

STATE HEARING DECISION

ODHS 4005 (Rev. 9/94)

County CUYAHOGA	District Hearings Section CLEVELAND	Assistance Group Name		Assistance Group Number
Place of Hearing CUYAHOGA CDHS	Initial Hearing Date 12/09/2002	Rescheduled Postponed to 12/31/2002	Rescheduled Postponed to	Rescheduled Postponed to

Appellant/Representative	Appellant Representation
	Local Agency Representation Joe Wadowick, CW #3764 Mary Gains, Supervisor Passport

Date Notice Mailed 10/07/2002	Date Received by Local Agency	Date Received by ODHS 10/16/2002	Date Appeal Summary Received 12/31/2002	Date Scheduling Notice Mailed 12/19/2002
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Appeal Number(s)/Program(s) 1089701/MED

Notice to Appellant

This is the official report of your hearing and is to inform you of the decision and order in your case. All papers and materials introduced at the hearing or otherwise filed in the proceeding make up the hearing record. The hearing record will be maintained by the Ohio Department of Job and Family Services. If you would like a copy of the official record, please telephone the hearing supervisor at the CLEVELAND District hearing section at 1-800-686-1551.

If you believe this state hearing decision is wrong, you may request an administrative appeal by writing to: Ohio Department of Job and Family Services, Office of Legal Services, 30 East Broad Street, 31st Floor, Columbus, Ohio 43215-3414 or FAX (614) 728-9574. Your request should include a copy of this hearing decision and an explanation of why you think it is wrong. Your written request must be received by the Office of Legal Services within 15 calendar days from the date this decision is issued. *(If the 15th day falls on a weekend or holiday, this deadline is extended to the next work day.)* During the 15-day administrative appeal period you may request a free copy of the tape recording of the hearing by contacting the district hearings section.

If you want information on free legal services but don't know the number of your local legal aid office, you can call the Ohio State Legal Services Association, toll free, at 1-800-589-5888, for the local number.

ISSUE:

Appeal #1089701:

The Appellant is a single, 79 year old individual receiving Home & Community-Based Waiver Services Medicaid (MAJ). The Passport Agency that provides Waiver services to the Appellant disenrolled the Appellant from the Passport program effective 9/4/02 because, allegedly, the Appellant no longer meets the intermediate Level of Care (LOC). The issue on appeal is whether the disenrollment from the Passport program is correct. The allegations that the Appellant no longer meets the appropriate LOC has not been supported by a preponderance of the evidence.

PROCEDURAL MATTERS:

Notice of disenrollment was issued to the Appellant by Passport on 8/21/02. Appellant disputes the disenrollment and requested a state hearing. The state hearing request was received by the Bureau of State

SLM

Appeal(s) SUSTAINED 1089701	Date Issued 02/14/2003	Compliance 1089701
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Distribution: Original to appellant, one copy to local agency; one copy to district Hearing section; one copy to district office; two copies to State Hearings. *(Photocopy to appellant's authorized representative, if any, and to ODHS units as appropriate.)*

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Hearings on 10/7/02. Appellant's services ended 9/24/02 based on the untimely appeal. The state hearing was initially scheduled for 12/9/02. Appellant was unable to attend on 12/9/02, and upon a showing of good cause, the state hearing was rescheduled. The state hearing schedule notice was issued to all parties on 12/20/02, and the state hearing was scheduled and heard on 12/31/02. An appeal summary was received from the county Agency on 12/6/02 (See EXHIBIT A). Passport presented an appeal summary on 12/31/02 (See EXHIBIT B). Appellant represented herself at the appeal; The county agency was represented by a caseworker, the Appellant's case manager from Passport, the case manager's supervisor, and the RN case manager from Passport.

FINDINGS OF FACT:

1. The Appellant is a seventy-nine year old individual who has been receiving Passport services.
2. The Appellant has been enrolled in Passport services since 1/4/99.
3. The Passport agency presented no evidence regarding the initial approval or how the Appellant met the appropriate LOC at that time.
4. The Passport agency alleges the Appellant is refusing personal care services, specifically, bathing assistance. Therefore, they reassessed the Appellant's LOC.
5. On 8/15/02, a reassessment of the Appellant's Level of Care was completed by a registered nurse. This was conducted at the Appellant's home. Based on this reassessment, the Passport agency maintains the Appellant no longer meets the appropriate LOC.
6. The Passport agency has not supported by a preponderance of the evidence that the Appellant's no longer meets the appropriate LOC to receive waiver services for the following reasons:
 - a. The Passport agency presented no evidence regarding the Appellant's initial approval in 1999 and how the LOC was met at that time. The Passport agency did not present evidence that the Appellant's condition has improved since that time.
 - b. Passport's own allegation that the Appellant is refusing personal care assistance is not supported by a preponderance of the evidence. The reports presented by Passport have conflicting information. Reports from Sunrise (See EXHIBIT C), the company providing the waiver services, dated 8/6/02, state the Appellant refused to accept any personal care and refuses receiving a bath. Notes dated 8/26/02 indicate the Appellant received personal care services of comb/brushing hair and lotioning skin.

