STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P.O. Box 30763, Lansing, MI 48909
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IN THE MATTER OF:

Docket No. 2010-36976 EDW

[redacted]

Appellant

_____/

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon the Appellant's request for a hearing.

After due notice, a hearing was held on [redacted]. [redacted], sister, appeared on the Appellant's behalf. [redacted], Nursing Supervisor, [redacted], Nurse Care Manager, and [redacted], Social Worker Care Manger, from [redacted] appeared on behalf of the Department of Community Health. [redacted] is the MI Choice Waiver agent for the Michigan Department of Community Health, (hereinafter Department).

The record was left open for one week to allow the Appellant's representative to respond to the waiver agency exhibits. No response was received from the Appellant's representative.

ISSUE

Did the Waiver Agency properly terminate participation in the MI Choice Waiver program following eligibility review?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. The Appellant is a [redacted] participant in MI Choice Waiver Services.

2. The Appellant had been found eligible for waiver services through Door 7, service dependency, of the Michigan Medicaid Nursing Facility Level of Care (LOC) Determination. (Exhibit 1, page 1)

3. On [redacted], the waiver agency completed a re-assessment of the Appellant's case. (Exhibit 1, pages 2-16)

4. On [redacted], the waiver agency also completed a Nursing Facility LOC Determination and found that the Appellant was no longer eligible for participation in the MI Choice Waiver services. (Exhibit 2, pages 32-38)

5. On [redacted], the waiver agency issued an Advance Action Notice to the Appellant indicating his waiver services would terminate effective [redacted]. (Nursing Supervisor Testimony)

6. The Appellant requested a formal, administrative hearing on [redacted]

CONCLUSIONS OF LAW

The Medical Assistance Program is established pursuant to Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). It is administered in accordance with state statute, the Social Welfare Act, the Administrative Code, and the State Plan under Title XIX of the Social Security Act Medical Assistance Program.

This Appellant is claiming eligibility for services through the Department's Home and Community Based Services for Elderly and Disabled (HCBS/ED). The waiver is called MI Choice in Michigan. The program is funded through the federal Centers for Medicare and Medicare Services to the Michigan Department of Community Health (Department). Regional agencies, in this case the Waiver Agency, function as the Department's administrative agency.

> Waivers are intended to provide the flexibility needed to enable States to try new or different approaches to the efficient and cost-effective delivery of health care services, or to adapt their programs to the special needs of particular areas or groups of recipients. Waivers allow exceptions to State plan requirements and permit a State to implement innovative programs or activities on a time-limited basis, and subject to specific safeguards for the protection of recipients and the program. Detailed rules for waivers are set forth in subpart B of part 431, subpart A of part 440 and subpart G of part 441 of this chapter. *42 CFR 430.25(b)*

1915(c) (42 USC 1396n (c) allows home and community based services to be classified as "medical assistance" under the State Plan <u>when furnished to recipients who would otherwise need inpatient care that is furnished in a hospital SNF, ICF or ICF/MR</u> and is reimbursable under the State Plan. (42 CFR 430.25(b))

Effective November 1, 2004, the Michigan Department of Community Health (MDCH) implemented revised functional/medical eligibility criteria for Medicaid nursing facility, MI Choice, and PACE services. Federal regulations require that Medicaid pay for services only for those beneficiaries who meet specified level of care criteria.

Section 4.1 of the Medicaid Provider Manual Nursing Facilities Section references the use of an online Michigan Medicaid Nursing Facility Level of Care Determination tool (*Michigan Medicaid Nursing Facility Level of Care Determination, March 7, 2005, Pages 1 – 9* or LOC). The LOC must be completed for all Medicaid-reimbursed admissions to nursing facilities or enrollments in MI Choice or PACE on and after November 1, 2004.

