

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

In the Matter of	)	
	)	
O G	)	OAH No. 15-0430-MDS
_____	)	Division No.

**DECISION**

**I. Introduction**

O G receives Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (Division) notified Ms. G that she was no longer eligible for Waiver services, and that they would be discontinued.<sup>1</sup> Ms. G requested a hearing.<sup>2</sup>

Ms. G’s hearing was held on July 2, 2015.<sup>3</sup> Ms. G represented herself. Her care coordinator, B C, assisted her and testified on her behalf. Ms. G’s PCA, D E, also testified for Ms. G. Victoria Cobo represented the Division. Kelly Russell, R. N., testified on behalf of the Division.

Ms. G is undeniably in poor health. However, her physical functionality has improved to the point where she no longer requires extensive physical assistance with any of her measured activities of daily living. This means her condition has materially improved, as it is measured by the Waiver program. As a result, the Division’s decision terminating Ms. G’s Waiver services is affirmed.

**II. Background Facts**

The following facts were established by a preponderance of the evidence.

Ms. G is 57 years old. Her diagnoses include chronic obstructive pulmonary disease, a seizure disorder, pancreatitis, Hepatitis C, cirrhosis, hypothyroid, thrombocytopenia, anxiety, and depression.<sup>4</sup> She was found eligible for Waiver services in 2013, based upon an assessment that found she required extensive assistance with transfers, locomotion, and toileting.<sup>5</sup>

Ms. G was reassessed in December 2014 to determine if she was still eligible for Waiver services. The December 2014 assessment found that Ms. G no longer qualified for Waiver services because she was independent with her transfers, locomotion, and toileting.<sup>6</sup> The

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<sup>1</sup> Division Ex. D.

<sup>2</sup> Division Ex. C.

<sup>3</sup> The record was left open until July 15, 2015 for the Division to file its written comments on Ms. G’s late filed medical records. The Division did not submit any comments.

<sup>4</sup> Ex. E, pp. 3, 48, 51.

<sup>5</sup> Division Ex. F, pp. 7 – 8, 10, 16, 19, 30.

<sup>6</sup> Ex. E, pp. 8 – 9, 11, 31.

assessment did not show any other nursing needs, therapies, cognitive impairment or behavioral issues.<sup>7</sup> It resulted in the Division notifying Ms. G on March 17, 2015 that her Waiver services would be terminated.<sup>8</sup> A registered nurse employed by Qualis Health, who was licensed in the State of Alaska at the time of the review, performed a third-party document review of the Division’s determination that Ms. G was no longer eligible for Waiver services. That review concurred with the Division’s determination.<sup>9</sup>

Ms. G’s weight fluctuates: in 2013, when she was found eligible for Waiver services, her weight was 98 lbs.<sup>10</sup> Her December 2014 CAT, which resulted in the Division finding her ineligible for Waiver services, states that her weight was 120 lbs.<sup>11</sup> However, her weight as of March 9, 2015 was 102 lbs.<sup>12</sup> Her weight on March 18, 2015 was 105 lbs.<sup>13</sup> B C, Ms. G’s care coordinator, and D E, Ms. G’s PCA, both testified that Ms. G experiences weakness at lower weight levels, which affects her ability to transfer, locomote, and toilet. They testified that she experiences diarrhea which also makes her weak and unable to function without assistance.

Ms. G’s medical records reflect back pain, which is relieved by spinal injections. However, they do not show recent problems with mobility, stability, balance, or weakness, other than Ms. G using a cane. For example, Ms. G had a preoperative physical on January 27, 2015, where the physician wrote that Ms. G walked with a cane, and reported “increased activity, which has made her knee ache and pop and crack more than it normal does, however she is happy with the increased functionality.” At that time, she weighed 108 lbs.<sup>14</sup> Ms. G’s recent medical records reference consistent fatigue and abdominal pain; however, they do not show that she experiences diarrhea or ongoing musculoskeletal weakness.<sup>15</sup>

### **III. Discussion**

#### **A. Method for Assessing Eligibility**

The Alaska Medicaid program provides Waiver services to adults with physical disabilities who require “a level of care provided in a nursing facility.”<sup>16</sup> The nursing facility level of care<sup>17</sup>

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<sup>7</sup> Ex. E, pp. 15 – 19.

<sup>8</sup> Ex. D.

