

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: October 29, 2021
MOAHR Docket No.: 21-004289
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, 42 CFR 431.200 *et seq.* and 42 CFR 438.400 *et seq.* upon Petitioner's request for a hearing.

After due notice, a telephone hearing was held on October 27, 2021. [REDACTED], Authorized Hearing Representative (AHR) and caregiver, appeared and testified on Petitioner's behalf. Petitioner, [REDACTED] appeared as a witness.

Emily Piggott, Appeals Review Officer, appeared on behalf of Respondent, Michigan Department of Health and Human Services (Department or MDHHS). Aimee Khaled, LOCD Policy Specialist; Amy Fialkoff, Waiver Manager, Danielle Loher, Waiver Social Worker, Tracey Hatch, Waiver RN, and Alec Jacobs, Waiver Associate Director of Quality and Compliance, appeared as witnesses for the Department/Waiver Agency.

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 requested services through the MI Choice Waiver Program. (Exhibit B, p 19; 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. (Exhibit A; Testimony)
3. On August 2, 2021, Petitioner was screened via telephone for services by

a Waiver Agency Social Worker following a referral. (Exhibit B, pp 19-26; Testimony)

4. On August 2, 2021, a Level of Care Determination (LOCD) of Petitioner was done by the Waiver Agency to determine medical eligibility for the MI Choice Waiver Program. Based on the results of the LOCD, the Waiver Agency determined that Petitioner was not medically eligible for the MI Choice Waiver Program because she did not pass through any of the seven doors of the LOCD. (Exhibit B, pp 19-26; Testimony).
5. On August 2, 2021, the Waiver Agency sent Petitioner an Adequate Action Notice informing Petitioner that it determined she was not medically eligible for the MI Choice Waiver Program. (Exhibit C, p 29; Testimony).
6. On September 20, 2021, the Michigan Office of Administrative Hearings and Rules received Petitioner's request for an administrative hearing. (Exhibit C, pp 27-28).

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/IID [Intermediate Care

Facility/Individuals with Intellectual Disabilities], 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*, which provides in part:

SECTION 1 – GENERAL INFORMATION

MI Choice is a waiver program operated by the Michigan Department of Health and Human Services (MDHHS) 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. The waiver is approved by the Centers for Medicare & Medicaid Services (CMS) under sections 1915(b) and 1915(c) of the Social Security Act. MDHHS carries out its waiver obligations through a network of enrolled providers that operate as Prepaid Ambulatory Health Plans (PAHPs). These entities are commonly referred to as waiver agencies. MDHHS and its waiver agencies must abide by the terms and conditions set forth in the approved waivers.

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. MDHHS will not enact any provision to the MI Choice program that prohibits or inhibits a participant's access to a person-centered service plan, discourages participant direction of services, interferes with a participant's right to have grievances and complaints heard, or endangers the health and welfare of a participant. The program must monitor and actively seek to improve the quality of services delivered to participants. Safeguards are utilized to ensure the integrity of payments for waiver services and the adequacy of systems to maintain compliance with federal requirements.

Waiver agencies are required to provide oral and written assistance to all Limited English Proficient applicants and participants. Agencies must arrange for translated materials to be accessible or make such information available orally through bilingual staff or the use of interpreters.

* * *

SECTION 2 – ELIGIBILITY

The MI Choice program is available to persons who are either elderly (age 65 or older) or adults with disabilities aged 18 or older and meet the following eligibility criteria:

- An applicant must establish their financial eligibility for Medicaid services as described in the Financial Eligibility subsection of this chapter.
- Must be categorically eligible for Medicaid as aged or disabled.
- 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 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.

2.1 FINANCIAL ELIGIBILITY

Medicaid reimbursement for MI Choice services requires a determination of Medicaid financial eligibility for the applicant by MDHHS. As a provision of the waiver, MI Choice applicants benefit from an enhanced financial eligibility standard compared to basic Medicaid eligibility. Specifically, MI Choice is available to participants in the special home and community-based group under 42 CFR §435.217 with a special income level up to 300% of the Supplemental Security Income (SSI) Federal Benefit Rate. Medicaid eligibility rules stipulate that participants are not allowed to spend-down to the income limit to become financially eligible for MI Choice.

