

**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

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IN THE MATTER OF:

Docket No. 2010-13816 EDW
Case No. 29890903

██████████

Appellant

_____ /

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon the Appellant's request for a hearing.

After due notice, a hearing was held ██████████. The Appellant was represented by his sister, ██████████. He was present and testified on his own behalf.

The Department of Community Health was represented by its MI Choice waiver agent, ██████████ represented the agency. ██████████, also testified on behalf of the agency. ██████████, was present on behalf of the agency. ██████████, was present.

ISSUE

Did the Department properly deny the Appellant's request for an increase in homemaking and personal care assistance, through the MI Choice waiver program?

FINDINGS OF FACT

Based upon the competent, material, and substantial evidence presented, I find, as material fact:

1. The Appellant is a Medicaid beneficiary who is enrolled in the MI Choice Waiver program.

2. The Appellant formerly resided in a nursing facility.
3. The Appellant resides in a home he shares with his sister, who is his provider, his brother in law and two (2) grandsons.
4. The Appellant is ██████ years old. He has a below the knee amputation of his left leg. He is able to ambulate with the use of walker when he is wearing his prosthesis.
5. Additional illness suffered by the Appellant include: end stage renal disease with dialysis since ██████, depression, hypertension, coronary artery disease with defibrillator placement, diabetes mellitus and a history of cellulitis of his right leg.
6. Upon transition home from the nursing facility, the MI Choice Waiver agent conducted an in home assessment.
7. The Waiver agent determined the Appellant requires some assistance and four (4) hours of homemaker care was authorized per week. He is also getting skilled care for bathing.
8. The Appellant is able to and does transfer independently. The Appellant has full range of motion of both arms equally.
9. He was assessed by an occupational therapist as well as a physical therapist in the home and it was determined he is able to participate in making his own simple meals and clean up. He would require some occasional assistance in preparing some meals and clean up.
10. Following telephone calls from other medical personal the Waiver agency increased the Appellant's homemaking hours from four (4) per week to six (6) per week. A second assessment was completed by an R.N. for the Waiver agency.
11. The Appellant does not participate in any IADL for himself, despite the nursing and occupational assessments indicating he is physically able to do so.
12. The Appellant's sister asserts she does not receive an adequate number of hours to provide for the Appellant's needs. She asserts she baths him, does all meal preparation, bill paying and housework.
13. The Appellant does not wear his prosthesis at all times and must put it on to get into the bathroom because the wheelchair won't fit.
14. The Appellant was authorized to receive physical therapy through skilled care but he elected not to participate in that in-home service.

15. The purpose of physical therapy for the Appellant would be to enhance his physical skill abilities and increase independence.
16. The Appellant was referred to the disability network for the purpose of getting home modifications that would increase the Appellant's independence.
17. The MI Choice Waiver agency denied the Appellant's request for an increase in homemaking and/or personal care hours sending Notice ██████████
18. The Appellant requested a hearing ██████████

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 Appellant 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 Services to the Michigan Department of Community Health (Department). Regional agencies, in this case Tri-County Office on Aging, 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)*

Home and community-based services under section 1915(c) exist for a period of three years initially, and may be renewed thereafter for periods of five years. *42 CFR 430.25(h)(2)(i)*

CMS [Centers for Medicare and Medicaid Services] may grant a state an extension of its existing waiver for up to 90 days to permit the State to document more fully the satisfaction of statutory and regulatory requirements needed to approve a new waiver request. CMS will consider this

option when it requests additional information on a new waiver request submitted by a state to extend its existing waiver or when CMS disapproves a state's request for extension. The MI Choice Waiver was last extended in Michigan in October of 2008.

*42 CFR 441.304(c)*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)

Home and community based services means services not otherwise furnished under the state's Medicaid plan, that are furnished under a waiver granted under the provisions of part 441, subpart G of this subchapter. 42 CFR 440.180(a)

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

- Case management services.
- Homemaker services.
- Home health aide services.
- Personal care services.
- Adult day health services
- Habilitation services.
- Respite care services.
- 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.

Other services requested by the agency and approved by CMS as cost effective and necessary to avoid institutionalization. 42 CFR 440.180(b). Michigan's approved waiver includes services in addition to those listed above. Homemaking and personal care services are two of the approved MI-Choice waiver services.

