

**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. 2010-6416 EDW

██████████

Appellant

_____ /

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 42 CFR 431.200 et seq. upon the Appellant's request for a hearing.

After due notice, a hearing was held on ██████████ and continued to ██████████, when the ALJ discovered that the Department's waiver agency had not received a complete copy of the Appellant's Exhibit #1.

██████████, represented the Appellant. Her witness was the Appellant, ██████████, director, represented the Department's waiver agency. Her witnesses were ██████████, QA manager, and ██████████, supports coordinator.

ISSUE

Did the Department properly terminate the Appellant from the MI Choice program?

FINDINGS OF FACT

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

1. At the time of hearing the Appellant is a ██████████ female Medicaid beneficiary. (Appellant's Exhibit #1)
2. She is afflicted with major depression, Bipolar disorder [paranoid type], Parkinson's, closed head injury the result of a brain aneurysm and various physical maladies. (See Testimony and Appellant's Exhibit #1, pp. 1, 12, 13, 15 and 24)

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3. The Respondent agency, the [REDACTED] is a contract agent for the State of Michigan, Department of Community Health. They are responsible for the eligibility determinations and the provision of MI Choice services in their geographical area.
4. On [REDACTED], an assessment was conducted resulting in the termination of the Appellant from the waiver program as it was determined she no longer met the requirements of the program. (Department's Exhibit A, p. 2)
5. The Department alleges that they revisited the Appellant on [REDACTED], to complete a new NF LOC assessment – following a consultation with the Appellant's psychiatrist. (Department's Exhibit A, p. 2)
6. The Department alleges that they gave the Appellant MPRO's Immediate Review information during that [REDACTED] visit. (Department's Exhibit A, p. 2)
7. The Department alleges that notice of termination was sent to the Appellant on [REDACTED] (Department's Exhibit A, p. 2)
8. The Appellant's representative disputes items 6 and 7. (See Testimony of [REDACTED] and Appellant's Exhibit #1, p. 1)
9. On [REDACTED], the instant request for hearing was received by SOAHR. (Appellant's Exhibit #1)

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.

Effective November 1, 2004, the Michigan Department of Community Health (MDCH) implemented revised functional/medical eligibility criteria for Medicaid nursing facility (NF), MI Choice, and PACE services. Federal regulations require that Medicaid pay for services only for those beneficiaries who meet specified level of care criteria. Nursing facility residents must also meet Pre-Admission Screening/Annual Resident Review requirements.

The Medicaid Provider Manual (MPM), Nursing Facilities/Coverages lists the policy for NF admission and the continued eligibility process as well as outlines functional/medical criteria requirements for Medicaid-reimbursement of NF, MI Choice, and PACE services.

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At section 4.1 the manual references the use of the web-based Michigan Medicaid Nursing Facility Level of Care Determination tool or the NF LOC Exception Process criteria. The LOC determination must be completed for all Medicaid-reimbursed admissions to nursing facilities or enrollments in MI Choice or PACE.

Nursing Facilities, MI Choice, and PACE have multiple components for determining eligibility for services. The MPM explains the components that comprise the eligibility and admission process for nursing facility eligibility and admission.

There are five (5) components for determining eligibility for Medicaid nursing facility reimbursement:

- Verification of financial Medicaid eligibility
- PASARR Level I screening
- Physician-written order for nursing facility services
- A determination of medical/functional eligibility via the Michigan Medicaid Nursing Facility Level of Care Determination
- Computer-generated Freedom of Choice form

MPM, §4.1 et seq Nursing Facility, January 1, 2010, pp. 6-14

The Level of Care Assessment Tool consists of seven-service entry doors or domains. 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 continued waiver program participation the Appellant must meet the requirements of at least one NF LOC door via a scored assessment - which was not present in the department's evidence.

Door 1

Activities of Daily Living (ADLs)

In the last 7 days, has the applicant needed hands-on assistance in moving around in bed, transferring from bed to chair or wheelchair, or standing, toileting or eating?

The Department provided no written evidence to support or deny program qualification through this domain. They testified that the Appellant was capable of meeting her ADLs.

Door 2
Cognitive Performance

In the last 7 days, has the applicant had any difficulty remembering things significant to daily life, or difficulty remembering to take scheduled medications?

The Department provided no written evidence to support or deny program qualification through this domain. Department witness ██████████ testified that they used information obtained from a psychiatrist to reach the conclusion that the Appellant did not qualify through Door 2.

Door 3
Physician Involvement

In the last 14 days, has the applicant been examined by a physician, practitioner or authorized assistant which resulted in at least 1 physician visit and 4 physician order changes, or 2 physician visits and at least 2 physician order changes? (This does not include a routine health maintenance visit.)

The Department provided no written evidence to support or deny program qualification through this domain. The Department witness testified that there was no physician involvement.

Door 4
Treatments and Conditions

In the last 14 days, has the applicant undergone 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-of-life care (life expectancy less than 6 months)
- E. Daily tracheostomy care, daily respiratory care, daily suctioning
- F. Pneumonia within the last 14 days
- G. Daily oxygen therapy
- H. Diabetes (2 insulin order changes in last 14 days)
- I. Peritoneal or hemodialysis

The Department provided no written evidence to support or deny program qualification through this domain. The Department witness testified that the Appellant had no such treatments or conditions.

Door 5
Skilled Rehabilitation Therapies

Has the applicant required at least 45 minutes of active PT, OT or ST (scheduled or delivered) in the last 7 days and continues to require skilled rehabilitation therapies?

