

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

In the Matter of:)
)
 Q F) OAH No. 14-1745-MDS
) Agency Case No.

DECISION

I. Introduction

The issue in this case is whether Q F continues to require skilled or intermediate level nursing care, or otherwise qualifies for Medicaid Home and Community-Based Waiver services (waiver services) based on the level of assistance that he requires with activities of daily living (ADLs). The Division of Senior and Disabilities Services (DSDS or Division) conducted an assessment on April 15, 2014 and subsequently determined that Mr. F's waiver services should be terminated.¹

This decision concludes that Mr. F no longer requires the skilled or intermediate level nursing services which originally qualified him for waiver services. Further, Mr. F does not require enough assistance with his ADLs to qualify for waiver services on that basis. Accordingly, Mr. F's condition has materially improved such that he is no longer eligible for waiver services. The Division's termination of Mr. F's waiver services is therefore affirmed.²

II. Facts

A. Eligibility

Mr. F is 62 years old. His diagnoses include diabetes, hypertension, cellulitis, and chronic open ulcers / wounds on his legs.³ Mr. F was found eligible for waiver services in 2012 because he was receiving daily wound treatment for his stage 3 or 4 decubitus ulcers.⁴

Mr. F was reassessed on April 15, 2014 to determine his ongoing eligibility for waiver services. The results of that assessment, as recorded on the CAT, were that although Mr. F had some cognitive and behavioral issues, and a need for some physical assistance with his activities of daily living, his care needs (physical, cognitive, behavioral, and nursing/medical)

¹ Exs. D, E.

² Should Mr. F's condition worsen, he may reapply for waiver services at any time; this can be done on an expedited basis if necessary.

³ Ex. E p. 5; Ex. F. pp. 45 - 47.

⁴ Ms. N's testimony; Ex. F, pp. 13, 26, 31.

were not sufficiently acute to qualify him for waiver services.⁵ Specifically, the findings recorded on the CAT were that Mr. F (1) received nursing care for wound services twice monthly; (2) had no specialized therapies; (3) required limited, but not extensive assistance, with only one of the waiver-qualifying ADLs (toileting); (4) had a cognitive impairment score of four, too low to qualify him to receive waiver services on that basis; and (5) had a behavioral impairment score was eight, too low to qualify him to receive waiver services on that basis.⁶

Based on the foregoing CAT scores, the Division's assessor found that Mr. F does not currently require skilled level or intermediate level nursing care, and does not otherwise qualify for waiver services based on his level of need for assistance with his activities of daily living (ADLs).⁷ That determination was subsequently reviewed by another DSDS nurse-assessor, who concurred.⁸ Finally, the eligibility determination was reviewed by a registered nurse employed by the Division's contractor, Qualis Health, who also concurred.⁹ Mr. F did not dispute the Division's findings on the 2014 CAT, with the exception of the nursing needs required for his wound care.

The 2014 CAT recorded that Mr. F required wound care only twice per month as of the date of the April 15, 2014 assessment.¹⁰ Consequently, the Division found that his wound care did not qualify him for waiver services.¹¹ Ms. G, who is Mr. F's care coordinator and familiar with his medical care needs, testified regarding his wound care. Her testimony did not address the assertion that Mr. F was only receiving wound care twice monthly in April 2014. Instead, she testified that Mr. F had been staying with family and reinjured his leg severely and had to receive wound care daily. Ms. G testified that in early September 2014 (about the time that the Division issued its waiver services termination letter), Mr. F moved back to No Name so that he could receive hyperbaric oxygen treatment for that leg. At that time (in September 2014) Mr. F was receiving wound treatment five days per week, but by the time of the hearing in this case (in February 2015) Mr. F was receiving wound treatment only twice per week.¹²

⁵ Exs. D, E.

⁶ Ex. E, pp. 1 – 2, 7 – 11, 15 – 16.

⁷ Ex. E pp. 32 - 33.

⁸ Ex. D p. 2.

⁹ Ex. D p. 2.