The Level of Care Assessment Tool consists of seven-service entry Doors. The doors are: Activities of Daily Living, Cognition, Physician Involvement, Treatments and Conditions, Skilled Rehabilitative Therapies, Behavior, or Service Dependency. In order to be found eligible for MI Choice Waiver services, the Appellant must meet the requirements of at least one Door. The Department presented testimony and documentary evidence that the Appellant did not meet any of the criteria for Doors 1 through 7.

Door 1
Activities of Daily Living (ADLs)

Scoring Door 1: The applicant must score at least six points to qualify under Door 1.

(A) Bed Mobility, (B) Transfers, and (C) Toilet Use:
- Independent or Supervision = 1
- Limited Assistance = 3
- Extensive Assistance or Total Dependence = 4
- Activity Did Not Occur = 8

(D) Eating:
- Independent or Supervision = 1
- Limited Assistance = 2
- Extensive Assistance or Total Dependence = 3
- Activity Did Not Occur = 8

The waiver agency determined that the Appellant is independent in bed mobility, transfers, toileting and eating. (Exhibit 2, pages 32-34) Since the Appellant did not score at least six (6) points, he did not qualify through Door 1.

The Appellant's representative testified that the Appellant is not independent with his ADLs, noting that there have been reports he crawled to the door when intoxicated. She stated that the Appellant had just returned home from a 5 week nursing facility stay at the time of the assessment and has had a recent 10 day hospitalization. The Appellant's representative also testified that the doctor documented a need for a motorized wheelchair that was delivered the day before this hearing.

The review period for Door 1 was the seven days prior to [redacted] assessment. (Exhibit 2, pages 32-34) The waiver agency case notes indicate that the Appellant was released from the nursing facility on [redacted], which was more than 7 days prior to the assessment. (Exhibit 1, page 23) The recent hospitalization and need for a motorized

wheelchair are also outside of the review period for this assessment.

The only activities considered under Door 1 are bed mobility, transfers, toilet use and eating. (Exhibit 1, pages 32-24) The Social Worker Case Manager credibly testified that she observed the Appellant transferring and walking on [redacted], as well as during prior home visits. The assessment report indicates that the Appellant reported he was independent with bed transfers, transfers, toileting and eating. (Exhibit 1, page 13) The Appellant's representative questions the accuracy of the Appellant's self reporting his abilities at the assessment. The assessment report notes that the Appellant has a tendency to not tell the truth all the time. (Exhibit 1, page 7) However, the activities the Appellant's representative stated the Appellant has trouble with, getting in and out of the tub, prolonged standing, cleaning the kitchen, are not activities considered under Door 1. Further, the Appellant had only been receiving homemaking, counseling, and home delivered meal services. (Exhibit 1, page 1) The nursing services agency confirmed that they were only providing homemaking services and no personal care assistance. (Exhibit 2, page 31) Based upon the evidence, the Appellant did not qualify under Door 1 at the time of the [redacted], assessment.

Door 2
Cognitive Performance

Scoring Door 2: The applicant must score under one of the following three options to qualify under Door 2.

1. "Severely Impaired" in Decision Making.
2. "Yes" for Memory Problem, and Decision Making is "Moderately Impaired" or "Severely Impaired."
3. "Yes" for Memory Problem, and Making Self Understood is "Sometimes Understood" or "Rarely/Never Understood."

The waiver agency found that the Appellant's short term memory was okay, that cognitive skills for daily decision making were modified independent (some difficulty in new situations only), and that he is able to make himself understood. (Exhibit 1, page 6 and Exhibit 2, pages 34-35). The modified independent decision making determination alone is not sufficient to be eligible for waiver services under Door 2. (Exhibit 2, pages 34-35).

The Appellant's representative testified that she questions the Appellant's cognitive function as he has auditory and visual hallucinations. She stated she questions his decision making ability. However, this does not establish that the Appellant's decision making is severely impaired, i.e. he can never (or rarely) make decisions. No evidence was presented indicating the Appellant has a memory problem or that he can not make himself understood. Based on the evidence, the Appellant did not qualify for waiver services under Door 2 at the time of the [redacted], assessment.

