

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

In the Matter of:	)	
	)	OAH No. 14-0277-MDS
T N	)	Agency No.
_____	)	

**DECISION**

**I. Introduction**

T N has a blood disease that leaves her weak and fatigued. In 2012, she was found eligible for the Medicaid Home and Community-Based Waiver program. She was re-assessed in 2013, and the Division of Senior and Disabilities Services (division) found that she had materially improved and therefore was no longer eligible. Ms. N appealed and requested a hearing. She disagreed with the division’s assessment of her functional abilities and also asserted that a required “independent review” was not done by someone who was actually independent.

The evidence showed that although Ms. N likely needs extensive assistance with transfers and toileting, she does not need extensive assistance with bed mobility, toileting, or eating. Therefore, she does not meet the level of care required to be eligible for the waiver program. The division has met its burden of proving a material improvement as that term is defined by statute. Ms. N is not eligible for the waiver program.

**II. Facts**

Ms. N is 31 years old. She lives in Anchorage with her two sons, ages eight and twelve. Her father and her brother, L R, also live in the home.

Ms. N has a rare blood disorder called thalassemia, which makes her anemic.<sup>1</sup> To treat her thalassemia, Ms. N receives a blood transfusion every three weeks.<sup>2</sup> Because receiving frequent transfusions results in an excess of iron in the blood, Ms. N administers a 10-hour subcutaneous infusion of deferoxamine six days per week.

In earlier years, Ms. N did not receive transfusions as frequently. In 2012, she received a transfusion every four weeks. In 2013, however, the specialist whom she visits

---

<sup>1</sup> Division Exhibits D at 3; E at 3. Her diagnoses also include a second primary diagnosis of persistent mental disorders, and secondary diagnoses of debility and coronary atherosclerosis. Division Exhibit E at 3.

<sup>2</sup> Division Exhibit E at 3.

in Oakland determined that in order to keep her hemoglobin level at 10 would require changing the schedule for transfusions to every three weeks.<sup>3</sup>

Because of her disease, Ms. N experiences weakness, fatigue, and dizziness.<sup>4</sup> Both she and her brother, Mr. R, testified that some days are worse than others.<sup>5</sup> She receives a rebound effect from her transfusions in that on the day of the transfusion she feels stronger and more capable, and the week before her transfusion is more difficult than the preceding two weeks.<sup>6</sup>

Mr. R is Ms. N's personal care assistant (PCA). He testified that although he just became her paid PCA in 2012, he has helped to take care of her for as long as he can remember.

Ms. N typically spends her days on the couch in the living room watching television. On a good day, she may go with her brother to shop, but in general, Mr. R buys all the groceries, and he also takes care of much of the clothes shopping for his nephews and for Ms. N.<sup>7</sup>

The weaker and more fatigued that Ms. N feels, the more assistance she needs from her brother. For example, when she is weak and fatigued, if she needs to transfer from a sitting or lying position to a standing position, her brother will put his arms around her and lift her. At other times, he often will stand by to ensure that she does not lose her balance. As she approaches the time for her transfusion, her fatigue increases. She sleeps more and gets up less frequently.<sup>8</sup>

With some activities of daily living, such as eating and personal hygiene, Ms. N needs little assistance. Although Mr. R may provide some set up assistance, she can feed herself, dress herself, brush her teeth, brush her hair, and wash her face without any physical assistance from Mr. R.

For six days of the week, Ms. N must connect her infusion pump to a needle that is inserted subcutaneously into her buttocks. The insertion usually takes place around nine in the morning. Mr. R always helps with inserting the needle and connecting the infusion

---

<sup>3</sup> N testimony.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; R testimony.

<sup>6</sup> N testimony.

<sup>7</sup> *Id.*

<sup>8</sup> N testimony; Hanley testimony.

pump. The infusion pump has to be connected for 10 hours per day. Mr. R is gone by the time it is disconnected. Ms. N is able to disconnect the infusion pump and remove the needle by herself.

Mr. R has a second job as a supervisor at a warehouse. He works Sunday through Thursday from 4-12. Before he leaves for work, he prepares the evening meal for the rest of the family. How Ms. N receives assistance during the time he is gone was somewhat unclear. Mr. R explained that as a supervisor, he can leave work and return home when needed. Their father provides some limited assistance to Ms. N when Mr. R is gone. In addition, under the waiver program, some respite services are possibly being provided (meaning another care giver is authorized to provide services), although the testimony on this was unclear.

