

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

In the Matter of)
)
 Q T)
_____)

OAH No. 15-0887-MDS
Division No.

DECISION

I. Introduction

Q T receives Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (Division) notified Mr. T that he was no longer eligible for Waiver services, and that they would be discontinued.¹ Mr. T requested a hearing.²

Mr. T’s hearing was held on September 18, 2015. Mr. T was represented by his brother U T, who holds his power-of-attorney. U T, and N C, Q and U’s sister, testified on his behalf. Victoria Cobo represented the Division. Peter Ndenderoh testified on behalf of the Division.

Mr. T’s health has not improved. He continues to need extensive assistance with transfers, locomotion, and toileting. This means his condition has not materially improved, as it is measured by the Waiver program. The Division’s decision terminating Mr. T’s Waiver services is reversed.

II. Background Facts

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

Mr. T is 69 years old. He lives in an assisted living home (ALH). His diagnoses include diabetes, congestive heart failure, acute cerebrovascular disease, hypertension, mild intellectual disability, neurogenic bladder, hypertension, and hyperlipidemia. He has a permanent suprapubic catheter.³ He was found eligible for Waiver services in 2013, based upon an assessment that found he required extensive assistance with transfers, locomotion, and toileting.⁴ The 2013 assessment states that he is 5’4” and weighed 260 lbs.⁵

Paul Bennetts, a Division assessor, assessed Mr. T on March 10, 2015 to determine if he was still eligible for Waiver services. That assessment found that Mr. T no longer qualified for

¹ Ex. D.
² Ex. C.
³ Ex. E, pp. 3.
⁴ Ex. F, pp. 6 – 7, 9, 29.
⁵ Ex. F, p. 9.

Waiver services because he no longer required extensive assistance with his transfers, locomotion, and toileting.⁶ The assessment did not show any other nursing needs, therapies, or cognitive impairment. It did show very minor behavioral issues.⁷ It resulted in the Division notifying Mr. T on July 2, 2015 that his Waiver services would be terminated.⁸ A registered nurse employed by Qualis Health performed a third-party document review of the Division's determination that Mr. T was no longer eligible for Waiver services. That review concurred with the Division's determination.⁹

At hearing, the Division agreed that Mr. T required extensive assistance with toileting, and limited assistance with transfers.¹⁰

III. Discussion

A. Method for Assessing Eligibility

The nursing facility level of care¹¹ requirement is determined by an assessment which is documented by the CAT.¹² The assessment measures both an applicant's needs for nursing or other professional medical services, and his or her ability to function physically: it records an applicant's needs for professional nursing services, therapies, and special treatments,¹³ whether an applicant has impaired cognition or displays problem behaviors,¹⁴ and the applicant's ability to perform specific measured activities of daily living (ADLs), and what type of assistance he or she needs, if any, with those activities.¹⁵ 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 3.¹⁶ Alternatively, if a person requires extensive physical assistance (self-performance code of 3) or is completely dependent (self-performance code of 4) with three or

⁶ Ex. E, pp. 8 – 9, 11, 31.

⁷ Ex. E, pp. 15 – 19.

⁸ Ex. D.

⁹ Ex. D, p. 2.

¹⁰ Peter Ndenderoh's testimony.

¹¹ See 7 AAC 130.205(d)(4); 7 AAC 130.215.

¹² 7 AAC 130.215(4).

¹³ Ex. E, pp. 15 - 17.

¹⁴ Ex. E, pp. 18 - 19.

¹⁵ Ex. E, pp. 8 – 9, 11, 20.

¹⁶ Ex. E, p. 31.

more of five specified ADLS (bed mobility, transfers, locomotion within the home, eating, and toileting), that person would also receive a score of 3.¹⁷

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.¹⁸

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.¹⁹

B. Eligibility

Mr. T does not require professional nursing services, therapy from a qualified therapist, or specialized treatment. Mr. T did not dispute that he only has minor behavioral issues. However, he disagreed with the Division's assessment that he was not cognitively impaired, and that he no longer required extensive assistance with transfers and locomotion. The Division has the burden of proof to establish that Mr. T no longer qualifies for Waiver services.²⁰

1. Impaired Cognition

A person can receive one point towards his or her Waiver eligibility score if his or her cognitive abilities are severely impaired. In order to obtain that point, Mr. T must satisfy each of four conditions: first, experience short-term memory issues; second, be unable to recall at least two of the following, current season, location of his own room, names/faces of caregivers, and where he is; third, have severely impaired daily decision making skills; and fourth, require either frequent (three or more times weekly) professional intervention to manage his cognition problems, or have a total cognitive score, as measured by the CAT, 13 or higher, in addition to needing limited assistance with at least one of his scored ADLS.²¹

The assessment states that Mr. T has no short-term memory problems, and does not satisfy the first condition.²² However, U T, Mr. T's brother, credibly testified about his brother's memory problems and his inability to recall recent events. Mr. T has satisfied that condition.

