

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

In the Matter of)	
)	
N N)	OAH No. 14-2149-MDS
_____)	Agency No.

DECISION

I. Introduction

N N is a participant in Medicaid’s Choice Waiver program. On September 12, 2014, Registered Nurse Sheila Griffin performed an assessment interview for the Division of Senior and Disabilities Services. The purpose of the assessment is to determine whether a waiver program recipient has materially improved. If a recipient has materially improved, they are no longer eligible for the waiver program. On October 28, 2014, the division determined that Ms. N had materially improved. Ms. N challenged the division’s determination, and a formal hearing was held. Based on the record relied upon by the division and developed through the hearing process, Ms. N has not materially improved, and is therefore eligible for the waiver program.

II. Overview of the Waiver Program

A. Home and Community-Based Waiver Program

At issue is the recipient’s continued participation in Medicaid’s Choice Waiver program. An adult is eligible to receive benefits under the waiver program if he or she requires the level of care that is normally provided in a nursing facility. If eligible, the program pays for services that allow the recipient to stay in his or her 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 interview. For adults with disabilities, this assessment interview looks at the nursing level services defined in 7 AAC 140.510 and .515, and incorporates the results of the Consumer Assessment Tool (CAT). The CAT is an evaluation tool created by the Department of Health and Social Services, and is adopted by reference in 7 AAC 160.900(d)(6). It is an attempt to objectively quantify a person’s needs. Once a recipient has been found eligible to participate in the waiver program, he or she cannot be terminated from the program unless the division can establish that the recipient has materially improved.

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.^[1]

The same criteria used in determining whether a recipient no longer has a functional limitation or cognitive impairment are used in making the initial determination that he or she did have the limitation or impairment.

B. The Division's CAT Assessment

There are a variety of ways in which the CAT may show that a person is eligible for the Choice Waiver program.² This can be best seen by reviewing the sumL page shown in Exhibit E, at page 29. It assigns points based upon a recipient's physical needs and cognitive/behavioral needs. The first section, nursing facility (NF) 1, lists five questions:

- a. In Section A, items 1-8 (Nursing Services) 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?^[3]

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

The results of the CAT assessment can indicate the need for a nursing facility level of care based on the need for help in activities of daily living in two different ways. First, if a person needs extensive assistance or is totally dependent in three or more of the five shaded ADLs, he or she is eligible.⁴ In the alternative, if a person scores a 1 in nursing services (section NF 2), memory issues (section NF 3), or behavioral issues (section NF4), and also

¹ AS 47.07.045(b)(3)(C).

² The CAT assesses the need for intermediate or skilled nursing facility care as well as the individual's ability to function in the home setting.

³ Exhibit E, page 29. The "shaded ADLs" are bed mobility, transfers, locomotion, eating, and toilet use.

⁴ Exhibit E 29, section NF 1.

needs a sufficient level of assistance with activities of daily living, then he or she is found to be eligible.⁵

The five shaded ADLs are scored based on the amount of assistance required and provided to complete the specific ADL. Supervision (scored as a one) is defined as oversight, encouragement, or cueing three or more times a week, with physical assistance no more than two times a week.⁶ Limited Assistance (scored as a two) is defined as requiring direct physical help or guidance from another individual three or more times a week, with weight-bearing support no more than two times a week.⁷ Extensive Assistance (scored as a three) is defined as requiring direct physical help with weight-bearing support at least three times a week, or full assistance without any involvement from the recipient at least three times a week, but not all of the time.⁸ Total Dependence (scored as a four) means the recipient has to rely entirely on the caretaker to perform the activity.⁹

Weight-bearing assistance is interpreted as supporting more than a minimal amount of weight. It does not require that the assistant bear most of the recipient's weight, but instead that the recipient could not perform the task without the weight-bearing assistance.¹⁰

III. Facts

N N is a 76-year-old retired woman who lives with her husband in their single level home. Ms. N was most recently approved for waiver services in April of 2013 based on her need for extensive assistance (score 3/2) with the ADLs of transfer, locomotion, and toilet use.¹¹ She was scored as needing limited assistance (score 2/2) with the ADL of bed mobility.¹²

Ms. N suffers from diabetes and obesity, and has had several strokes. Her last stroke in May 2014 resulted "in significant balance problems and left-sided weakness. She has a chronic left facial droop."¹³ In June 2014, she was left unattended in the bathroom and was holding onto her cane, attempting to get up from the toilet; she felt weak and fell into the bathtub.¹⁴ She also reported falling at church in August 2014.

⁵ Exhibit E 29.

⁶ Exhibit E 6.

⁷ 7 AAC 125.020(a)(1); Exhibit E6.

⁸ 7 AAC 125.020(a)(2); Exhibit E6.

⁹ 7 AAC 125.020(a)(3); Exhibit E6. Bathing and the IADLs have their own assistance level definitions.

