

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

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IN THE MATTER OF:

██████████,

Appellant

Docket No. 2010-40590 EDW
Case No. ██████████

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 ██████████. The Appellant was not present and did not participate.

The Department of Community Health was represented by its MI Choice Waiver agent, ██████████. Its ██████████, was present on its behalf. ██████████, was present and testified. ██████████, was present. ██████████, was present.

ISSUE

Did the Department properly deny the Appellant's request for Home Modification Services, 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 ██████████ who is enrolled in the MI Choice Waiver program.
2. The Appellant does not satisfy the level of care criteria adopted by the Michigan Department of Community Health. He is enrolled in the waiver program pursuant to a Michigan Peer Review Organization exception.
3. The Appellant participates in Adult Home Help Services through the

Department of Human Services.

4. The Appellant is diagnosed with HIV and partial complex seizures.
5. It is asserted by the Appellant's representative that he suffers neuropathy related to HIV, and he has been unable to ambulate normally for several years. It is further asserted he is reliant upon a cane and/or walker for ambulation.
6. The Appellant's Exhibit B is a letter dated ██████████ from ██████████. The letter indicates the Appellant is suffering from HIV neuropathy combined with a very difficult to control seizure disorder. It further states the Appellant's ability to ambulate has declined significantly over the years, resulting in use of cane. It further states, "in the last year or so, he has been using a walker more consistently."
7. The Appellant's Exhibit C does not list the of neuropathy among those identified. It is indicated to be a medical record for the Appellant and lists his attending physician as ██████████. The listed diagnosis is community-acquired pneumonia. Secondary diagnoses indicated are: immunodeficiency virus infection; chronic well-controlled major depression, moderate, in remission; hypothyroidism; partial complex seizure disorder ; allergic rhinitis and chronic diarrhea.
8. The Appellant's MI Choice assessment report, dated ██████████, indicates on page 7 of 13 a diagnosis of neuropathy in other DIS and contains the ICD-9 code: 357.4.
9. The medical records in evidence do not list a diagnosis of neuropathy.
10. The Appellant does bath unassisted at least on occasion, despite having access to workers who can assist him with this task. (uncontested testimony at hearing)
11. On ██████████, during the most recent re-assessment by a waiver agency employee, the Appellant ambulated unassisted in a steady manor, without use of cane or walker. (Department Exhibit 1)
12. On the ██████████, assessment the Appellant informed the agency worker that he fell on his stairs bringing food up to his bedroom and that he was wearing his flip flops when he fell on the stairs.
13. During the ██████████, assessment, the Appellant ambulated down the basement stairs during the assessment. He was wearing flip flops while doing so.
14. The Appellant informed the agency worker at assessment, in response to a

suggestion he not wear flip flops on the stairs, "I paid a lot of money for these and I like wearing them."

15. At the ██████████, assessment, the Appellant was directly observed walking, transferring from chair and using stairs independently without difficulty or assistive devices. (Department Exhibit 1)
16. The Appellant's representative has not seen the Appellant since ██████████, which she characterized at the ██████████ hearing as ██████████ ago.
17. The Appellant's sister speaks with the Appellant via telephone very frequently.
18. A hearing request was received by the State Office Administrative Hearings and Rules on or about ██████████.

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 ██████████, 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. The Specific Operating Standards for MI Choice Waiver program Services states:

These standards apply to each provider interested in providing the particular serve to MI Choice participants. The waiver agency must authorize the provision of each service to waiver participants. Waiver agents will not use MI Choice funds to pay for services not specifically authorized in advance and

included in the participant's plan of care.

Among those listed is Environmental Accessibility Adaptations. It is defined below:

Those physical adaptations to the home, required by the participant's service plan, that are necessary to ensure the health and welfare of the participant or that enables the participant to function with greater independence in the home, without which, the participant would require institutionalization. Such adaptations include the installation of ramps and grab-bars, widening of doorways, modification of bathroom facilities, or installation of specialized electric and plumbing systems that are necessary to accommodate the medial equipment and supplies that are necessary to accommodate the participant. Excluded are those adaptations or improvements to the home that are not of general utility, and are not of direct medical or remedial benefit to the participant. Adaptations that add to the total square footage of the home are excluded from this benefit except when necessary to complete an adaptation. All services shall be provided in accordance with applicable State or local building codes.

MI Choice Operating Standards
Attachment H
Version date 09/17/2009.

