

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF HEALTH AND HUMAN SERVICES**

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

IN THE MATTER OF:

██████████,

Appellant

Docket No. 15-000961 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. upon Appellant's request for a hearing.

After due notice, a hearing was held on ██████████. Appellant personally appeared and testified. ██████████ of the ██████████ of ██████████ Specialist represented and appeared as a witness on behalf of Appellant. ██████████, Social Worker at ██████████ Nursing Home appeared as a witness.

Individuals appearing on behalf of the ██████████ (Waiver Agency or Agency) of ██████████, Michigan include the following: ██████████, Transition Coordinator, ██████████, Clinical Supports Manager, ██████████, ██████████, RN Supports Coordinator, and ██████████, Social Works Supports Coordinator.

ISSUE

Did the Waiver Agency properly determine that Appellant was not eligible for the MI Choice Waiver Program under Door 7?

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 a ██████ year old female beneficiary of both the Medicaid and SSI programs.
2. Appellant has resided at ██████████, Michigan a long term skilled nursing care facility for 3 years. Appellant was initially admitted under Door 1 eligibility. (Testimony).
3. The Waiver Agency 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. (Exhibit A, Testimony)

4. Appellant's primary diagnosis is osteoarthritis, alcohol abuse, and PTSD. (Exhibit A).
5. On ████████, the Waiver Agency's nurse completed a NFLOC and determined that Appellant did not meet the criteria. (Testimony).
6. On ████████ the Waiver Agency issued an Adequate Action Notice informing Appellant that she did not meet the NFLOC under any of the 7 NFLOC Doors. (Exhibit A, Attachment D).
7. At the administrative hearing, the parties stipulated that the only Door in dispute is Door 7. (Testimony; Appellant's Hearing Request).
8. On ████████, the Michigan Administrative Hearing System received Appellant's request for an administrative hearing arguing that she believes that she qualifies based on Door 7, Service Dependency.

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 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 Medicaid (formerly HCFA) to the Michigan Department of Community Health (Department). Regional agencies 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)*

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, SNF [Skilled Nursing Facility], ICF [Intermediate Care Facility], or ICF/MR [Intermediate Care Facility/Mentally Retarded], and is reimbursable under the State Plan. 42 CFR 430.25(c)(2)

The policy regarding enrollment in the MI Choice Waiver program is contained in the *Medicaid Provider Manual, MI Choice Waiver*, April 1, 2014, which provides in part:

SECTION 1 – GENERAL INFORMATION

MI Choice is a waiver program operated by the Michigan Department of Community Health (MDCH) to deliver home and community-based services to elderly persons and persons with physical disabilities who meet the Michigan nursing facility level of care criteria that supports required long-term care (as opposed to rehabilitative or limited term stay) provided in a nursing facility. The waiver is approved by the Centers for Medicare and Medicaid Service (CMS) under section 1915(c) of the Social Security Act. MDCH carries out its waiver obligations through a network of enrolled providers that operate as organized health care delivery systems (OHCDS). These entities are commonly referred to as waiver agencies. MDCH and its waiver agencies must abide by the terms and conditions set forth in the waiver.

MI Choice services are available to qualified participants throughout the state and all provisions of the program are available to each qualified participant unless otherwise noted in this policy and approved by CMS. (p. 1).

* * *

SECTION 2 - ELIGIBILITY

The MI Choice program is available to persons 18 years of age or older who meet each of three eligibility criteria:

- An applicant must establish his/her financial eligibility for Medicaid services as described in the Financial Eligibility subsection of this chapter.
- The applicant must meet functional eligibility requirements through the online version of the Michigan Medicaid Nursing Facility Level of Care Determination (LOCD).
- It must be established that the applicant needs at least one waiver service and that the service needs of the applicant cannot be fully met by existing State Plan or other services.

All criteria must be met in order to establish eligibility for the MI Choice program. MI Choice participants must continue to meet these eligibility requirements on an ongoing basis to remain enrolled in the program. (p.1, emphasis added).

It is noted that effective 4/1/15 criteria for eligibility was changed from requiring “at least one waiver service” to requiring “at least two MI Choice services on a continual basis, one of which must be supports coordination.” (ASM, 125, MPM). However, this change is not pertinent to the facts herein at the action here was pursuant to an action that took place before the change-on 1/7/15. (See Finding of Fact No. 6 above).

