

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

In the Matter of:)
) OAH Nos. 13-1418/1755-MDS
 L O-Q)
_____)

DECISION AFTER SUPERIOR COURT REMAND

I. Introduction

L O-Q was receiving Medicaid Home and Community-based Waiver (Waiver) benefits and Personal Care Assistance (PCA) services. She was reassessed by the Division of Senior and Disabilities Services (Division) to determine her ongoing eligibility and benefit level for both programs. The Division notified her on September 30, 2013 that her PCA services were reduced, and on November 6, 2013 that her Waiver services were terminated. Ms. O-Q requested a hearing to challenge both the PCA reduction and the Waiver termination actions. The PCA reduction case¹ and the Waiver termination case² were consolidated.

The Division reassessed Ms. O-Q on May 1, 2014, during the course of this case, after which the Division reiterated that Ms. O-Q's Waiver benefits should be terminated and her PCA services reduced. The matter then went to hearing to address the termination/reduction actions based upon the May 1, 2014 assessment. A final decision was issued on November 7, 2014, which upheld the Waiver termination, and which also upheld, in part, the reduction in her PCA services. Ms. O-Q appealed the Waiver termination to the Superior Court, Case No. 3AN-14-00000-CI. She did not appeal the reduction of her PCA services. The Superior Court reversed the termination of Ms. O-Q's Waiver services and remanded the matter for the issuance of a new decision, directing that additional factual findings be made.

After a review of the evidence, the Division's termination of Ms. O-Q's Waiver services is upheld.

II. Background Facts

Ms. O-Q was 56 years old when she was reassessed in 2014. She lives with her husband, who has a full-time job outside the home. She is diabetic, which is poorly controlled, has Bipolar Disorder Type 1, and is incontinent. She is 4'9" tall and weighs 300 lbs.³ She has

¹ OAH Case No. 13-1418-MDS.
² OAH Case No. 13-1755-MDS.
³ Ex. K, pp. 3, 9; Ex. 6.

lumbosacral disc degeneration and has a dropped foot on her right leg.⁴ She uses a walker for locomotion.⁵

On May 1, 2014, Denise Kichura, a Division nurse, visited Ms. O-Q's home to reassess her Waiver eligibility. Ms. Kichura recorded the assessment visit using the Division's Consumer Assessment Tool or "CAT." Her findings resulted in a termination of Ms. O-Q's Waiver.⁶ In general, Ms. Kichura found that Ms. O-Q's physical functionality had increased, which resulted in her no longer qualifying for Waiver benefits. The Division's determination that Ms. O-Q no longer qualified for Waiver services was reviewed by Qualis Health, which concurred in the determination.⁷

Ms. O-Q disputed the termination of her Waiver services.

III. Discussion

In this case, in which the Division is seeking to terminate or reduce a benefit a citizen is already receiving, the Division has the overall burden to prove, by a preponderance of the evidence,⁸ facts that show the citizen's level of eligibility has changed.⁹

1. Overview

The Alaska Medicaid program provides Waiver services to adults with physical disabilities who require "a level of care provided in a nursing facility."¹⁰ The purpose of these services is "to offer a choice between home and community-based waiver services and institutional care."¹¹

The nursing facility level of care¹² requirement is determined in part by an assessment which is documented by the CAT.¹³ The CAT records an applicant's needs for professional nursing services, therapies, special treatments,¹⁴ and whether an applicant has impaired cognition or displays problem behaviors.¹⁵ 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,

⁴ Ex. 4, pp. 1- 2.

⁵ Ex. K, pp. 4, 6 - 7.

⁶ Exs. L, M.

⁷ H J's testimony; Ex. L, p. 2.

⁸ Proof by a preponderance of the evidence means that the fact in question is more likely true than not true.

⁹ 7 AAC 49.135.

¹⁰ 7 AAC 130.205(d)(1)(B) and (d)(2).

¹¹ 7 AAC 130.200.

¹² See 7 AAC 130.205(d)(2); 7 AAC 130.230(b)(2)(A).

¹³ 7 AAC 130.230(b)(2)(B).

¹⁴ Ex. E, pp. 13 – 15.