To initiate a financial eligibility determination, MI Choice waiver agencies must enter enrollment notifications electronically in the Community Health Automated Medicaid Processing System (CHAMPS). Once the electronic enrollment is completed in CHAMPS, the participant will be assigned an associated MI Choice Program Enrollment Type (PET) code. MI Choice waiver agencies must enter disenrollment notifications electronically in CHAMPS to notify MDHHS of participants who are no longer enrolled in MI Choice. Once an electronic disenrollment is completed in CHAMPS, the participant's PET code will end to reflect a disenrollment date. Proper recordkeeping requirements must be followed and reflected in the applicant's or participant's case record.

2.2 FUNCTIONAL ELIGIBILITY

The MI Choice waiver agency must verify an applicant's functional eligibility for program enrollment using the LOCD application in CHAMPS.

Waiver agencies must conduct an LOCD in person with an applicant and submit that information in the LOCD application in CHAMPS, or the agency may adopt the current existing LOCD conducted by another provider. The information submitted is put through an algorithm within the application to determine whether the applicant meets LOCD criteria. Only the LOCD application in CHAMPS can determine functional eligibility for the nursing facility level of care. Additional information can be found in the Nursing Facility Level of Care Determination Chapter and is applicable to MI Choice applicants and participants.

* * *

*Medicaid Provider Manual
MI Choice Waiver Chapter
July 1, 2021, pp 1-2*

The Nursing Facility Level of Care Chapter of the Medicaid Provider Manual provides, in pertinent part:

SECTION 4 – NURSING FACILITY LEVEL OF CARE DETERMINATION CRITERIA

The Michigan Nursing Facility Level of Care Determination criteria includes seven domains of need, called Doors. The Doors include: (1) Activities of Daily Living; (2) Cognitive Performance; (3) Physician Involvement; (4) Treatments and Conditions; (5) Skilled Rehabilitation Therapies; (6) Behaviors; and (7) Service Dependency. The Doors and the assessment items are listed below. Guidance on administering the LOCD, including definitions and methods, is provided in the Michigan Medicaid Nursing Facility Level of Care Determination Field Definition Guidelines.

The LOCD should be an accurate reflection of an individual's current functional status. This information is gathered in a face-to-face meeting by speaking to the individual and those who know the individual well, observing the individual's activities, and reviewing an individual's medical documentation. Refer to the Michigan Medicaid Nursing Facility Level of Care Determination Field Definition Guidelines on the MDHHS website for more information. (Refer to the Directory Appendix for website information.)

4.1 DOOR 1: ACTIVITIES OF DAILY LIVING

Door 1 assesses four ADLs: (1) Bed Mobility; (2) Transfers; (3) Toilet Use; and (4) Eating.

4.2 DOOR 2: COGNITIVE PERFORMANCE

Door 2 assesses short-term memory, cognitive skills for daily decision-making and making self-understood.

4.3 DOOR 3: PHYSICIAN INVOLVEMENT

Door 3 assesses the frequency of physician visits and physician order changes.

4.4 DOOR 4: TREATMENTS AND CONDITIONS

Door 4 assesses a set of nine treatments and conditions that may be a predictor of potential frailty or increased health risk. The treatments and conditions include: Stage 3-4 Pressure Sores; Intravenous or Parenteral Feeding; 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 the Last 14 Days; and Peritoneal or Hemodialysis.

4.5 DOOR 5: SKILLED REHABILITATION THERAPIES

Door 5 assesses the presence of rehabilitation interventions, including physical therapy, occupational therapy, and speech therapy.

4.6 DOOR 6: BEHAVIOR

Door 6 assesses behavioral challenges. It includes five behavioral symptoms: wandering, verbal abuse, physical abuse, socially inappropriate or disruptive behavior, and resistance to care. Door 6 also assesses for the presence of delusions and hallucinations.

4.7 DOOR 7: SERVICE DEPENDENCY

Door 7 applies to beneficiaries currently receiving other services and supports in nursing facilities, MI Choice, PACE, or the MI Health Link HCBS Waiver program. It assesses the beneficiary's dependence on services to maintain the current level of functioning and whether there are options for maintaining the level of functioning with services and supports available in the community.

