

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

In the Matter of)		
)		
K O)	OAH No.	14-1398-MDS
_____)	Agency No.	

DECISION

I. Introduction

The issue in this case is whether K O remains eligible for Medicaid Home and Community-Based Waiver services (Waiver Program). Senior and Disability Services re-assessed Ms. O, and determined she was no longer eligible. Ms. O appealed that decision.

A hearing was held on December 3, 2014.¹ Ms. O was represented by her Care Coordinator, B Q. SDS was represented by a lay advocate, Angela Ybarra. Based on the evidence presented, Ms. O is no longer eligible for the Waiver Program.

II. Facts

Ms. O was reassessed for her continued eligibility in the Waiver Program on February 6, 2014, by Registered Nurse Margaret Rogers.² Based on this assessment, SDS concluded that Ms. O was no longer eligible to participate in this program.³ This decision was reviewed by an independent health care professional who concurred with SDS's decision.⁴

SDS informed Ms. O of its decision on July 24, 2014.⁵

III. Discussion

A. Medicaid Home and Community-Based Waiver Program

An adult with a physical disability is eligible to receive benefits under the Waiver Program, if he or she meets the eligibility requirements, including requiring the level of care that is normally provided in a nursing facility.⁶ 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

¹ The hearing was held before Administrative Law Judge Rebecca L. Pauli. This matter was then reassigned to ALJ Jeffrey A. Friedman, who has reviewed the entire record, including listening to the hearing recording.

² Exhibit E.

³ Exhibit D.

⁴ Exhibit D2.

⁵ Exhibit D1.

⁶ 7 AAC 130.205(d)(2).

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.

SDS determines whether an applicant requires nursing facility level of care services by conducting an assessment.⁷ For older adults or 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 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.¹⁰ For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska and qualified to assess adults with physical disabilities.¹¹ 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.^[12]

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.¹³ In deciding whether a person is eligible, SDS looks at the recipient’s level of care needs as of

⁷ 7 AAC 130.213.

⁸ 7 AAC 130.213(4)(A) & (B).

⁹ 7 AAC 130.213(4). SDS typically also looks at available medical reports or other evidence related to the recipient’s need for services.

¹⁰ AS 47.07.045(b)(1) – (3).

¹¹ AS 47.07.045(b)(2)(B).

¹² AS 47.07.045(b)(3)(C).

¹³ *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>. SDS uses the CAT for this determination since the CAT measures both the need for nursing home placement and the individual’s ability to function in the home setting.

the date SDS notified the person of its determination.¹⁴ Because SDS seeks to terminate Ms. O's participation in the program, it has the burden of proof.¹⁵

B. Ms. O's Assessment

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 E31.

Ms. O would qualify for the program if she had certain skilled nursing needs listed in section NF1 of the summary sheet. She would also qualify if she needed less extensive nursing needs, shown in NF 2, NF 3, and NF4, or if she had some nursing needs along with a need for extensive assistance with certain activities of daily living (ADLs). Finally, she would qualify if she needed at least extensive assistance with three or more of the "shaded" ADLs.¹⁶ The shaded ADLs are Bed Mobility, Transfers, Locomotion, Eating, and Toilet Use.¹⁷ 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.¹⁸

At the hearing, both parties agreed that Ms. O did not need nursing services. Thus, the question in this case is whether she needed extensive assistance with three or more of the relevant ADLs. SDS agreed that Ms. O needed extensive assistance with toileting.¹⁹ Ms. O argued that she also needed extensive assistance with bed mobility, transfers, and locomotion.

C. Bed Mobility

Bed mobility is defined as how a person moves to or from a lying position, turns side to side, and repositions her body while in bed.²⁰ During the assessment, Ms. O told Ms. Rogers she was able to reposition herself in bed without assistance.²¹ During the hearing, Ms. O testified that she sometimes needed assistance, but her discussion of this need was more about standing up from the bed, rather than sitting up from a lying position, or positioning herself in bed. SDS has met its burden of showing that Ms. O did not need weight bearing assistance to sit up in bed,

¹⁴ *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>.

¹⁵ 7 AAC 49.135.

¹⁶ See Exhibit E31 NF1(e).

¹⁷ Exhibit E18.

¹⁸ See Exhibit E18.

¹⁹ Exhibit E20.

²⁰ Exhibit E8.

²¹ *Id.*

or reposition herself in bed, three or more times each week as of July 24, 2014. Therefore, Ms. O did not need extensive assistance with this ADL.

D. Transfers

Transferring is how a person moves between surfaces such as from a bed or chair to a standing position.²² During the assessment, Ms. O said that she needed assistance with transfers at times throughout the day. She was observed transferring from the sofa without assistance.²³ At the hearing, Ms. O testified that she sometimes needs assistance standing up out of bed, and that she also sometimes needs assistance standing from a chair. She explained that her daughter would pull her up. Ms. O needs this type of assistance most often in the mornings when she is still stiff and her back hurts more.²⁴ While she was unclear as to how often she needed assistance standing, Ms. O did testify that she seldom gets out of bed without assistance from her daughter.

Ms. O did not dispute that she could stand up without physical assistance some of the time. The question for this hearing, however, is whether she needed weight-bearing assistance to transfer at least three times a week. Being pulled up is a form of weight-bearing assistance.²⁵ Based on the evidence in this case, it is more likely true than not true that on July 24, 2014, Ms. O did need weight-bearing assistance to transfer at least three times each week.

E. Locomotion

Locomotion describes how a person moves in her own room, or between areas on the same floor.²⁶ Ms. O testified that she walked around her home using a cane. She is able to do so most of the time without any physical assistance.²⁷ On occasion, she receives help from her daughter, but that assistance is in the form of holding on to Ms. O's shoulder.²⁸ This assistance was not described as weight-bearing, and based on the totality of Ms. O's testimony, she did not need weight-bearing support (other than from her cane) with locomotion three or more times each week. She did not need extensive assistance with this ADL.

²² *Id.*

²³ *Id.*

²⁴ O testimony.

²⁵ Weight-bearing assistance means supporting more than a minimal amount of the recipient's weight. *See In re K T-Q*, OAH No. 13-0271-MDS (Commissioner of Health and Social Services 2013), page 4, available at <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130271.pdf>.

²⁶ Exhibit E9.

²⁷ O testimony.

²⁸ *Id.*

IV. Conclusion

At the time of SDS’ decision, Ms. O did not have any nursing facility needs. Accordingly, she would only be eligible for the Waiver Program if she needed extensive assistance with at least three of the relevant activities of daily living. SDS agreed that she needed extensive assistance with toileting, and Ms. O has shown she needs extensive assistance with transfers. However, those two needs alone are not sufficient to qualify for the Waiver Program. SDS’s decision to terminate her participation in this program is affirmed.

Dated this 4th day of August, 2015.

Signed _____
Jeffrey A. Friedman
Administrative Law Judge

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 18th day of August, 2015.

By: *Signed* _____
Signature
Kathryn A. Swiderski
Name
Administrative Law Judge
Title

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