

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

In the Matter of	)	
	)	
S Y	)	OAH No. 15-1064-MDS
<hr style="width:45%; margin-left:0"/>	)	Agency No.

**DECISION UPON SUMMARY ADJUDICATION**

**I. Introduction**

The Division of Senior and Disabilities Services issued S Y a notice that it intended to terminate his Medicaid Waiver benefits. Mr. Y appealed. Because as a matter of law the Division did not follow the statutorily-required procedures for terminating waiver services in this case, the Division’s termination decision is reversed.

**II. Factual and Procedural Background**

Mr. Y is a 50-year-old man with significant disabilities arising out of a stroke suffered in 2012.<sup>1</sup> Mr. Y was previously found eligible for the Medicaid Home and Community Based Waiver program in 2012 or before.<sup>2</sup> Mr. Y was later reassessed in June 2013 and found to be ineligible for Waiver services. This determination was based on scoring from the June 2013 Consumer Assessment Tool (“CAT”), which found that Mr. Y needed only “limited assistance” on any of the five “shaded” Activities of Daily Living (ADLs).<sup>3</sup>

When Mr. Y appealed that decision, however, the decision on appeal reversed the Division’s termination of his Waiver benefits. The 2014 fair hearing decision summarized in detail the testimony on which the Administrative Law Judge relied, and adjusted Mr. Y’s June 2013 CAT scores in the ADLs of bed mobility, transfers, and toileting. As rescored, Mr. Y was determined to in fact require “extensive assistance” with each of these ADLs.<sup>4</sup>

Mr. Y was reassessed again on March 18, 2015.<sup>5</sup> The March 2015 CAT scored Mr. Y as being “independent” in the ADL of bed mobility, needing only “supervision” in the ADL of transfers, and needing only “limited assistance” with the ADL of toileting.<sup>6</sup> The March 2015 assessment determined that Mr. Y “had materially improved,” and did not meet the required level

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<sup>1</sup> Ex. E, p. 5; *In re: S Y*, OAH No. 14-0056-MDS (“2014 Fair Hearing Decision”), p. 7.

<sup>2</sup> 2014 Fair Hearing Decision, p. 7.

<sup>3</sup> Ex. F, pp. 1-31.

<sup>4</sup> 2014 Fair Hearing Decision, pp. 13-15.

<sup>5</sup> Ex. E.

<sup>6</sup> Ex. E., pp. 8, 11.

of care for waiver services.<sup>7</sup> However, the CAT scores used as a basis for comparison were from the 2013 CAT, unmodified, rather than the scores as modified by the fair hearing decision.<sup>8</sup>

On May 18, 2015, a second nurse within the Division reviewed this determination and concurred with its conclusions.<sup>9</sup> However, the determination of material improvement was again based on a comparison with the unmodified June 2013 CAT, and the list of documents reviewed does not include the 2014 Fair Hearing decision.<sup>10</sup> Likewise, a required third-party review by the Division's contractor, Qualis, concurred with the finding of material improvement and agreed that Mr. Y no longer meets the required level of care for waiver services, but did so on the basis of a comparison with the original, unmodified 2013 CAT.<sup>11</sup>

On July 13, 2015, the Division notified Mr. Y that it was terminating his Waiver services based on the March 2015 assessment and Qualis's June 12, 2015 Third-Party Review.<sup>12</sup> Mr. Y appealed.<sup>13</sup>

The hearing initially convened on November 13, 2015. At the start of that hearing session, the Administrative Law Judge raised *sua sponte* the procedural issue of whether the Division had committed case-dispositive error by failing to provide the third-party reviewer with the last qualifying CAT – that is, the 2013 CAT *as rescored by the 2014 fair hearing decision*. The Division responded that it was not required to do so. With that issue unresolved, the hearing began and some testimony was taken. A second hearing session was then scheduled for December 1, 2015 to take the testimony of the remaining witnesses.

However, because the dispositive procedural issue was unresolved, the Administrative Law Judge issued an Order on November 18, 2015, directing the Division to provide written briefing on the issue prior to the December 1 hearing. The Order read:

As discussed on the record at the start of the first hearing session in this matter, the third-party review in this case compared Mr. Y's March 18, 2015 CAT with the results of the June 21, 2013 CAT. However, although the June 2013 CAT was rescored, in material part, through the decision in OAH Case No. 14-0056-MDS, the Division did not compare the March 2015 CAT to the June 2013 CAT *as rescored*. Rather, it compared the 2015 CAT only to the *unmodified* June 2013 CAT.

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<sup>7</sup> See Ex. D, p. 1; Ex. E, p. 14.

<sup>8</sup> Ex. E, p. 14.

<sup>9</sup> Ex. D, pp. 1-2; Ex. F, pp. 102- 109.

