

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

In the Matter of )  
 )  
D T ) OAH No. 20-0234-MDS  
 ) Agency No.  
\_\_\_\_\_ )

**DECISION**

**I. Introduction**

D T receives Medicaid Home and Community-Based Waiver program (“Waiver”) services. The Division of Senior and Disabilities Services (Division) initiated a review process to determine her continuing eligibility for services in late August 2019. The Division subsequently determined that Ms. T was no longer eligible for Waiver services and notified her of that decision on February 5, 2020.<sup>1</sup> Ms. T requested a hearing.<sup>2</sup>

Ms. T previously qualified for Waiver services primarily due to her need for wound care following a surgical procedure. The Division showed at the hearing that she no longer needs wound care, and she does not otherwise qualify for Waiver services under the other methods of determining eligibility – she does not need any other qualifying therapy or nursing services, and although she undoubtedly requires some assistance with activities of daily living (ADLs), she does not require **extensive** assistance with her ADLs. Accordingly, the Division met its burden of showing that Ms. T no longer qualifies for Waiver services, and the Division’s decision terminating her eligibility for those services is upheld.

**II. Background Facts and Procedural History**

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

Ms. T is 73 years old. Her major health conditions include complex regional pain syndrome, type 2 diabetes mellitus with diabetic neuropathy, osteoarthritis, anxiety disorders, recurring severe depression, Parkinson’s disease, hypertension, hyperlipidemia, and a bladder disorder.<sup>3</sup> Ms. T has been receiving Waiver services since April 2018. At that time she was assessed for Waiver eligibility by the Division’s assessor who determined that she was essentially independent with each of the five scored ADLs used to determine Waiver eligibility -

---

<sup>1</sup> Exh. D.  
<sup>2</sup> Exh. C.  
<sup>3</sup> 2018 Consumer Assessment Tool (CAT), p. 4; 2019 CAT, p. 3.

bed mobility, transfers, locomotion, eating, and toileting.<sup>4</sup> Based upon that scoring alone, Ms. T would not have been found eligible for Waiver services. However, she was also suffering the aftereffects of an abscess on her gluteal fold: the abscess had been treated in early February 2018, but it became septic and MRSA infected, causing her to be hospitalized for 10 days later that month; she still required wound care as of the April 2018 assessment.<sup>5</sup> Based on her need for physical therapy twice per week, which included wound care, and in addition her need for “24/7 supervision and hands on assistance” during her recovery, the Division determined Ms. T to be eligible for Waiver services.<sup>6</sup> She was discharged from the hospital into an assisted living home at that time and began receiving Waiver services.<sup>7</sup>

Ms. T left her assisted living home of her own accord in approximately July 2019 and moved into her own home.<sup>8</sup> She continued receiving Waiver services, however.<sup>9</sup> She was assessed again in April 2019; the assessment was done via a video conference rather than in person.<sup>10</sup> The assessor scored the five qualifying ADLs for Ms. T as follows: bed mobility – independent with no set up help; transfers - independent with no set up help; locomotion - independent with no set up help; eating - independent with no set up help; toileting - independent with no set up help.<sup>11</sup> The assessor noted that Ms. T was receiving physical therapy once a week, but did not note any continued need for wound care or other medical care related to the abscess she suffered in 2018.<sup>12</sup>

No action was taken by the Division immediately after the April 2019 assessment as to Ms. T’s Waiver eligibility. However, beginning on or about August 27, 2019, the Division initiated a “material improvement review process,” or MIRP, regarding her Waiver eligibility.<sup>13</sup> In October 2019, the Division made a preliminary determination that Ms. T was no longer eligible because she did not appear to meet nursing facility level of care; it then requested

---

<sup>4</sup> 2018 CAT, pp. 7-9. The only slight variation was she required setup help with eating. *Id.* at p. 9.

<sup>5</sup> *Id.* at p. 5; T 2018 Waiver Qualification Note in Harmony, April 27, 2018.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; M. Sullivan testimony.

<sup>8</sup> M. Sullivan testimony; C. T testimony.

<sup>9</sup> M. Sullivan testimony.

<sup>10</sup> P. Ndenderoh testimony.

<sup>11</sup> 2019 CAT, pp. 7-9.

<sup>12</sup> *Id.* at p. 3; P. Ndenderoh testimony.