¹⁵ Ex. E, pp. 16 - 17.

speech/language, occupation, or respiratory therapy) per week, he or she would receive a score of 3.¹⁶

The CAT also bases Waiver eligibility upon the coding provided for five specified activities of daily living (ADLs): body mobility, transfers, locomotion, toileting, and eating. The CAT numerical coding system has two components. The first component is the *self-performance code*. These codes rate how capable a person is of performing a particular ADL. The possible codes are **0** (the person is independent and requires no help or oversight); **1** (the person requires supervision); **2** (the person requires limited assistance¹⁷); **3** (the person requires extensive assistance¹⁸); and **4** (the person is totally dependent¹⁹). There are also codes which are not used in calculating a service level: **5** (the person requires cueing); and **8** (the activity did not occur during the past seven days).²⁰

The second component of the CAT scoring system is the *support code*. These codes rate the degree of assistance that a person requires for a particular ADL. The possible codes are **0** (no setup or physical help required); **1** (only setup help required); **2** (one person physical assist required); and **3** (two or more person physical assist required). Again, there are additional codes which are not used to arrive at a service level: **5** (cueing required); and **8** (the activity did not occur during the past seven days).²¹

If a person has a self-performance code of 2 (limited assistance, which consists of non-weight bearing physical assistance three or more times during the last seven days, or limited assistance plus weight-bearing assistance one or two times during the last seven days) or 3 (extensive assistance, which consists of weight-bearing support three or more times during the past seven days, or the caregiver provides complete performance of the activity during a portion of the past seven days), plus a support code of 2 (physical assistance from one person) or 3 (physical assistance from two or more persons) with any of the five specified ADLs, that person receives points toward his or her total eligibility score on the CAT. A person can also receive

¹⁶ Ex. E, p. 31.

¹⁷ Pursuant to 7 AAC 125.020(a)(1), limited assistance with an ADL “means a recipient, who is highly involved in the activity, receives direct physical help from another individual in the form of guided maneuvering of limbs, including help with weight-bearing when needed.”

¹⁸ Pursuant to 7 AAC 125.020(a)(2), extensive assistance with an ADL “means that the recipient is able to perform part of the activity, but periodically requires direct physical help from another individual for weight-bearing support or full performance of the activity.”

¹⁹ Pursuant to 7 AAC 125.020(a)(3), dependent as to an ADL, or dependent as to an IADL, “means the recipient cannot perform any part of the activity, but must rely entirely upon another individual to perform the activity.”

²⁰ Ex. E, p. 18.

²¹ Ex. E, p. 18.

points for combinations of required nursing services, therapies, impaired cognition (memory/reasoning difficulties), or difficult behaviors (wandering, abusive behaviors, etc.), and required assistance with any of the five specified ADLs.²²

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 ADLs (bed mobility, transfers, locomotion within the home, eating, and toileting).²³

The results of the assessment portion of the CAT are then scored. If an applicant's score is 3 or higher, the applicant is medically eligible for Waiver services.²⁴

2. Eligibility Decision

Ms. O-Q has been receiving Waiver benefits since 2005.²⁵ The 2005 assessment found that she was eligible for Waiver benefits because she required extensive assistance (self-performance code of 3) with three of the five specified ADLs: transfers, locomotion, and toilet use.²⁶ There was an assessment performed in 2012 that found she no longer technically qualified for Waiver benefits. However, a Division nurse reviewer made the decision to continue Ms. O-Q's Waiver benefits based upon her overall condition.²⁷ A 2013 assessment was performed that similarly found Ms. O-Q was also not Waiver eligible.²⁸ Finally, the May 1, 2014 assessment found Ms. O-Q not Waiver eligible, and the Division terminated those benefits.

Before the Division may terminate Waiver services for a person who was previously approved for those services, Alaska Statute 47.07.045, enacted in 2006, requires that the Division conduct an assessment that shows 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."²⁹ In an order issued in 2014 in the class action case *Krone et. al. v. State of Alaska, Department of Health and Social Services et. al.*, Case No. 3AN-05-10283CI, the Anchorage Superior Court held:

²² Ex. E, p. 31.

²³ Ex. E, p. 31.

²⁴ Ex. E, p. 31.

²⁵ Ex. D, p. 1.

²⁶ Ex. F, pp. 5, 13 (Case No. 13-1755-MDS).

²⁷ Ex. 9; Jan Bragwell's testimony.

²⁸ Ex. E.

²⁹ AS 47.07.045(b)(1) and (b)(3)(C).

