

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

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IN THE MATTER OF:

██████████,

Appellant

**Docket No. 2011-52595 EDW
Case No. 88975575**

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 ██████████. ██████████, Appellant's granddaughter, appeared and testified on Appellant's behalf. ██████████, Program Manager, represented the Department of Community Health's Waiver Agency, the ██████████ Center, Inc. ("Waiver Agency" or "MORC"). ██████████, Support Coordinator/Social Worker, and ██████████, Registered Nurse/Support Coordinator, also testified as witnesses for the Waiver Agency. Following the hearing, the record was left open until ██████████ so that Appellant could submit additional evidence (Exhibit 4).

ISSUE

Did the Waiver Agency properly determine that Appellant was not eligible for the MI Choice waiver program?¹

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 an ██████ year-old woman and has been diagnosed with arthritis, coronary heart disease, hypertension, peripheral vascular disease, and dementia. (Exhibit 1, pages 7, 22; Exhibit 4, page 2).

¹ As noted by Appellant's representative, this case is related to an earlier determination of Appellant's eligibility and the appeal from the denial of eligibility. Following that appeal, the Department's decision was reversed and the Waiver Agency was ordered to conduct a new assessment because the Waiver Agency did not employ a translator during the prior assessment. (Exhibit 3). The Waiver Agency/Department made the same determination after a later assessment and that eligibility determination/denial is the subject of this appeal.

2. Appellant is enrolled in and has been receiving MI Choice waiver services through MORC for approximately ten years. (Testimony of ██████████).
3. MORC 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.
4. Effective November 1, 2004, all MI Choice waiver applicants are required to be assessed using the MDCH approved Level of Care Assessment Tool. See Medical Services Administration Policy Bulletin 11-27 (July 1, 2011) (hereinafter "MSA 11-27").
5. On ██████████, MORC staff completed a reassessment and MDCH Level of Care Determination with Appellant. Subsequently, they determined that Appellant was not eligible for the MI Choice waiver program because the Level of Care Assessment Tool indicated that she did not qualify for such services. (Exhibit 1, pages 7-30; Testimony of ██████████; Testimony of ██████████).
6. On ██████████, MORC sent Appellant a notice that it had determined she was no longer eligible for the MI Choice waiver program and that, consequently, the personal care and homemaker services she had been receiving would be terminated. The effective date of the termination from the program was identified as ██████████. (Exhibit 1, page 5).
7. On ██████████, 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.

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.

The Medicaid Provider Manual, Nursing Facilities Coverages Section, July 1, 2009, lists the policy for admission and continued eligibility as well as outlines functional/medical criteria requirements for Medicaid-reimbursed nursing facility, MI Choice, and PACE services.

Section 4.1 of the Medicaid Provider Manual Nursing Facility Coverages Section references the use of an online Michigan Medicaid Nursing Facility Level of Care (NFLOC) Determination Tool. The NFLOC 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 NFLOC, 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 NFLOC 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, MORC provided evidence that on ██████████, MORC staff completed a NFLOC determination to determine if Appellant still met criteria for the MI Choice waiver program. The MORC staff subsequently determined that Appellant was no longer eligible for the MI Choice waiver program because she does not satisfy the criteria for any of the 7 Doors.

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 1, page 9)

With respect to Door 1, ██████████ testified that she marked Appellant as independent with respect to all four tasks based on what Appellant told her, through a translator, and Appellant's demonstration of an ability to transfer. (Testimony of ██████████).

Appellant's representative, on the other hand, testified that, due to Appellant's physical and mental problems, Appellant sometimes need assistance getting out of bed, getting to her walker, and eating. (Testimony of ██████████).

Appellant's representative also testified that she was not present during the home visit/reassessment and does not know what Appellant reported during that visit. (Testimony of ██████████). This Administrative Law Judge also finds ██████████ to be credible with respect to what Appellant told her and demonstrated during that visit. Accordingly, the Waiver Agency's determination with respect to Door 1 is sustained.

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 1, page 10)

Regarding Door 2, ██████████ testified that, while Appellant has memory problems, Appellant is modified independent in cognitive skills for daily decision-making and has no difficulty making herself understood, albeit with a ██████████ interpreter. (Testimony of ██████████). ██████████ also testified that Appellant reported that she only has difficulties in new situations and that, while she may not always take her medications, she does so by choice. (Testimony of ██████████). ██████████ further noted that Appellant can organize her day and correctly answered questions designed to assess her cognitive status. (Testimony of ██████████). Accordingly, the Waiver Agency found that Appellant does not meet the requirements to pass through Door 2. (Exhibit 1, pages 10-11).

