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. 2010-39503 EDW

[REDACTED],

Appellant
______________________/

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 the Appellant's request for a hearing.

After due notice, a hearing was held on [REDACTED] and [REDACTED]. [REDACTED] represented the Appellant who was present and testified. Her other witness was [REDACTED]. [REDACTED], represented the [REDACTED] [the Department's waiver agency] her witness was [REDACTED].

PRELIMINARY MATTER

The hearing was continued to allow the Department to submit additional evidence; the report of reassessment and an RN review. [Department's Exhibit B – admitted without objection] The RN review was not sent.

ISSUE

Did the Department properly reduce the Appellant's Community Support Services under 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 [REDACTED], Medicaid beneficiary.

2. She is afflicted with RA, Reynaud's disease, CHF, COPD PVD and dementia. (Appellant's Exhibit #1)

3. The Appellant's MI Choice waiver services include assistance with personal care, homemaking, bathing, dressing, incontinence care, and meal preparation. (*See* Testimony of [redacted] and Department's Exhibit B)

4. The Appellant was receiving 81-hours of community support per week.

5. The Appellant has informal support in her [redacted] who participates with the care and supervision of her mother. She has one paid caregiver, [redacted].

6. On [redacted], the Appellant was reassessed and based on a "quality review audit" was determined to need only 45.5 hours of community support services. (Department Exhibit B, p. 2)

7. The Department witness reported that it was not medically necessary to have an aide there "…all the time."

8. The Appellant was advised of the Department action on [redacted]. (Department's Exhibit A, p. 1)

9. The effective date of action was proposed as [redacted]. (Department's Exhibit A, p. 1)

10. The instant appeal was received by SOAHR on [redacted]. (Appellant's 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.

The 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 the [redacted], 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 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)

[ ] 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)[1] 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)

It is undisputed she has a need for personal care services.

The MI Choice waiver defines Service and 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 <u>hands-on assistance</u> (actually performing a task for the person) or cueing to prompt the participant to perform a task.

[1] Services for the chronically mentally ill.

> Personal care services may be provided on an episodic or on a continuing basis. Health-related services that are provided may include skilled or nursing care to the extent permitted by State law. Personal care under the waiver differs in scope, nature, supervision arrangements or provider type (including provider training and qualifications) from personal care services in the State plan. The differences between the waiver coverage and the State plan are that the provider qualification and the training requirements are more stringent for personal care as provided under the waiver than the requirements for this services under the State plan. 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, this 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 ongoing basis when participating in SD options." (Emphasis supplied

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The Appellant is receiving personal care services through the MI Choice waiver. She has assistance with bed mobility, transferring, toileting, meal preparation, bathing and dressing. Personal care services were reduced from 81 hours to 45.5 hours a week and spread throughout the day in (4) four segments consisting of morning, noon, dinner time and evening segments wherein the Appellant will receive her reduced ADL/IADL chores in blocks of 1.5 to 2 hours of service - or 6.5 hours a day. Increased reliance on the Appellant's informal support for miscellaneous SD details was anticipated.

Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services. *See* 42 CFR 440.230.

It is clear the Appellant's categories of needs have been addressed by the agency, but this proposed reduction on reassessment relies too heavily on an informal support and has overstated the Appellant's cognitive and physical abilities – a significant issue for this [redacted] Appellant.

The testimony and evidence of the Department witness described a reassessment on , with the corresponding reduction in services [almost half[2]] in large part relying on the continued or increased support of the Appellant's – a woman with her own advancing medical plight. The ability of the informal support to perform these tasks was not supported by the evidence.

I found the testimony of to be credible when she said there are times she cannot move herself to assist her mother owing to her own pain and disability – medical conditions aggravated by the fact that she is delaying treatment in order to be present for her mother.

The Department witness asked whether the Appellant's informal support would get the Appellant a glass of water when paid help was not available. testified that of course she would or that she would try – but that there are times when she cannot move herself owing to medical infirmity.

