

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

In the Matter of	)	
	)	
X P	)	OAH No. 15-1357-MDS
_____	)	Agency No.

**DECISION**

**I. Introduction**

This case is X P’s appeal of the denial of his continued eligibility for the Choice Waiver program. The Division of Senior and Disabilities Services (Division) denied Mr. P’s continued eligibility. Prior to the denial, the Division had arranged for a reassessment of Mr. P’s functional abilities. Based on this assessment, the Division determined that Mr. P was no longer eligible to participate in the Choice Waiver Program. Mr. P requested a hearing to contest that determination.

A telephonic hearing was held on November 27, 2015. Mr. P appeared and testified on his own behalf. The Division was represented by Laura Baldwin. Because this was a determination to discontinue benefits that had been previously approved, the Division had the burden at the hearing to show Mr. P was no longer eligible for the Choice Waiver Program. Based on the evidence presented at the hearing, and in the record, the Division met its burden of proof. The Division’s decision that Mr. P is no longer eligible for the Choice Waiver Program is upheld.

**II. Facts**

Mr. P’s functional abilities are limited because of back pain, his weight, his legs and other medical problems.<sup>1</sup> Mr. P was 65 years old on the date of the reassessment, which was April 24, 2015. Nurse Regina Theisen conducted the reassessment of Mr. P at his home.

Nurse Theisen was not available for the hearing. Nurse Marianne Sullivan reviewed the reassessment and other medical records and testified at the hearing for the Division. Mr. P’s Care Coordinator, J Q, testified on his behalf at the hearing.

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<sup>1</sup> The findings about Mr. P’s medical conditions and functional abilities are taken from the reassessment, and J Q’s and Nurse Sullivan’s testimony, and Mr. P’s testimony and medical records.

Mr. P suffers from arthropathy, morbid obesity, spondylosis, gout, spinal stenosis, diabetes, paraplegia, deep vein thrombosis and other medical conditions. In her reassessment, Nurse Theisen, wrote:

X has improved significantly since his last assessment especially in the last 3 months. He is regaining feeling in his legs and with twice a week physical therapy he can ambulate a little with his walker. He has lost 50 lbs since his last assessment continues on a 1200 cal/day diet. He is on an anticoagulant, takes oral meds for his diabetes and medication for his gout. He has had no hospitalizations, no ER visits or nursing home admissions in the last year.<sup>2</sup>

At the hearing, Mr. P contested Nurse Theisen's assertions regarding his weight loss and improvements in mobility. Ms. Q and Mr. P explained that Mr. P weighs about 392 pounds and cannot safely stand or walk without having someone next to him for balance support to prevent a fall. Mr. P explained that if he does fall, his Personal Care Assistant (PCA) is not strong enough to help him get up, so he has to call for emergency medical services by Lifeline, but recently there has not even been maintenance available for his Lifeline service. Ms. Q and Mr. P explained that his ability to make transfers, toilet, and move in his home is dependent on the special equipment he has there, which include a lift-bed and lift-chair, a high commode right next his bed, and his high wheelchair.<sup>3</sup>

At the hearing, Ms. Q explained that Mr. P uses a trapeze to get out of bed, and then uses his walker to get into his wheelchair. Mr. P cannot get around his home in his wheelchair, except into his garage. Mr. P goes through garage to go for medical appointments, and cannot access most other parts of his home because his wheelchair is too big, so there is just not enough room to maneuver his wheelchair in his home. Mr. P cannot safely perform transfers without hands on assistance. Ms. Q explained that all Mr. P's equipment is within five feet of his bed. He needs guided hands-on assistance for transfers and has limited locomotion due to fear of falling. Ms. Q explained that Mr. P uses a pivot maneuver to use the commode next to his bed. Ms. Q asserted that Mr. P has not lost weight. Ms. Q explained that Mr. P cannot stand long enough to prepare food. Mr. P is currently authorized to receive 29.75 hours of PCA service per week, but his PCA volunteers for extra time.

Ms. Q explained that in her opinion, without equipment he has in place, Mr. P would be in a nursing home facility. His legs are discolored and he cannot lift his legs very far. Ms. Q

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<sup>2</sup> Exhibit E, page 7.

<sup>3</sup> Recording of Hearing.

also explained that Mr. P needs the durable medical equipment provided through Medicaid and Medicare to be independent. Ms. Q explained that in her opinion, Mr. P's abilities were not properly scored in the 2015 assessment, and he should be reassessed before his Waiver services are terminated.

