

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

In the Matter of )  
 )  
 E O ) OAH No. 15-1207-MDS  
 ) Division No.  
\_\_\_\_\_)

**DECISION**

**I. Introduction**

E O receives Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (Division) notified Ms. O that she was no longer eligible for Waiver services, and that they would be discontinued.<sup>1</sup> Ms. O requested a hearing.<sup>2</sup>

Ms. O’s hearing was held on October 26, 2015. Her guardian, Q G, represented her and testified on her behalf. K D, who is one of Ms. O’s caregivers, testified on her behalf. Laura Baldwin represented the Division. Ernest Shipman, the Division’s assessor, and Jan Bragwell, R. N., testified on behalf of the Division.

Ms. O is undeniably in poor health. However, her physical functionality has improved to the point where she no longer requires limited or extensive assistance with at least two of her scored activities of daily living. Even though she continues to have some cognitive and behavioral issues, the improvement in her scored activities of daily living means her condition has materially improved, as it is measured by the Waiver program. As a result, the Division’s decision terminating Ms. O’s Waiver services is affirmed.

**II. Background Facts**

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

Ms. O is 39 years old. Her diagnoses include autoimmune encephalitis and encephalomyelitis, mild cognitive impairment, major depression, and deconditioning/debility.<sup>3</sup> She was found eligible for Waiver services in 2014, based upon an assessment that found she was severely cognitively impaired and required limited assistance with transfers, locomotion,

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<sup>1</sup> Division Exh. D.

<sup>2</sup> Division Exh. C.

<sup>3</sup> Exh. E, pp. 3 – 4; Exh. F, p. 77.

and toileting.<sup>4</sup> She had been recently released from hospitalization at the time of her 2014 assessment.<sup>5</sup> She currently resides in an assisted living home (ALH).

Ms. O was reassessed in April 2015 to determine if she was still eligible for Waiver services. The April 2015 assessment found that Ms. O no longer qualified for Waiver services because her cognitive impairment was no longer severe, and because she only required supervision/standby assistance with her transfers, locomotion, and toileting.<sup>6</sup> The assessment did not show any other nursing needs, therapies, and very minor behavioral issues.<sup>7</sup> It resulted in the Division notifying Ms. O on August 16, 2015 that her Waiver services would be terminated.<sup>8</sup> A registered nurse employed by Qualis Health, who was licensed in the State of Alaska at the time of the review, performed a third-party document review of the Division's determination that Ms. O was no longer eligible for Waiver services. That review concurred with the Division's determination.<sup>9</sup>

### **III. Discussion**

#### ***A. Method for Assessing Eligibility***

The Alaska Medicaid program provides Waiver services to adults with physical disabilities who require “a level of care provided in a nursing facility.”<sup>10</sup> The nursing facility level of care<sup>11</sup> requirement is determined by an assessment which is documented by the CAT.<sup>12</sup> The CAT records an applicant's needs for professional nursing services, therapies, and special treatments,<sup>13</sup> and whether an applicant has impaired cognition or displays problem behaviors.<sup>14</sup> 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.<sup>15</sup>

The CAT also records the degree of assistance an applicant requires for activities of daily living (ADL), which include five specific categories: bed mobility (moving within a bed, and

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<sup>4</sup> Division Exh. F, pp. 27 – 28, 30, 38, 40, 51.

<sup>5</sup> Exh. F, p. 24.

<sup>6</sup> Exh. E, pp. 1, 8 – 9, 11, 31.

<sup>7</sup> Exh. E, pp. 15 – 19.

<sup>8</sup> Exh. D.

<sup>9</sup> Exh. D, p. 2; Exh. F, pp. 111 – 115.

<sup>10</sup> 7 AAC 130.205(d)(4).

<sup>11</sup> See 7 AAC 130.205(d)(4); 7 AAC 130.215.

<sup>12</sup> 7 AAC 130.215(4).

<sup>13</sup> Exh. E, pp. 15 – 17.

<sup>14</sup> Exh. E, pp. 18 – 19.

<sup>15</sup> Exh. E, p. 31.

often referred to as body mobility), 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 associated personal hygiene care.<sup>16</sup>

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).<sup>17</sup>

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.<sup>18</sup>

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.<sup>19</sup>

***B. Eligibility***

Ms. O previously qualified for Waiver services due to a combination of severe cognitive impairment and a need for limited assistance with transfers, locomotion, and toileting. The Division has the burden of proof to establish that Ms. O no longer qualifies for Waiver services.<sup>20</sup> It is undisputed that she does not require professional nursing services, therapy from a qualified therapist, or specialized treatment.

