

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

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IN THE MATTER OF:

██████████,

Appellant

Docket No. 2013-9327 EDW

Case No. ██████████

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 42 CFR 431.200 *et seq.* and upon the Appellant's request for a hearing.

After due notice, a hearing was held on ██████████. Attorney ██████████ appeared on Appellant's behalf. ██████████, Appellant's ██████████ and ██████████, Appellant's ██████████, testified as witnesses for Appellant. ██████████, E/D Waiver Supervisor, represented the Department of Community Health's Waiver Agency, the Macomb-Oakland Regional Center, Inc. ("Waiver Agency" or "MORC"). ██████████, a registered nurse, also testified as a witness for the Waiver Agency.

ISSUE

Did the Waiver Agency properly terminate Appellant's personal care and homemaking 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, congestive heart failure, coronary heart disease, arthritis, dementia, anxiety, depression, and a history of cancer. (Appellant's Exhibit A, pages 1, 8-9).
2. 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.

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3. Appellant has been enrolled in and receiving MI Choice waiver services through MORC, including personal care and homemaking services. (Uncontested testimony during hearing; Respondent's Exhibit 1, page 1).
4. On [REDACTED], [REDACTED] completed a new Level of Care Determination (LOCD) and an assessment of Appellant's needs and services. (Respondent's Exhibit 2, pages 1-8; Respondent's Exhibit 3, pages 1-17).
5. Based on Appellant's reports and her own observations during that reassessment, [REDACTED] and MORC found that Appellant did not qualify for the waiver program. (Respondent's Exhibit 3, pages 7-8, 17; Testimony of [REDACTED])
6. On [REDACTED], MORC sent Appellant written notice that it was terminating her personal care and homemaking services. (Respondent's Exhibit 1, page 1).
7. On [REDACTED], the Department received a Request for Hearing regarding the termination of services in this case.

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.

Appellant is claiming services through the Department's Home and Community Based Services for Elderly and Disabled. The waiver is called MI Choice in Michigan. The program is funded through the federal Centers for Medicare and Medicaid 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).]

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A waiver under section 1915(c) of the [Social Security] Act allows a State to include as “medical assistance” under its plan, home and community based services furnished to recipients who would otherwise need inpatient care that is furnished in a hospital, Skilled Nursing Facility (SNF), Intermediate Care Facility (ICF), or Intermediate Care Facility/Mentally Retarded (ICF/MR), and is reimbursable under the State Plan. See 42 CFR 430.25(c)(2).

Types of services that may be offered include:

Home or community-based services may include the following services, as they are defined by the agency and approved by CMS:

- Case management services.
- Homemaker services.
- Home health aide services.
- Personal care services.
- Adult day health services
- Habilitation services.
- Respite care services.
- Day treatment or other partial hospitalization services, psychosocial rehabilitation services and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness, subject to the conditions specified in paragraph (d) of this section.

Other services requested by the agency and approved by CMS as cost effective and necessary to avoid institutionalization. [42 CFR 440.180(b).]

Moreover, with respect to the waiver 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 Rrequirements.

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

Here, MORC decided to deny Appellant’s services after finding that she did not meet the medical criteria for the waiver program. With respect to functional eligibility for the waiver program, the Medicaid Provider Manual (MPM) provides:

2.2 FUNCTIONAL ELIGIBILITY

The MI Choice waiver agency must verify applicant appropriateness for services by completing the online version of the Michigan Medicaid Nursing Facility Level of Care Determination (LOCD) within 14 calendar days after the date of the participant's enrollment. (Refer to the Directory Appendix for website information.) The LOCD is discussed in the Michigan Medicaid Nursing Facility Level of Care Determination subsection of this chapter. Additional information can be found in the Nursing Facility Coverages Chapter and is applicable to MI Choice applicants and participants.

The applicant must also demonstrate a continuing need for and use of at least one covered MI Choice service. This need is originally established through the Initial Assessment using the process outlined in the Need For MI Choice Services subsection of this chapter.

2.2.A. MICHIGAN MEDICAID NURSING FACILITY LEVEL OF CARE DETERMINATION

MI Choice applicants are evaluated for functional eligibility via the Michigan Medicaid Nursing Facility Level of Care Determination. The LOCD is available online through Michigan's Single Sign-on System. (Refer to the Directory Appendix for website information.)

Applicants must qualify for functional eligibility through one of seven doors. These doors are:

- Door 1: Activities of Daily Living Dependency
- Door 2: Cognitive Performance
- Door 3: Physician Involvement
- Door 4: Treatments and Conditions
- Door 5: Skilled Rehabilitation Therapies
- Door 6: Behavioral Challenges
- Door 7: Service Dependency

The LOCD must be completed in person by a health care professional (physician, registered nurse (RN), licensed practical nurse (LPN), licensed social worker (BSW or MSW), or a physician assistant) or be completed by staff that have direct oversight by a health care professional.

