STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH
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IN THE MATTER OF:

[redacted]

Appellant
_____/

Docket No. 2010-45003 EDW
[redacted]

AMENDED 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 [redacted]. [redacted] appeared on his own behalf.

[redacted], Hearings Coordinator appeared on behalf of [redacted], the Department's MI Choice program waiver agency (hereafter, Department) [redacted], and [redacted], appeared as witnesses for the Department.

ISSUE

Did the Department properly reduce the Appellant's Community Living Supports (CLS) 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 Medicaid beneficiary, and enrolled in the MI Choice Waiver program.

2. The Appellant has a history of head injury, congestive heart failure, coronary heart disease, hypertension, chronic obstructive pulmonary disease, arthritis, paraplegia, Parkinson's disease, seizure disorder, transient ischemic attack, and depression. (Exhibit 1, pages 9-10)

3. The Appellant resides in his own apartment and requires assistance with most activities of daily living and instrumental activities of daily living. (Exhibit 1, pages 13-15)

4. The Appellant had been receiving 6 hours of CLS services daily. (Hearing Coordinator Testimony)

5. The Appellant was admitted to the hospital then subsequently to a rehabilitation facility. As a result he was off the waiver program for 30 days. (Hearing Coordinator Testimony)

6. On [redacted], the Appellant returned home and the RN completed an assessment and Level of Care Determination at the Appellant's home. (Exhibit 1, pages 2-27 and 29)

7. The Level of Care Determination resulted in the Appellant being found eligible for waiver services under Door 1. (Exhibit 1, page 26)

8. On [redacted], the waiver agency issued Notice to the Appellant that his request for 6 hours of daily CLS services was denied, the authorization was only for 4 hours of CLS services daily. (Exhibit 1, page 31)

9. The Appellant requested a hearing [redacted]. (Exhibit 1, page 32)

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 Northeast Michigan Community Service Agency, functions 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 that the Appellant has a need for personal care services.

The MI Choice waiver defines Service and Personal Care as follows:

1 Services for the chronically mentally ill.

> "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 cueing to prompt the participant to perform a task. 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)
>
> MI Choice Waiver, April 9, 2009;
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Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services. *See 42 CFR 440.230.*

After the [redacted] assessment, the waiver agency authorized 4 hours of daily CLS services instead of resuming the 6 hours the Appellant received prior to his hospitalization. The waiver agency explained that the Appellant had some improvement in functioning and has become more independent since the initial authorization, specifically in the areas of feeding and transferring. (RN and Social Worker Testimony)

The Appellant disagrees with the reduction and testified he needs the same assistance now as he did before his hospitalization. He stated that he is not independent with transfers, but must get out of bed and into the wheelchair by himself in the mornings to let the aides into the apartment. He testified that the aides do assist him with transfers and must carry some

weight to do so. Regarding feeding, the Appellant explained that currently he can get the utensil to his mouth most of the time, but occasionally food falls off due to shaking caused by Parkinson's disease. He stated that he still needs his foods cut for him and that he uses special utensils. The Appellant contests the accuracy of the assessment and explained that he had just returned home and was lethargic during the 30 minute assessment.

There is evidence to support some improvements in the Appellant's functional ability. For example the Appellant was initially totally hand fed and now can get food to his mouth using the utensil himself most of the time. (RN Testimony and Appellant Testimony) However, it is not clear that there has been sufficient improvement in the Appellant's functional ability to justify a 2 hour per day reduction in CLS services. The assessment report contradicts itself about the Appellant's needs in some areas. Examples include whether or not the Appellant has pressure ulcers (Exhibit 1, pages 13 and 18) and his needs for assistance with toileting/transfers (Exhibit 1, pages 13-15). Further, the evidence supports the Appellant's testimony that the assessment was completed shortly after he returned home. The case notes indicate the waiver agency was informed the Appellant would be home around 2:00 pm and the Assessment occurred at 2:30 pm. (Exhibit 1, page 29) Therefore the Appellant may not have clearly or accurately communicated his needs for assistance. Lastly, it appears that the proposed plan for catheter care and bladder irrigation changed significantly shortly after the assessment and needs to be clarified and updated. (Appellant Testimony) This ALJ finds that there is insufficient evidence to support the 2 hours per day reduction to the Appellant's CLS hours. A new assessment is necessary to determine the appropriate amount of ongoing services.

DECISION AND ORDER

Based on the above findings of fact and conclusions of law, I decide the Department did not properly reduce the Appellant's services under the MI Choice program.

IT IS THEREFORE ORDERED that:

> The Department's decision is REVERSED. The MI Choice waiver agency is ORDERED to complete a new assessment to determine appropriate ongoing services available under the program to meet the medically necessary needs of the Appellant. The Appellant's CLS hours shall be returned to 6 hours per day until the re-assessment is completed.

Colleen Lack
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

[redacted]
Docket No. 2010-45003 EDW
Decision and Order

cc: [redacted]

Date Mailed: 10/18/2010

***** 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.