

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH**
P.O. Box 30763, Lansing, MI 48909
(517) 335-2484; Fax: (517) 373-4147

IN THE MATTER OF:

██████████,

Appellant

Docket No. 2012-43639 EDW
Case No. ██████████

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 ██████████ ██████████ ██████████, Appellant's ██████████, appeared and testified on Appellant's behalf. ██████████, Appellant's ██████████ also testified as a witness for Appellant. Appellant and his ██████████ were present during the hearing, but did not participate. ██████████, program director, appeared and testified on behalf of the Department of Community Health's Waiver Agency, the Tri-County Office on Aging ("Waiver Agency" or "Tri-County"). ██████████, registered nurse, and ██████████, social work care manager, also testified as witnesses for the Waiver Agency. ██████████, waiver program director for Tri-County, was present during the hearing, but did not participate.

ISSUE

Did the Waiver Agency properly reduce Appellant's personal care 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 ██████████ and has been diagnosed with vascular dementia, coronary heart disease, hypertension and diabetes mellitus. ██████████
2. Tri-County is a contract agent of the Michigan Department of Community Health (MDCH) and is responsible for waiver eligibility determinations and

¹ At the beginning of the hearing, Appellant's case was consolidated with the case involving the reduction in his wife Nora Markarova's personal care services (Docket No. 2012-43640 EDW).

the provision of MI Choice waiver services.

3. Appellant is enrolled in and has been receiving MI Choice waiver services through the Waiver Agency, including 4 hours of personal care services per day. ██████████
4. On ██████████, Tri-County staff completed a reassessment of Appellant's services and determined that Appellant's needs could be met through a decreased amount of services. ██████████
5. On ██████████ the Waiver Agency sent Appellant a notice that it was reducing his personal care services by 1 hour a day. The effective date of the reduction was identified as ██████████
6. On ██████████ the Department received Appellant's request for an administrative hearing with respect to the denial. ██████████

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.

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 Tri-County, 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))

² According to Nogel, the Waiver Agency had previously decided to reduce Appellant's services after the reassessment completed in July of 2011. However, due to improper notice, that reduction was never implemented. (Testimony of Nogel).

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) 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))

Here, it is undisputed that the Appellant has a need for some services and he has continuously been receiving 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 CFR 440.230.

For the reasons discussed below, this Administrative Law Judge finds that Appellant has failed to meet his burden of proving by a preponderance of the evidence that the

Waiver Agency erred in reducing his personal care services and that, consequently, the reduction should be sustained.

The Medicaid Provider Manual (MPM) provides:

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.

(MPM, MI Choice Waiver Chapter
January 1, 2012, page 10)

Here, both the Waiver Agency's witnesses and the record of the January 4, 2012 reassessment provide that the basis for the reduction in this case was the tasks Appellant could do for himself and the duplication of services between what Appellant and his wife were receiving. Regarding Appellant's abilities, the Waiver Agency found that he did not meet the specific criteria for any one door and that he can transfer, walk, use stairs, and use the toilet on his own. The Waiver Agency also found that the same worker was getting paid for assisting both Appellant and his ██████████ in tasks such as

cooking, cleaning and shopping, despite the fact that the worker could complete those tasks for Appellant and his wife at the same time.

In response, Appellant's witnesses testified that as Appellant gets older, he is moving slower and his memory is fading. However, they also conceded that Appellant can perform the tasks the Waiver Agency said he could, albeit slower, and there is no documentary evidence suggesting a worsening condition. Moreover, with respect to the preparation of meals, while Appellant's witnesses noted that Appellant is diabetic while his [REDACTED] is not, they did not testify that the meals could not be similar or prepared together. Additionally, they also testified that Appellant's [REDACTED] helps prepare meals for Appellant and his [REDACTED]

The burden is on Appellant to demonstrate by a preponderance of the evidence that the Waiver Agency erred in reducing his personal care services. Here, Appellant has failed to meet that burden. While it is undisputed that Appellant requires some personal care services, it is also undisputed that he can perform a number of significant tasks himself and that his worker was being paid for the same tasks twice as there was a duplication of services between what Appellant was receiving and what his wife was receiving. Given that record, the additional hour a day is not medically necessary and the Waiver's Agency's decision reduce Appellant's personal care services from 4 hours per day to 3 hours per day must be sustained.

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 personal care 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:

[REDACTED]

Markarov, Sergey
Docket No. 2012-43639 EDW
Decision and Order

Date Mailed: 6-11-2012

***** 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.