The MI Choice Waiver minimum operating standards, updated September 17, 2009, defines Personal Care as follows:

A range of assistance to enable program participants to accomplish tasks that they would normally do for themselves if they did not have a disability. This may take the form of hands-on assistance (actually performing a task for the person) or cuing to prompt the participant to perform a task. Health-related services that are provided may include skilled or nursing care to the extent permitted by State law. Personal Care includes assistance with eating, bathing, dressing, personal hygiene, and activities of daily living. This service may include assistance with preparation of meals, but does not include the cost of the meals themselves. When specified in the plan of care, the service may also include such housekeeping chores as bed making, dusting and vacuuming, which are incidental to the service furnished, or which are essential to the health and welfare of the individual, rather than the individual's family. Personal care may be furnished outside the participant's home. The participant oversees and supervises individual providers on an on-going basis when participating in self-determination option.

The Appellant's representative did not specify which service type she believes is insufficient, other than to say the overall authorization is inadequate to meet the Appellant's needs. In addition to a description of personal care services performed, the Appellant's sister also stated she performs services which are homemaking services. Homemaking is defined in the minimum operating stands as follows:

Services consisting of the performance of general household tasks, (e.g., meal preparation and routine household cleaning and maintenance) provided by a qualified homemaker, when the individual regularly responsible for these activities is temporarily absent or unable to manage the home and upkeep for him or herself or others in the home. This service also includes observing and reporting any change in the participant's condition and the home environment to the supports coordinator.

Mi Choice Operating Standards
Version date: 09/17/2009

Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services. See 42 CFR 440.230. The MI Choice Waiver did not waive the federal Medicaid regulation that requires that authorized services be medically necessary.

Medicaid Fair Hearing rights are available to waiver program participants pursuant to Appendix 1 of attachment k to the waiver contract with the Department of Community Health. At Page 44, it states impertinent part:

All Medicaid applicants and recipients have certain rights. This includes the right to a fair hearing. As a Medicaid provider, waiver agents have certain responsibilities related to the rights of persons applying for or receiving MI Choice services from them. This includes providing the applicant or participant with appropriate notice of their right to a fair hearing when the waiver agent takes an adverse action against them. For applicants and participants of the MI choice program, an adverse action occurs when, but is not limited to, situations where the waiver agent does any of the following:

1. Suspends or terminates participation in the MI Choice program;
2. Denies an applicant's request for participation in the MI Choice program
3. Reduces, suspends, terminates or adjust MI choice services currently in place;
4. Denies an applicant's or participant's request for MI Choice services that are not currently provided; or
5. Denies a participant's request for additional amounts of currently provided services.

Waiver Contract Attachment
K, appendix 1 page 44 of 75.

The Appellant's homemaking hours are authorized pursuant to the MI Choice waiver and are Medicaid benefits. He is entitled to a fair hearing where there is a dispute regarding the amount of services authorized if he believes they are inadequate to meet his needs. He must demonstrate he is being denied medically necessary services in order to prevail.

The evidence of record was carefully read and considered by this ALJ. The record did establish the Appellant is able to do much for himself. He is able to transfer himself from his bed to a wheelchair. If wearing his prosthesis, he is able to ambulate with the aid of a walker. He is able to prepare a breakfast and put his own dishes in the dishwasher. He has full range of motion of both arms. Although the Appellant is afflicted with illnesses requiring active treatment, dietary restrictions and that do impose physical limitations, he is resistant to developing additional skill through continued physical therapy. He allows his sister to perform Instrumental Activities of Daily Living on his behalf that is capable of performing for himself. The evidence of record does not establish he is unable to perform his own IADL's, thus the agency is correct to deny the requested increase in authorized hours. This ALJ relies on the material and relevant evidence from the experienced R.N.

who conducted two (2) assessments of the Appellant, as well as the social worker who performed the initial assessment to conclude the Appellant has a sufficient authorization to have his needs met in the home. Should the Appellant's sister continue to elect to perform tasks for the Appellant that he is capable of doing for himself, it is her choice to do so. The fact that she is doing it, however, is not evidence of a medical need for it. No evidence was presented that this ALJ finds competent to refute the assessments conducted by the Waiver agency's qualified employees. The hours of care currently authorized by the Department is adequate to reasonably achieve the program goals and meet the Appellant's medical needs.

DECISION AND ORDER

Based on the above findings of fact and conclusions of law, I find the Department properly denied the Appellant's request for an increase in personal care and homemaking hours.

IT IS THEREFORE ORDERED that:

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

Jennifer Isiogu
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc:

[REDACTED]

Date Mailed: 3/10/2010

***** NOTICE *****

The State Office of Administrative Hearings and Rules for the Department of Community Health may order a rehearing on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. The State Office of Administrative Hearings and Rules for the Department of Community Health will not order a rehearing on the Department's motion where the final decision or rehearing cannot be implemented within 90 days of the filing of the original request. The Appellant may appeal the Decision and Order to Circuit Court within 30 days of the mailing date of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the mailing date of the rehearing decision.