* * *

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 fourteen (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. (pp. 1-2).

In order to be found eligible for MI Choice Waiver services, Appellant must meet the requirements of at least one Door. The Department presented testimony and documentary evidence that 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

Appellant was found to be independent with bed mobility, toilet use and eating.

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."

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

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.

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. This section refers to applicants who are currently enrolled in and receiving services from either the MI Choice Program, PACE program, or a Medicaid reimbursed nursing facility. The applicant qualifying under Door 7 is eligible for continued enrollment and delivery of services from these programs.

Attachment B-16 of the Waiver Agency’s Exhibit A contains an explanation for Door 7 which is part of the instructions for completion of the NFLOC. That instruction regarding the “program participant for at least one year” states:

The applicant has been served by MI Choice, PACE or by a Medicaid reimbursed nursing facility for at least one year AND requires on going services to maintain current functional status. You may combine time the applicant received services across the three programs. No other community, residential or informal services are available to meet the applicant’s needs. (Exhibit A, Attachment B-16).

That is, the NFLOC Determination provides that Appellant 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,

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requires ongoing services to maintain current functional status, and no other community, residential, or informal services are available to meet the applicant's needs.

As noted above, the only issue Appellant requested review of is Door 7. Here, the Waiver Agency argued that there is no ongoing functional status needs as the assessment did not show any eligibility under Door 1, and that this was not disputed by Appellant. In addition, the Agency argued that Appellant does not have any ongoing CMH need as CMH discharged Appellant and that the [REDACTED] can provide ongoing coordination of services.

Appellant argues that the only Door disputed is Door 7, and thus, no issue regarding Door 1, that she needs mental health services if she leaves the nursing facility, and that the Disability Network does not provide coordination of services.

After a careful review of the credible and substantial evidence, this ALJ finds that Appellant does not meet eligibility under Door 7 as the evidence does not show that Appellant "requires ongoing services to maintain current functional status." Functional status is a reference to physical or exertional needs as indicated by ADLs. As noted, Appellant no longer has eligibility under Door 1-which is a measure of ADLs. Thus, while Appellant has been serviced by a nursing facility for at least one year, the evidence does not show that she requires ongoing services to maintain current functional status. Appellant did not dispute this. In addition, the Agency pointed out that Appellant was discharged from CMH.

It is noted that on [REDACTED], the Department of Community Health/OBRA issued a Notice of Determination finding NFLOC eligibility on behalf of Appellant on the grounds that "...recipient does qualify for the level of services provided by a nursing facility and does not require specialized mental health/developmental disabilities services, but may need other mental health/developmental services." (Appellant Exhibit 12, p.1). As noted above, the Waiver Agency's authority to act is pursuant to the authority delegated to it by the MDCH (the agency name at the time of this determination). It would seem that if the MDCH issues a decision contrary to the Waiver Agency, that the Waiver Agency would have to comply with its contractor. At the same time, the MDCH Notice of Determination is somewhat unclear as to its import specifically with regards to Door 7. In any case, as to the facts here, the [REDACTED] MCDH decision took place after the Agency's [REDACTED] determination and thus, under general evidentiary rules and requirements found under general at law and policy, this ALJ cannot take into account evidence that was not in existence at the time of the Waiver Agency's determination. It is noted that this ALJ makes no ruling on what impact this Notice of Determination may have on Appellant's EDW eligibility upon any subsequent request(s) for reassessment, and/or subsequent reviews.

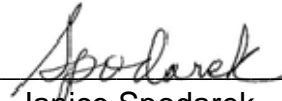
Based on the information available as of the [REDACTED] assessment, this ALJ must find that Appellant did not meet the Medicaid nursing facility level of care criteria.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the Waiver Agency properly determined that Appellant was not eligible for the MI Choice Waiver Program based on the available information at the time the Agency processed the review.

IT IS THEREFORE ORDERED that:

The Waiver Agency's decision is **AFFIRMED**.



Janice Spodarek
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Health and Human
Services

cc:

[REDACTED]

JS/ [REDACTED]

Date Signed: [REDACTED]

Date Mailed: [REDACTED]

***** 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. 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.