

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

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IN THE MATTER OF:

Docket No. 2011-22361 EDW

██████████,
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 ██████████. ██████████, son, appeared on the Appellant's behalf. ██████████, appeared on behalf of ██████████. ██████████ is the MI Choice Waiver agent for the Michigan Department of Community Health, (waiver agency). ██████████, 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 for over one year. (Respondent Exhibit 2, pages 1 and son Testimony)
2. The Appellant has multiple diagnoses including depression, anxiety, hypertension, arthritis, cholesteatoma, dementia moderate in degree, dispnea, congestive heart failure, peripheral vascular disease, dizziness, abdominal pain and back pain. (Respondent Exhibit 3, pages 6-7 and Appellant Exhibits 3 and 4)
3. On ██████████, ██████████ made a home visit to complete a re-assessment with the Appellant. A Michigan Medicaid Nursing Facility Level

of Care Determination (LOC) was also completed. (Respondent Exhibits 2 and 3)

4. The Appellant did not meet the functional/medical eligibility criteria for Medicaid nursing facility level of care. (Respondent Exhibit 2, pages 8-9)
5. On ██████████, the waiver agency issued notice to the Appellant that his MI Choice waiver services would terminate effective ██████████ because he was not medically eligible as the Home Help Program can sufficiently meet his needs. (Respondent Exhibit 1)
6. The Appellant requested a formal, administrative hearing on ██████████.

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 MORC, 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. (Respondent Exhibit 2)

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 waiver agency indicated that the Appellant was independent with these four activities of daily living in the seven days prior to the ██████████ home visit. (Respondent Exhibit 2, pages 1-3) The Appellant's son testified that the Appellant has a history of chronic back pain and when this is severe, the Appellant may need assistance to get up or move around. However, the Appellant's son acknowledged that the Appellant may not have needed assistance with bed mobility in the 7 day period at issue for this LOC determination. The Appellant's son indicated a similar issue with transferring, which also may not have been a problem during the relevant time period. Regarding eating, the Appellant's son indicated that the Appellant must be reminded daily, and meals must be prepared or he will not eat regularly. (Son Testimony and Appellant Exhibit 2) The waiver agency supports coordinator testified that during the home visit, the Appellant did not report any difficulties eating; only that sometimes he did not feel like eating. (Supports

Coordinator Testimony)

The LOC determination tool specifies the relevant time period for each door. For Door 1, the time period is the 7 days prior to the date the LOC is completed. The evidence does not support a finding that the Appellant needed assistance with bed mobility or transferring during the relevant week. There was no evidence contesting the Appellant's independence with toileting. The Appellant's son's testimony indicated that the Appellant does need multiple daily reminders to eat. This need for assistance with eating was supported by one of the submitted doctor statements. (Appellant Exhibit 3) Unlike bed mobility and transferring, the evidence indicates the Appellant did need the verbal assistance with this activity during the relevant time period. However, the Appellant could have only scored between 1 and 3 points on the LOC determination for eating. The assistance the Appellant needs with eating would not have been sufficient to meet the criteria to qualify through Door 1, which requires a score of at least six (6) points.

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 has a memory problem, is modified independent with cognitive skills for daily decision making, and is able to make himself understood. (Respondent Exhibit 2, pages 3-4) A translator was used to communicate with the Appellant during the home visit. (Supports Coordinator Testimony) The Appellant's son testified that the Appellant's day is uneventful, mostly laying around all day. The Appellant's son explained that the Appellant needs reminders for meals, medications, or even the steps to turn the television on. The Appellant's son provides many reminders by telephone throughout the day or when he stops by the Appellant's home, and the caregiver provides reminders during the times services are provided the three days per week. The Appellant also needs assistance with telephone calls, bills, and understanding letters. Regarding the ability to make himself understood, the Appellant's son testified that the Appellant is able to answer basic questions, but gets distracted easily. The Appellant's son also indicated that the translator knows his father well and may have been able to fill in the Appellant's answers the Appellant gave to questions during the home visit. (Son Testimony)

It is uncontested that the Appellant has a memory problem. The testimony of the Appellant's son regarding a need for multiple daily reminders with basic daily activities such as eating and taking medication indicates a moderate impairment with cognitive skills for

daily decision making, rather than modified independence. However, it does not appear that the waiver agency was aware that the caregiver and the Appellant's son were providing the multiple daily reminders at the time of the re-assessment. The Supports Coordinator's testimony indicated that the waiver agency was not aware of the need for these reminders, rather they understood that the Appellant is alone all day most days, that Appellant did not express any difficulty with eating, and demonstrated that he can take his own medications during the home visit. The waiver agency further understood that the Appellant was only receiving assistance 3 days per week with showers and homemaking. (Supports Coordinator Testimony and Exhibit 5 pages 12)

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.

No evidence was provided contesting the waiver agency's finding that the Appellant did not have any physicians' visits or order changes within the relevant 14 day period. (Respondent Exhibit 2, pages 4-5) Accordingly, the Appellant did not qualify under Door 3.

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 any of the specified health treatments or conditions during the relevant 14 day period. (Respondent Exhibit 2, page 5) 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 indicated that the Appellant received physical therapy “3 x days a week for massages for pinch nerve.” (Respondent Exhibit 2, pages 5-6) The Appellant’s son explained that the Appellant is driven to a physical therapy center three times per week. The Appellant sees a physical therapist for 30-40 minutes each time for massage for problems with his legs. (Son Testimony)

The evidence indicates that the Appellant did receive skilled rehabilitation therapy services for at least 45 minutes during the relevant 7 day period. The testimony indicates the massages are provided by a physical therapist at the physical therapy center. Accordingly, the massages should have been counted as a skilled rehabilitation therapy and the Appellant should have been found eligible 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 indicated that the Appellant did not have any of the specified behaviors delusions, or hallucinations during the 7 day time period. (Respondent Exhibit 1, pages 6-7) The Appellant’s son indicated that the Appellant has had delusions and hallucinations in the past due to overdose or missed doses of his medications. (Appellant Exhibit 2) However, no evidence was presented indicating the Appellant had any delusions or hallucinations during the 7 days prior to [REDACTED]. Accordingly, the Appellant did not qualify under 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.

It is uncontested that the Appellant has been a participant for over one year. The re-assessment notes indicate that the Appellant is receiving assistance with meal preparation, supervision for showers, and homemaking three days per week through the MI Choice waiver program. (Respondent Exhibit 3, page 12) The Appellant's son's testimony indicated that the caregiver has also been providing additional verbal assistance to the Appellant. The submitted doctors statements also support the Appellant's need for supervision and monitoring with medications and eating. (Appellant Exhibits 1 and 3) The Home Help Services Program can not authorize payment for verbal assistance such as supervising, monitoring, reminding, guiding or encouraging. (Department of Human Services Adult Services Manual (ASM) 363, Independent Living Services Program Procedures, 9-1-2008, pages 3 and 14). It is not clear that the Appellant's needs for assistance can be provided by the Home Help program or that the son can provide even further informal support to ensure the Appellant's needs are met.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, finds the Waiver Agency improperly terminated the Appellant's MI Choice Waiver services. The Appellant was receiving at least 45 minutes of physical therapy, which meets the criteria for Door 5.

IT IS THEREFORE ORDERED that:

The Department's decision is REVERSED. The Appellant shall be re-instated in the MI Choice Waiver program.

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

[REDACTED]
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Decision and Order

cc:

[REDACTED]

Date Mailed: 6/2/2011

***** NOTICE *****

The Michigan Administrative Hearing System 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 Michigan Administrative Hearing System 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.