

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

In the Matter of )  
 )  
X H ) OAH No. 15-0766-MDS  
 ) Agency No.  
\_\_\_\_\_ )

**DECISION**

**I. Introduction**

X H has been participating in Medicaid’s Choice Waiver program. Senior and Disabilities Services (SDS) re-evaluated him for continued participation, and on May 18, 2015, notified him that he was no longer eligible.<sup>1</sup> Mr. H appealed. A hearing was held on October 1, 2015.<sup>2</sup> Mr. H appeared and was assisted by his care coordinator, N T. SDS was represented by a lay representative, Angela Hanley.

Based on the evidence presented, SDS’ decision is affirmed.

**II. Facts**

Mr. H is 50 years old, and lives in an assisted living facility. His most recent diagnoses include hypertension, diabetes, and cerebrovascular disease.<sup>3</sup> He qualified for the Waiver program in 2013 based on a then-current need for nursing services – twice daily blood sugar checks and topical medication – and the need for assistance with three of his activities of daily living.<sup>4</sup> At that time, he did not score for needing assistance based on cognitive or behavioral problems.<sup>5</sup>

Registered Nurse Angela Hanley assessed Mr. H at his assisted living home on January 14, 2015. She also spoke with the home’s administrator about Mr. H’s condition.<sup>6</sup> Based on her observations and what she was told during her visit, SDS determined that Mr. H was no longer eligible to participate in the Waiver program.<sup>7</sup>

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<sup>1</sup> Exhibit D.

<sup>2</sup> The hearing was held before Administrative Law Judge Andrew M. Lebo. This matter was then reassigned to ALJ Jeffrey A. Friedman who has reviewed the entire record and listened to the hearing recording.

<sup>3</sup> Exhibit E.

<sup>4</sup> Exhibit F30; Exhibit F44.

<sup>5</sup> Exhibit F44.

<sup>6</sup> Testimony of Ms. Hanley.

<sup>7</sup> Exhibit D; Exhibit E; Testimony of Ms. Hanley.

### **III. Discussion**

#### ***A. Overview of the Waiver Program***

##### 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 skilled or intermediate level 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.<sup>[8]</sup>

##### The Division's CAT Assessment

Different sections of the CAT address functional limitations, cognitive and behavioral limitations, the need for skilled or intermediate level nursing services, and an individual's ability to function in a home setting without the need for Waiver services. This can be best seen by reviewing the summary page shown in Exhibit E. 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)?

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<sup>8</sup> AS 47.07.045(b)(3)(C).

- 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?<sup>19]</sup>

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 also 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.<sup>10</sup> 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 needs a sufficient level of assistance with activities of daily living, then he or she is found to be eligible.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> Total Dependence (scored as a four) means the recipient has to rely entirely on the caretaker to perform the activity.<sup>15</sup>

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<sup>9</sup> Exhibit E. The “shaded ADLs” are bed mobility, transfers, locomotion, eating, and toilet use.

<sup>10</sup> Exhibit E, scoring page section NF 1.

<sup>11</sup> Exhibit E.

<sup>12</sup> Exhibit E.

<sup>13</sup> 7 AAC 125.020(a)(1); Exhibit E.

<sup>14</sup> 7 AAC 125.020(a)(2); Exhibit E.

<sup>15</sup> 7 AAC 125.020(a)(3); Exhibit E.

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.<sup>16</sup>

In a case such as this where the division is terminating Waiver services, the division has the burden of proving there has been material improvement.

**B. Mr. H's Assessment**

*1. Nursing Needs, Cognition, Behavioral Problems*

Ms. Hanley found that Mr. H did not need any nursing services at the time of the assessment. She also found that his cognitive and behavioral problems were not severe enough to count towards Waiver eligibility. She explained the basis for these findings.

Facility X progress notes dated August 3, 2015, indicate that Mr. H is a very poor historian, and needs frequent cues and redirection to keep him on task. A progress note dated August 12, 2015 states that Mr. H was easily distracted and had difficulty staying on task. He also provided inconsistent reports concerning his ability to perform ADLs.

