as "extensive assistance" is defined.

Ms. J testified that she needs assistance with both transfers and locomotion. She falls often, and needs someone to steady her and catch her if necessary. Ms. Atanoa scored her as needing only supervision in these two ADLs. Supervision is defined as "Oversight, encouragement or cueing ... plus nonweight-bearing assistance provided only 1 or 2 times during last 7 days."²⁰ Ms. J actually needs physical assistance more than twice a week with each of these ADLs, and should have been scored as needing limited assistance with each of these ADLs. She does not, however, need extensive assistance as defined by the program regulations and the CAT.

Ms. J testified that her meals are all brought in for her, so she doesn't have to do any cooking. She is able to eat the food herself, and therefore was correctly scored as independent with this ADL.

Finally, Ms. J testified that she needs help transferring on and off the toilet. She did not assert a need for weight bearing assistance at least three times a week. Ms. Atanoa scored her as needing limited assistance with the ADL of toileting.²¹ This is consistent with Ms. J's testimony.

There is no dispute that Ms. J needs help with several of her activities of daily living. For some of the ADLs, she needs more assistance than what is shown on the June 26, 2013,

¹⁹ Division's Exhibit E6.

²⁰ *Id.*

²¹ Division's Exhibit E9.

CAT. She does not, however, need weight bearing assistance in at least three of the shaded ADLs.

IV. Conclusion

It was the division's burden to prove that Ms. J is no longer eligible for the Choice Waiver program. Based on Ms. Atanoa's interview and observations during the CAT evaluation, Ms. J has materially improved as defined by state law. Ms. J's testimony was consistent with that conclusion. Thus, the division has met its burden and has established that Ms. J is no longer eligible for this program. She may reapply if her condition changes such that she becomes eligible.

Dated this 20th 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 6th day of March, 2014.

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

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