

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

In the Matter of	)	
	)	OAH No. 15-0915-MDS
D V	)	Agency No.
_____	)	

**DECISION**

**I. Introduction**

The issue in this case is whether D V remains eligible for Medicaid Home and Community-Based Waiver services (Waiver Program). Senior and Disabilities Services (SDS) re-assessed Mr. V and determined that he was no longer eligible. Mr. V appealed.

A hearing was held on August 20, 2015. Mr. V represented himself. A lay advocate, Laura Baldwin, represented SDS. Based on the evidence presented, SDS correctly terminated Mr. V's participation in the Waiver Program.

**II. Facts**

Mr. V was evaluated for continued eligibility on February 23, 2015 by registered nurse Marianne Sullivan.<sup>1</sup> At that time, Mr. V was 82 years old.<sup>2</sup> He suffers from severe pain as a result of his spinal stenosis.<sup>3</sup> He has a history of spinal surgery, and may need further surgery in the near future.<sup>4</sup> SDS completed its review and informed Mr. V of its decision on June 23, 2015.<sup>5</sup>

**III. Discussion**

**A. Medicaid Home and Community-Based Waiver Program**

A person is eligible to receive benefits under the Waiver Program if he or she meets the eligibility requirements, including requiring the level of care that is normally provided in a nursing facility.<sup>6</sup> If eligible, the program pays for services that allow the recipient to stay in his or her home – or in 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.

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<sup>1</sup> Exhibit E.  
<sup>2</sup> Exhibit E3.  
<sup>3</sup> Mr. V testimony; Exhibit E5.  
<sup>4</sup> *Id.*  
<sup>5</sup> Exhibit D.  
<sup>6</sup> 7 AAC 130.205(d)(2).

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.<sup>7</sup> For older adults or adults with disabilities, this assessment looks at the nursing level services defined in 7 AAC 140.510 and .515,<sup>8</sup> and incorporates the results of the Consumer Assessment Tool (CAT).<sup>9</sup> The CAT is an evaluation tool created by the Department of Health and Social Services, and the January 29, 2009 version of that tool is adopted by reference in 7 AAC 160.900(d)(6).

Once an individual has qualified to participate in the Choice Waiver program, certain requirements must be met before he or she can be removed from that program. The individual must have had an annual assessment, the assessment must find that the individual has materially improved, and the assessment must have been reviewed by an independent qualified health professional.<sup>10</sup> For adults with disabilities, the qualified health professional must be a registered nurse licensed in Alaska and qualified to assess adults with physical disabilities.<sup>11</sup> Material improvement for an adult with physical disabilities is defined as

no longer [having] 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>[12]</sup>

Based on this definition, a “material improvement” determination is focused on whether the individual currently qualifies for the Choice Waiver program rather than on any specific changes in functional limitation or impairment since a prior assessment.<sup>13</sup> SDS uses the CAT to help it decide whether there has been a material improvement, because the CAT looks at both nursing facility level of care needs and at a person’s ability to function in a home setting.

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<sup>7</sup> 7 AAC 130.213.

<sup>8</sup> 7 AAC 130.213(4)(A) & (B).

<sup>9</sup> 7 AAC 130.213(4). SDS typically also looks at available medical reports or other evidence related to the recipient’s need for services.

<sup>10</sup> AS 47.07.045(b)(1) – (3).

<sup>11</sup> AS 47.07.045(b)(2)(B).

<sup>12</sup> AS 47.07.045(b)(3)(C).

<sup>13</sup> *In re E H*, OAH No. 13-1000-MDS (Commissioner of Health and Social Services 2013), page 3, available at <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS131000%20Superior%20Court%20appeal%20pending.pdf>. SDS uses the CAT for this determination since the CAT measures both the need for nursing home placement and the individual’s ability to function in the home setting.

In deciding whether a person is eligible, SDS looks at the recipient's level of care needs as of the date SDS notified the person of its determination.<sup>14</sup> Because SDS seeks to terminate Mr. V's participation in the program, it has the burden of proof.<sup>15</sup>

**B. Mr. V's Assessment**

There are several different ways in which the scoring on the CAT will indicate that a person qualifies for the Choice Waiver program. The nurse assessor's evaluation is summarized on the scoring page, which in this case was page E31.