<sup>13</sup> M. Sullivan testimony; Exh. D, p.1.

additional medical documentation from Ms. T and her care coordinator, B C, and also undertook a “second review” of the April 2019 CAT.<sup>14</sup>

On January 9, 2020, while the Division’s final MIRP determination was pending, Ms. C and Ms. M submitted an application for renewal of Ms. T’s Waiver eligibility.<sup>15</sup> Without addressing that application, the Division shortly thereafter reached its final determination that Ms. T’s condition had materially improved to the extent that she was no longer eligible for Waiver services; it sent her a letter to that effect on February 5, 2020.<sup>16</sup> Ms. T requested a hearing to contest that determination on March 5, 2020.<sup>17</sup>

The hearing was held via teleconference on May 6, 14, 21 and 27, 2020. The Division was represented by Victoria Cobo-George; Marianne Sullivan and Peter Ndenderoh testified for the Division. Ms. T appeared and testified on her own behalf. She was assisted by care coordinator B C and personal care services coordinator T M, both of whom also testified on Ms. T’s behalf. The record closed on May 27, 2020.

### **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>18</sup> The nursing facility level of care<sup>19</sup> requirement is determined by an assessment which is documented by the CAT.<sup>20</sup> The CAT records an applicant’s needs for professional nursing services, therapies, and special treatments,<sup>21</sup> and whether an applicant has impaired cognition or displays problem behaviors.<sup>22</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>23</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),

---

<sup>14</sup> *Id.*  
<sup>15</sup> Jan. 9, 2020 C email; S. M testimony.  
<sup>16</sup> Exh. D.  
<sup>17</sup> Exh. C.  
<sup>18</sup> 7 AAC 130.205(d)(4).  
<sup>19</sup> *See* 7 AAC 130.205(d)(4); 7 AAC 130.215.  
<sup>20</sup> 7 AAC 130.215(4).  
<sup>21</sup> 2019 CAT, pp. 15 – 17.  
<sup>22</sup> *Id.*, pp. 18 – 19.  
<sup>23</sup> *Id.*, p. 31.

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.<sup>24</sup>

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>25</sup>

A person can also receive points for combinations of required professional 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>26</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>27</sup>

If a recipient is receiving Waiver services, the Division can undertake the MIRP process to determine whether they continue to be eligible. Division policy dictates that if the recipient submits a renewal application while the MIRP process is underway, the Division will complete its MIRP determination prior to conducting a new assessment in response to the renewal request.

## ***B. Eligibility***

### **1. Material improvement**

Ms. T has been receiving Waiver services since April 2018. As the Division is seeking to terminate her eligibility for services based on its MIRP determination, it has the burden to prove by a preponderance of the evidence that Ms. T has materially improved, and that the termination decision therefore was correct.<sup>28</sup>

Ms. T does not dispute that her original eligibility determination was based on findings regarding her need for physical therapy, wound care, and related supervision and assistance as of April 2018. Nor does she dispute that at the time of the Division's termination decision at issue in this appeal, her condition had changed, and she did not have substantially impaired cognition

---

<sup>24</sup> *Id.*, pp. 20, 31.

<sup>25</sup> *Id.*, p. 31.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> 7 AAC 49.135. "Preponderance of the evidence" means that a disputed fact is shown to be more likely true than not true.

or any significant behavioral issues, she was not then receiving therapies from a qualified therapist three or more days per week, and she was not receiving any specialized medical treatments.<sup>29</sup> Rather, Ms. T contends that her diabetes is now “uncontrolled,” and that it causes a cascading, deleterious effect on her health by preventing her from having needed surgery and potentially exposing her to another serious infection.<sup>30</sup> She also contends that she needs continuing Waiver services so she can be safely transported to medical appointments.<sup>31</sup>

“Material improvement” is defined by statute as follows:

“materially improved” means that a recipient who has previously qualified for a waiver for ... an older Alaskan or adult with a physical disability, 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>32</sup>]

In Ms. T’s case, there is no dispute that the conditions that constituted the primary basis for her Waiver eligibility in April 2018 no longer existed at the time of the hearing. She no longer has any need for wound care for her abscess or specialized nursing assistance associated with her MRSA infection. In addition, there is no dispute that Ms. T’s need for ADL assistance has not increased to the level of extensive assistance for at least three of the five ADLs considered for Waiver eligibility. All of the testimony and documentary evidence presented at the hearing, including that provided by Ms. T and her supporters, indicated that her need for assistance ranges from possibly needing supervision for locomotion, bed mobility and eating, to needing at most limited assistance for transfers and toileting.<sup>33</sup> There is no evidence that she requires extensive assistance for those five ADLs.<sup>34</sup>

