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GOVERNOR

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

SHELLY EDGERTON
DIRECTOR

[REDACTED]

Date Mailed: December 27, 2016
MAHS Docket No.: 16-014221
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Colleen Lack

DECISION AND ORDER

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

After due notice, a hearing was held on December 1, 2016. [REDACTED], the Petitioner, appeared on his own behalf. [REDACTED], Care Management Director, represented the Department of Health and Human Services' Waiver Agency, [REDACTED] or "Waiver Agency"). [REDACTED], Registered Nurse (RN) Care Manager, and [REDACTED], Social Worker (SW) Care Manager, appeared as witness for the [REDACTED].

During the hearing proceedings, the Waiver Agency's Hearing Summary packet was admitted as Exhibit A, pp. 1-186.

ISSUE

Did the Waiver Agency properly terminate Petitioner's MI Choice Waiver services case due to a determination that Petitioner did not meet the Nursing Facility Level of Care Determination (LOCD) criteria?

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 was admitted to a Medicaid reimbursed nursing facility on [REDACTED] (Exhibit A, p. 80)
2. Petitioner began receiving services through the MI Choice Waiver program following his discharge from the Medicaid reimbursed nursing facility. (Care Management Director Testimony)

3. For the enrollment determination, it was found that Petitioner met the LOCD criteria on [REDACTED], via Door 1. (Exhibit A, pp. 82-90)
4. Petitioner continued to meet the Door 1 criteria on a subsequent LOCD completed on [REDACTED]. (Exhibit A, pp. 91-99)
5. On [REDACTED] the [REDACTED] completed another LOCD and determined that Petitioner did not meet the criteria for any of the 7 Doors. (Exhibit A, pp. 100-108)
6. On [REDACTED], an Advance Action Notice Termination of Services was issued to Petitioner stating his services would be terminated [REDACTED], because Petitioner did not qualify under any of the listed eligibility categories. (Exhibit A, pp. 68A-69)
7. On [REDACTED] Petitioner filed a Request for Hearing contesting the Waiver Agency's action. (Exhibit A, pp. 70-74)

CONCLUSIONS OF LAW

The Medical Assistance Program (MA) 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.

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 the AAA, 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.

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 reimbursable under the State Plan. (42 CFR 430.25(b))

Federal regulations require that Medicaid pay for services only for those beneficiaries who meet specified level of care criteria. In accordance with the federal regulations the Michigan Department of Health and Human Services implemented functional/medical eligibility criteria for Medicaid nursing facility, MI Choice, and PACE services.

MI Choice applicants are evaluated for functional eligibility via the Michigan Medicaid Nursing Facility Level of Care Determination (LOCD). The LOCD consists of seven screening Doors. The doors are: Door 1- Activities of Daily Living; Door 2-Cognitive Performance; Door 3- Physician Involvement; Door 4- Treatments and Conditions; Door 5- Skilled Rehabilitative Therapies; Door 6- Behavioral Challenges; and Door 7- Service Dependency. 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. *Medicaid Provider Manual, MI Choice Waiver Chapter, July 1, 2016, pp. 1-2.*

In order to be found eligible for MI Choice Waiver services, the Petitioner must meet the requirements of at least one Door. The LOCD at issue for the case action at issue was completed on September 29, 2016. (Exhibit A, pp. 100-108):

Door 1

Activities of Daily Living (ADLs)

The LOCD, pages 1-3 of 9, provides that the Petitioner must:

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

The Waiver Agency scored Petitioner as being independent with these four ADLs during the seven day lookback period for Door 1 for the [REDACTED], LOCD. Accordingly, Petitioner was scored as having 4 points and could not be found eligible through this Door. (Exhibit A, pp. 101-103)

