

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

P.O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax: (517) 373-4147

IN THE MATTER OF:

██████████

Appellant

Docket No. 2014-393 EDW
Case No. ██████████

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37, following the Appellant's request for a hearing.

After due notice, a telephone hearing was held on ██████████. Appellant appeared and testified. ██████████, Appellant's sister represented Appellant. ██████████, Clinical Manager for the ██████████ (██████ or Agency), the Department's MI Choice Program Waiver Agency. No witness(es) appeared on behalf of the Waiver Agency.

ISSUE

Did the Waiver Agency properly determine that the Appellant was not eligible for the MI Choice Waiver program following an eligibility assessment?

FINDINGS OF FACT

The Administrative Law Judge, based on the competent, material and substantial evidence on the whole record, finds as material fact:

1. Appellant is a ██████ year old male.
2. Appellant diagnoses include multiple impairments not specifically identified by testimony of the Agency witness at the administrative hearing. Notes indicate that as of the date of the assessment, Appellant was a recipient of skilled nursing from Residential Home Care for wound care; recently hospitalized due to vision problems for 11 days; receiving services through AAA1B CCM program; and uses oxygen daily.
3. On ██████████, the Waiver Agency assessed Appellant for participation in the MI Choice Waiver Program. Following the eligibility assessment, Appellant was notified via Adequate Action Notice on ██████████ that he did not meet the eligibility criteria for participation in the MI Choice Waiver program.

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4. Dates identified on the Hearing Summary as to the notice date of the notice of case action and hearing request dates were not supported by the evidence.
5. The Appellant's request for an administrative hearing was received by the Michigan Administrative Hearing System on [REDACTED]. (Exhibit 1).
6. The Agency requested a dismissal of Appellant's hearing request on the grounds that it was untimely. Appellant's hearing request was received timely, within the 90 day jurisdictional window.
7. The Agency witness who testified not have personal knowledge of Appellant's case. The individual who conducted the assessment was not available for the administrative hearing for testimony and/or cross-examination.

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 Region 14 Area Agency on Aging, 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

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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

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.

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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."

Appellant has brain damage due to frontal lobe injury. Appellant has severe short term memory problems. Appellant's brain injury and memory problems interfere with his ability to engage in many ADLs.

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.

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

Appellant uses oxygen daily.

Door 5
Skilled Rehabilitation Therapies

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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.

At the time of the assessment, Appellant was receiving wound care.

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.

Door 7
Service Dependency

Scoring Door 7: The applicant must be a current participant and demonstrate service dependency under Door 7.

First, regarding jurisdiction, the Agency argued that notice was issued ██████████, and the hearing request received ██████████. The Agency argued that Appellant’s hearing request was 91 days old and asks this administrative law judge to dismiss for lack of jurisdiction.

A review of the actual notice in the Agency’s own evidentiary file shows that the notice was dated ██████████, not ██████████. Appellant’s hearing request was filed on the 90th day, and thus, is timely. Jurisdiction is proper.

As noted in the Findings of Fact, the Agency did not have any witness(es) on behalf of the Agency except the Agency representative. This individual did not have personal knowledge of this case; she did not conduct the home assessment.

At the administrative hearing, Appellant’s representative attacked the credibility of no less than 25 items throughout Exhibits A, B and C. Appellant’s representative also demonstrated patent ambiguity throughout the Agency’s evidence. For instance, Exhibit A.10 states that there is no present psychiatric impairment. However, Appellant’s representative indicates that in fact, Appellant is on 5 psychiatric medications. Exhibit A.12 states Appellant does

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not wear a denture. In fact, Appellant has upper and lower dentures. On Exhibit A.12 the worker states regarding vision: "Adequate-sees fine detail, including regular print in newspaper/books." In fact, Appellant wears glasses. Moreover, Exhibit D.1, a document containing the worker's "Progress Notes" state that Appellant was hospitalized in ██████████ ██████████ for vision issues including double vision, with unknown etiology for 11 days. Exhibit A.10 states "has not had a BM in three days..." while Exhibit A.11 states with regard to constipation "...not exhibited in 3 days..." Both of these entries were made at the ██████████ ██████████, assessment.

Appellant sufficiently rebutted an extraordinary number of facts. Appellant's rebuttals did more than question the credibility-Appellant brought forth testimonial evidence, and, credible demonstrated a number of patent ambiguities in the Agency's assessment.

The purview of an administrative law judge is to review the Department's action and to make a determination as to whether the action was consistent with policy and procedure and not contrary to law. The Department's denial herein is not supported by the credible and substantial evidence of the whole record. As such, the Agency's actions must be reversed.

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

IT IS THEREFORE ORDERED that:

The Agency's decision is REVERSED.

The Agency is ordered to initiate a new assessment in this matter, which shall relate back to the initial assessment date of [REDACTED]. The Agency shall issue proper notice as to the outcome of the new assessment. Should Appellant disagree with the new assessment, then Appellant shall have a right to a new hearing, as will be indicated on the notice.

It is so ORDERED.

Janice Spodarek
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

[REDACTED]
cc:

[REDACTED]

Date Mailed: February 11, 2014

Date Signed: February 14, 2014

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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.