

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

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IN THE MATTER OF:

██████████,

Appellant

_____ /

Docket No. 2012-8345 EDW

Case No. ██████████

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 daughter and care provider, appeared and testified on Appellant's behalf. Appellant also testified on her own behalf. ██████████, Program Manager, represented the Department of Community Health's Waiver Agency, the ██████████. ("Waiver Agency" or ██████████). ██████████, supports coordinator/social worker, and ██████████, supports coordinator/registered nurse, also testified as witnesses for the Waiver Agency.

Following the hearing, the record was left open until ██████████ so that Appellant's representative could submit additional evidence. Appellant's representative subsequently submitted a letter and some medical records. (Exhibit 5).

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 an ██████ year-old woman who has been diagnosed with hypertension, osteoporosis, diabetes mellitus, and a closed fracture of unspecified part of neck of femur. (Exhibit 1, pages 5, 20-21). Appellant is also diagnosed as having suffered a stroke on ██████████ and having a retinal macro-aneurysm. (Exhibit 4, page 1; Exhibit 5, page 3). According to Appellant's daughter, because of that macro-aneurysm and other vision problems, Appellant is legally blind. (Testimony of ██████████).

2. ██████████ 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 ██████████ since ██████████. (Testimony of ██████████). Specifically, Appellant has been receiving personal care and homemaker services. (Exhibit 1, page 31).
4. On ██████████ staff completed a reassessment and redetermination with Appellant. (Exhibit 1, pages 5-29). Subsequently, MORC 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. (Testimony of ██████████).
5. On ██████████ sent Appellant a notice that it was terminating her services because she no longer meets the medical eligibility criteria to be in the waiver program. The effective date of the termination from the program was identified as ██████████. (Exhibit 1, page 31).
6. On ██████████, the Department received Appellant's request for an administrative hearing. (Exhibit 3, pages 1-4).

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, October 1, 2011, 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 the 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 (Field Definition Guidelines).

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, ██████████ provided evidence that on ██████████ 1, its staff completed a NFLOC determination to determine if Appellant still met criteria for the MI Choice waiver program. The ██████████ 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.

Appellant's representative disputes that finding and argues that Appellant meets the criteria for Door 1, Door 2 and Door 7. For the reasons discussed below, this Administrative Law Judge finds that the Waiver Agency's decisions on all three doors should be sustained.

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 7)

Regarding Door 1, ██████████ testified that she marked Appellant as independent in bed mobility and eating because of what Appellant and her daughter reported. (Testimony of ██████████). ██████████ also testified that she marked Appellant as requiring supervision with respect to transfers and toilet use based on what she was told. (Testimony of ██████████). ██████████ further testified that she observed Appellant moving around and sitting down without difficulty. (Testimony of ██████████). According to ██████████ she was told that Appellant could see objects, but ██████████ still took Appellant's vision problems

into account. (Testimony of ██████████). Given those findings, MORC concluded that Appellant did not satisfy the criteria for Door 1.

In response, Appellant's representative testified that Appellant is independent with respect to eating and that everything Draeger testified to essentially happened. (Testimony of ██████████). However, ██████████ also testified that Draeger forced Appellant to stand up and that Appellant, who is a fall risk and legally blind, barely walked two steps. (Testimony of ██████████). Regarding the specific tasks at issue in Door 1, ██████████ testified that (1) she helps Appellant get settled in bed and then Appellant does not move around much during the night; (2) Appellant does not orient very well and ██████████ helps her get out of bed or chairs; and (3) Appellant only goes to the bathroom with help. (Testimony of ██████████).

However, while Appellant's daughter/representative testified clearly regarding Appellant's limitations during the hearing, she also testified that she does not recall if those limitations were discussed during the assessment or what exactly she told Hughes and Draeger. (Testimony of ██████████. ██████████ and ██████████, on the other hand, both credibly and expressly testified that Appellant's daughter specifically told them that Appellant was either independent or only required supervision with respect to bed mobility, transfer, toilet use and eating. (Testimony of ██████████; Testimony of ██████████).

