

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

In the Matter of)	
)	OAH No. 15-0878-MDS
G S)	Agency No.
_____)	

DECISION

I. Introduction

G S has been participating in Medicaid’s Home and Community-Based Waiver program. Senior and Disability Services (SDS) re-evaluated him for continued participation, and on June 22, 2015, notified him that he was no longer eligible. Mr. S appealed SDS’ determination. A hearing was held on October 15, 2015. Mr. S represented himself. His care coordinator, Q K, was present at the hearing, and his personal care assistant, F T, testified on his behalf. SDS was represented by Laura Baldwin. The nurse who conducted the assessment, Marianne Sullivan, testified for SDS.

Based on the evidence presented, SDS has met its burden of proof and its decision to terminate Mr. S’ participation is affirmed.

II. Facts

Mr. S is 71 years old.¹ A personal care assistant, F T, comes to his home five days a week for three hours each day.² He has also been receiving transportation, escort, and care coordination services through the Waiver program. Mr. S has been diagnosed with congestive heart failure, diabetes, arthritis, and sleep apnea.³ He has chest pains when he moves or coughs, and will be receiving a stent for the veins in his legs in the near future. He has also been having trouble keeping his diabetes under control. He uses a CPAC machine at night, and an inhaler during the day.⁴

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.

¹ Exhibit E3.
² T testimony.
³ Exhibit E5.
⁴ S testimony.

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.

SDS 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 SDS 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.^[5]

The 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 scoring 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)?
- 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)?

⁵ AS 47.07.045(b)(3)(C).

- 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?^[6]

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 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.⁷ 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.⁸

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.⁹ 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.¹⁰ 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.¹¹ Total Dependence (scored as a four) means the recipient has to rely entirely on the caretaker to perform the activity.¹²

⁶ Exhibit E. The “shaded ADLs” are bed mobility, transfers, locomotion, eating, and toilet use.

⁷ Exhibit E, scoring page section NF 1.

⁸ Exhibit E.

⁹ Exhibit E.

¹⁰ 7 AAC 125.020(a)(1); Exhibit E.

¹¹ 7 AAC 125.020(a)(2); Exhibit E.

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

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.¹³

B. Mr. S' Eligibility

1. Nursing Services, Cognition, and Behavior.

Dr. J, Mr. S' physician, concluded that he does need intermediate nursing services. On the Level of Care Verification form, she stated:

Yes, needs assistance w/ mediset, partial assistance w/ ADLs like bathing, skin & nail maintenance care. Has heart failure & diabetes with neuropathic complications that limit self-care.^[14]

A treating physician's opinion is given considerable weight in Medicaid cases.¹⁵ However, Dr. J's opinion is not controlling here. She specifically stated that he needs help with taking medications, bathing, and skin and nail care. Those activities, while important, are not counted by the CAT towards Waiver eligibility. Nor do they meet the definition of intermediate level of care under 7 AAC 140.510.

Ms. Sullivan did not identify any nursing needs, cognitive problems, or behavioral issues that would assist Mr. S in qualifying for the Waiver program.¹⁶ The available medical records do not contradict this conclusion, and Mr. S did not identify any needs in these areas. Accordingly, he is eligible for Waiver services only if he needs at least extensive assistance with three or more of the shaded ADLs.

2. Bed Mobility

Ms. Sullivan concluded that Mr. S was independent with this activity. She observed that he was active during the assessment, and that he reported being able to sit up in bed by himself. Mr. S cannot sleep on his left side due to an old injury; he can turn himself between sleeping on his right side and sleeping on his back.¹⁷ SDS correctly concluded that he did not need extensive assistance with this ADL.

¹³ *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>.

¹⁴ Exhibit F35. SDS's position statement included a blank form labeled F35. The completed form was submitted by Mr. S with additional medical records.

¹⁵ See *Broughton v. Heckler*, 776 F.2d 960, 962 (11th Cir.1985); *Smith v. Schweiker*, 646 F.2d 1075, 1081 (5th Cir.1981); *Ortega v. Chater*, 933 F.Supp. 1071, 1074-75 (S.D.Fla.1996).

¹⁶ Sullivan testimony.

¹⁷ S testimony.

3. *Transfers*

Mr. S' mattress is on the floor. Because it is low, he cannot stand directly from his bed. Instead, he crawls across the floor to his door, and uses the door knob to help himself up. He cannot do that by himself using a cane.¹⁸ If Mr. S is not out of bed when she arrives in the morning, Ms. T will hold his hand to help him get up. She described this as providing help with balancing.¹⁹

Crawling across the floor to a door knob is not a reasonable method of transferring from bed. Mr. S cannot reasonably accomplish this task without assistance. Because this occurs on a daily basis, he should have been scored as needing limited assistance with transfers.²⁰ However, SDS correctly determined that he does not need extensive assistance.

4. *Locomotion*

For Waiver purposes, SDS looks at how an individual walks within his or her own house, or uses a wheelchair in the house. Mr. S acknowledged that he can walk around his house without assistance. Ms. T testified that he is slow, and that sometimes she walks behind him to assist. However, this type of assistance is at most limited assistance and does not count towards waiver eligibility.

5. *Eating*

There was no dispute that Mr. S is able to feed himself without assistance once the food is prepared. SDS correctly found he does not need extensive assistance with this ADL.

6. *Toileting*

Mr. S has a raised seat on his toilet, and is independent with this ADL.²¹ SDS correctly found he does not need extensive assistance with this ADL.

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¹⁸ S testimony; Exhibit E8.

¹⁹ T testimony.

²⁰ Mr. S acknowledged that he was able to stand up from chairs and his raised toilet without assistance.

²¹ S testimony; T testimony.

IV. Conclusion

SDS uses the CAT to determine whether a person has materially improved and is able to function at home without Waiver services. Based on the CAT and Mr. S’ own testimony, he does not meet the eligibility requirements. SDS’ finding that he is no longer eligible for the Waiver program is AFFIRMED.

Dated this 16th day of October, 2015.

Signed

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 23rd day of November, 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.]