The Department provided no written evidence to support or deny program qualification through this domain. The Department witness testified that the Appellant underwent no such therapies.

Door 6
Behavior

The LOC assessment tool provides a listing of behaviors recognized under Door 6: Wandering, Verbally Abusive, Physically Abusive, Socially Inappropriate/Disruptive, Resists Care.

The LOC assessment tool provides that the Appellant would qualify under Door 6 if the Appellant had a score under the following two options:

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 Department provided no written evidence to support or deny program qualification through this domain. The Department witness testified that the Appellant demonstrated no such behavior

Door 7
Service Dependency

Appellant could qualify under Door 7 if there was evidence that she is currently being served in a nursing facility (and for at least one year) or by the MI Choice or PACE program, and required ongoing services to maintain her current functional status.

Department provided no written evidence to support or deny program qualification through this domain. The Department witness testified that the Appellant had not been a program participant for at least one year as of [REDACTED].

The Appellant testified that her in home assessment team did not properly assess her or fully appreciate her medical plight. The Waiver agency representative testified that the Appellant was assessed and did not meet the functional/medical eligibility criteria for Medicaid NF LOC under any door [above]. However, they testified that there was initial concern over Door #2 – so they checked with the Appellant’s psychiatrist who presented them with unknown information. Armed with that information the supports coordinator, ██████████ went back to the Appellant’s residence a second time and determined that she did not meet the standard at Door #2.

There was no documentation, testimony or record produced of the conversation with the Appellant’s psychiatrist.

There was no indication what the psychiatrist said about her patient in relation to Door #2 and her then present cognitive ability – and there was no person or record to probe on cross examination.

The NF LOC assessment tool is a snap-shot of the waiver recipient at a certain moment in time – informed observations by the assessment team are critical and [usually] afforded great weight. However, when outside sources are relied upon to influence or color those evaluations – the waiver recipient is at a distinct disadvantage if not informed of the reviewing data used - as was the case here.

In the absence of the psychiatrist’s testimony, the Appellant’s evidence takes on extra weight and persuades this reviewer that the first suspicion of ██████████ on in-person assessment [conducted of ██████████] was the correct impression: the Appellant qualified for continued program participation through Door #2 – owing to impaired cognitive ability.

The Appellant still presents with cognitive impairment sufficient to disrupt her ability to follow through with tasks. [See Appellant’s Exhibit #1, p. 27] At hearing the ALJ observed that the Appellant’s testimony was disjointed and then abruptly silent.

There were other issues in the record which caused the ALJ to reassess the weight afforded to the testimony of the Department’s witnesses:

- The Department witness stated in its hearing summary that they provided notice of termination to the Appellant on ██████████ – and yet the Appellant filed her appeal on ██████████. See Department’s Exhibit A, p. 2 and Appellant’s Exhibit #1, p. 1.

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- The Department witness stated in their hearing summary that MPRO information was presented to the Appellant on the date of the reassessment – ██████████ – “or sometime later.” The Appellant denied this in her testimony, there is no record or evidence of such notice. At hearing both the Appellant and her representative said they “never heard of MPRO.”

The Appellant’s Exhibit #1 was approximately 30-pages in length and while some of the material was dated – some of the material was current and provided documentation of the Appellant’s battle with mental illness in various forms and a sampling of her daily status post closed head injury. I gave this exhibit considerable weight.¹

Appellant’s representative ██████████ [MSW] also observed that the Appellant still takes psychotropic medication, suffers from mental illness and is cognitively impaired to the point that she cannot speak [at times] and has difficulty communicating the rest of the time. I gave ██████████ testimony considerable weight on review.

The NF LOC assessment represents a mere snap-shot of symptoms as collected by the agency reviewers – based on the evidence presented by the Appellant and the lack of supporting evidence from the agency I find that the Appellant has, in this instance, preponderated her burden of proof that she is qualified for continued services through Door #2.

Clearly, the Department witnesses had second thoughts about this domain or they would not have conducted another reassessment on the cognitive performance issue on ██████████.

On review of the testimony and the evidence it was apparent that the agency failed to accurately assess the Appellant under Door #2. Even under questioning from the ALJ the Department witness could not produce supporting documents, testimonial observations or receipts of notice. Accordingly, its termination of the Appellant from program eligibility is without support.

The Appellant has preponderated her burden of proof through her testimony and records.

¹ The Appellant’s exhibit describes her use of Depakote (page 12) and staring spells. An evaluation conducted in ██████████, shows the Appellant improving to the point of “being stable” but still suffering from Bipolar disorder (page 15). Something prompted a person centered crisis plan for the Appellant on or about ██████████, significant symptoms are reported (page 22). The Appellant’s tendency to stare off into space was observed and reported by her interviewer at ██████████ on ██████████ (page 24). Another social worker catalogued the Appellants physical and mental symptoms with tremors, memory and focus issues plaguing the Appellant (page 27).

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that MI Choice waiver agency improperly assessed the Appellant at Door #2 of the NF LOC.

IT IS THEREFORE ORDERED that:

The Department's decision is REVERSED.

IT IS FURTHER ORDERED that:

The Department shall conduct a documented reassessment utilizing a LOC assessment tool within 90-days receipt of this Decision and Order.

Dale Malewska
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc:



Date Mailed: 3/12/2010

***** NOTICE *****

The State Office of Administrative Hearings and Rules 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 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.