



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Christopher Seppanen
Executive Director

MIKE ZIMMER
DIRECTOR

[REDACTED]

Date Mailed: [REDACTED]
MAHS Docket No.: 15-022379
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Janice Spodarek

Issued and entered
this [REDACTED]
by:
Janice Spodarek
Administrative Law Judge

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 Petitioner's request for a hearing.

After due notice, an in-person hearing was held on [REDACTED]. Petitioner appeared and testified. Witnesses who appeared on behalf of Petitioner include: [REDACTED], Independent Living Specialist, and [REDACTED], Information and Referral Specialist with the Disability Network.

[REDACTED], Clinical Director at [REDACTED] appeared on behalf of Senior Services, or Respondent. Witnesses on behalf of Respondent included [REDACTED], RN, Case Manager of the MI Choice Waiver Program, and [REDACTED] Program Manager of the MI Choices Waiver Program.

ISSUE

Did the Waiver Agency properly determine that Petitioner was not eligible for 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. Petitioner is a [REDACTED] year old Medicaid beneficiary, born [REDACTED], who applied for services through the MI Choice Waiver Program. (Exhibit A.).
2. The Waiver Agency is a contract agent of the Michigan Respondent of Health and Human Services (MDHHS) and is responsible for waiver eligibility determinations and the provision of MI Choice Waiver Services.
3. On [REDACTED], an enrollment assessment was completed by the Waiver Agency to determine Petitioner's eligibility for the MI Choice Waiver Program. (Exhibit A; Testimony).
4. On [REDACTED], the Waiver Agency provided Petitioner an Adequate Action Notice informing Petitioner that it determined he was not eligible for the MI Choice Waiver Program. (Exhibit A.).
5. On [REDACTED], the Michigan Administrative Hearing System received Petitioner's request for an administrative hearing. (Exhibit 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 (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 Petitioner is claiming services through the Respondent'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 Respondent of Health and Human Services (Respondent). Regional agencies function as the Respondent'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*, October 1, 2015, which provides in part:

SECTION 1 – GENERAL INFORMATION

MI Choice is a waiver program operated by the Michigan Respondent 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).

* * *

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, Petitioner must meet the requirements of at least one Door. The Waiver Agency presented testimony and documentary evidence that Petitioner did not meet any of the criteria for Doors 1 through 7 based on the following analysis:

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

Petitioner was found to be independent with bed mobility, transfers, toilet use and eating. As such, Petitioner did not qualify under Door 1.

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."

The Respondent here did find that Petitioner, with regard to the cognitive skills for daily decision-making was "modified independent." However, Petitioner expressed ideas clearly and without difficulty. Petitioner does have a payee from Guardian Financial Advocacy for monthly bill paying. However, there was no evidence at the time of the assessment to indicate that Petitioner's Door 2 score would trigger eligibility. As such, Petitioner did not qualify under Door 2.

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.

Petitioner did not report physician visits or change orders to meet the criteria in Door 3. As such, Petitioner did not qualify under Door 3.

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

Petitioner reported none of the conditions or treatments associated with Door 4. Accordingly, Petitioner did qualify under Door 4.

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.

Petitioner did not report that he was in therapy. Accordingly, Petitioner did not 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.

Petitioner did not have any delusions or hallucinations within seven days of the LOC Determination, or qualify for the requirement of at least 4 of the last 7 day categories. Accordingly, Petitioner did not qualify under Door 6.

Door 7
Service Dependency

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

The LOC Determination provides that Petitioner could qualify under Door 7 if he 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, requires ongoing services to maintain current functional status, and no other community, residential, or informal services are available to meet the applicant's needs.

Here, Petitioner had not been a participant in the Waiver Program for at least one year. As such, Petitioner did not qualify under Door 7.

Here, Petitioner argued that while there was a representative from Disability Network (none of the witnesses present at the administrative hearing here) at the in-home assessment, that person was not appearing in a professional capacity. Petitioner also argued that Petitioner suffers from significant cognitive impairments and qualifies under Door 2, evidenced by [REDACTED] psychological assessment Petitioner requested to admit into the record.

After a careful review of the credible and substantial evidence of the whole records, this ALJ finds that the Petitioner has failed to meet his burden to establish eligibility for the reasons set for the below.

First, it is noted that Petitioner's proposed exhibit regarding the psychological evaluation of [REDACTED] contains substantial evidence to support Petitioner's argument of a significant cognitive impairment(s), which may very well have made Petitioner eligible. This ALJ also agrees that in many ways, Petitioner comes across interpersonally as an individual who understands the situation despite these deficits. However, Petitioner did not offer this evaluation to the Respondent at the time of the assessment, nor any time after. Respondent would not have access to this assessment without Petitioner informing Respondent of its existence, requesting its review, and signing any necessary release to allow the Respondent to review the same. Under general evidentiary rules, this ALJ cannot give weight to evidence that was not available to the Respondent at the time of its determination. Such is beyond the jurisdiction of the administrative forum.

As to the role of the Disability Network support person at the assessment, again, absent Petitioner or the 'support person' from Disability Network informing the Respondent that the support person was not appearing in a professional capacity, there is no rational way to charge the Respondent with this knowledge. At the same time, even so, Petitioner offered no evidence that would indicate that even if the Respondent believed that this individual was appearing in a non-professional capacity that such knowledge would affect the outcome of the NFLOC.

Based on the information at the time of the NFLOC determination, Petitioner did not meet the Medicaid nursing facility level of care criteria. This does not imply that Petitioner does not need any assistance, or that he does not have any medical problems, only that he was not eligible to receive services through the MI Choice Waiver Program at the time of the assessment. As such, under the evidence of record, this ALJ must uphold the denial as in compliance with the facts known based on the NFLOC assessment on [REDACTED] and find that the Waiver Agency properly determined

that Petitioner was not eligible for continued MI Choice Waiver services.

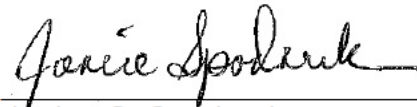
Petitioner understands that he may reapply at any time.

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 Petitioner was not eligible for the MI Choice Waiver Program based on the available evidence.

IT IS THEREFORE ORDERED that:

The Respondent's decision is AFFIRMED.



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

cc:



NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088; Attention: MAHS Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings
Reconsideration/Rehearing Request
P.O. Box 30763
Lansing, Michigan 48909-8139