This Administrative Law Judge is limited to reviewing the Waiver Agency's decision in light of the information it had at the time it made that decision. Here, given the contrast between the uncertain nature of Appellant's daughter's testimony and the definite testimony of ██████████ and ██████████, it appears that the information available at the time provides that that Appellant did not meet the criteria for Door 1 and Appellant failed to meet her burden of proving by a preponderance of the evidence that the Waiver Agency erred. Accordingly, the Waiver Agency's decision with respect to that door 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.

2. "Severely Impaired" in Decision Making.
3. "Yes" for Memory Problem, and Decision Making is "Moderately Impaired" or "Severely Impaired."
4. "Yes" for Memory Problem, and Making Self Understood is "Sometimes Understood" or "Rarely/Never Understood."

(Exhibit 1, page 8)

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With respect to Door 2, ██████████ and ██████████ found that Appellant's short-term memory was okay and, while she is only modified independent in her cognitive skills for daily decision-making, Appellant has no difficulty making herself understood. (Testimony of ██████████; Testimony of ██████████). ██████████ also noted that Appellant has no diagnosis regarding mental problems and has not received any psychological treatment. (Testimony of ██████████). ██████████ further testified that Appellant reported no memory changes, looked alert and oriented, and dialed her daughter's phone number from memory. (Testimony of ██████████). According to ██████████, Appellant also completed a memory test that consisted of a series of questions and a multiplication test. (Testimony of ██████████). Appellant also provided information for the assessment and, in ██████████ view, she has the ability to make decisions. (Testimony of ██████████). Given those findings, the MORC staff also concluded that Appellant did not meet the criteria to pass through Door 2.

Appellant's daughter/representative testified that, while the testimony of Hughes and Draeger is correct, they did not do enough testing of Appellant's memory, especially given Appellant's efforts to please them. (Testimony of ██████████). Appellant has a memory problem; one that worsened significantly after she suffered a stroke. (Testimony of ██████████). ██████████ makes most of Appellant's decisions, including what she wears and eats, while also scheduling her appointments and paying her bills. (Testimony of ██████████). However, ██████████ also concedes that Appellant does not really care what she wears or eats, and that she just generally stays in bed all day. (Testimony of ██████████).

As stated above, this Administrative Law Judge is limited to reviewing the Waiver Agency's decision in light of the information it had at the time it made that decision. Consequently, the stroke Appellant suffered after the termination decision is irrelevant. Additionally, the degree of any previous memory problem is unclear and there is no diagnosis of any memory or cognitive problems in the record. That absence of evidence, in addition to ██████████ and ██████████ clear and credible testimony, leads this Administrative Law Judge to affirm the Waiver Agency's finding that Appellant's short-term memory was okay.

Moreover, even if Appellant does suffer from memory problems, memory problems alone are insufficient to satisfy the criteria for Door 2. Here, all the testimony suggests that Appellant could make some decisions, but does not bother to and there is no suggestion that Appellant has any difficulty in making herself understood. Accordingly, the Waiver Agency's decision with respect to Door 2 is sustained.

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 11 (emphasis in original)).

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In this case, it is undisputed that Appellant has been in the waiver program for a least and year and, consequently, the only question remaining is whether Appellant requires the ongoing services to maintain her current functional status.

█ testified that Appellant does not need the waiver program's services to maintain her current functional status because her needs can be met through the Department of Human Services' Home Help Program. (Testimony of █). She also testified that she referred Appellant to the Home Help Program and provided Appellant and Appellant's daughter with information regarding those services. (Testimony of █).

Appellant's daughter acknowledges that they received information regarding the Home Help Program, but they did not act on it because the MI Choice Waiver program would be preferable. (Testimony of █). Nevertheless, given the availability of HHS, the Waiver Agency's decision should be sustained. The MI Choice program is the payer of last resort and Appellant has other fund sources for services she requires.

DECISION AND ORDER

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

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: 2/27/2012

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***** 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.