¹⁰ Ex. E, p. 15.

¹¹ Ex. E, pp. 32 – 33; Ms. N's testimony.

¹² Ms. G's testimony.

The limited medical records¹³ contained in the hearing record show that Mr. F began receiving wound treatment through the No Name Center in October 2013, and was receiving treatment there three times weekly at the end of January 2014. The same records also indicate that, as of the end of January 2014, Mr. F was intending to move to the No Name Area to be with family, and that it was expected his wound would be evaluated weekly at the local hospital.¹⁴ Mr. F resumed treatment at No Name Center sometime in late August or early September 2014, received 12 hyperbaric treatments, and at the end of September / beginning of October 2014 was receiving dressing changes three times per week.¹⁵

B. Relevant Procedural History

On September 9, 2014, the Division mailed a notice to Mr. F advising him that his waiver services would end in thirty days.¹⁶ On September 11, 2014 Mr. F's care coordinator, Ms. G, requested a hearing on Mr. F's behalf to contest the Division's decision.¹⁷

Mr. F's hearing was held on February 2, 2015. Mr. F and his care coordinator, Ms. G, both participated and testified on Mr. F's behalf. Victoria Cobo participated by phone and represented the Division. B N, R.N., a nurse employed by the Division, testified by phone on behalf of the Division. The record was left open after the hearing to allow Mr. F to submit additional documents and for the Division's written response to those documents. No additional documents were received.

III. Discussion

A. Applicable Burden of Proof and Standard of Review

Pursuant to applicable state and federal regulations, the Division bears the burden of proof in this case.¹⁸ The standard of review in a Medicaid "Fair Hearing" proceeding, as to both the law and the facts, is *de novo* review.¹⁹ In this case, evidence was presented at hearing that was not available to the Division's reviewers. The administrative law judge may independently weigh

¹³ At hearing, Mr. F was offered the opportunity to submit additional medical records. The Office of Administrative Hearings did not receive any additional records from either him or the Division.

¹⁴ Ex. F, pp. 34 – 36; Ex. 1, p. 1.

¹⁵ Ex. 1, pp. 2 – 7.

¹⁶ Ex. D. The Division's termination notice cited state Medicaid statute AS 47.07.045; state Medicaid regulations 7 AAC 130.205, 7 AAC 130.207, 7 AAC 130.213, 7 AAC 130.215, 7 AAC 130.219, 7 AAC 140.505, 7 AAC 140.510, 7 AAC 140.515; and federal Medicaid statute 42 USC 1396r, in support of its determination.

¹⁷ Ex. C.

¹⁸ 42 CFR § 435.930, 7 AAC 49.135.

¹⁹ See 42 CFR 431.244; *Albert S. v. Dept. of Health and Mental Hygiene*, 891 A.2d 402 (2006); *Maryland Dept. of Health and Mental Hygiene v. Brown*, 935 A.2d 1128 (Md. App. 2007); *In re Parker*, 969 A.2d 322 (N.H. 2009); *Murphy v. Curtis*, 930 N.E.2d 1228 (Ind. App. 2010).

the evidence and reach a different conclusion than did the Division's staff and/or Qualis, even if the original decision is factually supported and has a reasonable basis in law.

B. Relevant Medicaid Waiver Services Statutes and Regulations

States participating in the Medicaid program must provide certain mandatory services under the state's medical assistance plan.²⁰ States may also, at their option, provide certain additional services, one of which is the Home and Community-Based Waiver Services program²¹ (“waiver services”).²² Congress created the waiver services program in 1981 to allow states to offer long-term care, not otherwise available through the states' Medicaid programs, to serve eligible individuals in their own homes and communities instead of in nursing facilities.²³ Alaska participates in the waiver services program.²⁴

