

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

In the Matter of)	
)	
N C)	OAH No. 15-1046-MDS
_____)	Agency No.

DECISION

I. Introduction

This case is N C’s appeal of a decision of the Division of Senior and Disabilities Services (Division) to deny her continued eligibility for the Choice Waiver Program (Waiver) services.

A hearing was held on October 22, 2015. Ms. C was represented herself. The Division was represented by Darcie Shaffer. Based on the evidence presented, the denial of Ms. C’s application is affirmed.

II. Facts

Ms. C was reassessed for eligibility for continued waiver services on April 8, 2015, by nurse assessor Laura Denny. At the time, Ms. C was 64 years old and was living in an apartment by herself, with the help of personal care assistants.¹ She has been diagnosed with Rheumatoid arthritis, Bipolar disorder, Aseptic necrosis of the head and neck of her femur, chronic pain, respiratory abnormalities, and other medical conditions.² Ms. C currently is authorized to receive more than thirty hours of personal care assistant hours per week. Ms. C is receiving physical therapy twice per week in her home.³

In the April 8, 2015, reassessment the primary scoring difference in scoring that led to Division’s determination of the loss of waiver service eligibility were scoring changes in the level of assistance needed with Transfers, Locomotion, and Toileting.⁴ The testimony at the hearing, therefore, focused Ms. C’s needs and abilities in these areas.

In 2013, Ms. C had been assessed for waiver service eligibility and was determined to be eligible. In that 2013 assessment, Ms. C had been scored as needing extensive assistance with Transfers, Locomotion, and Toileting. In the 2015 assessment, Ms. C was scored as being

¹ Exhibit E & Recording of Hearing.
² See Exhibit E, page 5.
³ Recording of Hearing.
⁴ See Exhibit D, page 3.

independent with Transfers, Locomotion, and Toileting. These scoring changes made the difference between eligibility for waiver services and disqualification. At the hearing, the Division conceded that the evidence in the record for the hearing indicates that scoring in the areas of Transfers and Toileting areas should be limited assistance.

At the hearing, Ms. C explained her disagreements with the Division's assessment of her needs in these areas Transfers, Locomotion, and Toileting.

Regarding toileting, Ms. C explained that she needs help in the bathroom wiping herself due to the limited range of motion that she has in her arms. Ms. C also needs help in the shower because of this limited range of motion with her arms. Ms. C explained that her need for assistance with toileting is not just due to her problems with her arms, but the limitations on her ability to twist or bend or her body. Ms. C pointed out that at the time of the assessment her need for assistance was even greater because she also had a wound on her posterior, beyond her reach, which needed to be kept clean and dry after she used the bathroom. She needs help pulling up her pants because she cannot bend over and sometimes needs help, as she did at the time of the assessment, applying medicine to her bottom for ulcers on her skin.⁵

In the area of transfers, Ms. C testified that she needs assistance to get out of the chair. Ms. C explained that she has no feeling in right hand, which limits her ability to get up out of the chair without help. Many times every day her personal care assistant needs to help pull Ms. C off the chair and steady her on her walker. Ms. C admitted that sometimes she can get up herself. Ms. C feels that she is weakest in the morning. Ms. C admitted that she sometimes is able to get her body over to the commode next to her bed by herself in the night, but she also explained that she cannot always do this and wears incontinence underwear at night.⁶

When discussing her locomotion needs, Ms. C explained that she needs help walking so that she does not fall. Ms. C has a history of falling. When she leaves the house, Ms. C needs a wheel chair because her walker has wheels and is too heavy for her personal care assistant to transport. Sometimes when she is feeling better, Ms. C walks with quad-cane with assistance in her apartment. Ms. C explained that her personal care assistant must sometimes provide weight bearing support when she is using her walker.⁷

⁵ Recording of Hearing- Testimony of Ms. C.

⁶ Recording of Hearing- Testimony of Ms. C.

⁷ Recording of Hearing- Testimony of Ms. C.

Ms. C explained that one of her legs is shorter, she has cysts under her right kneecap, and her feet swell. Ms. C has pain in ankles and wears ankle braces when she leaves the house. She has special shoes as well as braces. Ms. C sometimes wears gait-belt to help her personal care assistant keep her from falling. Ms. C explained that her condition gets worse and better from day to day and she wears the gait-belt on days when she is more wobbly. She estimated that she wears the gait-belt about three days per week.⁸

Ms. C's Care Coordinator, B D, testified on Ms. C's behalf. Ms. D pointed out that Ms. C's Medical records for July 2015 indicate that her functional capacity fluctuates and that clear progress in improving Ms. C's functional capacity was uncertain. Ms. D explained that Ms. C has fluctuations in her balance and her strength. Ms. D pointed out that Ms. C has a history of frequent falls and the need for pain therapy. Ms. D also pointed out frequent references to long-term goals of therapy not being met in Ms. C's physical therapy records. Ms. D testified that Ms. C's medical history shows that the extent of her disability due the medical conditions caused by her rheumatoid arthritis is going to go up and down, but these conditions are degenerative and chronic.⁹

At the hearing the Division, did not call Laura Denny, the nurse assessor who had conducted the April 8, 2015, reassessment of Ms. C on which its determination of disqualification was based. Laura Denny was not available. Margaret Rogers testified for the Division. Ms. Rogers did not do an assessment of Ms. C. Ms. Rogers reviewed the April 8, 2015 assessment prepared by Laura Denny as well as Ms. C's medical records. Ms. Rogers testified that in her opinion, the evidence show that Ms. C is not as independent in the areas of Transfers, Locomotion, and Toileting as indicated on the CAT.¹⁰

Ms. Rogers explained that based on her review of the evidence she would consider re-scoring the locomotion as needing limited assistance because Ms. C needs someone with her providing some balance support and guidance when she is ambulating due to feeling like she is unstable and might fall. Ms. Rogers viewed the medical records as qualifying Ms. C for a score of one in locomotion, which reflects her need for supervision and need for physical assistance less than three times per week when she is walking.¹¹

⁸ Recording of Hearing- Testimony of Ms. C.