[i]n order to determine if a recipient is 'materially improved,' for purposes of AS 47.07.045(3)(C), the State 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. The State may not conclude that a recipient is no longer eligible based only on the results of the current assessment.³⁰

In addition, the Superior Court ruled in a Medicaid Waiver termination case, that the Division must show that the recipient can “function in a home setting without the need for waiver services.”³¹

Because 2012 was the last assessment which resulted in an eligibility finding, this decision will compare the 2012 and 2014 assessments.

The 2012 assessment, the last which resulted in a finding of eligibility, found that Ms. O-Q required extensive assistance with transfers and toileting, and that she only required limited assistance with locomotion. It, however, noted that she was very unsteady and slow and needed support when walking.³² While that assessment scored Ms. O-Q as technically not eligible, the Division’s internal nurse-reviewer determined she should remain eligible due to her overall health condition and because the assessment showed she was on the borderline of qualifying.³³

In contrast, the May 1, 2014 assessment found that Ms. O-Q required only supervision/cueing/oversight with regard to transfers and locomotion, and required limited assistance with toileting. That assessment scored Ms. O-Q as not eligible for Waiver services. The Division’s internal nurse reviewer, who was the same person who found continued eligibility in 2012, reviewed the May 1, 2014 assessment and concluded that Ms. O-Q no longer qualified, and that the issue was not even close.³⁴

The 2014 assessment, like the 2012 assessment, found that Ms. O-Q was not receiving any therapies (physical, speech, occupation, respiratory, or specialized treatments/therapies), had no impaired cognition or behavioral issues, and was not receiving professional nursing services.³⁵ Ms. O-Q was prescribed physical therapy on July 23, 2013 for three times per week for an anticipated eight week period.³⁶ However, the time period for this therapy expired well before June 5, 2014, which was the date the Division determined Ms. O-Q no longer qualified

³⁰ *Krone*, “Order Clarifying Final Judgment” issued October 1, 2014, p. 6.

³¹ *Bacon v. State, Department of Health and Social Services et. al.*, Case No. 3AN-13-08676CI/APP Opinion dated December 8, 2014, p. 3 (quoting AS 47.07.045(b)(3)(C).

³² Ex. 9, pp. 6 – 7, 9.

³³ Jan Bragwell’s testimony; Ex. J, p. 8.

³⁴ Jan Bragwell’s testimony; Ex. J, p. 8.

³⁵ Ex. K, pp. 5, 13 – 17.

³⁶ Ex. 5.

for Waiver benefits.³⁷ In addition, there is a June 30, 2014 doctor's note (written on a prescription pad) that she "is in need of Physical Therapy."³⁸ However, there is no evidence Ms. O-Q was receiving prescribed therapies as of June 5, 2014, which means that she is not entitled to receive a point towards her eligibility scoring for therapies.³⁹

The Division submits that Ms. O-Q no longer requires extensive assistance with the three ADLs, which originally qualified her for Waiver services and which continued to qualify her for Waiver services in 2012. Those are transfers, locomotion, and toileting. Ms. O-Q argues that she requires extensive assistance with those three ADLs. If Ms. O-Q no longer requires extensive assistance with each of these three ADLs, then her condition has materially improved and she is no longer eligible for Waiver benefits.

a. Transfers

In 2012, Ms. O-Q was assessed as requiring extensive assistance (self-performance code of 3) with transfers. This conclusion was reached by the nurse-assessor's observation of her being "lifted up and assisted to sit down on floor where she spends most of her waking hours."⁴⁰ In 2014, the nurse-assessor concluded that Ms. O-Q only required supervision assistance (self-performance code of 1) for transfers. This conclusion was based upon her observation of Ms. O-Q sliding from a lying position on the couch to a sitting position on the floor, without assistance, and then seeing Ms. O-Q move from a sitting position on the floor to a standing position, without assistance, by reaching up and grabbing the handles on her walker and pulling herself up. The

