

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

P.O. Box 30763, Lansing, MI 48909
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IN THE MATTER OF:

Docket No. 2011-37768 EDW

██████████,

Appellant.

_____ /

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge (ALJ) pursuant to MCL 400.9 and 42 CFR 431.200 *et seq.*, following the Appellant's request for a hearing.

After due notice, a telephone hearing was held ██████████, daughter, appeared on the Appellant's behalf.

██████████, Program Manager, appeared on behalf of ██████████, ██████████ is the MI Choice Waiver agent for the Michigan Department of Community Health (waiver agency). ██████████, RN Supports Coordinator, appeared as a witness for the waiver agency.

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 ██████ years old and has been a participant in MI Choice Waiver services. (Exhibit 3, page 20)
2. The Appellant has multiple diagnoses including hypertension, coronary heart disease, peripheral vascular disease, arthritis, anxiety, depression, diabetes, and history of bladder cancer. (Exhibit 3, pages 25-27)
3. A ██████████, letter from the Appellant's physician includes additional diagnoses of congestive heart failure, peptic ulcer disease, carpal tunnel syndrome, scoliosis, dyspnea, and early dementia. (Exhibit 2, page 2)

4. On ██████████, the waiver agency RN Supports Coordinator and an interpreter made a home visit to complete a re-assessment with the Appellant. (Exhibit 3, pages 20-34)
5. On ██████████, the RN Supports Coordinator and an interpreter returned to the Appellant's home to complete a Michigan Medicaid Nursing Facility Level of Care Determination (LOC) with the Appellant. The Appellant's daughter was present also for this home visit. (Exhibit 3, pages 4-19, RN Supports Coordinator Testimony, Daughter Testimony)
6. The Appellant did not meet the functional/medical eligibility criteria for Medicaid nursing facility level of care. (Exhibit 3, pages 11 and 19)
7. On ██████████, the waiver agency issued notice to the Appellant that her MI Choice Waiver services would terminate in 15 days. (Exhibit 3, page 3)
8. The Appellant requested a formal, administrative hearing on ██████████. (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.

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 ██████████, 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 (7) 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. (Exhibit 3, pages 4-19)

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

(Exhibit 3, pages 4-6)

The RN Supports Coordinator testified that the Appellant answered questions through the interpreter on [REDACTED], to complete the re-assessment. The interpreter was also present on [REDACTED], when the LOC was completed with the Appellant and her daughter. (RN Supports Coordinator Testimony and Exhibit 3, page 21) The Appellant was scored as independent with bed mobility, transfers, toilet use, and eating based on the information reported on [REDACTED] and [REDACTED], and the RN Supports Coordinator’s

observations during these home visits. (RN Supports Coordinator Testimony, Exhibit 3, pages 4-6, and 31)

The Appellant's daughter contested the waiver agency's determination that the Appellant is independent with these activities. The Appellant's daughter provided testimony regarding the assistance her mother needs with each of these activities. However, the Appellant daughter did not provide this information to the waiver agency on ██████████, when the LOC was completed. The Appellant's daughter stated that the waiver agency did not ask such detailed information during the 10 minute home visit. (Daughter Testimony)

The waiver agency can only base their determination on the available information. The Appellant reported her independence with bed mobility, transfers, toilet use, and eating during the ██████████, home visit. (Exhibit 3, page 24) It is not surprising that the waiver agency then anticipated the same information would be provided on ██████████, when they returned to complete the LOC, and would not have asked for details when the Appellant's independence with these activities was again reported. (Exhibit 3, pages 4-6) The Appellant's daughter was present for the ██████████, home visit, and had the opportunity to report what assistance the Appellant needed to the waiver agency, but did not do so.

The waiver agency's determination that the Appellant was independent with bed mobility, transfers, toilet use, and eating is upheld based on the information available to them at the time of the ██████████, LOC determination. The Appellant did not score at least six (6) points to 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."