In 2012, Ms. N was approved for services under the Medicaid Home and Community-Based Waiver program. On September 17, 2013, registered nurse Angela Hanley visited Ms. N to evaluate her to determine whether she was still eligible for waiver services. Ms. Hanley evaluated Ms. N's need for assistance by using the division's Consumer Assessment Tool (CAT).<sup>9</sup> This tool allows the evaluator to assign numerical scores to a client's ability to perform certain tasks, and to certain care procedures that the client needs. The division then uses the CAT to determine whether a client meets the level of care necessary to be eligible for waiver services.

On the day of the assessment visit, Ms. Hanley observed Ms. N walk without assistance, and sit and stand without assistance.<sup>10</sup> She questioned Ms. N closely, however, and she recognized that Ms. N had good days and bad days. She scored Ms. N based on the assistance that she understood Ms. N generally needed during those times when Ms. N needed assistance.<sup>11</sup> Ms. Hanley scored the frequency of need for assistance, however, based on an average, rather than on the frequency that might occur on any one day, good or bad.<sup>12</sup>

Using Ms. Hanley's CAT evaluation, the division completed its assessment and determined that Ms. N was no longer eligible for the Waiver program. This assessment was

---

<sup>9</sup> Division Exhibit E. The CAT is an evaluation tool created by the Department of Health and Social Services, and the January 29, 2009 version of that tool is adopted by reference in 7 AAC 160.900(d)(6).

<sup>10</sup> Hanley testimony.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

then reviewed by an independent third party reviewer, Qualis Health.<sup>13</sup> Qualis agreed with the division's conclusion that Ms. N no longer had functional limitations or cognitive impairments that would result in the need for intermediate or skilled level nursing care.<sup>14</sup>

The division notified Ms. N of its decision by certified mail on February 7, 2014.<sup>15</sup> Ms. N contested the decision and requested a fair hearing. A hearing was held on April 16, 2014, and continued on April 29, 2014. Mark Regan represented Ms. N, and Kimberly Allen represented the division.

### 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.<sup>16</sup> 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.<sup>17</sup>

The division determines whether an applicant requires nursing facility level of care services by conducting an assessment.<sup>18</sup> For older adults or adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and 515.<sup>19</sup>

Certain requirements must be met before a person can be removed from the waiver 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.<sup>20</sup> The assessment includes the entire evaluation process up to the time the division makes its eligibility determination.<sup>21</sup>

---

<sup>13</sup> Division Exhibit G.

<sup>14</sup> *Id.* at 7.

<sup>15</sup> Division Exhibit D.

<sup>16</sup> 7 AAC 130.205(d)(2).

<sup>17</sup> 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.

<sup>18</sup> 7 AAC 130.213.

<sup>19</sup> 7 AAC 130.215(4)(A) & (B).

<sup>20</sup> AS 47.07.045(b)(1) – (3).

<sup>21</sup> *See In re T S* OAH No. 12-0911-MDS (Commissioner of Health and Social Services 2013) (Modification of Proposed Decision) (Review during assessment process includes more than just a review of the CAT scores); *In re T C*, OAH No. 13-0204-MDS (Commissioner of Health and Social Services 2013), pages 7 – 8. Published OAH cases may be found online at <http://aws.state.ak.us/officeofadminhearings/categoryList.aspx>.

For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska and qualified to assess adults with physical disabilities.<sup>22</sup>

“Material improvement” for an adult with physical disabilities means that the individual 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.<sup>[23]</sup>

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 last assessment.<sup>24</sup> A person who previously was eligible, but is no longer eligible for the program has, by definition, materially improved. 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.<sup>25</sup> Because the division seeks to terminate Ms. N’s participation in the program, it has the burden of proof.<sup>26</sup>

***B. The Review By Qualis Health Meets the Statutory Requirements***

As noted above, the division’s evaluation must be reviewed by an independent health care professional before a person can be removed from the Waiver program.<sup>27</sup> Ms. N argues that a review that is limited to the “materials supplied by the agency whose determination is being reviewed” is not an independent review.<sup>28</sup> Ms. N’s only argument here is that the review does not go far enough because Qualis is limited to reviewing the materials it receives from the division.

The Commissioner has previously held that AS 47.07.045

does not impose any specific requirements as to the scope or nature of Qualis’ review. Accordingly, the statute does not require anything more than a “paper review.”<sup>[29]</sup>

---

<sup>22</sup> AS 47.07.045(b)(2)(B).

<sup>23</sup> AS 47.07.045(b)(3)(C).