³⁷ The Division argued based upon a recent Superior Court decision that the determinative date for eligibility/termination purposes was the date of the assessment, rather than the date of the Division's termination letter. *See Casey v. State, Dept. of Health and Social Services*, Superior Court Case No. 3AN-13-05178 (Suddock, J. April 21, 2014). The issue, among others, in *Casey* was whether eligibility should be determined as of the date of the administrative hearing instead of using the date of the assessment. However, the Superior Court's holding was that utilizing the date of the assessment was within the Division's discretion. After the underlying administrative decision was issued in the *Casey* matter (January 7, 2013), the Commissioner's designee issued a decision which expressly held that the date of the Division's decisional document, being the termination or reduction notice, rather than the assessment date, was the appropriate date for determining eligibility. *In re T. C.* OAH Case No. 13-0204-MDS (Commissioner of Health and Social Services, October 2, 2013). That decision is available online at <http://aws.state.ak.us/officeofadminhearings/Documents/MDS/HCW/MDS130204.pdf>. The Commissioner's level decision is that the Division is to use the applicant/recipient's condition as of the date of the decisional document, and not the date of the assessment, for determining eligibility for benefits.

³⁸ Ex. 19.

³⁹ If Ms. O-Q was receiving prescribed therapies 5 or more days per week, she would be eligible for Waiver benefits. *See* Ex. K, p. 29, Section NF1(d). If she was receiving prescribed therapies 3 or 4 days per week, she would receive one point towards her eligibility scoring. *See* Ex. K, p. 29, Section NF2(b).

⁴⁰ Ex. 9, p. 6.

nurse-assessor stated that Ms. O-Q told her she could get up from the floor on her own without requiring assistance.⁴¹

T C is Ms. O-Q's PCA. She is very familiar with Ms. O-Q's care needs, having worked as her PCA both in the past and since 2013. She testified that Ms. O-Q had asked the Medicaid program to provide her with a gait belt, but was denied. She said the purpose for the gait belt was to provide the PCA with some leverage for assisting Ms. O-Q with transfers on bad days, which occur approximately four days per week. On those bad days, she has to be pulled up to a sitting position from a reclining or lying down position to initiate a transfer from between three to six times per day. Once she is in a sitting position, she can usually complete the transfer herself. Upon further questioning, Ms. C clarified that Ms. O-Q needs to be pulled up from a sitting position to complete a transfer three to four times per week. She also occasionally needs assistance to transfer down. Ms. C further stated that the assessment occurred on one of Ms. O-Q's good days.⁴²

The Division has the burden of proof on this point, because Ms. O-Q was previously assessed as requiring extensive assistance with transfers. When the evidence is examined, the Division did not meet its burden of proof. Ms. C is quite familiar with Ms. O-Q's care needs. In contrast, the nurse-assessor had a limited time to observe Ms. O-Q and conduct her assessment. While Ms. C described Ms. O-Q as requiring weight-bearing assistance to be pulled up from a lying or reclining position to a sitting position, that would be more consistent with body mobility needs rather than transfers.⁴³ Her testimony about the need to be pulled up from a sitting position to a standing position three to four times a week was consistent with transfer needs. It is also consistent with the reported need for a gait belt, inasmuch as a gait belt would be of use in moving from a sitting to a standing position, rather than in moving from a lying or reclining position to a sitting position. A person who requires weight-bearing assistance with transfers three or more times per week would qualify for extensive assistance with transfers. Accordingly, the Division did not meet its burden of proof and Ms. O-Q still requires extensive assistance with transfers.

⁴¹ Ex. K, p. 6; Denise Kichura's testimony.

⁴² T C's testimony.

⁴³ See Ex. K, p. 6 for a definition of body mobility. Ms. O-Q, however, is not arguing that she requires extensive assistance with body mobility.

b. Locomotion

Ms. O-Q was assessed as requiring limited assistance (self-performance code of 2) with locomotion in 2012. However, the nurse-assessor stated that she has “an increased unsteady gait and now needs support when walking.”⁴⁴ 2012 was the year that the Division’s nurse-reviewer determined that Ms. O-Q was eligible for Waiver, despite only receiving scores of extensive assistance with two ADLs (transfers and toileting), because of Ms. O-Q’s overall poor condition and the fact that she was so close to qualifying. Accordingly, since Ms. O-Q’s only path to Waiver eligibility in 2012 would have been by receiving a score of extensive assistance with three ADLs, the record supports an inference that she should have received a score of extensive assistance with the ADL of locomotion, rather than the score of limited assistance provided on the 2012 assessment. This inference is supported by the nurse-assessor’s statement that Ms. O-Q “needs support when walking.”

