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

IN THE MATTER OF:

[redacted],

Appellant

_____/

Docket No. 2011-51674 EDW
Case No. 1032099640

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge (ALJ), pursuant to M.C.L. § 400.9 and 42 C.F.R. § 431.200 *et seq*., upon the Appellant's request for a hearing.

After due notice, a hearing was held on [redacted]. Appellant [redacted] appeared and testified on his own behalf. [redacted], Waiver Team leader, represented the Department of Community Health's Waiver Agency, the [redacted] ("Waiver Agency" or "[redacted]").

ISSUE

Did the Waiver Agency properly terminate Appellant's services through the MI Choice Waiver 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. Appellant is a [redacted] year-old man and has been diagnosed with a stroke/ cerebrovascular accident (CVA), hemiplegia, depression, diabetes mellitus, peroneal muscle atrophy, peripheral vascular disease, and hypertension. (Exhibit 1, pages 18, 25-26). Appellant's medical history also reflects that he has right side paralysis and had an infection in his spine that resulted in vertebrae being fused together. (Exhibit 1, pages 24, 26).

2. [redacted] is a contract agent of the Michigan Department of Community Health (MDCH) and is responsible for waiver eligibility determinations and the provision of MI Choice waiver services.

3. Appellant is enrolled in and has been receiving MI Choice waiver services through [redacted]. Specifically, Appellant has been receiving 4

hours a week of homemaker services. (Testimony of [redacted]).

4. On [redacted], [redacted] staff completed a reassessment of Appellant's services. (Exhibit 1, pages 18-33).

5. On [redacted], [redacted] sent Appellant a notice that it was terminating his services. (Exhibit 1, page 1).

6. The notice of termination provided: "Based on the assessment conducted on [redacted]011, it appears that you do not meet the eligibility requirements for the Waiver program. While you pass through door 3, you do not require an ongoing waiver service. It appears that your needs can be met through other community resources and/or informal supports." (Exhibit 1, page 1).

7. The effective date of the termination from the program was identified as [redacted]. (Exhibit 1, page 1).

8. On [redacted], the Department received Appellant's request for an administrative hearing. (Exhibit 2, page 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. 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, 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.

Section 2.2.A of the Attachment to Medical Services Bulletin 11-27 (June 28, 2011) (hereinafter "MSA 11-27) references the use of an online Michigan Medicaid Nursing Facility Level of Care Determination Tool. The LOC is mandated for all Medicaid-reimbursed admissions to nursing facilities or enrollments in MI Choice or PACE on and after November 1, 2004. A written form of the LOC, as well as field guidelines are found in the *MDCH Nursing Facility Eligibility Level of Care Determination, Pages 1-9, 3/07/05* and *MDCH Nursing Facility Eligibility Level of Care Determination Field Definition Guidelines, Pages 1-19, 3/15/05.*

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 Medicaid Nursing Facility placement the Appellant must meet the requirements of at least one door.

Here, on [redacted], [redacted] staff completed a Michigan Medicaid Nursing Facility Level of Care Determination to determine if Appellant still met criteria for the MI Choice waiver program. The [redacted] staff subsequently determined that Appellant was eligible for the MI Choice waiver program through Door 3:

> **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 Physician Order changes in the last 14 days, OR
>
> 2. At least two Physician Visit exams AND at least two Physician Order changes in the last 14 days.

However, while the Waiver Agency found Appellant to be eligible through Door 3, it still terminated the program because Appellant does "not require an ongoing waiver service." (Exhibit 1, page 1). Pursuant to policy:

> **2.3. NEED FOR MI CHOICE SERVICES**
>
> In addition to meeting financial and functional eligibility requirements and to be enrolled in the program, MI Choice applicants must demonstrate the need for a minimum of one covered service as determined through an in-person assessment and the person-centered planning process.
>
> **Note:** Supports coordination is considered an administrative activity in MI Choice and does not constitute a qualifying requisite service. Similarly, informal support services do not fulfill the requirement for service need.
>
> An applicant cannot be enrolled in MI Choice if his/her service and support needs can be fully met through the intervention of State Plan or other available services. State Plan and MI Choice services are not interchangeable. MI Choice services differ in nature and scope from similar State Plan services and often have more stringent provider qualifications.
>
> (MSA 11-27, Attachment, page 4)

