

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

P.O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax: (517) 334-9505

IN THE MATTER OF:

██████████,

Appellant

Docket No. 2011-51307 EDW
Case No. 26475362

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge (ALJ), pursuant to M.C.L. § 400.9 and 42 C.F.R. § 431.200 *et seq.*, upon the Appellant's request for a hearing.

After due notice, a hearing was held on ██████████. ██████████, Appellant's son, appeared and testified on Appellant's behalf. Appellant also testified on her own behalf. ██████████, Care Management Director, represented the Department of Community Health's Waiver Agency, the Region IV Area Agency on Aging ("Waiver Agency" or "AAA"). ██████████, Social Work Care Manager, and ██████████, Nurse Care Manager, also testified as witnesses for the Waiver Agency. Following the hearing, the record was left open for two weeks so that the parties could submit additional evidence. No additional evidence was submitted.

ISSUE

Did the Waiver Agency properly reduce Appellant's services through the MI Choice Waiver Program?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. Appellant is an ██████ year-old woman and has been diagnosed with hypertension and diabetes mellitus. (Exhibit 1, Attachment H, pages 15, 19-20).
2. Appellant is enrolled in and has been receiving MI Choice waiver services through AAA since ██████████. (Exhibit 1, Attachment K, pages 38-46; Testimony of Tyler).

3. AAA is a contract agent of the Michigan Department of Community Health (MDCH) and is responsible for waiver eligibility determinations and the provision of MI Choice waiver services.
4. On ██████████, AAA staff completed a reassessment of Appellant's services and determined that her needs could be met through a decreased amount of services. (Exhibit 1, Attachment J, pages 35-37). Specifically, it was determined that Appellant's personal care services could be decreased by 5 hours a week and her respite care hours could be decreased by 2 hours a week. (Exhibit 1, Attachment J, page 44).
5. Following the reduction, Appellant would receive 36 hours of personal care services a week (6 hours a day Mondays through Fridays and 3 hours a day on Saturdays and Sundays) and 5 hours of respite care per week (3 hours a day on Saturdays and 2 hours a day on Sundays). (Exhibit 1, Attachment N, page 52).
6. On ██████████, AAA sent Appellant a notice that it was reducing her services. The effective date of the reduction was identified as ██████████. (Exhibit 1, Attachment A, pages 3-4).
7. On ██████████, the Department received Appellant's request for an administrative hearing. (Exhibit 1, Attachment B, page 5).

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. 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 AAA, 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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) of this section.

Other services requested by the agency and approved by CMS as cost effective and necessary to avoid institutionalization.

(42 C.F.R. § 440.180(b))

Moreover, the Michigan Department of Community Health, Medical Services Administration issued bulletin number MSA 11-27 on July 1, 2011, effective August 1,

2011, for the purpose of adding a MI Choice Policy Chapter to the Medicaid Provider Manual. This new policy chapter provides in part:

4.1.C. PERSONAL CARE

Personal Care services encompass 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.

Services provided through the waiver differ in scope, nature, supervision arrangement, or provider type (including provider training and qualifications) from Personal Care services in the State Plan. The chief differences between waiver coverage and State Plan services are those services that relate to provider qualifications and training requirements, which are more stringent for personal care provided under the waiver than those provided under the State Plan.

Personal Care includes assistance with eating, bathing, dressing, personal hygiene, and activities of daily living. These services may also include assistance with more complex life activities. The service may include the preparation of meals but does not include the cost of the meals themselves. When specified in the plan of service, services may also include such housekeeping chores as bed making, dusting, and vacuuming that are incidental to the service furnished or that are essential to the health and welfare of the participant rather than the participant's family. Personal Care may be furnished outside the participant's home.

4.1.D. RESPITE CARE

Respite Care services are provided to participants unable to care for themselves and are furnished on a short-term basis due to the absence of, or need of relief for, those persons normally providing care for the participant. Services may be provided in the participant's home, in the home of another, or in a Medicaid-certified hospital or a licensed Adult Foster Care. Respite care does not include the cost of room and board, except when provided as part of respite care furnished in a facility approved by MDCH that is not a private residence.

Services include:

- Attendant Care (participant is not bed-bound), such as companionship, supervision, and assistance with toileting, eating, and ambulation.
- Basic Care (participant may or may not be bed-bound), such as assistance with ADLs, a routine exercise regimen, and self-medication.

There is a 30-days-per-calendar-year limit on respite services provided outside the home.

(MSA 11-27, pages 10-11)

Here, it is undisputed that the Appellant has a need for some services and she has been receiving both respite care and personal care. However, Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services and the MI Choice waiver did not waive the federal Medicaid regulation that requires that authorized services be medically necessary. See 42 C.F.R. § 440.230.

In support of the Waiver Agency's determination that the previous amount of allocated hours was not medically necessary and that the reduced amount was sufficient to meet Appellant's medical needs, both Social Work Care Manager ██████████ and Nurse Care Manager ██████████ testified that, given Appellant's medical conditions, she can participate in some of her own care and does not require the amount of time previously authorized. (Testimony of ██████████; Testimony of ██████████). Moreover, they both testified that Appellant's needs have been met since the reduction has been implemented. (Testimony of ██████████; Testimony of ██████████). Appellant and Appellant's representative, on the other hand, testified that Appellant's needs were barely being met with the previous amount of time authorized and certainly cannot be met with the reduced amount of time. (Testimony of Appellant; Testimony of Appellant's Representative). Specifically, both Appellant and her son testified that, since the reduction has been implemented, there has not been enough time for the workers to assist Appellant with her exercises. (Testimony of Appellant; Testimony of Appellant's Representative). Appellant's representative also testified that Appellant's orthopedic surgeon has insisted on Appellant performing a number of exercises, some of which require assistance, and the workers have been assisting with those exercises when time permits. (Testimony of Appellant's Representative).

However, while the exercises may be beneficial and the workers may have been assisting Appellant with her exercises in the past, that assistance is not part of Appellant's care plan and cannot be considered in allocating the amount of service time. Both ██████████ and ██████████ testified that the care workers are not authorized to assist Appellant with any exercises and that doing so could expose them and the Waiver Agency to liability. (Testimony of ██████████; Testimony of ██████████). Additionally, Appellant's

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care plan only provides that the personal care workers are to “[e]ncourage client to perform strengthening exercises daily as prescribed by P.T.” (Exhibit 1, Attachment K, pages 38, 40). Appellant received a copy of that care plan. (Exhibit 1, Attachment G, page 14).

As described above, it is undisputed that Appellant requires some services through the MI Choice program. Moreover, while such services must be sufficient in amount, duration, and scope to reasonably achieve its purpose, the Waiver Agency can also limit the services to what is medically necessary. 42 C.F.R. § 440.230(b)-(d). Additionally, the burden is on Appellant to demonstrate by a preponderance of the evidence that the reduction was in error. Here, given Appellant’s limited need for services and her ability to participate in her own care, in addition to the unpersuasive arguments made by Appellant’s representative, this Administrative Law Judge finds that Appellant has failed to meet her burden of proof that the reduced services were medically necessary. Therefore, the reduction is affirmed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly reduced Appellant’s services through the MI Choice Waiver Program.

IT IS THEREFORE ORDERED that:

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

Steven J. Kibit
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc:

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Date Mailed: 11/2/2011

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***** NOTICE *****

The Michigan Administrative Hearing System 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 Michigan Administrative Hearing System 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.