<sup>9</sup> Ex. D, p. 2; Ex. G.

<sup>10</sup> Ex. F, p. 9.

<sup>11</sup> Ex. E, p. 11.

<sup>12</sup> Ex. 3, p. 23. (Medical records faxed on July 2, 2015).

<sup>13</sup> Ex. 3, p. 20.

<sup>14</sup> See Dr. F’s chart notes from January 27, 2015 (Documents faxed on May 18, 2015).

<sup>15</sup> See Dr. U’s chart notes from March 9, 2015 through June 15, 2015 (Documents faxed on July 2, 2015).

<sup>16</sup> 7 AAC 130.205(d)(4).

<sup>17</sup> See 7 AAC 130.205(d)(4); 7 AAC 130.215.

requirement is determined by an assessment which is documented by the CAT.<sup>18</sup> The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,<sup>19</sup> and whether an applicant has impaired cognition or displays problem behaviors.<sup>20</sup> Each of the assessed items is coded and contributes to a final numerical score. For instance, if an individual required 5 days or more of therapies (physical, speech/language, occupation, or respiratory therapy) per week, he or she would receive a score of 3.<sup>21</sup>

The CAT also records the degree of assistance an applicant requires for activities of daily living (ADL), which include five specific categories: bed mobility (moving within a bed), transfers (i.e., moving from the bed to a chair or a couch, etc.), locomotion (walking or movement when using a device such as a cane, walker, or wheelchair) within the home, eating, and toilet use, which includes transferring on and off the toilet and personal hygiene care.<sup>22</sup>

In order for a person who only has physical assistance needs to score as eligible for Waiver services on the CAT, he or she would need a self-performance code of 3 (extensive assistance) or 4 (total dependence) and a support code of 2 or 3 for three or more of the five specified activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting).<sup>23</sup>

A person can also receive points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive behaviors, etc.), and if they require either limited or extensive assistance with the five specified activities of daily living.<sup>24</sup>

The results of the assessment portion of the CAT are then scored. If an applicant's score is a 3 or higher, the applicant is medically eligible for Waiver services.<sup>25</sup>

### ***B. Eligibility***

Ms. G does not require professional nursing services, therapy from a qualified therapist, or specialized treatment. She does not have any behavioral or cognitive issues. Although she has a documented seizure disorder, it is controlled. As a result, the only way for Ms. G to retain her eligibility for Waiver services is if she is totally dependent (self-performance code of 4) or requires extensive one person physical assistance (self-performance code of 3) with any three of

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<sup>18</sup> 7 AAC 130.215(4).

<sup>19</sup> Ex. E, pp. 15 – 17.

<sup>20</sup> Ex. E, pp. 18 – 19.

<sup>21</sup> Ex. E, p. 31.

<sup>22</sup> Ex. E, pp. 20, 31.

<sup>23</sup> Ex. E, p. 31.

<sup>24</sup> Ex. E, p. 31.

<sup>25</sup> Ex. E, p. 31.

the five specified activities of daily living (bed mobility, transfers, locomotion within the home, eating, and toileting). Ms. G maintains that she continues to require extensive assistance with transfers, locomotion, and toileting. The Division has the burden of proof to establish that Ms. G no longer qualifies for Waiver services.<sup>26</sup>

### *1. Transfers*

Transfers are defined as how a “person moves between surfaces,” such as from a sitting to a standing position.<sup>27</sup> In 2013, Ms. G was found to require extensive assistance (self-performance code of 3) for transfers, based upon the assessor’s observation of her using a cane and receiving weight-bearing assistance from her PCA to transfer from her bed.<sup>28</sup> In 2014, the assessor found Ms. G to be able to transfer independently, based upon her observation of Ms. G transferring from her bed to a standing position without using either an assistive device or any hands-on help from her PCA.<sup>29</sup>

Ms. G did not dispute that she was capable of transferring to and from her bed without requiring hands-on assistance. Ms. C explained that Ms. G’s bed had been modified and lifted so that she could transfer to and from it without assistance.<sup>30</sup> Ms. C and Ms. E both testified, however, that Ms. G required weight-bearing assistance to transfer from lower surfaces, which consisted of Ms. E pulling Ms. G up from a seated position. Ms. E and Ms. C further testified that Ms. G’s need for assistance varied depending on her weakness, which they attributed to weight loss and diarrhea. However, the medical records do not corroborate their testimony. They show instead that Ms. G is more active. If there was ongoing weakness, as compared to fatigue, or diarrhea, that would have been reflected in the medical records. Therefore, the totality of the evidence is that it is more true than not true, that Ms. G’s physical condition does not support a need for hands-on physical assistance for transfers. Accordingly, the Division has met its burden of proof and established that Ms. G is independent with transfers.