¹⁰ *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>.

¹¹ Exhibit F 18.

¹² Exhibit F 18.

¹³ May 25, 2014 Emergency Room Report.

¹⁴ June 24, 2014 Progress Notes.

On September 12, 2014, Ms. Griffin conducted an assessment interview to assist the division in determining if Ms. N had materially improved so that she no longer required waiver services.¹⁵ Ms. Griffin scored Ms. N as materially improved to the point that she was no longer eligible for waiver services. The reason written in the CAT for the change in scoring was that the “client has improved.”¹⁶ Ms. Griffin did not testify at the hearing. Instead, the division had another nurse, Janet Bragwell, testify. Ms. Bragwell has no personal knowledge of what was observed or reported during the assessment interview.

Based largely on the CAT compiled from the visit by Ms. Griffin, the division concluded that Ms. N was no longer eligible for this program.¹⁷ The division also considered the response of her physician, X C, MD, that she did not require nursing facility level of care.¹⁸ However, Dr. C did not testify and it is unknown if he understands the CAT process, the ADLs, etc. Therefore, in this instance, Dr. C’s statement is given less weight than the live testimony provided by witnesses who can be asked to clarify their statements.

IV. Discussion

A. Body Mobility

The ADL of body mobility includes the activity of positioning or turning in a bed or a chair. The CAT refers to this as bed mobility, which is described as how a person moves to or from a lying position, or turns side to side, or positions his or her body while lying in bed.¹⁹ In 2013, Ms. N was scored as requiring limited assistance (score 2/2). On the 2014 CAT, she was scored as being independent (score 0/0). At the hearing, the Division reconsidered and returned Ms. N to her prior score of limited assistance (score 2/2). Ms. N disagrees and believes she requires extensive assistance (score 3/2). Because Ms. N seeks to increase her score she has the burden of proof.²⁰

It is undisputed that Ms. N can reposition herself in her chair. Mr. N testified that she will try to reposition herself in bed, but that his wife cannot do this without his help. He explained that he will put one arm up for her to grab and his other hand will go on her hip area, so when he pulls, Ms. N can turn over. This occurs at least once a night and sometimes two or three times a night.

¹⁵ Exhibit E.

¹⁶ Exhibit E 14.

¹⁷ Exhibit D.

¹⁸ Exhibit F 32.

¹⁹ 7 AAC 125.030(b)(1); Exhibit E 6.

²⁰ 7 AAC 49.135.

What Mr. N described is weight-bearing assistance.²¹ Ms. N could not perform this ADL without some weight-bearing assistance from her husband. Because the weight-bearing assistance occurs at least three times each week, Ms. N needs extensive assistance (score 3/2) with bed mobility.

B. Transfers

Transferring is the act of moving between surfaces, such as getting out of or into a bed, or getting up from a chair to a standing position.²² Because the division seeks to reduce Ms. N's score from extensive assistance (score 3/2) to limited assistance (score 2/2), it has the burden of proof.

The assessor wrote that Ms. N reported

she can get up from her lift recliner using her walker but needs limited assistance getting out of her bed due to balance problems, dizziness and weakness. "It's harder for me to get out of bed than it is for me to get out of my chair."^[23]

Under assessor observations, the assessor wrote that she observed Ms. N get out of her lift recliner using her walker and standby assistance, but that she required "hands on assistance getting out of bed – her husband extended his arms and she held on and pulled herself up while he provided support."²⁴

It is unlikely that Ms. N would have used the term of art "limited assistance" when reporting on her ability to transfer. Rather, it is more likely true than not true that the words "limited assistance" is the assessor's conclusion from what she observed and was told.

Mr. N and Ms. N's personal care assistant, L T, both testified that Ms. N requires assistance moving to a standing position beyond that offered by the lift chair. They explained how the chair will raise Ms. N almost to a standing position, but that for her to actually stand requires additional assistance. Ms. T holds both of Ms. N's hands and pulls her up. Ms. N then leans against Ms. T until she balances herself. She would fall if she did not have someone to lean against.

In addition, Ms. T testified that Ms. N needs assistance when transferring out of bed. She uses both arms to help Ms. N sit up in bed, and then "I pull her up" to get her out of the bed.

²¹ See *In re K T-Q*, OAH No. 13-0271-MDS (definition of weight-bearing assistance).

²² 7 AAC 125.030(b)(2); Exhibit E 6.

²³ Exhibit E 8.

²⁴ Exhibit E 8.