Mr. V would qualify for the program if he had certain skilled nursing needs listed in section NF1 of the summary sheet. He would also qualify if he needed less extensive nursing needs, shown in NF 2, NF 3, and NF 4, or if he had some nursing needs along with a need for extensive assistance with certain activities of daily living (ADLs). Finally, he would qualify if he needed at least extensive assistance with three or more of the "shaded" ADLs.<sup>16</sup> The shaded ADLs are Bed Mobility, Transfers, Locomotion, Eating, and Toilet Use.<sup>17</sup> Extensive assistance is defined as needing weight bearing support to perform the task three or more times during a week, or being totally dependent on a caretaker to perform the task during some, but not all, of the prior week.<sup>18</sup>

Mr. V does not have nursing needs, so the only question at issue in this case is whether he needed extensive assistance with at least three of the shaded ADLs.

**C. Bed Mobility**

Bed mobility is the manner in which a person sits up in bed, turns from side to side, or repositions his or her body in a bed.<sup>19</sup> Mr. V acknowledged that he did not need assistance with this ADL.<sup>20</sup>

**D. Transfers**

Transferring is the act of moving between surfaces, such as getting up from a bed or chair, or sitting back down.<sup>21</sup> Mr. V sometimes needs help getting out of bed, and sometimes

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<sup>14</sup> *In re T C*, OAH No. 13-0204-MDS (Commissioner of Health and Social Services 2013), page 7, available at <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf>.

<sup>15</sup> 7 AAC 49.135.

<sup>16</sup> See Exhibit E31 NF1(e).

<sup>17</sup> Exhibit E20.

<sup>18</sup> *Id.*

<sup>19</sup> Exhibit E8.

<sup>20</sup> Mr. V testimony.

<sup>21</sup> Exhibit E8.

needs help standing from a seated position.<sup>22</sup> His need for assistance varies throughout the day depending on his level of pain.<sup>23</sup> When he does need help, he will hold on to his wife's hand and she will help pull him up.<sup>24</sup> Based on the testimony at the hearing, Mr. V does need weight-bearing assistance with transfers at least three times a week. He should have been scored as needing extensive assistance.

***E. Locomotion***

Locomotion is defined as how a person moves between locations on the same floor within their home.<sup>25</sup> Mr. V testified that he uses a cane or a walker. He can only walk with great difficulty, and his ability to walk is becoming worse. He stays in bed most of the day because walking has become too difficult.<sup>26</sup> He also testified that he needs assistance walking up stairs. While walking is difficult, Mr. V was still able to walk without weight-bearing assistance as of June 23, 2015, when SDS issued its decision.

***F. Eating***

The ADL of eating is the way in which a person feeds himself once the meal has been prepared.<sup>27</sup> Mr. V is able to eat without physical assistance from someone else.<sup>28</sup>

***G. Toileting***

Mr. V acknowledged at the hearing that he is able to use the toilet without assistance.

***H. Summary***

Based on Mr. V's testimony, he only needs assistance with the ADLs of Transferring and Locomotion. Even if both of these were scored as needing extensive assistance (score of 3), Mr. V would not qualify for the waiver program. To qualify, he would need to show a nursing need of some sort in addition to the need for assistance with these two ADLs.

Mr. and Mrs. V are both concerned about how they will manage without the services provided by the waiver program. Mrs. V has MS and cannot help her husband as much as she once could. Mr. V's condition is getting worse, and if he needs further back surgery he will need far more assistance. The Vs are trying to plan ahead so they can remain in their own home. The waiver program, however, is not a forward-looking program. Instead, it looks at the individual's

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<sup>22</sup> Mr. V testimony.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Exhibit E9.

<sup>26</sup> Mr. V testimony.

<sup>27</sup> Exhibit E11.

<sup>28</sup> Mr. V testimony.

condition at the time of the assessment. And, as noted earlier, this decision looks at Mr. V's condition at the time SDS issued its decision. The Vs' testimony that they will need more services in the near future is credible, but this decision cannot be based on that future need.

**IV. Conclusion**

SDS has met its burden of proving a material improvement. Accordingly, its decision that Mr. V is no longer eligible for the waiver program is affirmed.

Dated this 31<sup>st</sup> day of August, 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 15<sup>th</sup> day of September, 2015.

By: *Signed* \_\_\_\_\_  
Signature  
Cheryl Mandala  
Name  
Administrative Law Judge  
Title

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