The RN's report from 8/15/02 (See EXHIBIT D) states the Appellant's Personal Care Aide was questioned and stated the Appellant did not refuse personal care, the Appellant refused a tub bath due to having a dog locked in her bathroom. The Aide also indicated she did wash the client's feet. Appellant maintains she is able to wash her torso, but her aid washes her legs and feet and applies lotion to her back. Also, in the casemanager's notes from 8/15/02 (See EXHIBIT E), it indicates the Appellant's Aide indicated the Appellant can not bathe herself and Appellant needs someone to

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grocery shop and run other errands (See EXHIBIT).

c. The Appellant argues the RN's observations that she does not have difficulty with transferring, ambulation, movement of extremities or speech. Appellant has a bad back, an artificial knee, and arthritis. Appellant maintains she can not stand and she has a scooter for mobility. Other than the RN's observation, there was no medical documentation submitted to support the RN's conclusions.

d. On 8/17/02, the RN contacted the physician of record, Dr. Harris, who allegedly advised the Appellant should have no difficulty with self care and should be able to perform self care duties. Appellant argued Dr. Harris was not her primary doctor and that Dr. Harris has never examined the Appellant. Appellant maintains the Dr. Harris is not aware of her back problems. Appellant maintains additional medical records are available through her primary doctor. Absent documentation from Dr. Harris, the allegation that the Appellant "should" have no difficulty with self care has not been supported. Additionally, medical documentation from the Appellant's primary physician was not considered in the review.

CONCLUSIONS OF POLICY:

Policy:

1. Ohio Administrative Code (OAC) rule 5101:3-31-02 defines "PASSPORT HCBS waiver program" as a HCBS program which serves individuals who are aged sixty and over; have the LOC required for placement in a nursing facility (NF) if the waiver program were not available; and meet the PASSPORT eligibility criteria and enrollment requirements as described in Chapter 2101:3-31 of the Administrative Code.

2. OAC rule 5101:3-3-15 discusses in-person assessments and the level of care review process for Medicaid covered long term care services. An intermediate LOC or skilled LOC is necessary for NF placement.

3. OAC rule 5101:3-3-06, sets forth the criteria used to determine whether an individual who is seeking Medicaid payment for long term care services needs an intermediate level of care (ILOC).

Paragraph (B) defines:

(1) "Activity of daily living (ADL)" means a personal or self-care skill performed, with or without the use of assistive devices, on a regular basis that enables the individual to meet basic life needs for food, hygiene, and appearance. For purposes of this rule, the term "ADL" may refer to any of the following:

(a) "Mobility" is the ability to use fine and gross motor skills to reposition or move oneself from place to place, with or without the use of assistive devices. Mobility includes all of the following:

(i) "Bed mobility," the ability to move to and/or from a lying position, turn from side to side, or otherwise position the body while in bed;

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- (ii) "Transfer," the ability to move between surfaces (e.g. to/from bed, chair, wheelchair, standing position, etc.); or
 - (iii) "Locomotion," the ability to move between locations by ambulation or by other means.
 - (b) "Bathing" is the ability to cleanse one's body by showering, tub or sponge bath, or any other generally accepted method, and may be performed with or without the use of assistive devices.
 - (c) "Grooming" is the ability to perform the tasks associated with oral hygiene, hair care, and nail care.
 - (d) "Toileting" is the ability to appropriately eliminate and dispose of bodily waste, with or without the use of assistive devices or appliances. Toileting may include the use of a commode, bedpan, or urinal, the ability to change an absorbent pad, and to appropriately cleanse the perineum; and/or the ability to manage an ostomy or catheter;
 - (e) "Dressing" is the ability to put on, fasten, and take off all items of clothing, including the donning and/or removal of prostheses;
 - (f) "Eating" is the ability to feed oneself. Eating includes the processes of getting food into one's mouth, chewing, and swallowing, and/or the ability to use and self-manage a feeding tube.
- (2) "Assistance" means the hands-on provision of help in the initiation and/or completion of a task.
- (3) "Individual" has the same meaning as in rule 5101:3-3-15 of the Administrative Code.
- (4) "Medication administration" means the ability to prepare and self-administer all forms of over the counter and prescription medication.
- (5) "Supervision" means either of the following:
- (a) Reminding an individual to perform or complete an activity; or
 - (b) Observing while an individual performs an activity to ensure the individual's health and safety.
- (C) An individual may be determined to require an intermediate level of care (ILOC) only if both of the following conditions are met:
- (1) The individual's physical and mental condition and resulting service needs have been evaluated and compared to all of the possible levels of care (in accordance with rule 5101:3-3-15 of the Administrative Code) and it has been determined that:
 - (a) The individual requires services beyond the minimum required for a protective level of care (set forth in rule 5101:3-3-08 of the Administrative Code); but,
 - (b) The individual's condition and/or corresponding service needs do not meet the minimum criteria for a skilled level of care set forth in rule 5101:3-3-05 of the Administrative Code; and,
 - (c) The individual's condition and/or service needs do not meet the criteria for an ICF-MR/DD LOC set forth in rule 5101:3-3-07 of the Administrative Code; and
 - (2) At least one of the following applies:
 - (a) The individual requires hands-on assistance with the completion of at least two activities of