There are three basic ways in which an applicant or recipient can qualify for waiver services. First, an individual is eligible for waiver services if he or she requires the level of care specified in 7 AAC 130.205. For older adults and adults with disabilities (such as Mr. F), that level of care must be either “intermediate care” as defined by 7 AAC 140.510, or “skilled care” as defined by 7 AAC 140.515.²⁵ Intermediate care, a lower level of care than skilled care, is defined by 7 AAC 140.510 in relevant part as follows:

- (a) The department will pay an intermediate care facility for providing the services described in (b) and (c) of this section if those services are (1) needed to treat a stable condition; (2) ordered by and under the direction of a physician,

²⁰ See 42 USC §§ 1396a(a)(10)(A); 1396d(a)(1) - (5), 1396a(a)(17), and 1396a(a)(21); see also 42 CFR 440.210 & 440.220.

²¹ The program is called a “waiver” program because certain statutory Medicaid requirements are waived by the Secretary of Health and Human Services. See 42 U.S.C. § 1396n(c). Before a state receives federal funding for the program, the state must sign a waiver agreement with the United States Department of Health and Human Services. *Id.* The agreement waives certain eligibility and income requirements. *Id.*

²² See 42 USC § 1396a(a)(10)(A).

²³ See 42 USC § 1396n(c)(1); 42 CFR §§ 435.217; 42 CFR §§441.300 - 310. Federal Medicaid regulation 42 CFR § 440.180, titled “Home or Community-Based Services,” provides in relevant part:

- (a) Description and requirements for services. “Home or community-based services” means services, not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of Part 441, subpart G of this chapter . . .

- (b) Included services. Home or community-based services may include the following services . . . (1) Case management services. (2) Homemaker services. (3) Home health aide services. (4) Personal care services. (5) Adult day health services. (6) Habilitation services. (7) Respite care services. (8) Day treatment . . . (9) Other services requested by the agency and approved by CMS *as cost effective and necessary to avoid institutionalization*. [Emphasis added].

²⁴ AS 47.07.045, the Alaska statute that authorizes Medicaid Waiver Services, states in relevant part: Home and community-based services. (a) The department may provide home and community-based services under a waiver in accordance with 42 USC 1396 – 1396p (Title XIX Social Security Act), this chapter, and regulations adopted under this chapter, if the department has received approval from the federal government and the department has appropriations allocated for the purpose. To supplement the standards in (b) of this section, the department shall establish in regulation additional standards for eligibility and payment . . .

²⁵ 7 AAC 130.215.

except as provided in (c) of this section; and (3) provided to a recipient who does not require the level of care provided by a skilled nursing facility.

(b) Intermediate nursing services are the observation, assessment, and treatment of a recipient with a long-term illness or disability whose condition is relatively stable and where the emphasis is on maintenance rather than rehabilitation

(c) Intermediate care may include occupational, physical, or speech-language therapy provided by an aide or orderly under the supervision of licensed nursing personnel or a licensed occupational, physical, or speech-language therapist.

The Division is required to incorporate the results of the Consumer Assessment Tool (CAT) in determining whether an applicant requires intermediate or skilled nursing care.²⁶ The CAT measures nursing needs by reviewing whether an applicant requires nursing services, such as wound care, treatments for an unstable condition, or receives chemotherapy, physical therapy, or other specialized therapies, and then determines waiver eligibility based on how often such nursing services, treatments, or therapies are provided.²⁷

The second way an individual may qualify for waiver services is by showing that the individual's requirements for physical assistance with his or her activities of daily living (ADLs) are sufficiently high.²⁸ Under the CAT, an individual can qualify for waiver services by demonstrating a need for extensive assistance with at least three designated ADLs, known as "shaded" ADLs, even without demonstrating a need for professional nursing care.²⁹ An individual may also qualify for waiver services by having a certain minimum level of nursing needs, or cognitive or behavioral impairments, *combined with* a certain minimum level of need for physical assistance with ADLs.

