

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.⁸ 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.

The division determines whether an applicant requires nursing facility level of care services by conducting an assessment.⁹ For older adults or adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and 515,¹⁰ and incorporates the results of the Consumer Assessment Tool (CAT).¹¹ 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).

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.¹² For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska and qualified to assess adults with physical disabilities.¹³ 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.^[14]

⁸ 7 AAC 130.205(d)(2).

⁹ 7 AAC 130.213.

¹⁰ 7 AAC 130.213(4)(A) & (B).

¹¹ 7 AAC 130.213(4).

¹² AS 47.07.045(b)(1) – (3).

¹³ AS 47.07.045(b)(2)(B).

¹⁴ AS 47.07.045(b)(3)(C).

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.¹⁵ 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.¹⁶ Because the division seeks to terminate Mr. X’s participation in the program, it has the burden of proof.¹⁷

B. Mr. X’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 E29.

Mr. X would qualify for the program if he had certain skilled nursing needs listed in section NF1 of the summary sheet. He does not have skilled nursing needs.¹⁸ He would also qualify if he needed at least extensive assistance with three or more of the “shaded” activities of daily living (ADLs). The shaded ADLs are Bed Mobility, Transfers, Locomotion, Eating, and Toilet Use.¹⁹ Extensive assistance is defined as needing weight bearing support to perform the task three or more times during a week, or being totally dependent on a caretaker to perform the task during some, but not all, of the prior week.²⁰

Based on her observations during the CAT evaluation, Ms. Hanley concluded that Mr. X did not need extensive assistance with any of his shaded ADLs. T X testified that her father needs help with showers, and that he is not able to perform instrumental activities of daily living, such as cooking, shopping, or cleaning, on his own. She also discussed his need for assistance with transfers and his inability to walk long distances. Even with that evidence, however, the division has met its burden of proving that Mr. X does not need at least extensive assistance with at least three of the shaded ADLs.

¹⁵ *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>.

¹⁶ *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>.

¹⁷ 7 AAC 49.135.

¹⁸ Testimony of Ms. Hanley.

¹⁹ Exhibit E18.

²⁰ *See* Exhibit E18.

Mr. X could also be found eligible for the Choice Waiver program if he has sufficiently severe cognitive deficits and needs at least limited assistance with two or more of the shaded ADLs.²¹ However, even if it is assumed that Mr. X has a more severe cognitive impairment than found by the division, he still does not qualify for the waiver program because he only needs limited assistance with one of the shaded ADLs. Although he needs more assistance with dressing and bathing, and with his instrumental activities of daily living, those needs are not considered in deciding whether someone meets the Choice Waiver eligibility requirements.

1. Bed Mobility

Ms. Hanley concluded that Mr. X was able to independently turn himself in bed and sit up in bed.²² This finding was based on Mr. X's statement to her that he could reposition himself in bed, and his statement that he could get out of bed on his own using a trapeze. She also observed him reposition in his chair.²³ The other testimony at the hearing did not dispute this finding. The division has met its burden of proving that Mr. X is independent with this ADL.

2. Transfers

Mr. X told Ms. Hanley that he was able to get out of bed by himself using the trapeze, and that he could stand on his own now that he had a recliner. Ms. Hanley observed him stand independently.²⁴ Ms. X testified that her father had difficulty with transferring from a chair until the recliner was purchased. The division has met its burden of proving that Mr. X is independent with this ADL.

3. Locomotion

Locomotion is defined as the way in which a person moves between locations in his or her own room or other areas on the same floor. The division found that Mr. X needs limited assistance with this ADL,²⁵ and Mr. X did not dispute this finding.

4. Eating

This ADL refers to how a person eats and drinks regardless of skill. It does not include the activity of cooking or preparing the meal. Ms. Hanley found that Mr. X was

²¹ See Exhibit E29.

²² Exhibit E6.

²³ *Id.*

²⁴ *Id.*

²⁵ See Exhibit E7.

independent with this ADL based on his statements to her,²⁶ and Mr. X did not dispute this finding at hearing. The division has met its burden of proof on this ADL.

5. *Toilet Use*

Mr. X told Ms. Hanley that he was able to use the toilet independently,²⁷ and Mr. X did not dispute this finding at hearing. The division has met its burden of proving his independence with this ADL.

IV. Conclusion

Mr. X previously qualified for the Choice Waiver program because he was receiving physical therapy, nursing assessments, and monthly home doctor visits, and because he needed limited assistance with both transfers and locomotion.²⁸ He was not receiving physical therapy at the time of his most recent CAT evaluation or when the division issued its notice of termination. Nor was he receiving professional nursing assessments or home doctor visits. In addition, Mr. X is now independent with transfers. Accordingly, he no longer qualifies for the Choice Waiver program and the division's decision is affirmed. Mr. X may reapply if his condition changes.

Dated this 9th day of April, 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 23rd day of April, 2014.

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

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

²⁶ Exhibit E9.
²⁷ Exhibit E9.
²⁸ Exhibits D4, F18, and F29.