<sup>24</sup> *In re G X*, OAH No. 14-0280-MDS Commissioner of Health and Social Services 2014), page 3; *In re E H*, OAH No. 13-1000-MDS (Commissioner of Health and Social Services 2013) at 3. *See also In re M L, Jr.*, OAH No. 13-1572-MDS (Commissioner of Health and Social Services 2014), page 11 n. 68 (no requirement to compare most recent CAT to any prior CAT but comparison may be done if doing so is helpful).

<sup>25</sup> *In re T C*, OAH No. 13-0204-MDS at 7.

<sup>26</sup> 7 AAC 49.135.

<sup>27</sup> AS 47.07.045(b).

<sup>28</sup> Claimant’s Closing Statement at 9.

<sup>29</sup> *In re M L, Jr.*, OAH No 13-1572-MDS at 11 n.69.

The statutory language at issue here only requires an independent review of the division’s annual assessment.<sup>30</sup> As long as Qualis reviews the assessment and any documents relied on by the division in making that assessment, the independent review has met the requirements established by the legislature. Qualis’ review here meets the statutory requirements.

**C. Ms. N’s Assessment**

*1. Issues in Dispute*

Under the CAT, one way that a person may qualify for waiver services is if the person needs extensive assistance in three of the five following activities of daily living: bed mobility, transfers, locomotion, eating, and toileting.<sup>31</sup> Ms. Hanley determined that Ms. N needed only limited assistance in transfers, locomotion, and toileting, and that she needed only supervision in bed mobility and no assistance in eating. Therefore, Ms. N did not meet the activity test for eligibility. Because Ms. N’s needs did not meet any of other tests for skilled or intermediate nursing care, the division determined that Ms. N was no longer eligible for waiver services.

On appeal, Ms. N’s claim disputes only the issues of her need for assistance on bed mobility, transfers, locomotion, and toileting. In her view, she needs extensive assistance in all of these activities. She asserts that if the CAT had been properly scored, she would have qualified for the waiver program.<sup>32</sup>

One potentially nettlesome aspect of this case is the variability of Ms. N’s needs. On the day of the assessment visit, and on the days of the hearing, for example, Ms. N did not need physical assistance. On both days, she walked into the hearing room, and was able to transfer from a sitting position to a standing position without any physical assistance. Similarly, Ms. Hanley observed her walk and stand without assistance during the assessment

---

<sup>30</sup> AS 47.07.045(b)(2).

<sup>31</sup> See Division Exhibit E at 29 (CAT scoring summary, section NF1 e.)

<sup>32</sup> One of the tests on the CAT allots points for skilled nursing services, and one of the listed services is whether the person receives any “subcutaneous injections,” and if so, how frequently. Division Exhibit E at 13. Ms. N does receive subcutaneous infusions of Deferoxamine six days a week. The infusions are, in fact, delivered through a needle. Because she receives the infusion through her buttocks, she is unable to insert the needle herself. Ms. Hanley scored Ms. N as receiving “subcutaneous injections” twice per month, but was unable to recall why she scored it that way. Ms. Hanley explained that subcutaneous infusions through a pump are a very typical patient-managed intervention. Subcutaneous infusions are not a nursing service and do not qualify as “subcutaneous injections” as that term is used by the CAT. Ms. N did not argue that the subcutaneous infusions were incorrectly scored on the CAT.

visit. Yet, the three witnesses who had first-hand knowledge (Ms. Hanley, Ms. N, and Mr. R), were able to deal with the variability. They all seemed to address the issue of how much assistance Ms. N needed on those days and times that she needed assistance.

For Ms. Hanley, determining how much assistance Ms. N needed was based on an application of her judgment to the facts she had, including her observations, and her interview of Ms. N.<sup>33</sup> Her conclusions are subject to criticism on the basis that she did not observe Ms. N during a time when Ms. N needed assistance. For Ms. N and Mr. R, they gave testimony that generally described the assistance that Mr. R provided. Their testimony is subject to criticism in that Mr. R may be providing more physical assistance than is *needed*. The exercise that must be undertaken in this decision is to determine how much assistance Ms. N actually needs in each of the four disputed activities of daily living.

## 2. *Bed Mobility*

The activity of body mobility includes positioning or turning in a bed or chair.<sup>34</sup> The CAT refers to this as bed mobility, which is described as how a person moves to or from a lying position, or turns side to side, or positions his or her body while lying in bed.<sup>35</sup> Ms. Hanley noted that she saw Ms. N reposition herself in a chair during the CAT evaluation.<sup>36</sup> She also reported that Ms. N told her she needs help turning prior to her transfusions, and that Mr. R will assist her by pushing her.<sup>37</sup> Ms. Hanley scored Ms. N as needing only set-up help with bed mobility.