4.8 DOOR 8: FRAILTY

MDHHS or its designee determined that the beneficiary is eligible for Medicaid LTSS services based upon the Frailty Criteria. Individuals who exhibit certain behaviors and treatment characteristics that indicate frailty may be admitted or enrolled to LTSS programs requiring an LOCD. The individual needs to trigger one element of this criteria to be considered for Frailty. Refer to the Michigan Medicaid Nursing Facility Level of Care Determination Exception Process on the MDHHS website for more

information. (Refer to the Directory Appendix for website information.) For the MI Health Link program, the Frailty Criteria are applied by the Integrated Care Organization.

4.9 DOOR 0: INELIGIBLE

The LOCD was conducted and the beneficiary did not meet the criteria for any of the doors. The beneficiary is not eligible for Medicaid LTSS services at this time. (Refer to the Individual Does Not Meet LOCD Criteria, Action Notices, and Appeal Rights section for additional information.)

4.10 DOOR 87: ELIGIBLE PENDING FACE-TO-FACE REASSESSMENT

The passive redetermination process could not confirm eligibility. The provider has 45 days from the date of the passive redetermination or until the current End Date, whichever is earlier, to conduct a new face-to-face assessment.

*Medicaid Provider Manual
Nursing Facility Level of Care Determination Chapter
July 1, 2021, pp 9-10*

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 8.

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. The Waiver Agency witness indicated that Petitioner was able to get in and out of bed on her own by using a bed stool and was able to transfer using her wheelchair

and walker. The Waiver Agency witness noted that Petitioner was able get on and off the toilet on her own and cleanse herself after toileting. The Waiver Agency witness indicated that Petitioner could eat on her own and received home delivered meals, which were very helpful. 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 found to be okay, her cognitive skills for daily decision-making were found to be independent, and she was able to make herself understood. The Waiver Agency witness noted that Petitioner was alert and oriented, there was no formal diagnosis of cognitive impairment, and Petitioner managed her own medications, doctor's appointments, and finances. 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 0 physician visits and 0 physician change orders 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 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 not been a participant in the Waiver Program for at least one year and the Waiver Agency determined that other community, residential, or informal services are available to meet her needs.

Petitioner's AHR testified that she is Petitioner's caregiver and neighbor and cares for Petitioner daily or seven days per week. Petitioner's AHR indicated that Petitioner is wheelchair bound and uses a walker. Petitioner's AHR testified that Petitioner must use her walker to go from the living room to the bathroom because the wheelchair will not fit in the bathroom. Petitioner's AHR testified though that because Petitioner's hip is so bad, she really should not be walking at all. Petitioner's AHR indicated that she must put edema wraps on Petitioner's legs twice per day as prescribed by Petitioner's doctor. Petitioner's AHR testified that Petitioner does not have to see the doctor for her edema and cellulitis regularly because it is controlled, but if it gets bad, she will have to see her doctor.

Petitioner's AHR admitted that Petitioner does do a lot of personal care for herself, but Petitioner just wears a dress every day because that is all she can put on herself. Petitioner's AHR indicated that if Petitioner must dress in regular clothes to go out, she has to assist her in getting dressed. Petitioner's AHR testified that while Petitioner can get in and out of the bed on her own, it is not very safe the way Petitioner does it. Petitioner's AHR indicated that Petitioner steps backwards onto a stool next to the bed, throws her good leg up onto the bed, and then pulls the other leg up with a leash. Petitioner's AHR testified that this method is very painful for Petitioner. Petitioner's AHR testified that Petitioner cannot get into a car on her own so when they go out, they have to call the wheelchair accessible van. Petitioner's AHR testified that Petitioner is a very independent minded woman, so she tries to do everything on her own, but it is not really safe for her to do so.

Based on the information available 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 services through the MI Choice Waiver Program at the time of the assessment. Here, the Waiver Agency completed an LOCD via telephone (due to COVID) with Petitioner and her caregiver and based its findings on information provided by Petitioner and her caregiver. As noted, Petitioner did not meet any of the Doors in the LOCD. And while Petitioner's AHR and caregiver pointed out the many needs

Petitioner does have; she did not provide any evidence that Petitioner met any of the doors for the LOCD withing the relevant look back periods for that screening tool. Accordingly, the Waiver Agency properly determined that Petitioner was not eligible for MI Choice Waiver services.

Petitioner did not prove by a preponderance of evidence that the Waiver Agency erred in finding that she was not medically 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 not medically eligible for the MI Choice Waiver Program.

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED.



RM/sb

Robert J. Meade
Administrative Law Judge

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
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