

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

In the Matter of)

J J)

OAH No. 14-0536-MDS
Agency No.

DECISION

I. Introduction

J J has been receiving services under the Older Alaskan or Adult with a Physical Disability Waiver program, also known as the Choice Waiver program. Recently, 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 Choice Waiver program. The assessment visit on which this termination was based was conducted by Nurse Denise Kichura in mid-June of 2013. After considering the assessment visit and other materials, the Division issued a decision letter to Ms. J (“Denial of Alaska Waiver Payment for Waiver Services”) that told her that her Choice Waiver services would terminate. The decision letter was issued on November 5, 2013.¹

Ms. J, who participated through her power of attorney T Z, requested a hearing to contest that determination. The matter was referred to the Office of Administrative Hearings 16 weeks after the hearing was requested. Several continuances were granted, and the case concluded on June 5, 2014. Administrative issues that were not the fault of either party caused a delay in the issuance of a decision.

Because the Division proposed terminating benefits previously granted, it had the burden of proving at the hearing that Ms. J was no longer eligible.² Although the exhibits submitted by the Division reveal that this case is much closer than the Division’s assessor acknowledged, the Division did meet that burden in this case.

II. Background Facts

In 2012, Ms. J had qualified for the Choice Waiver program based on a need for “extensive assistance” with three key activities of daily living: bed mobility, transfers, and

¹ Ex. D.
² 7 AAC 49.135.

toileting.³ The Division visited Ms. J on June 5, 2013 to begin a reassessment process. Based largely on a Consumer Assessment Tool (CAT) compiled from that visit by Denise Kichura, R.N., the Division concluded that Ms. J was no longer eligible for this program.⁴ This conclusion grew out of findings that Ms. J no longer needed “extensive assistance” with *any* key activities of daily living, and did not otherwise qualify for the program.⁵ The Division made its decision in mid-November of 2013, five months after the assessment visit.

This case turns primarily on the accuracy of Ms. Kichura’s CAT assessment and scoring as a measurement of Ms. J’s care needs at the time of the decision. While other professionals reviewed the J case on behalf of the Division, they did not independently assess Ms. J, instead relying upon the observations recorded in the CAT.

Ms. J was 81 years old at the time of assessment. She lives at an assisted living facility. The CAT shows Ms. J as having two diagnoses: DM 1 and Colon Cancer.⁶ However, the Division had two documents in its possession establishing that she suffered from osteoarthritis, colon cancer, diabetes, and anxiety, as well as several other diagnoses that are indiscernible.⁷

T Z, Ms. J’s power of attorney, participated in the proceeding on behalf of Ms. J. She did not participate in the last hearing.⁸ Ms. Z did testify at an earlier hearing that she does not believe Ms. J can perform the ADLs at the level of assistance recorded for an extended period of time.

Ms. Kichura testified that she observed Ms. J get up and walk to her bedroom, get in and out of her bed, and show her where she keeps her toiletries in the bathroom. Ms. J prefers to use the commode in her bedroom rather than the toilet in the bathroom.⁹ Finally, Ms. Kichura observed Ms. J walk without physical assistance.¹⁰

On the CAT, Ms. Kichura noted that Ms. J had reported one fall, in April 2013.¹¹ However, there are a total of three falls. As to the April 2013 fall, Ms. Kichura wrote that Ms. J

³ Ex. F at 18, 29.

⁴ Ex. D.

⁵ Ex. E at 29.

⁶ Ex. E at 3.

⁷ Ex. F at 41, 42.

⁸ The date and time of hearing was selected with Ms. Z’s input and agreement. A message was left on her telephone.

⁹ Kichura Testimony.

¹⁰ *Id.*

¹¹ Ex. E at 3.

told to her that she fell reaching into the closet.¹² This is incorrect. The Critical Incident Report (CIR) for this fall reveals that Ms. J had just gotten up from the recliner to move to the dining room table and fell when sitting down.¹³

There was an earlier fall that was not mentioned in the CAT. On August 12, 2012, Ms. J fell when she was on the commode in her room and bent over to wipe.¹⁴ She sat on the floor and tried to pull herself over to the bell to notify staff, and was calling out when staff heard the calls.¹⁵ The staff attributed the fall to the arthritis in her knees.¹⁶

The third fall occurred on November 12, 2012.¹⁷ This time Ms. J was trying to transfer from the wheelchair to the commode when her knee started to shake and did not have the strength to shift her weight back to the wheelchair and, as a result, she fell.¹⁸ Again, the staff attributed the fall to Ms. J's arthritis.¹⁹ The two 2012 CIRs were in the Division's possession at the time of the assessment visit, but neither fall is mentioned, nor is the arthritis that contributed to the falls.