(Exhibit 3, pages 6-7)

It was uncontested that the Appellant has a short term memory problem. The Appellant's daughter contests the waiver agency's determination that the Appellant is independent with cognitive skills for daily decision making and is able to make herself understood. (See Exhibit 3, pages 6-7) The Appellant's daughter described the Appellant's mood swings, anxiety, and having difficulty making decisions because she is scared to make the wrong decision. She also explained that the Appellant is only sometimes understood because she starts talking, gets confused, and does not recall what she was saying. (Daughter Testimony)

However, these impairments with decision making and making herself understood were not reported to the waiver agency. Rather the waiver agency was able to complete the ██████████, redetermination with the Appellant through an interpreter, during which she reported she was independent with daily decision making and was able to make herself understood. (Exhibit 3, pages 21 and 23-24) This was again reported during the ██████████, home visit, for which the Appellant's daughter was present. (Exhibit 3, pages 6-7)

The waiver agency's determinations that the Appellant has a short term memory problem, is independent with cognitive skills for daily decision making and is able to make herself understood are upheld based on the information available to them at the time of the ██████████, LOC determination. Accordingly, the Appellant did not meet the criteria to qualify through 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.

(Exhibit 3, pages 7-8)

The Appellant's daughter testified that it was probably correctly marked that she had two physician visits in the two weeks prior to ██████████. Her testimony indicated that the Appellant may have had physician order changes to the dosage of her medications. However, there was no specific evidence of any physician's order changes during the relevant time period, such as the date and dosage information for a medication being changed. Without more specific evidence of physician's order changes within the relevant two week period, the waiver agency's determination that the Appellant did not have sufficient physician's visits or order changes to meet the criteria for Door 3 must be upheld.

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

(Exhibit 3, page 8)

No evidence was presented indicating that the Appellant received any of the specified treatments or demonstrated any of the specified health conditions during the relevant time period to meet the criteria for 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. (Exhibit 3, pages 8-9)

No evidence presented indicating that the Appellant received skilled rehabilitation therapies during the relevant time period to meet the criteria for 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.

(Exhibit 3, pages 9-10)

The Appellant’s daughter testified that the Appellant is verbally abusive to her and resists taking medications. (Daughter Testimony) The waiver agency scored the Appellant as being verbally abusive 1-3 of the relevant 7 day time period. (Exhibit 3, page 9) The evidence indicates that during the ██████████, home visit it was reported that the Appellant resists care, but this was not exhibited during the last 3 days. (Exhibit 3, page 25) The evidence does not indicate that verbal abuse or resisting care were reported to the waiver agency as occurring at least 4 of the 7 days prior to ██████████. Accordingly, the Appellant did not meet the criteria for 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.

(Exhibit 2, page 7)

It is uncontested that the Appellant has been a participant for over one year. The Appellant was receiving about 9 hours of personal care and homemaking services through the MI Choice Waiver program. (Exhibit 3, page 32) The Program Manager explained that homemaking and personal care services could be provided through the Department of Human Services Home Help Program. (Program Manager Testimony) Accordingly, the Appellant can not meet the criteria to remain eligible through Door 7 because services are available to meet her needs through other resources.

The Appellant's daughter testified that the Appellant's condition has been getting worse, and she needs even more help that was authorized through the MI Choice Waiver program. She indicated that a nursing home would be a last resort. (Daughter Testimony)

The Appellant did not meet the Michigan Medicaid Nursing Facility Level of Care criteria based on the information available at the time of the ██████████, determination. Accordingly, the Appellant was not eligible for continuing services through the MI Choice Waiver program. This does not imply a finding that the Appellant no longer needs any assistance. If she has not already done so, the Appellant may wish to complete an application for the Home Help Services program with the Department of Human 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 because she did not meet the Michigan Medicaid Nursing Facility Level of Care criteria.

IT IS THEREFORE ORDERED that:

[REDACTED]
Docket No. 2011-37768 EDW
Decision and Order

The Department's decision is AFFIRMED.

Colleen Lack
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc:

[REDACTED]

Date Mailed: 10/11/2011

***** NOTICE *****

The Michigan Administrative Hearing System 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 Michigan Administrative Hearing System 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.