STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH
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IN THE MATTER OF:

Docket No. 2010-54873 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], appeared on the Appellant's behalf. [redacted] appeared and testified.

[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). [redacted], and [redacted] all from the [redacted] were present as Department witnesses. [redacted] with the Department of Human Services, was also present.

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 [redacted] years old and has been a participant in MI Choice Waiver Services since [redacted]. (Exhibit 1, Attachment B page 1 and [redacted] Testimony)

2. The Appellant has multiple diagnoses including back disorder, hypertension,

arthritis, and depression. (Exhibit 1, Attachment B pages 7-8)

3. The Appellant initially qualified for MI Choice Waiver services through Door 2 of the Michigan Medicaid Nursing Facility Level of Care Determination. ([redacted] Testimony)

4. On [redacted], the waiver agency completed a re-assessment with the Appellant. (Exhibit 1, Attachment B)

5. On [redacted], the waiver agency also completed a Michigan Medicaid Nursing Facility Level of Care Determination. (Exhibit 1, Attachment C)

6. The Appellant did not meet the functional/medical eligibility criteria for Medicaid nursing facility level of care. (Exhibit 1, Attachment C)

7. On [redacted], the waiver agency issued an Advance Action Notice to the Appellant indicating her MI Choice Waiver services would terminate effective [redacted], because she is medically ineligible. (Exhibit 2, page 1)

8. 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 [redacted], 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 when furnished to recipients who would otherwise need inpatient care that is furnished in a hospital SNF, ICF or ICF/MR 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 Appellant reported that she was independent with bed mobility, transfers, toileting and

eating at the [redacted], re-assessment. (Exhibit 1, Attachment C pages 1-3) The Appellant's daughter testified that the Appellant needs help out of bed on a daily basis due to her back problems, and needs help with transferring about two days per week. The Appellant's daughter stated that she was present for the re-assessment appointment but did not talk with the waiver agency. She stated she was trying not to interfere. ([redacted] Testimony)

The waiver agency could only base the determination on the information provided at the time of the re-assessment. If the Appellant provided incorrect information, her daughter was present and could have given the correct information to the waiver agency. The waiver agency indicated that the Appellant reported sleeping on the couch, not in her bed, and demonstrated being able to get off the couch independently. ([redacted] Testimony) Additionally, the prescription for services written by the Appellant's doctor does not indicate a need for assistance with any of the activities considered under Door 1. (Exhibit 5) Accordingly, the Appellant did not score at least six (6) points based on the information available at the time of the re-assessment, thus she did not qualify through Door 1.

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."

It is uncontested that the Appellant has a memory problem. Based on the information provided at the time of the re-assessment, the Appellant was marked as modified independent for cognitive skills for daily decision making and as able to make herself understood. (Exhibit 1, Attachment C pages 3-4) The Appellant's daughter testified that she organizes the Appellant's day for her, including prompting her to take medications, when to eat, get dressed, etc. She also indicated that the Appellant has some trouble expressing herself by saying things wrong and having trouble finding words or finishing thoughts. Again, the waiver agency had to base their determination on the information provided at the re-assessment. It was not reported that the Appellant needed assistance with daily decision making. Further, no evidence was presented that the Appellant is only sometimes or rarely understood as described in the Michigan Medicaid Nursing Facility Level of Care Determination. Based on the information available at the time of the re-assessment, the Appellant did not qualify under Door 2.

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 wavier agency documentation indicates that the Appellant did not have any physician visits or order changes within the past 14 days. (Exhibit 1, Attachment C page 4) The Appellant's daughter testified she was not sure if this was correct. However, there was no evidence presented that the Appellant had either physician's visit exams or order changes within the 14 day period that would have allowed her to met either of the criteria listed for Door 3 at the time of the re-assessment. Accordingly, the Appellant did not qualify under Door 3.

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 any of the criteria listed for Door 4. Accordingly, the Appellant did not qualify under Door 4.

Door 5
Skilled Rehabilitation Therapies

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

The wavier agency found that the Appellant did not qualify through Door 5 because she did not have any skilled rehabilitation therapies within relevant 7 day review period. (Exhibit 1, Attachment C pages 5-6) The Appellant's daughter testified that this is not correct and reviewed a calendar of the Appellant's appointments. She stated that the Appellant had a 45 minute physical therapy session on [redacted]. This would have been within 7 days of the [redacted], re-assessment.

However, the waiver agency contacted the Appellant's physical therapy provider on [redacted], and was informed that the Appellant did not have an active order for physical therapy in the past 8 days. The physical therapy provider indicated that the last physical therapy was done on [redacted], and that the Appellant did not show for her appointment on [redacted]. ([redacted] Testimony)

According to the information provided by the Appellant's physical therapy provider to the waiver agency, the Appellant did not receive skilled rehabilitation therapies within the seven day period that would have allowed her to qualify through Door 5.

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 wavier agency documentation indicates that the Appellant did not exhibit any of the behavioral symptoms or have any delusions or hallucinations at the time of the re-assessment. (Exhibit 1, Attachment C pages 6-7) The Appellant's daughter testified that the waiver agency did not ask the Appellant about this at the re-assessment. She stated that the Appellant is verbally abusive on a daily basis and also hears voices.

The waiver agency RN supports coordinator testified that these questions were asked on [redacted] and the Appellant only mentioned hearing crickets. ([redacted] Testimony) The documentation from the initial assessment and plan of care notes some concerns with use of the stove and potential to wander up to the donut shop. (Exhibit 4, pages 1-2) However, these concerns were not reported to the waiver agency again at the [redacted] appointment. As no evidence was presented to the waiver agency at this review demonstrating that Appellant met the criteria set forth above, she did not qualify under Door 6.

Door 7
Service Dependency

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

The assessment provides that the applicant could qualify under Door 7 if she is currently (and has been a participant for at least one (1) year) being served by either the MI Choice Program, PACE program, or Medicaid reimbursed nursing facility, requires ongoing services to maintain current functional status, and no other community, residential, or informal services are available to meet the applicant's needs.

It is uncontested that the Appellant has only been a participant since [redacted]. Accordingly, she can not meet the criteria to remain eligible through Door 7.

The Appellant was given the opportunity to review and sign the level of care determination, but she refused to sign. (Exhibit 1, Attachment C page 8-9) The Appellant's daughter explained that they felt the waiver agency was trying to trick the Appellant. However, the Appellant's daughter was present for the re-assessment and could have clarified any areas in which she believed the Appellant was being tricked. The Appellant's daughter also could have provided additional or more accurate information to correct what her mother reported to the waiver agency. Based on the information provided by the Appellant at the re-assessment, she did not meet the Medicaid nursing facility level of care criteria. This does not imply that the Appellant does not need any assistance, only that she is not eligible to receive services through the MI Choice Waiver. Accordingly, the Waiver Agency properly terminated the Appellant's MI Choice Waiver services.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, finds the Waiver Agency properly terminated the Appellant's MI Choice Waiver services.

[redacted]
Docket No. 2010-54873 EDW
Decision and Order

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED.

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

cc: [redacted]

Date Mailed: 12/9/2010

***** 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.