At the hearing, Mr. P explained has been trying hard to lose weight but has not been successful, and that he uses a Ski-Erg pull down rope to exercise his arms while in his wheelchair. Mr. P explained that his weight now seems to be stuck at about 390, and at one time was up to 420. Mr. P also explained that his lift-bed gets him almost to a standing position, but without this lift-bed and his other specialized equipment, he would not be able to get out of bed or make other transfers.

At the hearing, Nurse Sullivan explained that while she did not do the 2015 assessment, she carefully reviewed the assessment and the other medical records. Nurse Sullivan explained that Exhibit F at page 68 indicates that Mr. P is ambulatory up to 25 feet, and pointed out that these records indicate that Mr. P's arms are getting stronger. That medical record is dated January 13, 2015. In contrast, the medical record at Exhibit F at page 65, dated July 14, 2015, indicates Mr. P can ambulate only a couple of feet at a time.

Nurse Sullivan explained the Division's position is that experiencing pain when performing a function such as a transfer, or needing to use specialized equipment to perform a function does not increase the assessment score on that ability, rather the score is based on ability with pain, or with the equipment in use. In Nurse Sullivan's view, the assessor correctly scored Mr. P as independent with transfers because his medical records support her finding that he is independent with transfers, even if he needs equipment such as his lift-chair, and his lift-bed to perform transfers independently.

Nurse Sullivan explained that, her review of the assessment at Exhibit E, page 11, indicates that Nurse Theisen, the assessor, had observed Mr. P's locomotion with a walker and with a wheelchair and he could use both independently. Nurse Sullivan concluded that Mr. P was scored as needing limited assistance in locomotion because he does need limited locomotion assistance when he goes for medical appointments outside the house.

Nurse Sullivan explained the division's position that the score for eating should be "independent" if the person assessed has ability to independently get food from their plate to their mouth and chew. Nurse Sullivan acknowledged that Mr. P needs assistance with meal

prep. Nurse Sullivan noted that in an August 5, 2015 medical record at Exhibit F, page 70, a 70-pound weight-loss was documented. This medical record, from T O. J, MD also notes that he has Cauda Equina Syndrome with near paralysis.

Nurse Sullivan concluded that the assessment's toileting score of 0 or independent was supported by medical records. Nurse Sullivan admitted that Mr. P needs assistance to empty his commode, but explained that he is independent in toileting because the medical records indicate that all his of his toileting needs are within five feet of his bed.

At the hearing, Nurse Sullivan estimated that on average Mr. P spends around 19 hours of his day alone. Nurse Sullivan's opinion is that Mr. P is not utilizing Waiver services, and does not indicate the need for nursing home level care.

Nurse Sullivan explained that in her opinion, a letter dated July 15, 2015 from Mr. P's doctor, N N, M.D. at Exhibit F at page 42 does not support his eligibility for Waiver Services, because the condition described, deep vein thrombosis, requires only quarterly testing and oral medication treatment, which does not indicate that this is an acute condition that is not controlled. Nurse Sullivan asserts that the level of treatment described in this letter indicates a chronic, rather than an acute, condition.

This letter also lists several other serious medical conditions that Mr. P suffers from in addition to deep vein thrombosis and explains that Dr. N is "concerned that without continued Waiver Services, Mr. P is in jeopardy of care and would be forced to be put in a nursing home and/or institution." However, in a "level of care verification" dated May 5, 2015, Doctor N indicated that she would not admit Mr. P into a skilled nursing facility and he did not have intermediate nursing home needs.<sup>4</sup>

Nurse Sullivan testified that, in her opinion, the changes between the 2013 and 2015 assessments found at Exhibits F and E indicate improvement. Nurse Sullivan explained that Mr. P's medical records show that his history of physical therapy also shows his improvement. Nurse Sullivan's view is that Mr. P's continued eligibility for Waiver Service benefits is not reflected in Mr. P's past year of medical and physical therapy records.

Based on the evidence presented at the hearing, and in the record, the Division met its burden of proof to show that Mr. P is no longer eligible for the Choice Waiver Program.<sup>5</sup>

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<sup>4</sup> Exhibit F, page 37.

<sup>5</sup> Exhibits E & F and Recording of Hearing.

### III. Discussion

An adult with a physical disability is eligible to receive benefits under the Choice Waiver program if he requires the level of care that is normally provided in a nursing facility.<sup>6</sup> The program pays for services that allow an eligible person to stay in his home rather than move into a nursing facility. The level of care that is provided in a nursing facility is described by regulation. Skilled nursing facility services are defined in 7 AAC 140.515. Intermediate care facility services are defined in 7 AAC 140.510.

The Division determines whether an applicant requires nursing facility level of care services by conducting an assessment.<sup>7</sup> For 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 is adopted by reference in 7 AAC 160.900(d)(6).