However, notes from a July 22, 2015 visit to the Facility Y state that while he wasn't tested, his cognitive functioning appeared intact. Medical records and admission notes from his assisted living home dated April 25, 2014 indicate that he is easily agitated and can be unruly and demanding.

Based on these written notes, Mr. H may have more problems with cognition and behavior than were noted by Ms. Hanley. However, in order for cognition problems to count towards Waiver eligibility, he would need to have scored at least 13 points on the cognition scoring sheet.<sup>17</sup> Mr. H did not testify, and Ms. T's testimony was limited to Mr. H's need for assistance with medications and to a recent prescription for Ambien. The medical notes might support awarding more than the two points awarded by Ms. Hanley, but would not support an award of 13 points on the cognition scoring sheet.

For behavioral issues to count towards Waiver eligibility, Mr. H would need to score at least 14 points on the behavioral scoring page.<sup>18</sup> Again, while the medical notes might support

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<sup>16</sup> *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>.

<sup>17</sup> *See* Exhibit E31. This is not the only requirement that must be met, but because he does not meet this one, the others need not be addressed in this decision.

<sup>18</sup> Exhibit E31. Again, this is not the only requirement, but it is the only one that needs to be addressed in this decision.

awarding more than the seven points awarded by Ms. Hanley, they would not support awarding 14 points.

Ms. Hanley also found that Mr. H was not receiving any skilled or intermediate nursing services, and there is nothing in the record to contradict that finding.

## 2. *Bed Mobility*

Ms. Hanley was told by Mr. H during the assessment that he was independent with bed mobility, and she observed him reposition himself. She scored him as independent with this ADL, and there is nothing in the record to contradict that finding.

## 3. *Transfers*

Mr. H told Ms. Hanley that he can usually get out of bed by himself, but that he sometimes asks staff for assistance. The assisted living home administrator told her that staff sometimes helps with transfers because he has poor balance. Ms. Hanley observed Mr. H transfer without any assistance. She scored him as needing limited assistance because he sometimes needs someone to help him with his balance when he transfers.<sup>19</sup>

Mr. H did not provide any testimony or other evidence to contradict Ms. Hanley's findings.

## 4. *Locomotion*

Ms. Hanley observed Mr. H walk a few steps without his cane. She was told that the staff will often provide assistance to keep him from losing his balance. Accordingly, she scored him as needing limited assistance with this ADL.<sup>20</sup> Mr. H did not provide any testimony or other evidence to contract Ms. Hanley's findings.

## 5. *Eating*

Mr. H told Ms. Hanley that he could eat independently, and she observed him bringing his right hand up to his face.<sup>21</sup> Nothing in the record suggests he cannot perform this ADL independently.

## 6. *Toileting*

Mr. H told Ms. Hanley he could use the toilet independently except that he needs help cleaning himself after a bowel movement. She scored him as needing limited assistance with this ADL.<sup>22</sup> Nothing in the record suggests he needs more than limited assistance with this ADL.

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<sup>19</sup> Exhibit E8; Testimony of Ms. Hanley.

<sup>20</sup> Exhibit E9; Testimony of Ms. Hanley.

<sup>21</sup> Exhibit E11.

**IV. Conclusion**

In order to be eligible for Waiver services, Mr. H would have to need nursing services, or have significant cognitive or behavioral problems. SDS has met its burden of showing that he does not need nursing services and that his cognitive and behavioral problems are not sufficiently severe to count towards eligibility. In the absence of points from these areas, he would be eligible for Waiver services if he needs extensive assistance with at least three of the Activities of Daily Living that count towards Wavier eligibility. SDS has met its burden of showing that he does not need more than limited assistance with any of the ADLs. SDS' decision is AFFIRMED.

Dated this 9<sup>th</sup> day of October, 2015.

Signed  
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Jeffrey A. Friedman  
Administrative Law Judge

**Adoption**

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 27<sup>th</sup> day of October, 2015.

By: Signed  
\_\_\_\_\_  
Signature  
Andrew M. Lebo  
\_\_\_\_\_  
Name  
Administrative Law Judge/OAH  
\_\_\_\_\_  
Title

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

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<sup>22</sup> Exhibit E11; Testimony of Ms. Hanley.