During the hearing, the Waiver Agency argued that Appellant does not require an ongoing waiver service because (1) homemaker services are not a qualifying waiver service; (2) Appellant does not medically need an ongoing waiver service; and (3) any need for services Appellant does have is unrelated to the door through which he qualified. For the reasons discussed below, this Administrative Law Judge finds that the Waiver Agency's arguments must be rejected and that Appellant does require an ongoing waiver service.[1]

(1) Homemaker services are not, by themselves, a qualifying waiver service

The Waiver Agency first argued during the hearing that the homemaker services Appellant was receiving do not constitute a qualifying waiver service and that Appellant therefore does not require an ongoing waiver service. However, while it is true that Appellant has only been receiving homemaker services and is not requesting any other services now, the Waiver Agency's representative could not point to any policy in support of her argument that homemaker services are not a qualifying waiver service or her statement that homemaker services are merely part of personal care services. Moreover, MSA 11-27 provides that homemaking is a covered MI Choice service separate from personal care services:

> **SECTION 4 - SERVICES**
>
> The array of services provided by the MI Choice program is subject to the prior approval of CMS. Waiver agencies are required to provide any waiver service from the federally approved array that a participant needs to live successfully in the community, that is:
>
> - indicated by the most current assessment,
> - detailed in the plan of service, and
> - provided in accordance with the provisions of the approved waiver.
>
> Services may not be provided unless they are defined in the plan of service and may not precede the establishment of a plan of service. Waiver agencies may neither limit in aggregate the number of participants receiving a given service nor the number of services available to any given participant. Participants have the right to

[1] This Administrative Law Judge would also note that the Advance Negative Action Notice in this case also stated that Appellant's "needs can be met through other community resources and/or informal supports" (Exhibit 1, page 1) and such a reason can be adequate to deny services. However, the Waiver Agency did not make this argument during the hearing. Appellant's informal supports were briefly discussed, but [redacted] did not dispute that Appellant's family was unavailable to assist him. There was no discussion of any community resources potentially available to Appellant and [redacted] specifically testified that she did not discuss Home Help Services with Appellant.

receive services from any willing and qualified provider.

MDCH and waiver agencies do not impose a copayment or any similar charge upon participants for waiver services. MDCH and waiver agencies do not impose a premium, enrollment fee, or similar cost-sharing arrangement on waiver participants.
Although MI Choice participants must have services approved by the waiver agency, participants have the option to select any participating provider, thereby assuring freedom of choice.

4.1. COVERED WAIVER SERVICES

In addition to regular State Plan coverage, MI Choice participants may receive services that include:

* * *

4.1.B. HOMEMAKER

Homemaker services include the performance of general household tasks (e.g., meal preparation and routine household cleaning and maintenance) provided by a qualified homemaker when the individual regularly responsible for these activities, i.e., the participant or an informal supports provider, is temporarily absent or unable to manage the home and upkeep for himself or herself. Each provider of Homemaker services must observe and report any change in the participant's condition or of the home environment to the supports coordinator.

4.1.C. PERSONAL CARE

Personal Care services encompass a range of assistance to enable program participants to accomplish tasks that they would normally do for themselves if they did not have a disability. This may take the form of hands-on assistance (actually performing a task for the person) or cueing to prompt the participant to perform a task. Personal Care services may be provided on an episodic or on a continuing basis. Health-related services that are provided may include skilled or nursing care to the extent permitted by State law.