In 2014, the nurse-assessor concluded that Ms. O-Q only required supervision assistance (self-performance code of 1) for transfers. She arrived at this conclusion by observing Ms. O-Q move around in her home using her walker.⁴⁵ The testimony provided by Ms. C is consistent with the nurse-assessor’s conclusion: Ms. C reported that, although Ms. O-Q had an extensive history of falls, including one that caused broken ribs in the fall of 2013, Ms. O-Q was able to walk with standby assistance, such as grabbing onto clothes, in the event she started to fall.⁴⁶

Given the consistency of Ms. C’s testimony with that of the nurse-assessor, the Division has met its burden of proof on this point and established that Ms. O-Q no longer requires extensive assistance with locomotion, and instead requires supervision/standby assistance.

c. Toileting

Ms. O-Q was previously assessed as requiring extensive assistance (self-performance code of 3) with toileting. That determination was based upon Ms. O-Q’s statements that she needed help with walking, transferring, and cleansing, along with the nurse-assessor’s functional assessment.⁴⁷ In 2014, the nurse-assessor concluded that Ms. O-Q only required limited assistance (self-performance code of 2) for toileting. She arrived at this conclusion by observing

⁴⁴ Ex. 9, p. 7.

⁴⁵ Ex. K, p. 7; Ms. Kichura’s testimony.

⁴⁶ Ms. C’s testimony.

⁴⁷ Ex. 9, p. 9.

Ms. O-Q move to the bathroom using her walker, and seeing her sit down and then get up from the toilet without requiring assistance.⁴⁸

Ms. C's testimony was that Ms. O-Q only needed assistance being pulled up from the toilet about once per week. She, however, testified that she continually required hands-on assistance with cleansing herself after either using the toilet, or after incontinence episodes. Ms. C's description of the physical process was that Ms. O-Q stood and held onto the counter while Ms. C cleaned her. This is not weight-bearing assistance. At most, Ms. C's testimony described a need for weight-bearing assistance once per week. In order to qualify for extensive assistance, Ms. O-Q would have to require weight-bearing assistance three or more times per week.⁴⁹ Accordingly, the Division has met its burden of proof on this point and established that Ms. O-Q requires limited assistance with toileting, rather than extensive assistance.

d. Ability To Function In Home

Ms. O-Q resides with her husband. She receives some PCA services which are designed to allow her to live in her home.⁵⁰ While she has some impairments, which are reflected in part above, her PCA services are designed to help her cope with those. As a result, the preponderance of the evidence is that she does not require Waiver services to remain in her home.

e. Material Improvement

It is undisputed that Ms. O-Q's overall medical condition has not improved. However, her functionality has improved since 2012. She qualified for Waiver services in 2012 based upon her need for assistance with transfers, locomotion, and toileting. In 2014, as discussed above, she required extensive assistance with only one qualifying ADL: transfers. In 2014, she required supervision/standby assistance with locomotion and limited assistance with toileting. She did not require extensive assistance with any other of the qualifying ADLs. Nor does the record show that she requires Waiver services to remain in her own home. As a result, she no longer has functional impairments that would result in a nursing home placement, and she has the ability to function within her own home without Waiver services. This improvement in her functionality means that her condition has materially improved. The Division has therefore met

⁴⁸ Ex. K, p. 9; Ms. Kichura's testimony.

⁴⁹ Ex. K, p. 9.

⁵⁰ See the earlier decision issued in this case on November 7, 2014, which reflects that Ms. O-Q was an ongoing recipient of PCA services.

its burden of proof on the larger question of whether Ms. O-Q continues to qualify for Waiver benefits.

The Division's assessment showing material improvement must be "reviewed by an independent qualified health care professional under contract with the department."⁵¹ The Division satisfied this condition when Qualis Health performed its third-party review. The reviewer agreed with the Division's conclusion that Ms. O-Q's condition had materially improved. The Division's determination that Ms. O-Q no longer qualifies for Waiver services is therefore affirmed.

IV. Conclusion

Ms. O-Q's condition has materially improved since 2012, and she is able to function in a home setting without the need for Waiver services. She is thus no longer eligible for Medicaid Waiver services. The Division's decision to terminate those services is affirmed.

DATED this 8th day of April 2016.

Signed

Lawrence A. Pederson
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 22nd day of April, 2016.

By: *Signed*

Name: Lawrence A. Pederson
Title/Agency: Admin. Law Judge, DOA/OAH

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

⁵¹ AS 47.07.045(b)(2).