

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

In the Matter of)
)
 N G)
_____)

OAH No. 14-1749-MDS
Agency No.

DECISION

I. Introduction

N G has significant physical and mental impairments for which she needs assistance. She has received services under the Medicaid Home and Community-Based Waiver Services program for many years. She was reassessed in September to determine whether she was still eligible. Even though her condition has deteriorated, she can perform her physical/structural activities of daily living without extensive assistance. And although she has cognitive issues that can lead to faulty decision-making, she does not have the memory deficits or confusion issues that would qualify her for waiver services. Therefore, the decision of the Division of Senior and Disability Services terminating her waiver benefits is affirmed.

II. Facts

N G is a 54-year-old woman who lives in an assisted-living home (ALH) in No Name. She suffers from anemia and joint pain. The diagnoses provided by her doctor include a notation for “intracranial injury,” asthma, obesity, and diabetes.¹ She experiences shoulder pain, knee pain, and dizziness. A letter from her doctor notes “a history of posttraumatic stress disorder, bipolar, and severe depressive problems” as well as three suicides attempts in her past.² She needs assistance on a daily basis to perform activities and with chores. For many years she has been receiving services under the Medicaid Home and Community-Based Waiver Services program.

Ms. G was assessed by Registered Nurse P Q on June 19, 2014, to determine whether she was still eligible for waiver services. The results of the assessment were recorded on a template called the “Consumer Assessment Tool,” better known as the “CAT.”

¹ Division Exhibit E at 5.

² Division Exhibit G at 1.

Only two of the many issues addressed by the CAT are germane to Ms. G.³ These are cognition and ability to perform what are called “activities of daily living” or “ADLs.” ADLs include basic activities, such as eating, dressing, walking, transferring, and using the toilet.

On the measurements under the CAT, Ms. G scored remarkably well. The CAT notes her struggles with physical activities, but it also notes that she will persevere. For example, the CAT notes that she has difficulty in walking, but that she uses her walker and leans on her arms when tired. She walks slowly, but she walks without assistance.⁴ Even with her difficulties and struggles, ultimately, she does her best to be independent on ADLs, needing some assistance with dressing, bathing, and hygiene.⁵ Ms. G does not contest these scores.

In the area of cognition, for purposes of scoring on the CAT, Ms. G does not have any cognitive problems. She is able to remember the seasons, knows where she is, can remember three items in five minutes, is able to draw a clock, and so on. At her fair hearing in this case, she spoke clearly and articulately, and demonstrated that she has a fine mind.

When the Division of Senior and Disabilities Services tabulated the scores on Ms. G’s CAT, it determined that she was no longer eligible for waiver services. Under the CAT, a client may be eligible for waiver services if the client requires extensive assistance or is completely dependent on others for three or more of what are called the structural/physical ADLs—body mobility, transfers, locomotion, toilet use, or bathing.⁶ Ms. G did not meet this requirement for any of these ADLs.⁷ Under the cognition category, in certain cases, a client may be eligible for waiver services if the client’s cognition/memory debilitation is scored at a 13 or higher on the supplemental screening tool.⁸ In Ms. G’s case, however, because she has no measureable cognitive debilitation that can be detected based on the criteria in the CAT, she scored a zero on the supplemental tool. Based on these scores, the division determined that Ms. G was no longer

³ The CAT has several different tests under which a person can qualify for Waiver services. These tests are found on page 31 of Division Exhibit E. The various tests are abbreviated as “NF.1, NF.2,” and so on, up to “NF.6.” Under NF.1, a person can qualify if any of the questions are answered “yes.” Under the other tests, the scores a person receives can be aggregated for a “total nursing and ADL Needs Score” (which is called “NF.7”).

⁴ Division Exhibit E at 9.

⁵ *Id.*

⁶ This qualification is found in the CAT under “NF.1.e.” *See* Division Exhibit E at 31.

⁷ Division Exhibit E at 20.

⁸ *See* Division Exhibit E at 31, section NF.3.d. Because Ms. G had a 2/2 score on transfers, the issue regarding her cognition under NF.3.d is whether she received a score of 13 or higher on the supplemental screening tool for cognition. *Id.*

eligible for waiver services, and on September 14, 2014, it sent her an “adverse action letter” informing her that her waiver benefits would be terminated.⁹

Ms. G protested the termination, and requested a fair hearing.¹⁰ A telephonic hearing was held on December 29, 2014.

At the hearing, Ms. G did not contest the scores in the CAT. She did, however, present the testimony of her counselor, M L O. Ms. L O is a licensed professional counselor. Ms. G has been her client for about seven years. Ms. G has been an adult rehabilitation client at No Name Facility for about 20 years.

