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. 2011-976 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 [redacted]. [redacted] is the MI Choice Waiver agent for the [redacted], (hereinafter Department). [redacted], from the [redacted]. was present as a Department witness.

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] and has been a participant in MI Choice Waiver Services since [redacted]. (Exhibit 1, page 3 and Hughes Testimony)

2. The Appellant has multiple diagnoses including pyogenic arthritis, hypertension, osteoperosis, diabetes, and abdominal aortic aneurysm. (Exhibit 1, pages 8-9)

3. The Appellant previously qualified for MI Choice Waiver services through Door 1 of the Michigan Medicaid Nursing Facility Level of Care Determination. (Hughes Testimony)

4. The Appellant was receiving stand by assistance for showers and homemaking services through the MI Choice Waiver program. (Hughes Testimony)

5. On [redacted], the waiver agency completed a re-assessment with the Appellant. (Exhibit 1, pages 2-16)

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

7. The Appellant does not meet the functional/medical eligibility criteria for Medicaid nursing facility level of care.

8. 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 does not need or meet nursing home eligibility requirements. (Exhibit 1, page 2)

9. 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 [redacted], assessment notes indicate the Appellant and her [redacted] reported that the Appellant is independent with bed mobility eating and toileting excluding the transferring, and was independent with article or device provided or placed (no physical assistance or supervision) for transferring generally and transferring for toileting. (Exhibit 1, page 11) The waiver agency marked the Appellant as independent for bed mobility and eating. However, the waiver agency marked the Appellant as requiring extensive assistance for transfers and toiling because the Appellant sometimes uses a walker for these activities. (Hughes Testimony and Exhibit 2, pages 1-3) Extensive assistance is not consistent with the Appellant's abilities as reported during the assessment. No other person provided weight bearing support or full performance of these activities on some days.

The Appellant's [redacted] testified that the Appellant is independent with bed mobility and eating, needs help sometimes with transfers when her blood pressure is low, and some help with toilet use at night. However, this is not what was reported to the waiver agency during the [redacted], home visit. Based on the waiver agency documentation, the Appellant was reported to be independent with these activities, using her walker some of the time for transferring. (Exhibit 1, page 11 and Exhibit 2, pages 1-3)

The waiver agency could only base the determination on the information provided at the time of the re-assessment. Based on the assessment report and LOC determination notes, neither the Appellant nor her [redacted] reported that the Appellant needed help from another person with the activities considered under Door 1. Based on the information provided at the time of the assessment, the Appellant did not score at least six (6) 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 ok, she was independent with cognitive skills for daily decision making and was able to make herself understood. (Exhibit 2, pages 3-4) The [redacted] explained that a translator is used when she goes to the Appellant home. The [redacted] stated that the Appellant's primary language is Russian, but she can speak some English. The Social Worker Supports Coordinator stated that the Appellant was able to answer questions and be understood during the assessment.
The Appellant's [redacted] testified that some people have some trouble understanding the

Appellant. The Appellant testified and was able to make herself understood at the [redacted] hearing, without use of a translator. She stated that she went to school for English and understands a little but can not see well to read.

No evidence was presented indicating that the Appellant has a memory problem or needs assistance making decision regarding tasks of daily life. The Appellant is able to express herself and 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 wavier agency documentation indicates that the Appellant had 1physician visit but no order changes within the 14 days prior to the assessment. (Exhibit 2, page 4) The Appellant's [redacted] testified that there was only 1 dentist appointment during this time frame. 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 re-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. 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 2, pages 5-6) The Appellant's [redacted] testified that the Appellant is doing exercises at home because she ran out of visits. Accordingly, 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.

No evidence was presented indicating the Appellant had met any of the criteria listed for Door 6. 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 (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 been a participant since [redacted]. However, the waiver agency found that the services the Appellant is receiving could be provided by the Home Help Program through the [redacted]. Accordingly the Appellant was referred to the Home Help program, where she has previously received services. ([redacted] Testimony) Because other services are available to meet the Appellants needs, she did not qualify through Door 7.

While this ALJ is sympathetic to the Appellant's position, she does 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 ongoing 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 [redacted] 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 terminated the Appellant's MI Choice Waiver services.

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: 12/21/2010

***** 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.