<sup>10</sup> *Id.*

<sup>11</sup> Ex. D, pp. 1-2; Ex. G.

<sup>12</sup> Ex. D.

<sup>13</sup> Ex. C.

Prior to the December 1 hearing session in this matter, the Division shall provide written briefing on whether the methodology used violates the Superior Court's Order Clarifying Final Judgment in *Krone et al. v. State of Alaska, Department of Health and Social Services et as*, Case No. 3AN-05-10283-CI, particularly as interpreted by the Commissioner's designee in the June 8, 2015 Order Remanding Case in OAH Case No. 14-1543-MDS, a redacted copy of which is attached hereto.

No briefing was received, however, and on the morning of December 1, 2015, OAH staff called the Division to inquire about the whereabouts of its briefing. The Division's hearing representative told OAH staff that the Division did not intend to file written briefing. In light of the dispositive nature of the issue raised in the briefing order, the hearing was cancelled and this Order follows.

### **III. Discussion**

Before the Division may terminate Waiver services for a person who was previously approved for those services, it must satisfy two conditions. First, the Division must conduct an assessment showing 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."<sup>14</sup> Next, an assessment finding material improvement in a recipient's condition must be "reviewed by an independent qualified health care professional under contract with the department."<sup>15</sup>

Here, the Division conducted an assessment. And the Division submitted that assessment to its contractor, Qualis, for an independent third-party review. But the CAT scores used as a comparator were not Mr. Y's most recent qualifying scores. Rather, they were the unadjusted 2013 scores.<sup>16</sup> Likewise, the third-party review was based on a comparison of the 2015 CAT with the original 2013 CAT, without regard to the subsequent rejection of the 2013 CAT scores. This omission renders the third-party review deficient as a matter of law.

A determination of material improvement under AS 47.07.045(3)(C) must "compare the results of the current assessment with those of the most recent assessment *that concluded that the recipient was eligible for the Waiver program.*"<sup>17</sup> The Commissioner's Designee has previously explained, in a written Order provided to the parties along with the briefing Order in this case,

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<sup>14</sup> AS 47.07.045(b)(1); (b)(3)(C).

<sup>15</sup> AS 47.07.045(b)(2)(B).

<sup>16</sup> See Ex. E, p. 14.

<sup>17</sup> *Krone v. State of Alaska*, 3AN-05-10283CI, Order Clarifying Final Judgment.

that the Division cannot use as its comparator an earlier assessment that was subsequently modified through a fair hearing decision. Rather, where an assessment is subsequently modified through a fair hearing decision, it is the *modified* assessment that must serve as the basis for comparison.<sup>18</sup>

Here, the Division's in-house and contractual reviewers did not follow this requirement. Rather, they were provided with and considered only the original 2013 CAT. Notably, the Qualis review assumes that Mr. Y did not actually qualify for Waiver services in 2013, summarizing the outcome of the 2015 assessment thusly: "He *again* does not meet the Waiver level of care in 2015."<sup>19</sup>

The scoring differences between the original and rescored 2013 assessments were materially significant, with the 2014 Fair Hearing decision finding considerably more assistance to be necessary for the ADLs of bed/body mobility, transfers, and toileting than was recognized in the original 2013 CAT.<sup>20</sup> As the Commissioner's designee has previously explained, where the most recent qualifying CAT is a CAT that has been re-scored by a fair hearing decision, the analysis of material improvement must then consider that CAT as modified by the fair hearing decision. This is a matter of common sense, since it is only by focusing on how a person previously qualified that a fully informed decision can be made about changes in that person's condition and needs. Here, the decision to terminate was fatally deficient because the reviewers were not provided access to and did not consider the most recent qualifying CAT – that is, the 2013 CAT as rescored in OAH Case No. 14-0056-MDS. As a matter of law, therefore, the Division's termination decision must be reversed.

#### **IV. Conclusion**

While this decision does not preclude the Division from reevaluating Mr. Y's eligibility consistent with the applicable statutory and regulatory requirements, the procedures used to terminate Mr. Y's waiver benefits in July 2015 were legally insufficient. The Division's July 18, 2015 decision terminating Mr. Y's waiver services is therefore reversed.

DATED: December 1, 2015.

By: Signed \_\_\_\_\_  
Cheryl Mandala  
Administrative Law Judge

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<sup>18</sup> See OAH Case No. 14-1543-MDS, Commissioner's Order Remanding Case (June 8, 2015).

<sup>19</sup> Ex. G, p. 8 (emphasis added).

<sup>20</sup> Compare Ex. F, p. 18 with 2014 Fair Hearing Decision, pp. 13-14.

## 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 15<sup>th</sup> day of December, 2015.

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

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