



RICK SNYDER
GOVERNOR

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

SHELLY EDGERTON
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
MAHS Docket No.: 16-002340
[REDACTED]
[REDACTED]

ADMINISTRATIVE LAW JUDGE: Steven Kibit

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and upon Petitioner's request for a hearing.

After due notice, a telephone hearing was held on [REDACTED]. Petitioner appeared and testified on his own behalf. Mark Bomberg, Director of Long-Term Care Programs, appeared and testified on behalf of the Department of Health and Human Services' Waiver Agency, the [REDACTED]. [REDACTED], a social worker with Respondent, and [REDACTED], a registered nurse/review coordinator with the [REDACTED] [REDACTED] [REDACTED] [REDACTED]), testified as witnesses for Respondent. [REDACTED], a registered nurse with Respondent, was also present for the hearing.

ISSUE

Did the Respondent properly terminate Petitioner'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:

1. Petitioner is a sixty-five-year-old Medicaid beneficiary who has been diagnosed with insulin-dependent diabetes mellitus; chronic osteomyelitis; hypertension; venous insufficiency; depression; sleep apnea; neuropathy; gastroesophageal reflux disease; hypothyroidism; a chronic draining fistula on mid spine; and a history of methicillin-resistant staphylococcus aureus (MRSA) infections. (Exhibit 2, page 1; Exhibit 10, page 9; Testimony of Respondent's social worker).

2. Petitioner has also underwent a partial amputation of his right foot. (Exhibit 10, page 9; Testimony of Respondent's social worker).
3. Petitioner applied for services through Respondent and the MI Choice Waiver Program, and a Level of Care Determination (LOCD) screening was completed on [REDACTED]. (Exhibit 1, pages 1-7).
4. During that screening, Respondent determined that Petitioner was ineligible for the waiver program because he did not pass through any of the seven doors of the LOCD. (Exhibit 1, pages 1-7).
5. Petitioner and Respondent then contacted [REDACTED] and requested a nursing facility level of care exception. (Exhibit 10, page 8; Testimony of Respondent's social worker).
6. The exception was granted and Petitioner was enrolled in the waiver program and authorized for services. (Exhibit 10, page 8; Testimony of Respondent's social worker).
7. Specifically, Petitioner was approved for [REDACTED] hours per week of Community Living Supports (CLS), nursing services two times a week; nutritional supplements; and a personal emergency response system. (Exhibit 10, page 8; Testimony of Respondent's social worker).
8. On [REDACTED], Petitioner was hospitalized after falling and injuring himself. (Exhibit 10, pages 6-7; Testimony of Respondent's social worker).
9. On [REDACTED], he was transferred to a medical care facility for rehabilitation. (Exhibit 10, pages 6-7; Testimony of Respondent's social worker).
10. On [REDACTED], he was discharged from the facility and returned home. (Exhibit 10, pages 6-7; Testimony of Respondent's social worker).
11. That same day, Respondent completed a new LOCD with Petitioner. (Exhibit 3, pages 1-7).
12. During that screening, Respondent determined that Petitioner was eligible for the waiver program because he passed through Door 5 of the LOCD due to his skilled rehabilitation therapies. (Exhibit 3, pages 1-7; Exhibit 5, page 1).
13. On [REDACTED] [REDACTED] [REDACTED], Respondent completed another LOCD with Petitioner. (Exhibit 5, pages 1-7).

14. During that screening, Respondent found that Petitioner was no longer eligible for the waiver program because he did not pass through any of the seven doors of the LOCD. (Exhibit 5, pages 1-7).
15. It then provided Petitioner with a written form notifying Petitioner of its decision and his appeal rights. (Exhibit 6, page 1).
16. Respondent also contacted [REDACTED] and requested another nursing facility level of care exception for Petitioner. (Exhibit 10, page 3; Testimony of [REDACTED] review coordinator).
17. However, the request for an exception was denied. (Exhibit 10, page 3; Testimony of [REDACTED] review coordinator).
18. On [REDACTED], [REDACTED] sent written notice of its decision to Petitioner. (Exhibit 8, page 1).
19. On [REDACTED] the Michigan Administrative Hearing System (MAHS) received the Request for Hearing filed in this matter. (Exhibit 9, page 1).
20. Petitioner's services have been maintained, through general fund dollars, while his appeal has been pending. (Testimony of Respondent's representative).

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.

Petitioner is seeking 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 to the Michigan Department of Health and Human Services. Regional agencies, in this case Respondent, 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)

The Medicaid Provider Manual (MPM) outlines the governing policy for the MI Choice Waiver program and, with respect to functional eligibility, the applicable version of the MPM states in part:

2.2 FUNCTIONAL ELIGIBILITY

The MI Choice waiver agency must verify an applicant's medical/functional eligibility for program enrollment by inputting a valid Michigan Medicaid Nursing Facility Level of Care Determination (LOCD) into the online LOCD application. A valid LOCD is defined as an LOCD that was completed in-person with the applicant according to MDCH policy and put in the online LOCD application within 14 calendar days after the date of enrollment into the MI Choice program. (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 two covered MI Choice services, one of which must be Supports Coordination. 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 person completing the LOCD must either be waiver agency staff or in the waiver agency's provider network.