Their testimony is consistent with the observations of the assessor in the 2013 CAT. During that assessment interview, it was noted that Ms. N receives pull up physical assistance, even from the lift chair due to fear of falling, leg weakness and dizzy spells when first standing.²⁵ On the 2013 CAT, the assessor wrote that she observed Ms. N receive “weight bearing physical assistance with transfer to/from chair. Required balance assist when standing up.”²⁶

As explained by Ms. Bragwell, the purpose of a lift chair is to raise the person to a standing position so they can get up without help from anyone else. As explained by Ms. T, that is not the case with Ms. N; the lift chair helps, but does not quite do the job. Ms. T does need to pull up on Ms. N’s arms, though not as hard as she would need to pull without the chair, and she still must allow Ms. N to lean into her while she gains her balance after standing. Mr. N also explained that his wife leans into him until she is steady, and that she leans against him while she sits back down into the lift chair.

Ms. Griffin gave as a reason for the improvement “client has improved.”²⁷ When balanced against the evidence in the record, the division has not met its burden of proof. Ms. N’s score will remain at extensive assistance (score 3/2).

C. Locomotion

The ADL of locomotion refers to the manner in which a person moves within his or her own room or other areas on the same floor.²⁸ The division reduced Ms. N from extensive assistance (score 3/2) to limited assistance (score 2/2). Because the division seeks to reduce Ms. N’s score, the division has the burden of proof. As with transfers, Ms. Griffin wrote that the reason for the lower score was that the “client has improved.”²⁹

Ms. Griffin wrote that she observed Ms. N walk from her living room to her bedroom using her walker with stand by assistance, holding onto her caregiver’s arm to provide balance and stability.³⁰ Ms. Bragwell testified that Ms. N has a four-wheeled walker, and that this type of walker is used by someone who is unbalanced or unsteady. The walker bears the weight.

²⁵ Exhibit F 6.

²⁶ Exhibit F 6.

²⁷ Exhibit E 14.

²⁸ 7 AAC 125.030(b)(3); Exhibit E 7.

²⁹ Exhibit E 14.

³⁰ Exhibit E 9.

Ms. N has a four-wheel walker which she can use in her home. However, she cannot use it without assistance, because her left grip is not strong enough to use the hand brake. Because assisting Ms. N with the walker in the house is more difficult than simply walking with her without the walker, Ms. N only uses it about 10% of the time. Although not using the walker is reasonable, and probably less time consuming, it is still a choice made by Ms. N and her caregivers. She can use the walker, and when she does, she does not need weight-bearing assistance because she is supported by her legs and her walker.

The exception is when she has to walk to the toilet. The walker does not fit into the bathroom, and someone must hold her, supporting her weight, when she enters the bathroom. However, walking to and from the bathroom is included in the ADL of toileting, rather than locomotion. For the remaining walking that Ms. N does, she could use the walker with limited assistance rather than weight-bearing assistance. The division has met its burden of proof to reduce the score for locomotion to limited assistance (score 2/2).

D. Eating

The parties agree that Ms. N is independent with the ADL of eating.

E. Toilet Use

Toilet use includes transfers on and off the toilet, cleaning oneself, and adjusting clothing and routine incontinence care.³¹ The division reduced Ms. N from extensive assistance (score 3/2) to limited assistance (score 2/2). Because the division seeks to reduce Ms. N's score, the division has the burden of proof. As with the other ADLs, Ms. Griffin wrote that the reason for the lower score was that the "client has improved."³²

Ms. Griffin wrote that Ms. N reported that using her "walker and stand-by assist, I walk to the toilet and sit on the toilet. I need help pulling up and adjusting my Depends and pants."³³ Under assessor observation, Ms. Griffin wrote "Functional assessment and observations supports need for limited assistance with this task."³⁴

The evidence establishes by a preponderance of the evidence that Ms. N cannot use her walker when entering the bathroom. Ms. T explained that Ms. N needs someone to help hold her up when she walks without a walker. Ms. T holds a lot of Ms. N's weight, but not all of it.

³¹ 7 AAC 125.030(b)(6); Exhibit E 9.

³² Exhibit E 14.

³³ Exhibit E 11.

³⁴ Exhibit E 11.

Accordingly, she needs weight-bearing assistance for at least a portion of the time she is walking to the toilet.

Ms. T also explained that Ms. N needs weight-bearing assistance to get on and off the toilet. Ms. T has to hold her while she is sitting down, and helps pull her up when she stands. This is consistent with Mr. N's testimony that his wife needs help with both sitting down and getting up again after toilet use.

The division has not met its burden of establishing by a preponderance of the evidence that Ms. N requires only limited assistance (score 2/2) to complete the ADL of toileting. Rather, what is described is extensive assistance (score 3/2).

V. Conclusion

The division has not presented evidence establishing by a preponderance of the evidence that Ms. N is no longer eligible to participate in the Choice Waiver program. Ms. N requires extensive assistance with bed mobility, transfers, and toilet use. Accordingly, Ms. N remains eligible for Choice Waiver benefits.

Dated this 19th day of August, 2015

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 16th day of September, 2015.

By: Signed
Signature
Jared C. Kosin, J.D., M.B.A.
Name
Executive Director, ORR, DHSS
Title

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