



RICK SNYDER
GOVERNOR

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

SHELLY EDGERTON
DIRECTOR

[REDACTED]

Date Mailed: [REDACTED]
MAHS Docket No.: 16-003021
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Robert J. Meade

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, a hearing was held on [REDACTED]. Petitioner appeared on her own behalf. [REDACTED], Petitioner's fiancé and [REDACTED], Petitioner's mother, appeared as witnesses.

[REDACTED], Hearings Coordinator, represented the Department's Waiver Agency, Region 9 Area Agency on Aging. (Waiver Agency or Region 9 AAA). [REDACTED], Case Manager and [REDACTED], RN, appeared as witnesses for the Waiver Agency.

ISSUE

Did the Waiver Agency properly determine that Petitioner was no longer 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 has been receiving services through the MI Choice Waiver Program since [REDACTED]. (Exhibit A, p 6; Testimony).
2. The Waiver Agency is a contract agent of the Michigan Department of Health and Human Services (MDHHS) and is responsible for waiver eligibility determinations and the provision of MI Choice Waiver Services.

3. Petitioner is diagnosed with epilepsy. (Exhibit A, p 26; Testimony).
4. Petitioner lives with her fiancé, her children and her parents and is never left alone. (Exhibit A, pp 19, 27; Testimony).
5. On [REDACTED], a Level of Care Determination (LOCD) of Petitioner was done by the Waiver Agency to determine continued eligibility for the MI Choice Waiver Program. Based on the results of the LOCD, the Waiver Agency determined that Petitioner was no longer eligible for the MI Choice Waiver Program because she did not pass through any of the seven doors of the LOCD. (Exhibit A, pp 6-15; Testimony).
6. On [REDACTED], the Waiver Agency sent Petitioner an Advance Action Notice informing Petitioner that it determined she was no longer eligible for the MI Choice Waiver Program and advised her that services would be terminated effective [REDACTED]. (Exhibit A, pp 38-39; Testimony).
7. 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 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 Health and Human Services (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*, January 1, 2016, 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).

* * *

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.

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."

Petitioner's short-term memory was determined to be okay, she was found to be independent with cognitive skills for daily decision-making, and she was able to make herself understood. 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 reported 1 physician visit and 1 physician change order within the 14-day period leading up to the LOCD. 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 was not currently receiving any skilled rehabilitation therapies at the time of the LOCD. 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 LOCD. Petitioner did not exhibit any of the challenging behaviors associated with Door 6 within the seven days of the LOCD. 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 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, 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 has been a participant in the Waiver Program for at least one year, but the Waiver Agency determined that she did not require ongoing services to maintain her current functional status. The Waiver Agency noted that Petitioner had acute, as opposed to ongoing needs and that she was never left alone. As such, Petitioner did not qualify under Door 7.

Petitioner testified that the LOCD is very generic and not tied in any way to her specific illness. Petitioner indicated that when she started with the Waiver program workers told her that they would have to learn about her condition because they had never had anyone on the program with epilepsy. Petitioner indicated that she can generally take care of herself when she is not having a seizure, but when she has a seizure she completely blacks out and relies on others to keep her safe and provide her medication. Petitioner indicated that she became very upset when the workers were conducting the assessment and ran into the bathroom and slammed the door, then had a seizure. Petitioner testified that she never refused to sign the LOCD, she was in the bathroom having a seizure and was unable to sign. Petitioner indicated that she does have short-term memory issues and that after a seizure she cannot remember anything. Petitioner also indicated that she requires daily reminders to take her medications.

Petitioner's fiancé agreed with Petitioner that the LOCD was very generic and did not relate to someone like Petitioner with epilepsy. Petitioner's fiancé also affirmed that the Waiver Agency workers told Petitioner when she began on the program that they would have to learn about her condition because they did not have anyone else on the program with epilepsy. Petitioner's fiancé testified that the Waiver Agency wanted them to install grab bars in the bathroom for Petitioner but the family did not because the bars would just be one more thing Petitioner could hit her head on when she fell during a seizure. Petitioner's fiancé indicated that before a seizure Petitioner goes completely blank and falls hard to the floor. Petitioner's fiancé testified that Petitioner does not remember anything after having a seizure so it did not make any sense that the Waiver Agency indicated during the assessment that only Petitioner could answer the questions. Petitioner's fiancé also indicated that Petitioner does sometimes get violent after she has a seizure. Petitioner's fiancé testified that someone has to give Petitioner a pill when she has a seizure and it would be very serious if no one was there to do so. Petitioner's fiancé testified that Petitioner's doctor has indicated that she requires 24 hour supervision. Petitioner's fiancé testified that when Petitioner had her seizure on the day of the assessment, the Waiver Agency workers did not even try to help her.

In response, the Waiver Agency nurse indicated that it was not apparent to them that Petitioner was having a seizure when she ran into the bathroom and slammed the door and that had they been aware they certainly would have tried to help.

Based on the information at the time of the LOCD, Petitioner did not meet the Medicaid nursing facility level of care criteria. The LOCD is designed by the Michigan Department of Health and Human Services and must be applied in all cases regardless of what the applicant's diagnosis is. This does not imply that Petitioner does not need any assistance, or that she does not have any medical problems, only that she was not eligible to receive ongoing services through the MI Choice Waiver Program at the time of the assessment. It appears that Petitioner's needs are acute when she has a seizure, but at other times, she is independent. Based on the evidence presented, Petitioner lives with her fiancé, her children and her parents and she is never left alone. Accordingly, the Waiver Agency properly determined that Petitioner was not eligible for continued MI Choice Waiver services.

Petitioner did not prove by a preponderance of evidence that the Waiver Agency erred in finding that she was no longer eligible for the MI Choice Waiver Program. Therefore, Petitioner is not eligible for the MI Choice Waiver Program.

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 that Petitioner was no longer eligible for the MI Choice Waiver Program.

IT IS THEREFORE ORDERED that:

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



RM/cg

Robert J. Meade
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]

DHHS -Dept Contact

[REDACTED]

Community Health Rep

[REDACTED]