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.**

*MPM, January 1, 2016 version
MI Choice Waiver Chapter, pages 1-2
(Emphasis added)*

Accordingly, based on the above policy, Petitioner must qualify for functional eligibility through one of seven doors on a continuing basis and, if Respondent determines that he no longer meets the functional level of care criteria for participation, another face-to-face online version of the LOCD must be conducted reflecting the change in functional status.

The [REDACTED] LOCD was the basis for the action at issue in this case. In order to be found eligible for the program, Petitioner must have met the requirements of at least one door:

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.
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 Physician Order changes in the last 14 days, OR
2. At least two Physician Visit exams AND at least two Physician 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 [Stage 3-4 pressure sores; Intravenous or parenteral feedings; Intravenous medications; End-stage care; Daily tracheostomy care, daily respiratory care, daily suctioning; Pneumonia within the last 14 days; Daily oxygen therapy; Daily insulin with two order changes in last 14 days; Peritoneal or hemodialysis] and have a continuing need to 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.

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 has been a participant for at least one (1) year] and demonstrate service dependency under Door 7.

In addition to challenging the LOCD, Petitioner also appears to indicate disagreement with [REDACTED] denial of an Nursing Facility Level of Care Exception. Regarding such an exception, the applicable policy provides:

Applicants who exhibit the following characteristics and behaviors may be admitted to programs requiring the Nursing Facility Level of Care definition.

Frailty

The applicant has a significant level of frailty as demonstrated by at least one of the following categories:

- Applicant performs late loss ADLs (bed mobility, toileting, transferring and eating) independently but requires an unreasonable amount of time
- Applicant's performance is impacted by consistent shortness of breath, pain or debilitating weakness during any activity
- Applicant has experienced at least two falls in the home in the past month
- Applicant continues to have difficulties managing medications despite the receipt of medication set up services
- Applicant exhibits evidence of poor nutrition, such as continued weight loss, despite the receipt of meal preparation services

- Applicant meets criteria for Door 3 when emergency room visits for clearly unstable conditions are considered

Behaviors

The applicant has at least a one month history of any of the following behaviors, and has exhibited two or more of any these behaviors in the last seven days, either singly or in combination:

- Wandering
- Verbal or physical abuse
- Socially inappropriate behavior
- Resists care

Treatments

The applicant has demonstrated a need for complex treatments or nursing care.

Exhibit 7, page 1

Here, Respondent's staff completed a face-to-face reassessment and new LOCD with Petitioner on [REDACTED] and, during that determination, Respondent found that Petitioner was no longer eligible for the waiver program because he did not pass through any of the seven doors of the LOCD. During the hearing, its representative and social worker also testified regarding the history of this case and how the specific findings in the LOCD were made.

The review coordinator for [REDACTED] also testified as to why Petitioner did not meet any exception in this case. In particular, with respect to an exception based on the treatments an applicant is receiving, she testified that, while Petitioner is receiving nursing services twice a week, the above criteria requires that he be receiving skilled nursing care daily.

In response, Petitioner testified that he still needs assistance putting on shoes, washing his back, cleaning and shopping. He also testified that, while he has difficulty standing up and fell out of his wheelchair once, he transfers and uses the toilet independently. Petitioner further testified that his conditions are only worsening and that he may require eye surgery and another amputation in the future, and that he will need physical therapy again once a new prosthetic is put in.

Petitioner bears the burden of proving by the preponderance of the evidence that Respondent erred in terminating his services. Moreover, the undersigned Administrative Law Judge is limited to reviewing Respondent's decision in light of the information available at the time the decision was made.

Given the evidence in this case, Petitioner has failed to meet that burden of proof and Respondent's decision must be affirmed.

With respect to the LOCD, while Petitioner testified that he still needs assistance with putting on his shoes, washing his back, cleaning and shopping, there is no evidence that he needed assistance with the specific tasks identified in Door 1 and he expressly acknowledged that he is independent in transferring and toileting. Moreover, the record fails to demonstrate that Petitioner's medical conditions or the effects of those conditions meet the criteria for passing through Doors 2, 4, or 6; or that any medical treatment Petitioner receives meets the criteria required by Doors 3, 4, 5 or 6. Petitioner also does not pass through Door 7 because he had not been a program participant for a year.

While Petitioner may again pass through one of the doors of the LOCD in the future as his conditions worsen, his needs increase or his circumstances change, Respondent is required by policy to assess Petitioner under the specific criteria and look-back periods outlined in the LOCD and, based on that criteria, it properly found that Petitioner no longer met the functional eligibility criteria for the program.

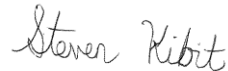
Similarly, with respect to any exception through MPRO, Petitioner has failed to meet his burden of proof. While Petitioner may have been hospitalized after a fall in [REDACTED] there is no suggestion in the record that he has experienced at least two falls in the home in the month prior to the review or that he met the criteria for any other frailty exception. Moreover, his case also does not trigger an exception based on any behaviors or treatments as he has none of the listed behaviors and, as explained by the [REDACTED] reviewer, the limited nursing services he does received do not demonstrate a sufficient need for complex treatments or nursing care. Accordingly, based on the information available at the time, [REDACTED] also properly found that Petitioner did not meet the criteria for exception eligibility for nursing facility services as described in the MPM.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that Respondent properly terminated Petitioner's services.

IT IS THEREFORE ORDERED that

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



SK/db

Steven Kibit
Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

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

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]

[REDACTED]

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