There are a variety of ways in which the CAT may show that a person is eligible for the Choice Waiver program. This can be best seen by reviewing the summary page shown in Exhibit E at page 29. Section NF 1 of this page lists five questions:

- a. In Section A, items 1-8 (Nursing Services) did you code any of the responses with a 4 (i.e. services needed 7 days/wk)?
- b. In Section A, items 9 (Ventilator/Respirator) did you code this response with a 2, 3 or 4 (treatment needed at least 3 days/wk)?
- c. In Section A, item 10 (Uncontrolled seizure), did you code this response with a 1, 2, 3, or 4 (care needed at least once/wk)?
- d. In Section A, item 11 (Therapies), was the total number of days of therapy 5 or more days/wk?
- e. In section E, (Physical Functioning/Structural Problems), were 3 or more shaded ADLs coded with a 3 (extensive assistance) or 4 (dependent) in self-performance?<sup>[10]</sup>

A person who receives a “yes” answer to any one of these questions is presumed to be eligible for nursing facility level of care, and thus qualifies for the Choice Waiver program.

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<sup>6</sup> 7 AAC 130.205(d)(2).

<sup>7</sup> 7 AAC 130.230.

<sup>8</sup> 7 AAC 130.230(b)(2)(A).

<sup>9</sup> 7 AAC 130.230(b).

<sup>10</sup> Exhibit E, page 31 & Exhibit F, page 29. The “shaded ADLs” are bed mobility, transfers, locomotion, eating, and toilet use.

If a person does not qualify under section NF 1, scores are established in sections NF 2 (nursing services and therapies), NF 3 (cognitive ability), and NF 4 (inappropriate behavior). Section NF 5 states that if the total score for sections 2, 3, and 4 is zero, the individual does not qualify for nursing facility care. If the score is greater than zero, Section NF 6 is considered. Section NF 6 asks how many of the shaded Activities of Daily Living (ADL) were scored with a 2 or higher in self-performance and given a support score of 2 or 3. In other words, it asks how many of these ADLs received a score of 2/2 or higher.

Under Section NF 7, the score in section NF 5 is added to the score in section NF 6. An individual with a score of 3 or higher is eligible for the Choice Waiver program.

The April 2015 assessment of Mr. P scored him as not qualifying for the Choice Waiver program.<sup>11</sup> At the hearing, Mr. P argued Nurse Theisen underscored this assessment, but did not provide persuasive evidence that the scoring was incorrect. Mr. P's argument is that he would have been scored as eligible for Waiver Services without the special equipment that allows him to perform transfers, toileting and locomotion independently or with limited assistance. The evidence in the record shows that Mr. P is correct. He would have scored as needing extensive assistance in transfers, toileting and locomotion on the CAT in the 2015 assessment as he did in the 2013 assessment without the special equipment, such as his lift-bed, lift-chair, high commode and wheelchair. This special equipment allows him to perform these functions without extensive assistance. The evidence also indicates that because of Mr. P's weight these tasks could not be safely performed without his special equipment, even with extensive assistance from Mr. P's current PCA. However, Mr. P does have this equipment, and is able to use it without needing extensive assistance. Mr. P and his equipment bear his weight when he performs these functions, without weight-bearing assistance from his PCA.

Mr. P is not cognitively or behaviorally impaired. He does not require professional nursing services, therapy from a qualified therapist, specialized treatment, or therapies. While he has been receiving physical therapy, the total number of days of therapy is less than five days per week. Accordingly, the only method Mr. P would have for retaining his eligibility for Waiver services is if he is either totally dependent (self-performance code of 4) or requires extensive one-person physical assistance (self-performance code of 3, support

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<sup>11</sup> Exhibit E.

code of 2) with any three of the five specified activities of daily living (bed mobility, transfers, locomotion, eating, and toileting).

As discussed above, Mr. P does not require extensive one-person physical assistance with any of his ADLs. This does not satisfy the requirement that he require a minimum of extensive assistance with three ADLs to maintain his eligibility for Waiver services.

Although he does not presently qualify for the Choice Waiver program, Mr. P is free to reapply at any time if he believes he might qualify.

#### **IV. Conclusion**

Mr. P is no longer eligible for the Choice Waiver program. The Division's decision to terminate Mr. P's Waiver services is upheld.

Dated this 16th day of December, 2015.

*Signed* \_\_\_\_\_  
Mark T. Handley  
Administrative Law Judge

### **Adoption**

The undersigned, by delegation from of 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 5th day of January, 2016.

By: *Signed* \_\_\_\_\_  
Name: Mark T. Handley  
Title: Administrative Law Judge

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