### *2. Locomotion*

Locomotion is the act of moving about in the home. It may involve the use of an assistive device such as a cane, walker, or a wheelchair.<sup>31</sup> In 2013, the assessor found that Ms. G required

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<sup>26</sup> 7 AAC 49.135.

<sup>27</sup> Ex. E, p. 8.

<sup>28</sup> Ex. F, p. 6.

<sup>29</sup> Ex. E, p. 8.

<sup>30</sup> Ms. C’s testimony.

<sup>31</sup> Ex. E, p. 9.

extensive assistance with locomotion.<sup>32</sup> In 2014, the assessor found that Ms. G was independent with locomotion, based upon Ms. G's statement that she could walk in her home without using an assistive device and upon her observation of Ms. G walking in her home without having assistance or using an assistive device.<sup>33</sup> Ms. C, Ms. E, and Ms. G all testified similarly: that she requires hands-on physical assistance with walking. Although Ms. E typified the assistance as being weight-bearing, what they described was Ms. G leaning on Ms. E and Ms. E providing her some support and stability, rather than Ms. E holding Ms. G up. At the most, this would be limited assistance (self-performance code of 2) rather than being active weight-bearing assistance.

However, the medical records do not show that Ms. G requires assistance with locomotion. Instead, they reference the use of a cane at the end of January 2015. This was at a time when Ms. G weighed 108 lbs. and is persuasive evidence that corroborates the assessor's finding of independence. The Division has met its burden of proof and established that it is more true than not true that Ms. G is independent with locomotion.

### *3. Toileting*

In 2013, the assessor found that Ms. G required extensive assistance with toileting.<sup>34</sup>

In 2014, the assessor found that Ms. G was able to toilet independently based upon Ms. G's statements and her assessment of Ms. G's ability to transfer.<sup>35</sup> Ms. G and her PCA, Ms. E, both disagreed, testifying that Ms. G required extensive assistance with toileting, due to locomotion, transfer, and cleansing needs. However, as found above, Ms. G is capable of independent locomotion and transfer. The medical records do not demonstrate a limitation in range of motion such as would require assistance with self-cleansing. Accordingly, the Division has met its burden of proof and established that it is more true than not true that Ms. G is independent with toileting.

### **C. Termination of Waiver Services**

Before the Division may terminate Waiver services for a person who was previously approved for those services, Alaska Statute 47.07.045, enacted in 2006, requires that the Division must demonstrate that the recipient's condition has materially improved to the point that the recipient "no longer has a functional limitation or cognitive impairment that would result in the

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<sup>32</sup> Ex. F, p. 6.

<sup>33</sup> Ex. E, p. 9.

<sup>34</sup> Ex. F, p. 9.

<sup>35</sup> Ex. E, p. 11.

need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for waiver services.”<sup>36</sup> While Ms. G qualified for Waiver services in 2013 due to her need for extensive assistance with locomotion, transfers, and toileting, she no longer requires extensive assistance with those activities. Consequently, Ms. G’s 2014 assessment shows that she is no longer eligible for Waiver Services, *i.e.*, her condition has materially improved, as the term is defined by statute.<sup>37</sup>

#### **IV. Conclusion**

Ms. G’s condition has materially improved to the point that she no longer qualifies for Medicaid Waiver services. The Division’s decision to terminate Ms. G’s Waiver services is upheld.

DATED this 17th day of July, 2015.

*Signed* \_\_\_\_\_  
Lawrence A. Pederson  
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 4th day of August, 2015.

By: *Signed* \_\_\_\_\_  
Name: Lawrence A. Pederson  
Title: Administrative Law Judge

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

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<sup>36</sup> AS 47.07.045(b)(1) and (b)(3)(C).

<sup>37</sup> AS 47.07.045 also requires that the Division’s assessment showing material improvement must be “reviewed by an independent qualified health care professional under contract with the department.” This was done. *See* Ex. D, p. 2; Ex. G.