Petitioner testified that he was not independent with these activities. Regarding eating, Petitioner stated that he cannot cut his food because he cannot use his hand. Petitioner's initial example involved dicing up vegetables to cook them. However, meal preparation is a separate activity. Petitioner clarified that regarding eating itself, he still can only eat food that has been cut up for him. Regarding bed mobility, Petitioner testified that he cannot roll over and wakes up after two hours. Therefore, he only sleeps in a two hour shift at night because he gets up and cannot get back to sleep. However, Petitioner acknowledged that he is able to get up on his own. Regarding transferring and toilet use, Petitioner testified that he falls down going to the bathroom at least once per week. However, Petitioner's example was from the week before the December 1, 2016, telephone hearing proceedings. Petitioner then confirmed that there have been changes in his condition since the September 29, 2016, LOCD. Further, Petitioner testified he could not recall what he said on September 29, 2016. Petitioner acknowledged that things are worse now than they were at that time. (Petitioner Testimony)

There was insufficient credible evidence that Petitioner reported any needs for assistance with the four ADLs considered under Door 1 at the time of the [REDACTED], assessment. While Petitioner described some needs for assistance with these activities in his testimony, Petitioner acknowledged that his condition had changed and things are worse now. Petitioner was unable to recall what he told the [REDACTED] at the time the [REDACTED], LOCD was completed. Accordingly, it cannot be found that the [REDACTED] erred in determining that Petitioner scored 4 points based on the information available at the time of the [REDACTED], LOCD, which is not sufficient to qualify through Door 1.

Door 2 Cognitive Performance

The LOCD, pages 3-4 of 9, provides that to qualify under Door 2 Petitioner must:

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 Waiver Agency scored Petitioner as memory okay; independent with daily decision making; and able to make himself understood for the [REDACTED], LOCD. (Exhibit A, pp. 103-104)

Petitioner testified that he has memory problems all the time. Petitioner stated that since his stroke, he does not remember stuff. Regarding cognitive skills, Petitioner explained that his home care worker makes his meals and then he eats and they help him with medications because he often forgets. Petitioner testified that his medications are lined for him based on how many times per day he takes them and stated that it is not a big thing. Regarding making himself understood, Petitioner testified that quite often with his girlfriend he has trouble finding the right words to express himself. Petitioner indicated he has lost that ability and he is not sure if it is going to come back. Petitioner testified that he and the SW Care Manager disagreed about the criteria for this Door at the time of this assessment. Petitioner indicated this was passed over and he was not able to make himself understood to the SW Care Manager that he was having a problem with what she said. (Petitioner Testimony)

The SW Care Manager explained the discussion from the [REDACTED], assessment for evaluating this Door. Regarding short term memory, the LOCD considers whether Petitioner seems/appears to be able to recall after 5 minutes. (Exhibit A, p. 103) The SW Care Manager had called Petitioner to remind him that she was coming out for the assessment. An hour later Petitioner did remember that she was coming out for the assessment, indicating he was able to recall more than five minutes later. Petitioner was also able to recall parts of the conversation five minutes later throughout the hour and a half assessment. Regarding cognitive skills for daily decision making, Petitioner appeared to be able to make safe decisions. For example Petitioner: presented as safe and well in his home; he eats on a regular basis; takes his medication regularly; and his decisions present as reasonable and consistent with his lifestyle and culture values. Additionally, Petitioner calls the SW Care Manager when he needs a ride to doctor appointments or when he needs financial assistance when he receives a shut off notice. These examples also addresses Petitioner's ability to make himself understood, make his needs known. The SW Care Manager noted that Petitioner expresses his ideas clearly and without difficulty during those calls, which are made in a timely manner. (SW Care Manager Testimony)

There was insufficient credible evidence to establish that the Waiver Agency scored Door 2 improperly. The SW Care Manager provided specific, detailed, and credible testimony that Petitioner demonstrated an ability to recall after 5 minutes; the ability to be independent with daily decision making; and was able to make himself understood at the time of the [REDACTED], LOCD. Further, even if Petitioner's testimony were found fully credible for this Door, at most, he could have scored as having a memory problem, "modified independent" with daily decision making and "usually understood," which is still not sufficient to qualify through Door 2. Specifically, there was no

indication that Petitioner never or rarely made decisions; nor that he makes poor decisions or that he needed significant reminders, cues, supervision, or correcting with daily routines beyond having his medications set out for him. Eating once a meal has been prepared is not the same as having to be reminded, cued, or prompted to eat. Regarding making self understood, Petitioner's testimony indicated he has difficulties with finding the right words, which most closely meets the description for being scored as "usually understood" under the LOCD criteria. The criteria for this Door requires that in addition to a short term memory problem, the individual is also: scored as moderately impaired or severely impaired with decision making; or scored as sometimes understood or rarely/never understood. (Exhibit A, pp. 103-104) Petitioner's testimony did not indicate the qualifying degree of assistance with daily decision making nor that he had the qualifying severity of difficulty in making himself understood during the relevant time period. Accordingly, Petitioner did not qualify through Door 2.