Ms. T still suffers from diabetes, the condition underlying her 2018 gluteal fold abscess, which in turn led to her need for wound care and related services. She contends that her diabetes has become uncontrolled, and she cannot get it under control without nursing assistance. The evidence, however, did not support her contention that it has become uncontrolled; instead, it appears that she needs assistance with checking her blood sugar levels and administering insulin

---

<sup>29</sup> C. T testimony; A. C email to V. Cobo-George, May 13, 2020.

<sup>30</sup> *Id.*

<sup>31</sup> C. T testimony.

<sup>32</sup> AS 47.07.045(b)(3)(C).

<sup>33</sup> Ms. T’s concern regarding transportation to medical appointments, while not relevant to her waiver *eligibility*, was addressed at the hearing by Ms. Sullivan, who pointed out that such services are available through general Medicaid eligibility.

<sup>34</sup> “Extensive assistance,” as defined in the CAT, requires that a person receive weight-bearing assistance three or more times per week in a specified ADL.

injections. These types of services associated with controlling diabetes, however, do not qualify as skilled nursing services for waiver eligibility purposes.<sup>35</sup> Rather, they can be provided through the Division's Personal Care Services (PCS) program, which Ms. T can access by submitting an application for an assessment with the Division.

## **2. Renewal application and new assessment**

In addition to the issue concerning Ms. T's diabetes, she and her supporters Ms. C and Ms. M argue that if the Division had timely responded to their January 2020 renewal application by conducting a new assessment, it would have found Ms. T to continue to be Waiver eligible. In effect, they suggest that the renewal application should have acted to preempt the Division's MIRP determination process.

Ms. T's argument that the Division should have conducted a new assessment fails to take into account the fact that the Division had been conducting its MIRP analysis for several months when she submitted her January 2020 renewal application. Significant effort and resources had been expended, a preliminary determination had already been issued in October 2019, and the Division had requested additional input and documents from medical providers, and from Ms. C and Ms. M at that time. The Division's policy to not process a renewal application and conduct a new assessment under such circumstances makes sense, because to do otherwise would result in inefficiency and potential waste of resources. In a case such as this, it would have been counterproductive to require the Division to curtail the MIRP effort in mid-stream and instead conduct a new assessment while maintaining Ms. T's Waiver eligibility.

Rather, it made far more sense in this case for the Division to complete the MIRP analysis, and make its eligibility determination based on the last available assessment plus all available documents, medical records, and input from the recipient. Then when the determination was made that the recipient was no longer Waiver eligible, she was free to request a new assessment if and when she believed her condition had changed to an extent that she could again be eligible. As previously mentioned, she could also request an assessment to evaluate her eligibility for PCS services, which could be available for all the ADLs (not just the five used for Waiver eligibility), as well as IADLs.

During the hearing, recognizing the evidence indicating that Ms. T's needs for PCS services may have recently increased, Ms. Cobo-George stated on the record that if an

---

<sup>35</sup> See 2019 CAT, p. 11.

assessment for such services were requested for Ms. T, the Division would undertake the assessment without delay. Any assessment undertaken for PCS purposes would utilize the same CAT form that is used for Waiver eligibility purposes. The same scoring regarding ADL and IADL assistance needs, cognition, behavior, disabilities, therapies, and specialized medical services, applies to both programs. It must be noted, however, that Ms. T's eligibility for PCS services for ADLs and IADLs is not an issue presented for decision in this matter.

#### **IV. Conclusion**

The Division met its burden of proof in this case. The Division's MIRP analysis demonstrated that Ms. T has materially improved in the areas of need that gave rise to her eligibility for waiver services in April 2018. All of the evidence presented indicated that she does not currently meet skilled nursing level of care as required for Waiver eligibility. Consequently, the Division's decision to terminate her Waiver services is upheld.

DATED this 27<sup>th</sup> day of November, 2020.

By: *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 11<sup>th</sup> day of December, 2020.

By: Signed \_\_\_\_\_

Name: Carmen Clark

Title: Administrative Law Judge

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]