Door 3
Physician Involvement

Scoring Door 3: The applicant must meet either of the following to qualify under Door 3

1. At least one Physician Visit exam AND at least four Physicians Order changes in the last 14 days, OR
2. At least two Physician Visit exams AND at least two Physicians Order changes in the last 14 days.

The evidence presented is uncontested that the Appellant did not qualify under Door 3 as he did not have any physicians exam visits or physicians order changes within 14 days of the assessment. (Exhibit 2, page 34)

Door 4
Treatments and Conditions

Scoring Door 4: The applicant must score "yes" in at least one of the nine categories above and have a continuing need to qualify under Door 4.

In order to qualify under Door 4 the applicant must receive, within 14 days of the assessment date, any of the following health treatments or demonstrated any of the following health conditions:

A. Stage 3-4 pressure sores
B. Intravenous or parenteral feedings
C. Intravenous medications
D. End-stage care
E. Daily tracheostomy care, daily respiratory care, daily suctioning
F. Pneumonia within the last 14 days
G. Daily oxygen therapy
H. Daily insulin with two order changes in last 14 days
I. Peritoneal or hemodialysis

No evidence was presented indicating the Appellant had met the criteria listed for Door 4 at the time of the assessment. (Exhibit 2, page 36)

Door 5
Skilled Rehabilitation Therapies

Scoring Door 5: The applicant must have required at least 45 minutes of active speech therapy (ST), occupational therapy (OT) or physical therapy (PT), scheduled or delivered in the last 7 days and continues to require skilled rehabilitation therapies to qualify under Door 5.

No evidence was presented indicating the Appellant required any of the skilled rehabilitation therapies that met the criteria listed for Door 5 at the time of the assessment. (Exhibit 2, pages 36-37)

Door 6
Behavior

Scoring Door 6: The applicant must score under one of the following 2 options to qualify under Door 6.

1. A "Yes" for either delusions or hallucinations within the last 7 days.
2. The applicant must have exhibited any one of the following behaviors for at least 4 of the last 7 days (including daily): Wandering, Verbally Abusive, Physically Abusive, Socially Inappropriate/Disruptive, or Resisted Care.

The Appellant's representative stated that the Appellant has both visual and auditory hallucinations. The [redacted], assessment report indicates hallucinations are present but not within the past 3 days. Similarly issues with verbal abuse and socially inappropriate or disruptive behavior were noted as present but not within the past 3 days. Resisting care was reported as occurring daily in the past 3 days. (Exhibit 1, page 7)

The review period for Door 6 is 7 days. (Exhibit 2, pages 37-38) The waiver agency assessment can not support the determination that the criteria for Door 6 were not met because they only reviewed a 3 day period. Based on the evidence, it can not be determined whether or not the Appellant met the criteria for Door 6 at the time of the assessment. A new assessment is necessary to determine whether or not the Appellant meets the Nursing Facility Level of Care Determination criteria.

Door 7
Service Dependency

Scoring Door 7: The applicant must be a current participant and demonstrate service dependency under Door 7.

There is no need for this ALJ to review the criteria for Door 7 as it has already been determined that a new assessment must be completed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, finds the Waiver Agency did not properly complete the assessment and Nursing Facility Level of Care Determination prior to terminating the Appellant's MI Choice Waiver services.

IT IS THEREFORE ORDERED that:

The Department's decision is REVERSED. The waiver agency is ORDERED to conduct a new assessment to determine whether or not the Appellant meets the Nursing Facility Level of Care Determination criteria.

Colleen Lack
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 8/24/2010

***** NOTICE *****

The State Office of Administrative Hearings and Rules for the Department of Community Health may order a rehearing on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. The State Office of Administrative Hearings and Rules for the Department of Community Health will not order a rehearing on the Department's motion where the final decision or rehearing cannot be implemented within 90 days of the filing of the original request. The Appellant may appeal the Decision and Order to Circuit Court within 30 days of the receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt of the rehearing decision.