I. HAS THE APPELLANT IMPROVED?

The issue of whether the Appellant could operate a phone or an emergency distress device was dismissed by the Appellant's representative.

The cognitive skills of the Appellant were reviewed at hearing. She said that the Appellant was not capable of using a telephone or an emergency button – under any circumstance.

"Her 'think-ability' is good, but everything else is worn out, she has no balance… there is nothing she can do without assistance. She is not capable of operating either a telephone or an [emergency] button in the event of trouble," said.

She added that it is important to be in the same room "all of the time" because the Appellant's voice is so faint – verified by her brief testimony during the first day of hearing. [It was also apparent during the hearing that has some level of hearing impairment herself which no doubt complicates the provision of informal supports and personal services].

The faint testimony and auditory aphasia evidenced by the Appellant during her brief testimony at hearing – and as observed on reassessment - supports the idea of the Appellant's inability to be task focused and physically able in the throes of an emergency. *See* Department's Ex. B at pages 4, 8[3], 9, 10, 13.

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[2] Thirteen hours of personal care were determined to be not medically necessary – because the Appellant has informal support. The testimony and the Department's proofs did not support this conclusion. I believe that the informal support is willing, but not able to provide the amount of support envisioned by the Agency. *See* Department's Ex. B and Testimony of

[3] In addition to dementia the Appellant has a primary diagnosis of rheumatoid arthritis. The ALJ takes official notice that button pushing – even on FOB device - can be problematic for a person suffering that affliction.

II. IS THE INFORMAL SUPPORT ABLE TO HELP AS ENVISIONED?

The testimony established that the Appellant's representative/daughter/informal support is scheduled for overnight medical evaluations and possible surgery – procedures she has delayed so she can help her mother.

The weight of the Department's Exhibit B [reassessment document] was lessened when some inconsistent observations were noted on review and credibly disputed by the Appellant's representative.

The reassessment documented that the Appellant's informal support [ ] is "unable to get out due to bad knees" This was consistent with testimony about pending medical testing and delayed surgeries – it also supported her testimony that she was frequently not able to assist her mother – although she was willing to try.

The Appellant's representative was clear about the decline in her own health and her need for medical intervention - delayed owing to the needs of her mother. *See* Department's Exhibit B, at pages 4, 5.

This ALJ finds the MI Choice agency did offer and authorize appropriate services available under the program to meet the medically necessary needs of the Appellant prior to . However, the proposed reduction in the number of hours on reassessment was not supported by the evidence and relied, I believe, too heavily on the on the informal supports of the Appellant's .

On further review of the exhibits and the testimony in this matter the ALJ makes the following two findings:

- Based on the evidence and the testimony at hearing, the Appellant's dementia [cognitive function] is more pronounced than "minimal."

- Based on the evidence and the testimony at hearing, the Appellant's physical prowess is so compromised that her ability to operate any emergency device – during an emergency – is unlikely.

While this ALJ has concern for the needs of the to review their programs for quality performance, the MI Choice program requires the agency to provide adequate services where medically necessary. The reduction in services which prompted this appeal and the greater weight of the evidence, while perhaps serendipitous to the physical decline of the informal support,[4] established that the Appellant does require greater hands on assistance to meet her personal care needs when they arise.

[4] The Appellant's informal support is her who faces imminent knee and back surgeries and who requires other medical testing which will take her out of the home – at least temporarily. *See* Testimony of and Department's Ex. B, p. 4.

Based on a review of the policy and evidence, I find that the Department's previous authorization of 81-hours a week of Community Support Services remain medically necessary for the Appellant.

IT IS THEREFORE ORDERED that:

The Department's decision is REVERSED.

Dale Malewska
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc:

Date Mailed: 9/1/2010

***** NOTICE *****

The State Office of Administrative Hearings and Rules 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 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 receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt of the rehearing decision.