STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P.O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax: (517) 334-9505

IN THE MATTER OF:

Docket No. 2011-2473 EDW

[redacted]

Appellant

_____/

DECISION AND ORDER

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

After due notice, a hearing was held on [redacted]. The Appellant, [redacted] appeared on her own behalf. [redacted], appeared on behalf of the Department of Community Health. [redacted] is the MI Choice Waiver agent for the Michigan Department of Community Health, (Department).

ISSUE

Did the waiver agency properly deny participation in the MI Choice Waiver program following an eligibility review?

FINDINGS OF FACT

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

1. The Appellant is [redacted] and has been a participant in MI Choice Waiver services since [redacted]. (Exhibit 1, page 3; Testimony of Risker)

2. The Appellant has multiple diagnoses, including congestive heart failure, COPD, hypertension, arthritis, anxiety, depression, and diabetes. (Exhibit 1, pages 16-17)

3. In [redacted], the Appellant moved to [redacted] County. (Testimony of [redacted])

4. The Appellant was previously receiving MI Choice Waiver services in her former county of residence. (Testimony of [redacted])

5. The Appellant was receiving personal care and homemaking services through the MI Choice Waiver program. (Testimony of [redacted])

6. On [redacted], the waiver agency completed an initial assessment with the Appellant. (Exhibit 1, pages 11-24)

7. On [redacted], the waiver agency also completed a Michigan Medicaid Nursing Facility Level of Care Determination. (Exhibit 2)

8. The Appellant did not meet the functional/medical eligibility criteria for Medicaid nursing facility level of care. (Testimony of [redacted]; Exhibit 1, page 7)

9. The waiver agency contacted MPRO to request immediate review of an exception or the Appellant. That request for an exception was denied. (Testimony of [redacted]; Exhibit 1, page 9)

10. On [redacted], the waiver agency issued an Adequate Action Notice to the Appellant, indicating that her request for MI Choice Waiver services was denied because she does not need or meet nursing home eligibility requirements. (Exhibit 1, page 8)

11. The Appellant requested a formal, administrative hearing on [redacted]. (Exhibit 1, pages 25-26)

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 [redacted] assessment notes indicate that the Appellant reported that she is independent with bed mobility, eating, toileting, and transferring. (Exhibit 1, pages 20-21)

The Appellant testified that she is independent with bed mobility, eating, and toileting. However, she stated that is not independent with transferring because she cannot get up from a seated position without pushing off on the arms of the chair or sofa. The Appellant also testified that she does drive a car, but she does so against her family and physicians' advice.

Because the Appellant does not need help from another person with transferring, her need for assistance with that activity would not qualify for any score under Door 1. Accordingly, the Appellant did not score at least six points, 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."

The waiver agency found that the Appellant's memory was okay, she was independent with cognitive skills for daily decision making, and she was usually able to make herself understood. (Exhibit 1, page 14; Exhibit 2) The Appellant testified that she sometimes has memory problems. She stated that she recently got lost on the highway because she could not remember where she was. The waiver agency's witness testified that the Appellant's memory problems were noted at the time of the assessment, but did not rise to the level of scoring under Door 2. She further explained that even if the Appellant's memory problems were scored, that alone would not qualify her under Door 2 because she does not have any significant problems with decision making or making herself understood.

The evidence did not support that the Appellant has a memory problem that would qualify her under Door 2. There was no evidence that the Appellant needs assistance making decisions regarding tasks of daily life. And the Appellant is able to express herself and usually be understood. Accordingly, 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 waiver agency documentation indicates that the Appellant had no physician visits or no order changes within the 14 days before the assessment. (Exhibit 2) Based on the evidence, the Appellant did not have sufficient physician's visit exams and order changes within the 14 day period that would have allowed her to meet either of the criteria listed for Door 3 at the time of the assessment.

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. The Appellant testified that she does take daily insulin, but there had been no order changes within 14 days of the assessment. 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 waiver agency found that the Appellant did not qualify through Door 5 because she did not have any skilled rehabilitation therapies within the relevant 7-day review period.

(Exhibit 2) The Appellant testified that she was previously receiving physical therapy before she moved, and she has since resumed physical therapy services, but she admits that she was not receiving physical therapy at the time of the assessment. Accordingly, the Appellant did not receive skilled rehabilitation therapies within the 7-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 waiver agency's assessment indicated, and the Appellant testified, that the Appellant had exhibited verbally abusive behavior in the 7 days before the assessment. However, that behavior was not frequent enough to qualify under Door 6. In addition, the Appellant testified that she had exhibited socially inappropriate behavior by not dressing appropriately in public. But examples of socially inappropriate behavior include making disruptive sounds or noises, screaming out, self-abusive acts, smearing or throwing feces, hoarding, and rummaging through others belongings. Clearly, the Appellant's inappropriate dress does not rise to the same level as the behaviors provided as examples. Accordingly, the Appellant did not qualify through this Door.

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 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 been a participant since [redacted]. However, the waiver agency found that the services the Appellant is receiving could be provided by other community-based programs, i.e., the Home Help program through the Department of

Human Services. In addition, the Appellant is currently being provided some personal care and homemaking services through the waiver agency, and she also receives home-delivered meals from another agency. Because other services are available to meet the Appellant's needs, she did not qualify through Door 7.

While this Administrative Law Judge is sympathetic to the Appellant's position, I do not have authority to override or disregard the policy set forth by the Department. The Appellant did not meet the nursing facility level of care criteria at the time of the [redacted] assessment to be eligible for waiver services. This is not a determination that the Appellant does not need assistance, only that she is not eligible to receive ongoing services through the MI Choice Waiver program. If she has not already done so, the Appellant should follow up with the Department of Human Services for the Home Help program.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, finds the waiver agency properly denied the Appellant MI Choice Waiver services.

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED.

Kristin M. Heyse
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 1/14/2011

***** 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.