⁹ Recording of Hearing- Testimony of B D.

¹⁰ Recording of Hearing- Testimony of Margaret Rogers

¹¹ Recording of Hearing- Testimony of Margaret Rogers

Ms. Rogers explained Ms. C's sores were not serious enough to require wound care as that term used in determining Waiver eligibility.¹²

III. Discussion

A. Home and Community-Based Waiver

The Alaska Medicaid program provides Waiver services to adults with physical disabilities who require "a level of care provided in a nursing facility."¹³ The nursing facility level of care¹⁴ requirement is determined by an assessment which is documented by the Consumer Assessment Tool (CAT).¹⁵ The CAT records an applicant's needs for professional nursing services, therapies, and special treatments, and whether an applicant has impaired cognition or displays problem behaviors. Each of the assessed items is coded and contributes to a final numerical score.

The CAT also records the degree of assistance an applicant requires for activities of daily living, which include five categories that are specific to Waiver eligibility: 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.¹⁶

In order to terminate a person's waiver benefits, the Division has the burden of proving that the recipient has materially improved since the previous assessment. Material improvement for an adult with physical disabilities means a person

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.¹⁷

Because the definition relates to the client's current need and functioning, without regard to past functioning, the Department's past cases have not required a showing of actual gains in functioning in order to terminate waiver services.¹⁸ The client's previous assessments and past

¹² Recording of Hearing- Testimony of Margaret Rogers

¹³ 7 AAC 130.205(d)(4).

¹⁴ See 7 AAC 130.205(d)(4); 7 AAC 130.215.

¹⁵ 7 AAC 130.215(4); Exhibit E.

¹⁶ Exhibit E.

¹⁷ AS 47.07.045(b)(3)(C).

¹⁸ See, e.g., *In re G.X.*, OAH NO. 14-0280-MDS at 2-3 (Dep't Health and Soc. Serv. 2014) & *In re E.H.*, OAH No. 13-1000-MDS at 3 (Dep't of Health and Soc. Serv. 2013).

functional ability are relevant, however, and will be considered in determining whether the client is still eligible for waiver services.

The issue in this appeal is whether the evidence shows that Ms. C meets the level of care required to be eligible for waiver services. The Division must demonstrate that Ms. C has the ability to function in a home setting without the need for waiver services.

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). A person also can receive points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), difficult behaviors (wandering, abusive behaviors, etc.), and the need for either limited or extensive assistance with the five specified activities of daily living. 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. Ms. C's Activities of Daily Living

There was credible testimony that Ms. C needs constant supervision as well as physical assistance with all of her activities of daily living. However, for purposes of the Waiver program, only five ADLs are considered. Of those, only three are contested by Ms. C: Transfers, Locomotion, and Toileting.

To qualify for the Waiver program, Ms. C must show a need for extensive assistance with each of these three ADLs because she did not score as needing extensive assistance in any of the other ADLs. The distinction between extensive assistance and limited assistance in these areas is based on whether 1) weight bearing support was provided at least three times during the past week, or 2) whether the recipient was completely unable to assist with performing the ADL at least once during the past week.²⁰

Weight bearing support is defined as supporting more than a minimal amount of weight. It does not require that the assistant bear most of the recipient's weight. Instead, it is enough that the recipient would be unable to reasonably complete the ADL without the weight bearing

¹⁹ Ex. E scoring page.

²⁰ Exhibit E.

assistance.²¹ This is the definition that both SDS and OAH are required to use in considering whether a recipient needs extensive assistance.

1. Transfers

The Division met its burden of proof to show that Ms. C can transfer without requiring extensive assistance. Not clear from the record is whether Ms. C needs weight bearing assistance to transfer at least three times each week. Ms. C should not have been scored as being independent with transfers, but the evidence does not show whether she needs extensive assistance.

2. Locomotion

Ms. C can usually walk with her walker needing only balance guiding and supervision. Ms. C is not independent but does not need extensive assistance with locomotion.

3. Toileting

Ms. C persuasively testified she is not always independent with transfers. Ms. C does not always need weight bearing assistance. She is likely to also sometimes need weight bearing assistance with her toileting transfers. She should have been scored as needing at least limited assistance with toileting.

IV. Conclusion

Based on the parties' agreement at the beginning of the hearing, the only issue in dispute was the level of assistance needed for three ADLs. Ms. C is eligible for the Waiver program only if she needs extensive assistance with all three. Because the Division met its burden of proof as at least in regards to Locomotion, Ms. C is not eligible, and the Division's decision is AFFIRMED. This does not preclude her from reapplying if her condition has declined since the assessment.

Dated this 4th day of December, 2015.

Signed _____
Mark T. Handley
Administrative Law Judge

²¹ *In re K T-Q*, OAH No. 13-0217-MDS (Commissioner of Health and Social Services 2013), available at <http://doa.alaska.gov/oah/Decisions/mds.html>.

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 21st day of January, 2016.

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.]