The above stated provision allows for a modification of existing bathroom facilities. In order to be authorized for the service, it must be medically necessary and part of the plan of service. In this case, the Appellant's representative is requesting an entire bathroom be built where none exists, rather than requesting a modification of an existing facility. Thus, whether it is medically necessary to build a bathroom on the ground floor of the Appellant's home is at issue in this case. This ALJ will make a determination of the medical necessity of the request at hand prior to making a determination regarding whether the above cited provision contemplates building a bathroom or merely modifying an existing bathroom. While there is a provision in the minimum operating standards for the MI Choice Waiver agents that could potentially allow for a home modification such as this, it must be shown to be medically necessary in order to be authorized.

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 in pertinent 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 request for a home modification was denied, thus he is entitled to a Medicaid fair hearing. He must demonstrate he is being denied a medically necessary service in order to prevail.

DISCUSSION

In this case, the Appellant's sister and representative is asserting on his behalf that it is medically necessary to modify the Appellant's home for the purpose of adding a bathroom, complete with toilet and shower, to the ground floor of his home. The Appellant is residing in a home containing one bathroom, located on the upper level along with his bedroom. Submitted in support of the assertion is a letter from the Appellant's doctor indicating, "There was no question in my mind, based upon his underlying medical problems, and my personal witness of his seizures and ambulation ability that climbing stairs presents a significant risk for falls and related injury." Further, the doctor states, "the combination of weakness and stiffness from his neuropathy with the ever present risk of a concurrent partial, or worse, generalized seizure makes climbing stairs a very significant health hazard for him." The letter also stated the Appellant had described frequent falls at home to the

doctor. It makes no mention medical treatment had ever been sought as a result of a fall. Or that a fall occurred as a result of stair climbing. No direct testimony or evidence from the Appellant himself was introduced into the record. He was not made available for direct examination at hearing. His sister presented all evidence of record submitted on his behalf.

The submissions presented by the Appellant's representative were each read by this ALJ. There is no assertion from her that the Appellant would incur institutionalization but for adding a first floor bathroom to his home. There is no medical documentation asserting this; nor testimony to that effect. It is undisputed the Appellant's participation in the MI Choice Waiver program is pursuant to an exception granted by the Michigan Peer Review Organization. His latest assessment indicates he does not meet the level of care criteria set forth in policy for those seeking to participate in the MI Choice Waiver services, thus it could not be presumed by this ALJ that the Appellant is actually at risk of incurring institutionalization if denied.

The waiver agency submitted direct testimony from ██████████, a care manager who has had direct contact and observation of the Appellant himself. She submitted testimony that the Appellant ambulates independently throughout his home, including the stairs using the hand rail. She asserts he has no medical need to add a bathroom to the main floor of his home. She submitted testimony that the Appellant could get a shower bench and commode if ordered by a doctor and that the agency could facilitate Medicare paying for these items, evidencing there are other, less expensive ways to provide means of toileting without frequent use of the stairs. She asserts the Appellant won't sign a medical release for the waiver agency, therefore they cannot communicate with his doctors.

Given the uncontested evidence the Appellant was ambulating independently at an assessment on ██████████, without even the use of a cane or walker, the claims from both his doctor and sister that he requires a ground floor bathroom to be built lack persuasive effect. The evidence from the care manager is found more reliable than that of the Appellant's sister who admittedly has not actually seen the Appellant for nearly ██████████ as of the hearing date. The care manager made direct observations on ██████████. She saw him walking unassisted inside of his home. She directly observed him walking down the basement stairs wearing flip flops. This evidence directly refutes the evidence from the Appellant's sister and doctor asserting he is unable to safely negotiate stairs. Not only is there direct evidence of independent ambulation on ██████████, there is evidence of choices made by the Appellant that are inappropriate as concerns his own safety. He wears flip flops and does so while climbing up and down stairs. He carries food and dishes with him up and down stairs, despite having 51 hours per month of personal care provided by the Adult Home Help program. He has access to in home assistance, thus has no need to carry food up or down stairs, yet he does. These decisions are inconsistent with the assertion that he is highly fragile, dependent and at significant risk of institutionalization without the addition of a first floor bathroom. He has access to assistance getting into and out of the tub, yet reportedly struck his head while bathing unassisted, because it is his preference to do so. His actions are inconsistent with a concern he will become injured due to falling on the stairs. Certainly, a program participant

would have to exercise appropriate care and caution inside a home as concerns stair climbing and ambulation before Medicaid funds could be used to complete a home modification purportedly to eliminate unreasonable risk of fall.

In sum, there is no record supporting a finding the Appellant could satisfy the criteria set forth indicating that without a home modification of the type requested, he would require institutionalization. After review of the evidence of record, this ALJ cannot find support for a finding that it is medically necessary to build a first floor bathroom to include a shower and toilet.

DECISION AND ORDER

Based on the above findings of fact and conclusions of law, I find the Department properly denied the Appellant's request to build a ground floor bathroom in his private residence.

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: 10/13/2010

***** 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.