Ms. G's and Ms. D's testimony provided the basis for an argument that Ms. O continued to experience severe cognitive impairments, and had some behavioral issues. Their testimony, however, taken in the light most favorable to Ms. O, did not show severe behavioral issues. This is because they testified only about Ms. O not taking her medications without active oversight, not grooming herself without active oversight, and not eating. In order to have behavioral issues considered as a factor in qualifying for Waiver services, a person must first have at least one of the following behaviors: wandering, verbally abusive, physically abusive, or socially

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<sup>16</sup> Exh. E, p. 20, 31.

<sup>17</sup> Exh. E, p. 31.

<sup>18</sup> Exh. E, p. 31.

<sup>19</sup> Exh. E, p. 31.

<sup>20</sup> 7 AAC 49.135.

inappropriate behavior.<sup>21</sup> The Division's assessment found that she had minor behavioral issues.<sup>22</sup> It found, based on statements made by ALH staff, that she resisted care, but also found that she did not display wandering, verbally abusive, physically abusive, or socially inappropriate behaviors.<sup>23</sup> Ms. G's and Ms. D's testimony was consistent with the assessment because it only showed resistance to care. Accordingly, it is more likely true than not true that Ms. O's behavioral issues are not severe enough to help her qualify for Waiver services.

It is undisputed that Ms. O is cognitively impaired.<sup>24</sup> The assessment, however, found that her cognition difficulties were not severe enough to qualify her for Waiver services.<sup>25</sup> When a person has a severe cognitive impairment, and does not have a qualifying behavioral impairment, he or she must also require a minimum of limited assistance with at least two of the five scored ADLs (bed mobility, locomotion, transfers, toileting, and eating).<sup>26</sup> The assessment found, based upon the assessor's observation and ALH staff statements, that Ms. O was independent with bed mobility and eating, and required only supervision/standby assistance with transfers, locomotion, and toileting. It stated that Ms. O has a wheelchair which she operates herself, *i.e.*, she does not require either limited or extensive assistance with locomotion.<sup>27</sup> Medical records from April 2015 indicate that she is also able to use a walker.<sup>28</sup>

No testimony was presented that disputed the findings in the assessment regarding Ms. O's abilities with regard to the scored ADLs. The only contrary evidence is a critical incident report that showed Ms. O had a fall in December 2014 when she tried to transfer off the toilet by herself instead of calling ALH staff for assistance.<sup>29</sup> There is no evidence in the record that this was other than an isolated incident, which occurred slightly over five months before the April 2015 assessment. As a result, the Division has met its burden of proof and shown that it is more likely true than not true than Ms. O does not require either limited or extensive assistance with any of her scored ADLs.

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<sup>21</sup> Exh. E, p. 19; Exh. E, p. 31, Question NF. 4 (a).

<sup>22</sup> Exh. E, p. 2.

<sup>23</sup> Exh. E, p. 19; Mr. Shipman's testimony.

<sup>24</sup> Exh. E, p. 1.

<sup>25</sup> Exh. E, p. 31, question NF. 3.

<sup>26</sup> Exh. E, p. 31, questions NF. 3(d), NF. 5 – 7.

<sup>27</sup> Exh. E, pp. 8 – 9, 11; Mr. Shipman's testimony.

<sup>28</sup> Facility X clinic notes from April 7, 2015.

<sup>29</sup> Exh. F, pp. 54 – 57.

The record shows that the assessor may have underrated the extent of Ms. O's cognitive impairment: for instance, the assessor scored Ms. O in the CAT as having no long-term memory issues, whereas his testimony was that she was "very sketchy" on the details.<sup>30</sup> However, because Ms. O does not require either limited or extensive assistance with two or more of her scored ADLs, she does not qualify for Waiver services regardless of the level of her cognitive impairment.

#### **IV. Conclusion**

Ms. O's increase in her physical functioning means that her condition has materially improved to the point that she no longer qualifies for Medicaid Waiver services. The Division's decision to terminate Ms. O's Waiver services is upheld.

DATED this 14th day of December, 2015.

*Signed* \_\_\_\_\_  
Andrew M. Lebo  
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 29th day of December, 2015.

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

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

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<sup>30</sup> See Exh. E, p. 18; Mr. Shipman's testimony at 40:20 – 41:55.