Services provided through the waiver differ in scope, nature, supervision arrangement, or provider type (including provider training and qualifications) from Personal Care services in the State Plan. The chief differences between waiver coverage and State Plan services are those services that relate to provider qualifications and training requirements, which are more stringent

> for personal care provided under the waiver than those provided under the State Plan.
>
> Personal Care includes assistance with eating, bathing, dressing, personal hygiene, and activities of daily living. These services may also include assistance with more complex life activities. The service may include the preparation of meals but does not include the cost of the meals themselves. When specified in the plan of service, services may also include such housekeeping chores as bed making, dusting, and vacuuming that are incidental to the service furnished or that are essential to the health and welfare of the participant rather than the participant's family. Personal Care may be furnished outside the participant's home.
>
> (MSA 11-27, Attachment, pages 10-11)

Additionally, MSA 11-27 does provide examples of services that are insufficient on their own to justify entry into the program. For example, Section 2.3 on the "Need for MI Choice Services" specifically notes:

> Supports coordination is considered an administrative activity in MI Choice and does not constitute a qualifying requisite service. Similarly, informal support services do not fulfill the requirement for service need.
>
> (MSA 11-27, Attachment, page 4)

Homemaker services, on the other hand, are specifically identified as a service provided by the MI Choice program and there is no support for the Waiver Agency's position that it is not a qualifying waiver service. Accordingly, its argument must be rejected.

(2) Appellant does not medically need an ongoing waiver service

The Waiver Agency also argued that Appellant does not require any services at all and is therefore ineligible for the MI Choice Program. According to [redacted], Appellant's condition had stabilized from the time he went into the nursing home and, consequently, he did not physically need the homemaker services. (Testimony of [redacted]).

Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services and the MI Choice waiver did not waive the federal Medicaid regulation that requires that authorized services be medically necessary. *See* 42 C.F.R. § 440.230.

However, in this case, the Waiver Agency never identified what condition had stabilized and [redacted] never specifically addressed Appellant's medical conditions and diagnoses. (Testimony of [redacted]). As described above, Appellant has been diagnosed with a stroke, hemiplegia, depression, diabetes mellitus, peroneal muscle

atrophy, peripheral vascular disease, and hypertension while his medical history also reflects that he has right side paralysis and had an infection in his spine that resulted in vertebrae being fused together. (Exhibit 1, pages 24-26). Those conditions justified his need for services before and Appellant testified during the hearing regarding their effects and his need for homemaker services. (Testimony of Appellant).

[redacted] general testimony and argument fails to refute Appellant's specific testimony regarding his need for homemaker services and this Administrative Law Judge finds Appellant to be credible on this issue. Accordingly, the Waiver Agency's second argument must also be rejected.

(3) To the extent that Appellant does need ongoing waiver services, his need is not related to the door through which he entered the waiver program

The Waiver Agency further argued, through [redacted], that, even assuming Appellant meets the criteria for Door 3 and has a need for homemaker services, Appellant would not be eligible for the MI Choice waiver program because his need for services is not related to Door 3. According to [redacted], the fact that Appellant's reasons for requiring homemaker services are unrelated to the reason he passed through Door 3 precludes a granting of services in this case. (Testimony of [redacted]).

However, [redacted] could not point to any policy in support of her argument and there does not appear to be any such policy. Instead, as described above, the relevant policy merely states:

> In addition to meeting financial and functional eligibility requirements and to be enrolled in the program, MI Choice applicants must demonstrate the need for a minimum of one covered service as determined through an in-person assessment and the person centered planning process.
>
> (MSA 11-27, Attachment, page 4)

Moreover, [redacted] own testimony undercuts the Waiver Agency's argument. [redacted] testified that she does not know what medical condition(s) lead to the physician visits or physician order changes that justified the Door 3 determination and that the actual medical condition is irrelevant to Door 3. (Testimony of [redacted]). Given the irrelevancy of the underlying medical condition(s), in addition to [redacted] ignorance of what the conditions are in this case, it is impossible for her to connect the homemaker services to the reasons he passed through Door 3.

Furthermore, if the Waiver Agency's argument was correct, then [redacted] erred by not continuing the NFLOC determination determining that Appellant met the criteria for Door 3. [redacted] testified that she stopped the NFLOC after finding Appellant qualified through Door 3. (Testimony of [redacted]). However, Appellant also testified and argued that he is eligible through Doors 5 and 7 as well. (Testimony of Appellant).

If a need for services has to be specifically connected to the door a client passes through, then all of the doors should have been evaluated in case Appellant met the criteria for multiple doors, but could only relate his requested services to one door.

DECISION AND ORDER

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

IT IS THEREFORE ORDERED that:

The Department's decision is REVERSED.

Steven J. Kibit
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 11/14/2011

***** 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.