



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS
DIRECTOR

[REDACTED]
[REDACTED], MI [REDACTED]

Date Mailed: June 2, 2020
MOAHR Docket No.: 20-001744
Agency No.: [REDACTED]
Petitioner: [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 May 28, 2020. [REDACTED], Petitioner's cousin, appeared and testified on Petitioner's behalf. Theresa Root, Appeals Review Officer represented the Respondent Department of Health and Human Services (DHHS or Department). Emily Franklin, MI Choice Policy Analyst with the Department, and Abbey Stone, registered nurse (RN)/care manager with the Area Agency on Aging of Western Michigan, testified as witnesses for Respondent.

During the hearing, Respondent submitted an evidence packet that was admitted into the record as Exhibit A, pages 1-59. Petitioner did not submit any exhibits.

ISSUE

Did Respondent properly find Petitioner ineligible for 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 record, finds as material fact:

1. Petitioner is a [REDACTED] ([REDACTED]) year-old who was initially approved for services by the Area Agency on Aging of Western Michigan through the MI Choice Waiver Program in February of 2020.
2. He was found eligible for the program after passing through Door 4 of the Michigan Medicaid Nursing Facility Level of Care Determination ("LOCD").
3. Petitioner passed through Door 4 based on reports that he was receiving

end-stage care with respect to his prostate cancer.

4. However, after conferring with Petitioner's doctor and reviewing Petitioner's medical records, the Area Agency on Aging of Western Michigan subsequently learned that Petitioner was not receiving end-stage care.
5. Another LOCD was therefore completed with Petitioner on February 24, 2020, and, in that LOCD, the Area Agency on Aging of Western Michigan determined that Petitioner was ineligible for waiver services based upon his failure to qualify via entry through one of the seven doors of the LOCD.
6. The Area Agency on Aging of Western Michigan then sent Petitioner written notice that he had been found ineligible and services would not be approved.
7. On March 6, 2020, the Michigan Office Administrative Hearings and Rules (MOAHR) received the request for hearing filed by Petitioner in this matter regarding Respondent's decision. (Exhibit A, page 4).

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 applied for 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)

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. See 42 CFR 430.25(c)(2).

Types of services that may be offered through the waiver program include:

Home or community-based services may include the following services, as they are defined by the agency and approved by CMS:

- (1) Case management services.
- (2) Homemaker services.
- (3) Home health aide services.
- (4) Personal care services.
- (5) Adult day health services
- (6) Habilitation services.
- (7) Respite care services.
- (8) Day treatment or other partial hospitalization services, psychosocial rehabilitation services and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness, subject to the conditions specified in paragraph (d) of this section.
- (9) Other services requested by the agency and approved by CMS as cost effective and necessary to avoid institutionalization.

42 CFR 440.180(b)

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

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 their 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 requires at least two waiver services, one of which must be Supports Coordination, 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.

* * *

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 MDHHS 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 MILogin in CHAMPS. (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.

Copies of the LOCD for participants must be retained by the waiver agency for a minimum period of six years. This information is also retained in the MDHHS LOCD database. For individuals who do not meet the LOCD criteria, a paper copy of the LOCD must be retained in the applicant's record for no less than three years.

*MPM, January 1, 2020 version
MI Choice Waiver Chapter, pages 1-3
(emphasis added)*

A LOCD is therefore mandated for all Medicaid-reimbursed admissions to the MI Choice Program and, even after enrollment, a beneficiary must continue to meet the outlined criteria in the LOCD on an ongoing basis in order to remain in the program.

The LOCD consists of seven-service entry doors or domains. The doors are: Activities of Daily Living, Cognitive Performance, Physician Involvement, Treatments and Conditions, Skilled Rehabilitative Therapies, Behavior, or Service Dependency. See MPM, January 1, 2020 version, Nursing Facility Level of Care Determination Chapter, pages 9-10.

The February 24, 2020 LOCD was the basis for the action at issue in this case. To be found eligible for the MI Choice 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, demonstrate service dependency, and meet all three criteria [participant for at least one consecutive year (no break in coverage); requires ongoing services to

maintain current functional status; no other community, residential, or informal services are available to meet the applicant's needs] to qualify under Door 7.

Here, Respondent and the agency determined that Petitioner did not pass through any of the above seven doors in the February 24, 2020 LOCD and that he was therefore ineligible for the MI Choice Program.

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

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

While, as testified to by Petitioner's representative, Petitioner may need assistance with some activities, there is no evidence that, at the time of the LOCD at issue in this case, that Petitioner needed assistance with any of the specific tasks identified in Door 1. Moreover, nothing in the record suggests that, during the relevant look-back periods, that Petitioner's medical conditions, or the effects of those conditions, met the criteria for passing through Doors 2, 4, or 6; or that any medical treatment Petitioner received met the criteria required by Doors 3, 4, 5 or 6. The mere fact that Petitioner is on narcotics for medicine and needs reminders to take his medications does not establish that his cognition is sufficiently impaired to pass through Door 2; and, while Petitioner may have reasonably gotten upset when told that a second LOCD had to be completed, that is not behavior that would meet the criteria for Door 6. Finally, as Petitioner has not been a waiver or PACE participant, or a nursing facility resident, for over a year, he does not pass through Door 7.

Petitioner's representative did testify that Petitioner failed to accurately report Petitioner's needs during the LOCD and, to the extent Petitioner has updated or additional information to provide regarding his need for services, then he can always reapply for the waiver program if and when appropriate. With respect to the decision at issue in this case however, Respondent's decision must be affirmed given the available information and applicable policies.

DECISION AND ORDER

The Administrative Law Judge, based on the above Findings of Fact and Conclusions of Law, decides that Respondent properly found Petitioner ineligible for services through the MI Choice Waiver Program.

IT IS, THEREFORE, ORDERED that:

Respondent's decision is **AFFIRMED**.

SK/sb



Steven Kibit

Administrative Law Judge
for Robert Gordon, 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 Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR 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. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

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

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

DHHS -Dept Contact

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