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.²⁰ The program pays for services that allow an eligible person to stay in his or her home (which may be 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.²¹ For adults with disabilities, this assessment looks

¹² *Id.*
¹³ Ex. F at 44 – 47.
¹⁴ Ex. F at 50, 51.
¹⁵ *Id.*
¹⁶ *Id.*
¹⁷ Ex. F at 60, 61.
¹⁸ *Id.*
¹⁹ *Id.*
²⁰ 7 AAC 130.205(d)(2).
²¹ 7 AAC 130.230.

at the nursing level services defined in 7 AAC 140.510 and 515,²² and incorporates the results of the CAT.²³ The CAT is an evaluation tool in the nature of a questionnaire and scoring mechanism. Because it is adopted by reference in 7 AAC 160.900(d)(6),²⁴ it is itself a regulation.

Once an individual has qualified to participate in the Choice Waiver program, there are additional protections before he or she can be removed 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.²⁵ For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska and qualified to assess adults with physical disabilities.²⁶ 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.^[27]

The criteria used in determining whether a recipient no longer has a functional limitation or cognitive impairment are the criteria listed for making an initial determination of limitation or impairment.²⁸

In the present case, the evidence presented is precarious. The failure of the CAT to accurately identify Ms. J's other diagnoses or recognize her falls calls into question the reliability of the CAT or its scores. Moreover, Ms. Kichura's failure to correct Ms. J's recollection of her April 2013 fall, or note the discrepancies between her self-reported explanation of the fall with the explanation in the CIR, calls into question the reliability of Ms. J's accuracy as a historian.

However, to meet the above threshold for removal from the program, Ms. J must have improved to a point that she no longer requires and qualifies for Waiver services.

²² 7 AAC 130.230(b)(2)(A).

²³ 7 AAC 130.230(b).

²⁴ Adopting January 29, 2009 version of the CAT.

²⁵ AS 47.07.045(b)(1) – (3).

²⁶ AS 47.07.045(b)(2)(B).

²⁷ AS 47.07.045(b)(3)(C).

²⁸ 7 AAC 130.230(g).

Thus, for practical purposes, the essential question in this case is whether the Division has demonstrated that Ms. J no longer qualifies for the program.

B. *The CAT*

1. Scoring the CAT Assessment

There are two routes by which the CAT may show that a person is eligible for the Choice Waiver program. This can be best seen by reviewing the summary page shown in Exhibit E at page 29.

Section NF 1 of this page lists five questions:

- a. In Section A, Nursing Services, items 1-8 did you code any of the responses with a 4 (i.e., services needed 7 days/wk)?
- b. In Section A, items 9 (Ventilator/Respirator) did you code this response with a 2, 3, or 4 (treatment needed at least 3 days/wk)?
- c. In Section A, item 10 (Uncontrolled seizure), did you code this response with a 1, 2, 3, or 4 (care needed at least once/wk)?
- d. In Section A, item 11 (Therapies), was the total number of days of therapy 5 or more days/wk?
- e. In section E, (Physical Functioning/Structural Problems), were 3 or more shaded ADLs coded with a 3 (extensive assistance) or 4 (dependent) in self performance?^[29]

A person who receives a “yes” answer to any one of these questions is eligible for nursing facility level of care, and thus immediately qualifies for the Choice Waiver program.

The second route for qualification is through a combination of scores given under sections NF 2 (nursing services and therapies), NF 3 (cognitive ability), and NF 4 (inappropriate behavior), and NF 6—with the last only being examined if a score of at least one was found somewhere in NF 2-4. Section NF 6 returns to the key ADLs, asking how many of them were scored with a two or higher (limited assistance) in self-performance and given a support score of two or three. In other words, it asks how many of these ADLs received a score of 2/2 or higher in the body of the assessment. The number of such raw scores becomes the single numerical score in NF 6. Under Section NF 7, the total score in sections NF 2-4 and 6 are added. An individual with a grand total of three or higher is eligible for the Choice Waiver program.

²⁹ Ex. E at 29. The “shaded ADLs” are bed mobility, transfers, locomotion, eating, and toilet use.

In this case, it is undisputed that Ms. J could not qualify for any of the threshold scores in NF 2, NF 3, or NF 4, and hence the second route to qualification is unavailable. There is also no contention that she had any of the qualifying conditions or therapies in NF-1a, NF-1b, or NF-1c. With respect to NF-1d, there are likewise no qualifying therapies.

With the second route to qualification entirely off the table, and NF-1a through NF-1d also unavailable, *the sole route for potential qualification for Ms. J is NF-1e, whereby a patient can be in the program if she has a score of 3 (extensive assistance) or 4 (dependent) in self performance in three of the five “shaded” activities of daily living (ADLs), which are: bed mobility, transfers, locomotion, eating, and toilet use.* The remainder of this decision will focus on whether Ms. J should receive ADL scores at that level.