Door 3 **Physician Involvement**

The LOCD, pages 4-5 of 9, provides that to qualify under Door 3 Petitioner must:

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.

The Waiver Agency scored Petitioner as having one day with physician visit exam(s) and 1 day with physician order change(s) during the 14 day review period for Door 3. (Exhibit A, p. 104-105) The waiver agency contacted both of Petitioner's doctor's offices to confirm this on the day of the [REDACTED], assessment. (Care Management Director Testimony)

Petitioner testified that he does not have any idea about what happened in September. (Petitioner Testimony)

The evidence presented by the Waiver Agency for this Door is found to be credible based on the specific testimony regarding calling Petitioner's doctor's offices for confirmation of examinations and order changes. With one day with physician visit examination(s) and one day with physician order change(s) during the relevant review period, Petitioner did not meet the criteria to qualify through Door 3.

Door 4
Treatments and Conditions

The LOCD, page 5 of 9, indicates that in order to qualify under Door 4, the Petitioner 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

Scoring Door 4: The applicant must meet score “yes” in at least one of the nine categories and have a continuing needs to qualify under Door 4.

The Waiver Agency scored Petitioner as not receiving any of the listed health treatments or demonstrating any of the listed health conditions during the relevant time period for the [REDACTED], LOCD assessment. (Exhibit A, p. 105) In part, this was based on documentation from the physician that Petitioner’s wound is a Stage 2. (Exhibit A pp. 105; Care Management Director Testimony)

Petitioner testified that he did not know what makes a pressure sore stage 2 versus stage 1, 3, or 4. (Petitioner Testimony) The RN Care Manager explained that the stages relate to how far the wound has penetrated, i.e. through what layer of the skin or if it is down to the bone. The RN Care Manager stated that because she did not see the actual wound that day, the SW Care Manager called and got the information from Petitioner’s doctor to confirm the stage of the wound. (RN Care Manager Testimony)

Petitioner then testified that he is not sure if it was before or after the assessment, but he went to the hospital and was told his foot was broken. Petitioner lost a silver dollar sized piece of skin on the heel of his left foot and he does not know what category that would be. Petitioner again noted that this was right around the time of the assessment, but he was not sure if it was before or after. Regarding the rest of the health treatments and conditions, Petitioner indicated there was an IV, but he did not know the timing; and that he did not know the timing of when anything happened regarding daily insulin with order changes. (Petitioner Testimony)

There was insufficient credible evidence presented to establish that Petitioner received any of the specified treatments or demonstrated any of the specified health conditions during the relevant time period to meet the criteria for Door 4 for the

[REDACTED], LOCD assessment. Petitioner acknowledged that for the three areas he identified that may apply, he was unsure if they occurred during the relevant time period. Further, the RN Care Manager credibly testified that because she did not see the actual wound that day, Petitioner's doctor's office was contacted to confirm the stage of the wound. Accordingly, Petitioner did not meet the criteria to qualify through Door 4.

Door 5 **Skilled Rehabilitation Therapies**

The LOCD, pages 5-6 of 9, provides that the Petitioner must:

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.

The Waiver Agency scored Petitioner as not requiring any minutes of physical, occupational, or physical therapy during the relevant time period. (Exhibit A, PP. 105-106)

Petitioner testified that he was supposed to receive skilled rehabilitation therapy all along but he still has never received any. Petitioner stated that he has been asking for it since he left Southgate, which was on April 28, 2016. (Petitioner Testimony)

Accordingly, no evidence was presented indicating that any skilled rehabilitation therapies were scheduled or delivered for Petitioner during the relevant time period to meet the criteria for Door 5 for the September 29, 2016, LOCD assessment.

