

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

In the Matter of)	
)	
X M)	OAH No. 15-0090-MDS
_____)	Agency No.

DECISION

I. Introduction

In 2014, X “C” M applied for services under the Older Alaskan or Adult with a Physical Disability Waiver program, also known as the Choice Waiver program, as well as under the Personal Care Assistant (PCA) program. He was assessed late in the year by a state nurse, and on the basis of that assessment he was awarded some PCA services but was denied entry into the Waiver program. He appealed the latter determination. After delays for a variety of reasons, some of them consensual, his case came to hearing on July 20, 2015. Mr. M appeared in person at his hearing, represented by an attorney.

Mr. M suffers from some cognitive limitations and a seizure disorder secondary to a brain tumor that had to be removed about 20 years ago. He seems to have benefited greatly from the devoted assistance of his lifelong friend, J F, but his care eventually became too difficult for Mr. F to handle. There are significant care needs to be addressed by the appropriate program or programs. The Waiver program does not appear to be an applicable program, however. As an initial applicant, Mr. M (through counsel) had the burden to show at hearing that he qualified for the Waiver program as of the date his application was denied, or December 1, 2014. This decision concludes that he did not carry that burden.

II. Background Facts

C M is a gentleman in his early sixties who has generally good physical functioning. His main challenges at the moment are epileptic seizures, coupled with difficulties with concentration and short-term memory.¹ He takes a number of medications, and interactions between these medications have been a concern for his physicians. His medication for seizure control has been Levetiracetam (better known under the trade name Keppra), with his providers

¹ He also has hepatitis C and hypertension, and has to take an anti-rejection drug for a liver transplant he received in 2001.

having to give some attention to getting the dose correctly adjusted. If he neglects to keep up with this medication—which can easily occur if he is not supervised, due to the cognitive issues—his seizures can become very frequent. Failure to take the prescribed levels of Keppra appears to have been a cause of a series of five seizures in two days and a related hospital stay in August of 2014.² The August 2014 event is the only one of its kind (a cluster of frequent seizures) documented or described in the last year. There is no dispute that Mr. M requires constant supervision.³

A Division nurse visited Mr. M on November 17, 2014 as part of the process of assessing his eligibility for Choice Waiver and another program. The nurse did not observe any seizures, and her observations during the assessment visit are not critical to this particular case. The Division made a decision to deny Choice Waiver services on December 1, 2014,⁴ and Mr. M requested a Fair Hearing on the 29th of the same month.

III. Qualification for Choice Waiver

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.⁵ 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.⁶ For adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and 515,⁷ and incorporates the results of the CAT.⁸ The CAT is an evaluation tool in the nature of a questionnaire and scoring

² See Ex. 3.

³ E.g., Ex. G, p. 2; testimony of J F.

⁴ Ex. D.

⁵ 7 AAC 130.205(d)(2).

⁶ 7 AAC 130.230.

⁷ 7 AAC 130.230(b)(2)(A).

⁸ 7 AAC 130.230(b).

mechanism. Because it is adopted by reference in 7 AAC 160.900(d)(6),⁹ it is itself a regulation.

There are a variety of ways to score a sufficient number of points on the CAT to qualify for Choice Waiver. In this decision, it will not be necessary to review all of them in detail; only two are potentially applicable to Mr. M. The first of these is direct qualification through his seizure disorder: although Mr. M's counsel did not press for this route of qualification in his closing argument, it is a qualification route argued in his hearing brief and it will be assessed below in Part B. The second route to qualification—argued strongly in Mr. M's closing—is through demonstrated need for “extensive assistance” with three or more key activities of daily living. This qualification route will be evaluated in Part C.

It is important to note that this is a *de novo* evaluation.¹⁰ The undersigned does not endorse the exact reasoning behind the Division's original denial of Mr. M's application, insofar as he understands it.¹¹ However, it is not necessary to test that reasoning in detail, because the fuller record developed at hearing made it clear that Mr. M's seizures were less frequent than the nurse assessor had assumed.

B. Seizure Disorder

The CAT allows a person to qualify for Waiver services if he has an “uncontrolled seizure disorder,” the “safe management” of which requires “direct assistance from others.”¹² To achieve a qualifying score by this route, the direct assistance from others to manage seizures must be required at least “1-2 days a week.”¹³

The best evidence in this case is that, during the period corresponding to the denial decision that is under review, Mr. M suffered seizures significantly less often than once per week. This was the testimony of his primary caregiver from that period, J F, who recalls that Mr.

⁹ Adopting January 29, 2009 version of the CAT.

¹⁰ See, e.g., *In re O.E.*, OAH No. 13-0542-MDS (Dep't of Health & Soc. Serv, Kosin, Commissioner's Designee, 2013) (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130542.pdf>).

¹¹ The general reason identified in the Division's decision notice to Mr. M is accurate enough, and thus this case presents no issue of inadequate notice. However, the nurse-assessor's handling of seizures in scoring the CAT was not well explained at hearing.

¹² Ex. E, p. 16.