With regard to the need for assistance when changing positions in bed, Ms. N testified that when she is feeling weak she generally lays still. Sometimes her brother helps her shift positions by pulling up her arms and switching her from side to side.

---

<sup>33</sup> In their closing arguments, both counsel raised arguments based on an assumption that Ms. Hanley was engaged in trying to find a weighted average of need for assistance when she scored Ms. N as needing limited assistance. *E.g.*, Division's Closing Brief at 12-13; Claimant's Closing Statement at 7. Although Ms. Hanley's testimony was somewhat confusing on that point, her testimony appeared to indicate that she was not basing the scores on an average need over a month. Rather, she was using her judgment to determine how much assistance Ms. N generally needed when she needed assistance. That approach was consistent with the testimony of Ms. N and Mr. R, both of whom acknowledged the variability. Indeed, this approach is not markedly different from what must be applied in many cases in which the client has good days and bad days.

<sup>34</sup> 7 AAC 125.030(b)(1).

<sup>35</sup> Division Exhibit E at 6.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

Mr. R testified that when Ms. N cannot really move he will “lift her body, part by part, arms, legs, scoot her to the side.”<sup>38</sup> When asked by Ms. N’s counsel whether he supports Ms. N’s weight for moving in bed more than three times per week, Mr. R answered affirmatively. Mr. R acknowledged that he and Ms. N sleep in different rooms, but explained that when Ms. N needs assistance she will call out to him.

Ms. Hanley explained that her scoring was generally based on a conclusion that Ms. N, even when in a weakened condition, was not a dead weight. She never lost use of her limbs, and never was immobilized or unable to bear her own weight. If a fire occurred, she would be able to get out of the house.

For the ADL of bed mobility, Ms. Hanley’s testimony meets the division’s burden of proof that Ms. N does not require extensive assistance. Here, the evidence shows that Ms. N is a young woman who weighs 112 pounds and has full use of all four of her limbs.<sup>39</sup> If a person who is not overweight and has use of her limbs were unable to turn in bed without *extensive* assistance, we would expect to see evidence of extreme debilitation—debilitation so extreme it would carry over into all activities, and be so remarkable that the level of debilitation would be commented on and made clear. Yet, this record indicates that on all days—even bad days—Ms. N can dress herself, feed herself, brush her teeth, wash herself, and take care of other minimal personal tasks.<sup>40</sup> Therefore, this record does not support a conclusion that Ms. N needs extensive assistance to turn in bed.

Both Ms. N and Mr. R did testify, however, that when Ms. N was weakened Mr. R would assist her by moving her limbs so that she could turn. This would justify a score of “1/2”—limited assistance by one person, consisting of guided maneuvering of limbs. Although Mr. R would also give a push or a scoot to help her turn, this record does not establish that the push or other lifting/weight bearing was actually necessary. Given that Ms. N had use of all four of her limbs, it is more likely than not that she *could* turn herself in bed with only limited assistance, even on those occasions that Mr. R provided the extra push.

### 3. Transfers

---

<sup>38</sup> R testimony.

<sup>39</sup> Division Exhibit E at 23.

<sup>40</sup> Division Exhibit E; N testimony.



Transfers occur when a person moves between surfaces, such as from a chair to standing, or from standing to a bed.<sup>41</sup> Ms. Hanley noted in the CAT that in the week prior to a transfusion, Mr. R will assist with transfers by placing his arm under Ms. N's, and pulling her to a standing position.<sup>42</sup> Ms. Hanley observed one transfer which was accomplished independently.<sup>43</sup> Ms. Hanley testified that she scored Ms. N as needing only limited assistance with transfers because she was able to support her own weight when walking, and that her brother's assistance was only partial weight bearing.<sup>44</sup>

Ms. N testified that for most transfers, her brother will put his arms around her and lift her up. Mr. R testified that from time to time, Ms. N will get up on her own, and from time to time, she will need his help. When she needs help, he has to lift her up. He agreed with counsel that he supports her weight in transfers more than three times per week, but Mr. R said that nine times out of ten, he is just there for balance.