Door 6 **Behavior**

The LOCD, pages 6-7 of 9, provides a listing of behaviors (Wandering, Verbally Abusive, Physically Abusive, Socially Inappropriate/Disruptive, and Resists Care) and problem conditions (Delusions, and Hallucinations) recognized under Door 6.

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.

The Waiver Agency scored Petitioner as not displaying any of the listed behavioral symptoms or problem conditions during the relevant time period for the [REDACTED], LOCD assessment. (Exhibit A, pp. 106-107)

Petitioner testified that he did not have problems with wandering. Petitioner stated he may have been a little bit abusive and been socially inappropriate/disruptive after the relevant time period. Regarding resisting care, Petitioner did not recall when it was, but there were times that the bandaging on Petitioner's wound did not get changed daily when it should have been. However, this was because Petitioner was dependent on others to change his bandaging and sometimes he did not get it. Petitioner was not able to do this himself. Accordingly, Petitioner was not refusing or resisting care, rather there was difficulty with the arrangements to have someone else come to provide the needed care. Petitioner also testified that there were a few episodes with delusions/hallucinations, but he thinks they were after the [REDACTED], LOCD assessment. (Petitioner Testimony)

Accordingly, there was insufficient credible evidence presented to establish that Petitioner displayed any of the listed behavioral symptoms or problem conditions during the relevant time period for the [REDACTED], LOCD assessment to qualify through Door 6.

Door 7 **Service Dependency**

The LOCD, page 7 of 9, provides that Petitioner could qualify under Door 7 if there was evidence that he: is currently being served by either the MI Choice Program, PACE program, or Medicaid reimbursed nursing facility; for at least one year; requires ongoing services to maintain current functional status; and no other community, residential or informal services are available to meet the Petitioner's needs.

The Waiver Agency explained that Petitioner could not be found to qualify through Door 7 because he had not been served by either the MI Choice Program, PACE program, or Medicaid reimbursed nursing facility for at least one year. (Exhibit A, p. 107; Care Management Director Testimony) Petitioner was admitted to a Medicaid reimbursed nursing facility on [REDACTED]. (Exhibit A, p. 80) Petitioner began receiving services through the MI Choice Waiver program following his discharge from the Medicaid reimbursed nursing facility. (Care Management Director Testimony) The LOCD at issue was completed on [REDACTED]. (Exhibit A, pp. 100-108)

Petitioner cannot be found to have been receiving services from either the MI Choice Program, PACE program, or Medicaid reimbursed nursing facility; for at least one continuous year for the [REDACTED], LOCD assessment because continuous services through either the MI Choice Program, PACE program, or Medicaid reimbursed nursing facility had only been being provided since the [REDACTED], admission to the nursing facility. Accordingly, there is no need to review the other components of the Door 7 criteria. Petitioner could not qualify through Door 7 because he had not been

served by either the MI Choice Program, PACE program, or Medicaid reimbursed nursing facility for at least one continuous year.

There is an exception review process related to the LOCD. However, in this case, the testimony of the parties did not establish that an exception review was requested through the Michigan Peer Review Organization (MPRO). The AAA did not request an exception review. (Care Management Director Testimony) Petitioner could not recall calling MPRO. Petitioner testified that he only called the Disability Network and they put him in touch with Dawn. (Petitioner Testimony) The Care Management Director confirmed who Dawn was and that she is not with MPRO. (Care Management Director Testimony)

Accordingly, the evidence established that Petitioner did not meet the criteria for any of the seven Doors at the time the [REDACTED] LOCD was completed and no exception review was requested. Therefore, Petitioner did not remain eligible for the MI Choice Waiver program and the [REDACTED], determination to terminate his MI Choice Waiver services must be upheld.

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 the Petitioner's MI Choice Waiver services case because he did not meet the LOCD criteria for the September 29, 2016, assessment.

IT IS THEREFORE ORDERED that

The Waiver Agency's decision is AFFIRMED.

CL/cg



Colleen Lack
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

DHHS -Dept Contact

[REDACTED]

Petitioner

[REDACTED]

Community Health Rep

[REDACTED]

DHHS -Dept Contact

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