¹³ Ex. E, p. 15. This would result in a “yes” answer to question NF1-c on page 29 of the CAT, which would cause “the person [to] be found medically eligible.” Ex. E, p. 31. See also, e.g., *In re U.S.*, OAH No. 13-0059-MDS (Dep't of Health & Soc. Serv., Durych, Commissioner's designee, 2013), Decision at 10 (<http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130059.pdf>).

M was down to two or three seizures a month during the winter.¹⁴ It accords with the medical history taken by Mr. M's caregivers in August of 2014 (1-2 or 1-3 per month)¹⁵ and March of 2015 (three in month),¹⁶ and is consistent with the experience recorded by his neurologist's office on September 15, 2014 (noting a significant seizure in late August—coinciding with the cluster for which he was hospitalized—but noting none since).¹⁷

In April of 2015, Mr. M's primary care physician, Dr. G, prepared a letter for him, apparently in connection with this case, in which he noted that Mr. M "can have" 3-5 seizures per week.¹⁸ This is certainly true: Mr. M had five seizures in the cluster he experienced in August of 2014, after which he was hospitalized and his caregivers expressed concerns that he had not been taking the amount of Keppra that had been prescribed. But Dr. G did not say how many breakthrough seizures Mr. M ordinarily *does* have.¹⁹ Dr. G did not testify at the hearing.

On this record, it has not been demonstrated that Mr. M requires direct assistance from others to manage seizures one or more times per week. He therefore does not qualify for Waiver services on the basis of seizure care. This is not to say that the seizures are of no concern, or that close monitoring is not required. Indeed, there is good evidence that Mr. M needs at least the level of supervision and access to help provided by an assisted living home.²⁰ However, because he does not—or to be precise, on December 1, 2014, the date relevant to this decision, he did not—require direct assistance at least once a week in connection with his seizures, he does not have the CAT score to support entry into the Waiver program on the basis of his seizure disorder.

C. Extensive Assistance with ADLs

Another way for a client to qualify for Waiver services is via a need for extensive assistance with certain activities of daily living, or ADLs. The CAT numerical scoring codes for self-performance codes 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

¹⁴ Direct testimony of Mr. F. Mr. F reported that the seizure frequency increased to 3-5 times per month in the last 3-4 months before the hearing this July.

¹⁵ Ex. 2, p. 12; Ex. 3, p. 4.

¹⁶ Ex. 2, p. 1.

¹⁷ Ex. 2, p. 7.

¹⁸ Ex. 1, p. 1.

¹⁹ In a much earlier document, in which he was explaining that Mr. M "will do best at the assisted living level of care," Dr. G indicated that seizures occur "weekly." Ex. G. In context, this does not seem to have been an attempt to quantify the seizures with any precision and is less persuasive than the other medical records, coupled with Mr. F's testimony.

²⁰ See Ex. G, p. 2.

requires supervision); **2** (the person requires limited assistance²¹); **3** (the person requires extensive assistance²²); **4** (the person is totally dependent²³). 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). A person can qualify for Waiver services if he has a self-performance score of 3 (extensive assistance) or 4 (dependent) in self performance in three of five “shaded” ADLs, which are bed mobility, transfers, locomotion, eating, and toilet use. At the close of the hearing, Mr. M’s counsel pressed this route of qualification, arguing that Mr. M should be accorded the requisite score in the ADLs of locomotion, toilet use, and transfers.

The evidence does not bear this out. There is no dispute that, apart from cueing or supervision, Mr. M has needed no help with any of these activities unless he is in the post-ictal phase following a seizure. To score the minimum “3” in locomotion, Mr. M would have to show that he needed weight-bearing support to move from one location to another at least three times in a seven-day period.²⁴ With seizures ordinarily occurring less than once a week, this would not be the case. Moreover, Mr. M would not always need to move around his house in the period immediately after every seizure; Mr. F testified that some seizures occur at night, with Mr. M fully recovered by the time has to get up. Thus, insofar as Mr. M ever needs weightbearing assistance for locomotion, it is needed far less than three times per week. Likewise, the requisite score for transfers and toilet use both require weight-bearing assistance or more on at least three occasions in a seven-day period,²⁵ and the evidence does not demonstrate such a need with anything close to that level of frequency.

D. 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

²¹ 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.”

²² 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.”

²³ 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.”

²⁴ Ex. E, p. 9.

²⁵ Ex. E, pp. 8, 11.

recipient is ineligible for Choice Waiver services.²⁶ It may be that in exceptional cases there are factors outside the CAT that might override a nonqualifying CAT score, but none have been suggested in this case.

IV. Conclusion

Because Mr. M had a non-qualifying CAT score as of the time of the decision under review, the decision was correct. The decision to deny his application for Choice Waiver services is affirmed. The date on which Mr. M shall be deemed to have fallen below level of care is the date of the adverse action letter, December 1, 2014.

If Mr. M's condition has changed since that date or changes in the future, he may reapply for the program.

DATED this 27th day of July, 2015.

Signed _____

Christopher Kennedy
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 11th day of August, 2015.

By: *Signed* _____

Name: Christopher M. Kennedy
Title: Administrative Law Judge

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

²⁶ 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>).