Before a recipient's waiver services may be terminated, the Division must conduct an annual assessment to “determine whether the recipient continues to meet the [applicable] standards”³⁰ To remove a recipient from the program, the assessment must find:

that the recipient’s condition has materially improved since the previous assessment; for purposes of this paragraph, “materially improved” means that a recipient who has previously qualified for an older Alaskan or adult with a physical disability [waiver], no longer has a functional limitation or cognitive impairment that would result in the need for nursing home placement, and is able

²⁶ 7 AAC 130.215.

²⁷ Ex. E p. 32.

²⁸ Ex. E p. 32.

²⁹ Ex. E p. 32.

³⁰ AS 47.07.045(b)(1).

to demonstrate the ability to function in a home setting without the need for wavier services.^[31]

Finally, in an order issued recently in the class action³² case *Krone et. al. v. State of Alaska, Department of Health and Social Services et. al.*, Case No. 3AN-05-10283CI, an Anchorage Superior Court judge held that, "in order to determine if a recipient is 'materially improved,' for purposes of AS 47.07.045(3)(C), the State must compare the results of the current assessment with those of the most recent assessment that concluded that the recipient was eligible for the Waiver program," and that "[t]he State may not conclude that a recipient is no longer eligible based only on the results of the current assessment."³³ The judge further held that "[t]he State may not base its annual determination of whether a recipient is 'materially improved' solely upon the scoring obtained from the CAT," and that "[t]he State must consider all reasonably available information relevant to that determination."

C. The Consumer Assessment Tool (CAT)

Under state Medicaid regulation 7 AAC 130.230(b)(2)(B), level of care determinations for waiver services applicants seeking services under the "adults with physical disabilities" or "older adults" categories must incorporate the results of the Department's Consumer Assessment Tool (CAT), which is adopted by regulation at 7 AAC 160.900(d)(6). The activities of daily living (ADLs) scored by the CAT are body mobility, transfers (non-mechanical), transfers (mechanical), locomotion (in room), locomotion (between levels), locomotion (to access apartment or living quarters), dressing, eating, toilet use, personal hygiene, and bathing.

The CAT numerical scoring system has two components. The first component is the *self-performance score*. These scores rate how capable a person is of performing a particular ADL.³⁴ The possible scores are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance); **3** (the person requires extensive assistance); and **4** (the person is totally dependent). There are also codes that are not

³¹ AS 47.07.045(b)(3).

³² Although a Superior Court decision generally does not constitute binding precedent for the Office of Administrative Hearings (except in the particular case being appealed), a class action like the *Krone* case is binding in all cases involving class members, one of whom is Mr. F.

³³ *Krone* order dated October 1, 2014 at page 6.

³⁴ According to the federal Medicaid statutes, the term "activities of daily living" includes tasks such as eating, toileting, grooming, dressing, bathing, and transferring. See 42 USC § 1396n(k)(6)(A). In Alaska, pursuant to AS § 47.33.990(1), "activities of daily living" means "walking, eating, dressing, bathing, toileting, and transfer between a bed and a chair."

treated as numerical scores for purposes of calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).³⁵

The second component of the CAT scoring system for ADLs is the *support score*. These scores rate the degree of assistance that a person requires in order to perform a particular ADL. The relevant scores are **0** (no setup or physical help required); **1** (only setup help required); **2** (one person physical assist required); and **3** (two or more person physical assist required).

D. Does Mr. F Require Intermediate or Skilled Nursing Care?

Based on the waiver regulations (which incorporate the CAT), there are several ways in which a waiver services applicant or recipient can qualify for (or remain qualified for) waiver services. The first way is to demonstrate a need for either skilled nursing care or intermediate level nursing care.³⁶ Because skilled care is a higher level of care than intermediate care, the minimum level of nursing care for which Mr. F must demonstrate a need, in order to remain eligible for waiver services on that basis, is intermediate care. Intermediate level nursing care is defined by 7 AAC 140.510 (quoted in Section III(B), above).