Ms. L O participated in the decision to have Mr. G move into an ALH, which had been made about a year earlier. Other living situations for Ms. G had not worked out. Since she has moved into the ALH, her situation has improved dramatically. Before moving into the ALH, Ms. G had been unable to exercise the judgment necessary to keep herself safe. Because Ms. G has both physical and mental impairments, she needs supervision and assistance every day on bathing, eating, taking medication, not overusing substances, avoiding violent situations, and not injuring herself. In Ms. L O’s professional opinion, if Ms. G is unable to remain at the assisted living home, Ms. G will be a frequent burden on hospital emergency services and on psychiatric hospital services, all of which will be more expensive for Medicaid than her current waiver services. Further, Ms. L O believes that termination of Ms. G’s waiver services may result in injury and possibly death for Ms. G.¹¹

Examples of the danger Ms. G faces even in her current living situation occurred on November 5th and 9th, 2014. On those days, a friend call the police to alert them that Ms. G was at risk. The police performed a welfare check and Ms. G was admitted to the hospital in part for alcohol detoxification.¹² The operator of the ALH, S C, explained those incidents may have been triggered by Ms. G’s receipt of the termination letter from the division, which led to increased alcohol consumption. The record revealed that although Ms. G at one point was able to avoid alcohol for 15 years, she does have a life-long problem with alcohol. Ms. G will at times drink around a fifth of vodka per day.¹³

⁹ Division Exhibit D at 1.

¹⁰ Division Exhibit C.

¹¹ L O testimony.

¹² Division Exhibit G at 5.

¹³ *Id.* at 1, 30; L O testimony; C testimony.

III. Discussion

The home and community-based waiver services program exists to provide an alternative to institutional care for individuals who meet the eligibility criteria.¹⁴ To be eligible for waiver services, a person in Ms. G's Medicaid status must need "nursing facility level of care."¹⁵ This level of care can be either "skilled nursing services" or "intermediate nursing services."¹⁶ The issue here is whether Ms. G meets the level of care required to be eligible for waiver services.

As discussed above, the CAT includes measurements that, if high enough, will establish that the client meets the threshold necessary to be considered nursing facility level of care. Two of these measurements include needing extensive physical assistance from another person in order to perform certain ADLs, or having severe cognitive deficits. At the hearing, Ms. G did not contest that she did not meet the eligibility criteria for assistance on three structural/physical ADLs, or on cognitive deficits.

The CAT also assesses whether a person needs what are called "professional nursing services."¹⁷ These services include injections, intravenous feedings, feeding tubes, suctioning, treatments and dressings, oxygen administration, catheters, comatose care, ventilator or respirator, uncontrolled seizure disorder, therapies, and assessment/management services. A person who needs these services in sufficient frequency, or who meets the requirement for nursing services in combination with a need for physical assistance on ADLs, will meet the level of care requirement, and qualify for waiver services. Again, however, Ms. G did not contest that she did not need these services in sufficient quantity or frequency to qualify for waiver services.

Ms. G argued that she should remain eligible for waiver services because she was deemed eligible in the past, and for her, nothing has changed. If anything, her condition has deteriorated. She also believed that the denial of her services was punishment for having moved into an ALH. She considered it a catch-22—to her, of course an ALH cannot meet nursing level of care. If it could, it would be a nursing home, not an ALH.

To address the catch-22 question first, the issue is not whether the ALH is providing nursing services, it is whether Ms. G needs nursing level of care. Many residents of ALHs qualify for waiver services because those residents meet the criteria for physical assistance on at least three of the physical/structural ADLs. Others may qualify because certain nursing services

¹⁴ 7 AAC 130.200.

¹⁵ 7 AAC 130.205.

¹⁶ For a definition of skilled care, see 7 AAC 140.515; for intermediate care, see 7 AAC 140.510.

¹⁷ Division Exhibit E at 15-16.

or therapies are provided by an outside medical professional or by a person working under the supervision of a medical professional. There is no catch-22 or barrier for a resident of an ALH to be eligible for waiver benefits.

With regard to Ms. G’s argument that nothing has changed, the issue is not whether something has changed but whether Ms. G qualifies for waiver services.¹⁸ That she may have been found eligible in the past makes it somewhat easier for her to remain eligible—the division has to prove that she is ineligible before it can terminate her services—but it does not mean that she is forever deemed eligible. Her past eligibility may have been because at that time she needed a higher level of care, it may have been an error, or it may have been determined under different regulatory standards for eligibility. In Ms. G’s case, she received the benefit of remaining eligible under the terms of a court settlement that had grandfathered in certain recipients, in order to give the division an opportunity to change its regulations and procedures. At this time, however, the division has made the changes, and all recipients must meet the current eligibility standards each year in order to remain eligible for waiver services.

Without doubt, Ms. G needs assistance. In that regard, the testimony of Ms. L O was striking. Indeed, the purpose of the waiver program is to provide for the type of win-win that Ms. L O was describing—reducing costs by receiving necessary services in a non-institutional setting, instead of having care provided by more expensive institutional providers. The waiver program, however, cannot stretch to meet every need, and Ms. G’s specific issues do not meet the eligibility criteria described in regulation. Because Ms. G does not meet the level-of-care requirements, she is not eligible for waiver services. She will have to access other programs to meet her needs.

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¹⁸ See, e.g., *In re GX*, OAH No. 14-0280-MDS at 3 (Dep’t Health and Soc. Servs. 2014) (“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.”).

IV. Conclusion

The division has met its burden of proving that Ms. G does not meet the nursing facility level of care criteria required under regulation for a person to be eligible for waiver services. Accordingly, the division’s decision terminating Ms. G’s Medicaid Home and Community-Based Waiver Services is affirmed.

DATED this 7th of January, 2015.

By: Signed
Stephen C. Slotnick
Administrative Law Judge

Adoption

The undersigned, by delegation from 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 26th day of January, 2015.

By: Signed
Name: Bride Seifert
Title/Division: ALJ/OAH

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