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daily living;

(b) The individual requires hands-on assistance with the completion of at least one activity of daily living; and is unable to perform self-administration of medication and requires that medication administration be performed by another person;

(c) The individual requires one or more skilled nursing or skilled rehabilitation services (as defined in paragraphs (B)(4) and (B)(5) of rule 5101:3-3-05 of the Administrative Code) at less than a skilled care level (as defined in paragraph (B)(3) of rule 5101:3-3-05 of the Administrative Code); or

(d) Due to a cognitive impairment, including but not limited to dementia (as defined in rule 5101:3-3-151 of the Administrative Code), the individual requires the presence of another person, on a twenty-four-hour-a-day basis for the purpose of supervision to prevent harm.

4. Pursuant to OAC rule 5101:3-3-05, an individual may be determined to require a skilled level of care (SLOC) only if both of the following conditions are met:

(1) The individual's physical and mental condition and resulting service needs have been evaluated and compared to all of the possible levels of care (in accordance with rule 5101:3-3-15 of the Administrative Code) and it has been determined that:

(a) The individual requires services beyond the minimum of those of protective care (set forth in rule 5101:3-3-08 of the Administrative Code); and

(b) The individual requires services beyond the minimum of those of intermediate care (set forth in rule 5101:3-3-06 of the Administrative Code); and/or

(c) The individual requires services beyond the minimum of those of an ICF-MR/DD LOC (set forth in rule 5101:3-3-07 of the Administrative Code); and

(2) At least one of the following applies:

(a) The individual's condition necessitates, and the individual's physician has ordered, that at least one skilled nursing service (as defined in paragraph (B)(4) of this rule) be provided at the skilled care level (as defined in paragraph (B)(3) of this rule);

(b) The individual's condition necessitates, and the individual's physician has ordered, that at least one skilled rehabilitation service (as defined in paragraph (B)(5) of this rule) be provided at the skilled care level (as defined in paragraph (B)(3) of this rule); however

(3) An individual who meets the requirements of paragraphs (C)(1)(c) and (C)(2) of this rule may be determined to require an SLOC unless the individual has applied to a specific ICF-MR that is equipped to provide services at the skilled care level (as defined in paragraph (B)(3) of this rule). An individual who has applied to an ICF-MR that is equipped to provide services at the skilled care level may be determined to require an ICF-MR/DD LOC if there is written certification that the facility can meet the individual's skilled care needs.

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5. Ohio Administrative Code (OAC) 5101:6-7-01(C)(1)(c) provides that the agency must show by a preponderance of the evidence that its proposed action(s) are in accordance with the rules. OAC 5101:6-6-02 states the Agency representative presents and is the advocate for the Agency's case at the hearing. This person shall explain the reasons for the Agency's action, cite the regulations upon which the action was based, provide relevant case information and documents, and answer relevant questions for the individuals and the Hearing Officer.

Analysis:

The Appellant was determined eligible for Passport waiver services due to meeting the appropriate level of care in 1/99, and has been receiving services since that time. In order to meet the minimum level of care, intermediate, the Appellant must require hands-on assistance with the completion of at least two ADL's or require hands-on assistance with the completion of at least one activity of daily living; and is unable to perform self-administration of medication and requires that medication administration be performed by another person or requires one or more skilled nursing or skilled rehabilitation services at less than a skilled care level or due to a cognitive impairment, the individual requires the presence of another person, on a twenty-four-hour-a-day basis for the purpose of supervision to prevent harm. There has been no evidence submitted that the Appellant's condition has improved since previously meeting the level of care requirements. The Passport agency has not supported by a preponderance of the evidence that the Appellant does not require assistance with at least two ADL's. Therefore, the 9/4/02 disenrollment from the Passport program is not correct and cannot be affirmed.

HEARING OFFICER'S RECOMMENDATIONS:

Based on the record before me, I find the appeal should be SUSTAINED. The disenrollment from the Passport program effective 9/4/02 because, allegedly, the Appellant no longer meets the intermediate Level of Care (LOC) has not been supported. The Agency should reinstate Passport services from the 9/4/02 termination date.

FINAL ADMINISTRATIVE DECISION AND ORDER:

Finding the hearing officer's decision to be supported by the evidence, the recommendations above are adopted.

Appeal #1089701 is **SUSTAINED**. **COMPLIANCE IS REQUIRED**

O.A.C. Section 5101: 6-7-03 requires prompt compliance with state hearing decisions. For decisions involving public assistance compliance shall be achieved within 15 calendar days from the date the decision is issued, but in no event later than 90 calendar days from the date of the hearing request.

Compliance shall be promptly reported to the Bureau of State Hearings, ODHS, via "State Hearing

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Compliance," ODHS 4068, accompanied by appropriate documentation.

EXHIBITS:

- A. Agency appeal summary and miscellaneous documents
- B. Passport appeal summary and miscellaneous documents
- C. Sunrise notes
- D. RN's notes
- E. Case manager's notes
- F. Appellant's miscellaneous documents

Date Issued: 02/14/2003