The evidence in the record demonstrates that Mr. F does not currently require the types of services which indicate a need for intermediate level care under 7 AAC 140.510 and the CAT. While Mr. F was receiving wound care at the time the Division notified him that he was no longer eligible for waiver services (September 9, 2014), the evidence shows that he was receiving them no more than five times per week. This factual finding is made based upon Ms. G's testimony that Mr. F was receiving daily wound care until he moved to No Name, which would have been in early September, the same time the Division issued its denial letter, at which point he received wound care five days per week. The medical records show a frequency of three times a week at the end of September/beginning of October 2014, but do not indicate how many times a week wound care was received on September 9, 2014, when the Division made the decision to terminate Mr. F's waiver services.in conclusion.³⁷ In order to qualify for waiver services based solely upon his wound care, Mr. F would need to receive those services seven days per week, as of the date of the Division's denial letter, which was issued September 9, 2014.³⁸ He therefore does not qualify for waiver services based only upon his wound care.

³⁵ See, for example, Ex. E, p. 8.

³⁶ 7 AAC 140.510, 7 AAC 140.515.

³⁷ Ms. G's testimony; Ex. 1.

³⁸ Ex. E, p. 32, § NF1(a).

A person can also qualify if he is scored as requiring extensive assistance (self-performance code of 3) in three or more of the scored ADLs (bed mobility, locomotion, transfers, eating, and toileting).³⁹ It is undisputed that Mr. F did not receive a score of 3 in any of the scored ADLs. The highest score he received was a 2 in one ADL, toileting.⁴⁰ He therefore does not qualify for waiver services based only upon his wound care.

Another potential method to achieve eligibility required a substantial impairment score in either cognition (score of 13) and/or behavior (score of 14), in combination with a score of limited assistance (code of 2) or higher in at least one of the scored ADLs.⁴¹ While Mr. F has a score of limited assistance in toileting, he does not have a sufficiently severe score in either cognition (actual score of 4) or behavior (actual score of 11) to provide eligibility.

The last option which could provide Mr. F with eligibility is the combination of his nursing needs along with his ADL needs. Assuming, solely for the purpose of discussion, that he was receiving nursing wound care services five days per week,⁴² he would receive 1 point for those services.⁴³ He would also receive 1 point because he had been scored with a 2 (limited assistance) in toileting.⁴⁴ Adding those points together, Mr. F's total score on the CAT would be 2. Eligibility requires a total score of 3.⁴⁵ As a result, the combination of Mr. F's nursing care needs and his physical assistance needs with toileting does not qualify him for waiver services.

IV. Conclusion

Mr. F was found eligible for waiver services in 2012 because he was receiving daily wound treatment for his stage 3 or 4 decubitus ulcers. However, Mr. F no longer receives daily wound care treatment. As a result, Mr. F does not require either an intermediate or skilled level of care as defined under the relevant regulations and the Consumer Assessment Tool. Further, although Mr. F has some cognitive and behavioral impairments, and was scored as needing limited assistance with one of his "shaded" ADLs, these problems are not sufficient, under the regulations and the CAT, to qualify for waiver services on that basis. Accordingly,

³⁹ Ex. E, p. 32, § NF1(e).

⁴⁰ Ex. E, p. 11.

⁴¹ For instance if Mr. F had a qualifying score in both impaired cognition and impaired behavior, along with his toileting score of 2, he would qualify for waiver. If he only had a qualifying score in only one of the categories of impaired cognition or impaired behavior, then he would need to receive a self-performance score of two or greater for two or more of the scored ("shaded") ADLs. See Ex. E, p. 32, §§ NF3(d), NF4(b), and NF6.

⁴² See fn. 34 above.

⁴³ Ex. E, p. 32, § NF2(a).

⁴⁴ Ex. E, p. 32, § NF6.

⁴⁵ Ex. E, p. 32, § NF7.

the Division's decision that Mr. F is no longer eligible for the waiver services program is affirmed.

Dated this 28th day of April, 2015.

Signed _____
Jay D. Durych
Administrative Law Judge, DOA/OAH

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 7th day of May, 2015.

By: *Signed* _____
Name: Jay D. Durych
Title: Administrative Law Judge, DOA/OAH

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