2. ADL Scores for Ms. J

The CAT numerical scoring codes for self-performance rate how capable a person is of performing a particular ADL. The possible codes are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance³⁰); **3** (the person requires extensive assistance³¹); **4** (the person is totally dependent³²). There are also codes which are not used in calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).

We will now turn to the state of the proof regarding the five shaded ADLs. If the evidence shows that Ms. J should have less than a qualifying self-performance score (3 or 4) in three or more of these ADLs, the agency has met its burden of demonstrating that she needs to be terminated from the Choice Waiver program.

a. Bed Mobility

The first of the five “shaded ADLs” relevant to qualification under NF-1e is bed mobility (how a person changes positions in bed). Ms. Kichura gave Ms. J a self-performance score of 0 in bed mobility, judging her to be fully independent. Although the accuracy of Ms. Kichura’s

³⁰ According to 7 AAC 125.020(a)(1), limited assistance with an ADL “means a recipient, who is highly involved in the activity, receives direct physical help from another individual in the form of guided maneuvering of limbs, including help with weight-bearing when needed.”

³¹ According to 7 AAC 125.020(a)(2), extensive assistance with an ADL “means that the recipient is able to perform part of the activity, but periodically requires direct physical help from another individual for weight-bearing support or full performance of the activity.”

³² According to 7 AAC 125.020(a)(3), dependent as to an ADL, or dependent as to an IADL, “means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity.”

report and CAT has been called into question, the information in the CIRs regarding her mobility (unrelated to the falls) provide independent corroboration of Ms. Kichura's score.

b. Transfers

The second shaded ADL is transfers, or how a person moves between surfaces, such as from a bed to a wheelchair. Ms. J had been scored as requiring extensive assistance (score of 3). Ms. Kichura gave Ms. J a score of 1 in this area. Ms. Kichura wrote that she observed Ms. J “stand up using an arm rest for support, sit on a regular kitchen chair, sit on her bed and stand up while reaching for her walker independently and without difficulty.”³³ Ms. Kichura either disregarded Ms. J's history of falls or was not aware of them when she assigned a score of 1. However, Ms. J's falls while transferring and persistent arthritis make it more likely than not that Ms. J requires at least limited assistance more than twice a week. A score of 2 is the appropriate score.

c. Locomotion

Another of the five shaded ADLs is locomotion, how a person moves from one location to another. Ms. J was previously scored as requiring limited assistance (score of 2). Ms. Kichura assigned a self-performance score of 1 in this area, requiring supervision and set up help only. The information contained in the CIRs support the Division's scoring on locomotion.³⁴ No testimony or documentary evidence suggested that a score of 2 could not be appropriate.

d. Eating

A fourth shaded ADL is eating. The self-performance score of 0 awarded by Ms. Kichura was not challenged at the hearing.

e. Toilet Use

Ms. J was previously scored as requiring extensive assistance (score of 3) with this shaded ADL. Ms. Kichura scored Ms. J as requiring only limited assistance (score of 2). The assisted living facility staff reported that they clean Ms. J after her daily bowel movement “to ensure she cleans properly.”³⁵ The requirement for daily cleansing performed by staff suggests that a score of three is appropriate.

³³ Ex. F at 37.

³⁴ Ex. F at 51 (It was noted that Ms. J used a walker independently.)

³⁵ Ex. E at 9.

3. Scoring Summary

Given the lack of any skilled therapies, there is only one route by which Ms. J could achieve a qualifying score for the Waiver program: scoring 3 or more on three of the five above ADLs. However, insofar as one can tell from the evidence presented, her condition at the time of the termination decision would not support a score of 3 on any of the shaded ADLs except toileting. Accordingly, Ms. J would not qualify for Waiver services under the CAT methodology.

C. *Factors Beyond the CAT*

The CAT has been incorporated into the Department's regulations, and as the Department interprets those regulations, a non-qualifying CAT score creates at least a presumption that the recipient is ineligible for Choice Waiver services.³⁶ It may be that in exceptional cases there are factors outside the CAT that might override a qualifying CAT score, but none have been suggested in this case.

V. Conclusion

Because Ms. J had non-qualifying CAT scores as of the time of the decision under review, the decision was correct. The decision to terminate her is affirmed. If Ms. J's condition has changed, she may reapply for the Choice Waiver program.

DATED this 9th day of October, 2014.

Signed

Rebecca Pauli

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 October, 2014.

By: *Signed*

Name: Andrew M. Lebo

Title: Administrative Law Judge

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

³⁶ Cf. *In re O.P.*, OAH No. 13-0054-MDS (Comm'r of Health & Soc. Serv., adopted Feb. 20, 2013), at 8 (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130054.pdf>).