Here, Ms. Hanley's conclusion that even when Ms. N is weak, she is not dead weight and can assist with transfers by pushing herself up is reasonable. That reasoning would support a conclusion that Ms. N actually *requires* only limited assistance in transfers, even though Mr. R will, at times, *provide* weight-bearing assistance. Yet, in his testimony, Mr. R emphasized Ms. N's dizziness in addition to her weakness as being the trigger for when he provides weight-bearing assistance. It is not clear that Ms. Hanley took dizziness into account. That Mr. R differentiates between times when his sister needs balance-only assistance and times when she needs weight-bearing assistance indicates that he gives weight-bearing assistance only when *needed*. On this record, it is at least as likely that Ms. N requires weight bearing assistance at least three times per week as it is that she does not. Therefore, the division has not met its burden of proof that Ms. N only needs limited assistance on transfers.

Ms. Hanley found that Ms. N needs assistance in transfers only one time per day. Although Mr. R's testimony indicates that Ms. N does not need assistance with all transfers,

---

<sup>41</sup> Division Exhibit E at 6; 7 AAC 125.030(b)(2).

<sup>42</sup> Division Exhibit E at 6.

<sup>43</sup> *Id.*

<sup>44</sup> Weight bearing support means supporting more than a minimal amount of weight. *In re K T-Q*, OAH No. 13-0271-MDS (Commissioner of Health and Social Services 2013), page 4. Thus, partial weight bearing is sufficient to establish a need for extensive assistance. *See also In re L D*, Consolidated OAH No. 13-0306-MDS & 13-0781-MDS (Commissioner of Health and Social Services 2013), page 10; *In re O D*, OAH No. 13-0856-MDS (Commissioner of Health and Social Services 2013), page 6.

only one per day would be unusually low. Even though she does not need *extensive* assistance except for one transfer out of ten, she likely needs either extensive or limited assistance on average at least twice per day.<sup>45</sup> Therefore, frequency for transfers will be increased to two times per day.

#### 4. *Locomotion*

Locomotion refers to the way in which a person moves within his or her own room, or between rooms on the same floor.<sup>46</sup> Ms. Hanley scored Ms. N as needing limited assistance with this ADL, which is the same score she was given in the previous year. Ms. N does not use a cane or a walker. She sometimes holds on to Mr. R's arm to steady herself while walking. Although Mr. R agreed with counsel that he provided weight bearing help with walking more than three times per week, Ms. N has not shown that she *needs* weight bearing assistance with this activity at least three times each week. Ms. N only needs limited physical assistance with locomotion.

#### 5. *Toileting*

Toileting refers to how a person uses a toilet, and includes the act of transferring onto or off of the toilet.<sup>47</sup> Ms. Hanley noted in the CAT that Ms. N needs help with transferring onto and off the toilet "sometimes when she is weak and fatigue[d], usually prior to transfusion."<sup>48</sup>

Mr. R testified in detail that he helps Ms. N with toileting all of the time. He helps her balance onto the toilet. He leaves while she takes care of her toileting needs. She always is able to cleanse herself without assistance. When she is ready to stand up, if she needs to be pulled up, he pulls her up, but otherwise he assists her in balancing. She always pulls up her own underwear, but he often helps with her pants. As with other issues, he agreed with counsel that weight-bearing assistance occurred more than three times per week. Mr. R's testimony, especially his distinction between help that is limited to balance and actually physically helping her to stand, is credible. The division has not met its burden of proof that Ms. N does not need extensive assistance in toileting.

---

<sup>45</sup> The parties did not brief this issue. The twice per day result is based on the twice per day frequency for locomotion assistance that was noted in the CAT.

<sup>46</sup> Division Exhibit E at 7; 7 AAC 125.030(b)(3).

<sup>47</sup> Division Exhibit E at 9; 7 AAC 125.030(b)(6).

<sup>48</sup> Division Exhibit E at 9.

#### **IV. Conclusion**

The CAT should be amended to reflect that Ms. N needs:

- limited assistance in bed mobility, which should be scored “1/1;”
- extensive assistance with transfers and toileting, which should be scored “3/2”; and
- assistance with transfers at a frequency of twice per day.

In all other respects, the division’s assessment is affirmed. Ms. N is not eligible for continued services under the Medicaid Home and Community-Based Waiver program.

Dated this 6<sup>th</sup> day of August, 2014.

*Signed*

\_\_\_\_\_  
Kay L. Howard  
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 12<sup>th</sup> day of September, 2014.

By: *Signed*

\_\_\_\_\_  
Name: Jared C. Kosin, J.D., M.B.A.  
Title: Executive Director  
Agency: Office of Rate Review, DHSS

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