¹⁷ Ex. E, p. 20, 31.

¹⁸ Ex. E, p. 31.

¹⁹ Ex. E, p. 31.

²⁰ 7 AAC 49.135.

²¹ Ex. E, p. 31, § NF. 3.

²² Ex. E, p. 18.

The second condition Mr. T must satisfy is his recollection ability.²³ The assessment provides that Mr. T could recall the current season, location of his room, names/faces, and where he is.²⁴ U T's testimony is consistent with the assessment's findings because his testimony was that Mr. T becomes greatly confused several times per year, and becomes confused regarding his room and location approximately every other month. This means that Mr. T does not satisfy the second condition because his confusion is not acute frequently enough to meet this requirement. Although Mr. T, as credibly testified to by U T, has substantial issues with cognition, his inability to satisfy the second condition, means that he is not eligible to receive one point towards his Waiver eligibility due to his impaired cognition. As a result, it is not necessary to address the third and fourth conditions.

2. *Activities of Daily Living*

Mr. T's impaired cognitive abilities do not qualify him to receive a scoring point towards his continued Waiver eligibility. Accordingly, his only path to continued Waiver eligibility is if he requires a minimum of extensive assistance with three or more of the scored ADLs (bed mobility, transfers, locomotion, eating, and toileting). The Division agrees that Mr. T requires extensive assistance with toileting. Mr. T argues that he also requires extensive assistance with transfers and locomotion.

a. Transfers

Transfers are defined as how a "person moves between surfaces," such as from a sitting to a standing position.²⁵ In 2013, Mr. T was found to require extensive assistance (self-performance code of 3) for transfers, based upon statements made to the assessor and her observation of him receiving PCA assistance when standing up from a chair.²⁶ In 2015, the assessor found Mr. T was independent with transfers, based upon his observation.²⁷ At hearing, the Division agreed that Mr. T was not independent with transfers, but instead required limited assistance.

The assessor was not available to testify. U T, Mr. T's brother, did testify. He was a very credible witness. This credibility determination is based upon his telephonic demeanor, his clear non-evasive answers, including providing answers that were not conducive to Mr. T's eligibility,

²³ Ex. E, p. 31, § NF. 3(b).

²⁴ Ex. E, p. 18.

²⁵ Ex. E, p. 8.

²⁶ Ex. F, p. 6.

²⁷ Ex. E, p. 8.

such as the answers he provided on Mr. T's cognition issues and his long-term knowledge about his brother's care needs. He testified that sometimes Mr. T can transfer by himself, by pushing up off of furniture. M O is a caregiver at Mr. T's ALH. She has been caring for Mr. T since May. She testified that she has to help lift Mr. T to get out of bed in the mornings. She described a process where she holds onto his gait belt, and he pulls himself up with her helping to pull him up. Mr. T is a short heavy man.

The combination of U T's testimony and Ms. O's testimony establishes that Mr. T can, except on bad days, transfer himself up without assistance in a situation where he can push off of furniture, but that for getting out of bed in the mornings, he requires a degree of weight-bearing assistance. Because transferring out of bed is a daily activity, this would occur three or more times per week. Accordingly, the Division has not met its burden of proof to establish that Mr. T no longer requires extensive assistance with transfers.

b. 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.²⁸ In 2013, the assessor found that Mr. T required extensive assistance with locomotion.²⁹ In 2015, the assessor found that Mr. T was able to walk by himself, based upon statements made by ALH staff and his observation of Mr. T walking independently. Again, the assessor was not available to testify. U T's credible testimony described a process where he both guides and supports his brother when walking, and he estimated that Mr. T required that degree of assistance 70 to 80 percent of the time. He attributed the need for assistance to Mr. T's weight, his poor vision, and leg pain. N C, Mr. T's sister, also testified that Mr. T needed a lot of help, and had leg pain. Ms. O's testimony was that she walks side by side with Mr. T and that she has her arm under his armpit and helps to hold him up. The cumulative effective of the testimony established that Mr. T continues to require extensive assistance with locomotion. The Division has not met its burden of proof to establish that Mr. T no longer requires extensive assistance with transfers.

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

²⁸ Ex. E, p. 9.

²⁹ Ex. F, p. 6.

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 need for nursing home placement, and is able to demonstrate the ability to function in a home setting without the need for waiver services."³⁰ Mr. T qualified for Waiver services in 2013 due to his need for extensive assistance with locomotion, transfers, and toileting. He continues to require extensive assistance with those activities. Consequently, the Division cannot terminate his Waiver services.

IV. Conclusion

Mr. T's condition has not materially improved to the point that he no longer qualifies for Medicaid Waiver services. The Division's decision to terminate Mr. T's Waiver services is reversed.

DATED this 29th day of September, 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 14th day of October, 2015.

By: *Signed* _____
Name: Andrew M. Lebo
Title: Administrative Law Judge

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

³⁰ AS 47.07.045(b)(1) and (b)(3)(C).