The online version of the LOCD must be completed within 14 calendar days after the date of enrollment in MI Choice for the following:

- All new Medicaid-eligible enrollees
- Non-emergency transfers of Medicaid-eligible participants from their current MI Choice waiver agency to another MI Choice waiver agency
- Non-emergency transfers of Medicaid-eligible residents from a nursing facility that is undergoing a voluntary program closure and who are enrolling in MI Choice

Annual online LOCDs are not required, however, subsequent redeterminations, progress notes, or participant monitoring notes must demonstrate that the participant continues to meet the level of care criteria on a continuing basis. If waiver agency staff determines that the participant no longer meets the functional level of care criteria for participation (e.g., demonstrates a significant change in condition), another face-to-face online version of the LOCD must be conducted reflecting the change in functional status. This subsequent redetermination must be noted in the case record and signed by the individual conducting the determination.

Copies of the LOCD for participants must be retained by the waiver agency for a minimum period of six years. This information is also retained in the MDCH LOCD database for six years. [MPM, MI Choice Waiver Chapter, October 1, 2012, pages 1-2.]

Here, Appellant's representative concedes that Appellant does not pass through Doors 1, 3, 4, 5, 6, or 7 and solely argues that Appellant is eligible for the waiver program because she meet the criteria for Door 2. Regarding Door 2, the LOCD tool states:

Door 2: Cognitive Performance

Scoring Door 2: The applicant must score under one of the following three options to qualify under Door 2.

“Severely Impaired” in Decision Making.

“Yes” for Memory Problem, and Decision Making is “Moderately Impaired” or “Severely Impaired.”

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“Yes” for Memory Problem, and Making Self Understood is
“Sometimes Understood” or “Rarely/Never Understood.”
[Respondent’s Exhibit 2, page 4.]

In this case, the parties agree that Appellant has a memory problem, but has no difficulty making herself understood. Consequently, whether Appellant passes through Door 2 depends on her cognitive skills for daily decision-making. If Appellant is independent or modified independent in that area, she does not pass through Door 2. If Appellant is moderately impaired or severely impaired in daily decision-making, then she does pass through Door 2.

As defined in the LOCD, a person is “Modified Independent” if she “organized daily routines and made safe decisions in familiar situations, but experienced some difficulty in decision-making when faced with new tasks or situations” and is “Moderately Impaired” if her “decisions were poor; the applicant required reminders, cues, and supervision in planning, organizing, and correcting daily routines.” (Respondent’s Exhibit 2, page 4). Moreover, as stated in the Michigan Medicaid Nursing Facility Level of Care Determination Field Definition Guidelines, page 8 of 19:

The inquiry should focus on whether the applicant is actively making his/her decisions, and not whether there is a belief that the applicant might be capable of doing so. Remember, the intent of this item is to record what the applicant is doing. When a family member takes decision-making responsibility away from the applicant regarding tasks of everyday living, or the applicant does not participate in decision making, whatever his/her level of capability, the applicant should be considered to have impaired performance in decision making.

MORC found that Appellant was modified independent in her cognitive skills for daily decision-making. As ██████████ wrote in the assessment and testified to during the hearing, Appellant was alert and oriented during the home visit. She also could do multiplications, call her ██████████ cell phone, and sign her plan of care. Based on the above, ██████████ and MORC determined that Appellant is able to organize her daily routine and make safe decisions in familiar situations, but may be experience some difficulty when faced with new tasks or situations.

Appellant’s witnesses testified that Appellant has dementia and that her memory problems have only worsened. Accordingly, Appellant’s ██████████ handles Appellant’s doctor’s appointments, medications and finances. Appellant’s ██████████ also testified that Appellant did not understand what was going on during the assessment, but then later stated that Appellant answered all questions correctly even though Appellant was

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tired. Appellant's ██████████ also testified that Appellant lives alone, has the same diet every day and does the same thing every day (watch ██████████ television).

Appellant bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in finding that she did not meet the criteria for Door 2. Here, Appellant has failed to meet that burden. While Appellant focuses extensively on Appellant's memory problems, those memory problems are not disputed and are only a separate, but related, part of the Door 2 analysis. Moreover, while Appellant also focuses on a lack of improvement from previous assessments and LOCDs, the LOCD requires that the Waiver Agency look at decisions regarding tasks of daily life made within the 7 days prior to the LOCD and not at previous assessments. See Respondent's Exhibit 2, page 4.

Regarding those decisions, the evidence demonstrates that the Waiver Agency properly found that Appellant is modified independent in her cognitive skills of daily decision-making rather than moderately impaired in that area. While a number of decisions have been taken away from Appellant and her natural supports/care givers provide her with assistance, Appellant appears able to organize her daily routine and make safe decisions in familiar situations. Appellant lives by herself and is alone most of the time. Appellant also has a routine for each day and can safely follow that routine. Moreover, Draeger credibly testified that Appellant was alert and oriented during the home visit and it is undisputed that Appellant participated and answered questions correctly during that assessment.

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 homemaking and personal care services.

IT IS THEREFORE ORDERED that:

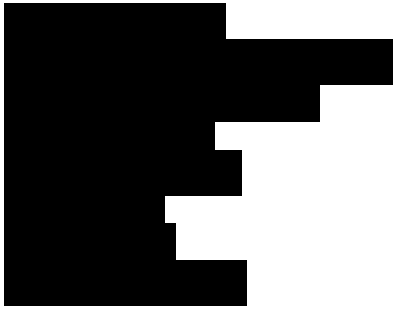
The Department's decision is **AFFIRMED**.

/s/

Steven J. Kibit
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

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cc:



Date Mailed: January 16, 2013

***** 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.