With respect to Appellant's cognitive issues, her representative's testimony almost exclusively focuses on Appellant's memory problems. (Testimony of ██████████). However, those memory problems are not disputed and the Waiver Agency expressly found that Appellant has memory problems in its NFLOC determination. (Exhibit 1, page 9; Testimony of ██████████). Moreover, as the scoring system makes clear, the criteria for Door 2 requires more than just memory problems. (Exhibit 1, pages 10-11).

Here, while Appellant's representative did testify that Appellant requires constant supervision and cannot make decisions for herself, she also concedes that she was not

present during the home visit and is unable to testify as to how Appellant acted or spoke during that assessment. (Testimony of ██████████). Appellant's representative does deny that Appellant ever consciously chooses not to take her medications or that Appellant's family would let Appellant make that choice. (Testimony of ██████████). Nevertheless, both ██████████ and Appellant's representative stated that Appellant does not have any mental health diagnoses. (Testimony of ██████████; Testimony of ██████████). A doctor's letter submitted after the hearing does indicate that there is a diagnosis of dementia (Exhibit 4, page 1), but that letter was dated the same date as the hearing and there is no suggestion that it was available to the Waiver Agency at the time it made its decision, especially given Appellant's representative's testimony. Nor does it expressly address Appellant's decision-making ability.

Additionally, as to the last factor in Door 2, Appellant's representative conceded that, while Appellant will stare off into space sometimes, Appellant can clearly make herself understood and that there are no cognitive issues affecting her ability in that area. (Testimony of ██████████).

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.

(Exhibit 1, pages 10-11)

According to the Waiver Agency, Appellant reported that she had gone to 1 physician exam and had no physician order changes in the 14 days prior to the reassessment. (Testimony of ██████████).

Appellant's representative testified that Appellant has so many visits to doctors that Appellant most likely qualified under Door 3. (Testimony of ██████████).

Here, the record was left open for 2 weeks after the hearing so that Appellant's representative would have the opportunity to submit additional evidence. No evidence of relevant physician exams or order changes was submitted. Accordingly, the Waiver Agency's decision with respect to Door 3 is sustained.

Door 4
Treatments and Conditions

Scoring Door 4: The applicant must score “yes” in at least one of the nine categories and have a continuing need to qualify under Door 4.

- 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 1, page 11)

Here, Appellant’s representative testified that Appellant qualifies through Door 4 because Appellant would have pressure sores if not for her family’s help. (Testimony of ██████████). Nevertheless, the Appellant must actually have been treated for Stage 3-4 pressures sores in the 14 days prior to the reassessment to qualify. It is undisputed that Appellant has received no such treatment in this case and has no need for such treatment.

Door 5
Skilled Rehabilitation Therapies

Scoring Door 5: The applicant must have required at least 45 minutes of active [Speech Therapy], [Occupational Therapy] or [Physical Therapy] (scheduled or delivered) in the last 7 days and continues to require skilled rehabilitation therapies to qualify under Door 5

(Exhibit 1, page 12)

It is undisputed in this case that Appellant did not satisfy 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 1, page 13)

With respect to Door 6, Appellant's representative testified that Appellant wanders at least two times per week and is verbally abusive weekly. (Testimony of ██████████). However, even accepting that testimony as true, it does not meet the criteria for Door 6. Moreover, as testified to by ██████████, there is no evidence in the record supporting such testimony and, according to ██████████, no such behavior was mentioned during the reassessment. (Testimony of ██████████).

Door 7 Service Dependency

An applicant could qualify under Door 7 if she is a “**Program participant for at least one year** and requires ongoing services to maintain current functional status.” (Exhibit 1, page 13 (emphasis in original)).

Here, with respect to Door 7, Appellant's representative testified that Appellant has been in the MI Choice waiver program for years and that, given her medical conditions, she requires the ongoing services to maintain her current functional status. (Testimony of ██████████).

As noted by the Waiver Agency and confirmed by Appellant's representative, however, Appellant has been approved for Home Help Services (HHS) through the Department of Human Services. (Testimony of ██████████; Testimony of ██████████). While Appellant cancelled those services once her MI Choice services were reinstated while her appeal was pending, that cancellation does not change the fact that Appellant was approved for HHS. Given that approval and her ability to get services through another program, Appellant does not require her ongoing MI Choice services to maintain her current functional status and she does not meet the criteria for Door 7.

Therefore, weighing the above evidence in this case, this Administrative Law Judge finds that the preponderance of evidence demonstrates that Appellant did not meet the requirements for any Door on the Medicaid Nursing Facility Level of Care Determination Tool at the time she was deemed ineligible and, therefore, she is not eligible for MI Choice program eligibility. Accordingly, the Waiver Agency's decision was proper.

DECISION AND ORDER


The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly determined the Appellant was not eligible for the MI Choice waiver program.

IT IS THEREFORE ORDERED that:

The Department's decision is **AFFIRMED**.

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

cc:

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Date Mailed: 11/15/2011

***** 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.