

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

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IN THE MATTER OF:

**Docket No. 2012-5566 EDW
Case No. 59427936**

██████████

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 Wednesday, ██████████. ██████████, Appellant, appeared on her own behalf. ██████████, Appellant's spouse, appeared as a witness for the Appellant.

██████████, RN, ██████████ Supervisor, represented the Department's MI Choice waiver agency, Area Agency on Aging of ██████████, (Agency or AAA). ██████████, RN, Care Manager, and ██████████, Social Worker, appeared as witnesses on behalf of Agency.

ISSUE

Did the MI Choice Waiver agency properly reduce the Appellant's personal care service from 56 hours per week to 40 hours per week?

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 a ██████ year old Medicaid beneficiary, born ██████████. (Exhibit 1, p 8)
2. Appellant has been enrolled in the MI Choice Waiver program for at least two to three years. (Testimony).
3. Appellant's diagnosis include: stroke, insulin dependent diabetes, mellitus, neuropathy, fibromyalgia, and retinopathy. (Exhibit 1, p 2).
4. The Appellant resides in a private home with her husband, ██████████, who

is unemployed, home all day, and is able to provide informal supports to Appellant. (Exhibit 1, p 8; Testimony).

5. In ██████████, Appellant was hospitalized with an infection in her left foot, resulting from a recent surgery. She was discharged home on ██████████ with physician orders that she was to be non-weight bearing and on total bed-rest. Following her return home, Appellant's personal care services were temporarily raised to 8 hours daily (56 hours per week) due to the fact that she was on total bed-rest. (Exhibit 1, p 2).
6. Appellant's bed-rest restriction was removed on ██████████, but personal care services remained at 56 hours per week so that Appellant could receive physical therapy to help her build strength to get out of bed. The physical therapy was discontinued after a few weeks for non-compliance. (Exhibit 1, p 2).
7. On ██████████, a MI Choice waiver social worker and nurse met with Appellant in her home and performed a full reassessment. (Exhibit 1, pp 5-21).
8. During the reassessment the MI Choice waiver social worker and nurse asked the Appellant questions, observed her abilities and consulted Appellant's other medical documentation. (Exhibit 1, pp 5-21).
9. Based on the ██████████ MI Choice waiver agency in-person observations, the MI Choice waiver agency determined there was medical need for only 40 hours per week for personal care and therefore reduced the Appellant's personal care hours to 40 per week. (Exhibit 1).
10. On ██████████, the MI Choice waiver agency provided Appellant with notice of the reduction in her personal care hours from 56 hours per week to 40 hours per week (Exhibit 1, pp 23-24).
11. On ██████████, the Appellant requested a hearing to contest the reduction of personal care hours. (Exhibit 2).

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

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Medicaid (formerly HCFA) to the Michigan Department of Community Health (Department). Regional agencies, in this case an Area Agency on Aging (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 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) of this section.

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Other services requested by the agency and approved by CMS as cost effective and necessary to avoid institutionalization. 42 CFR 440.180(b).

The MI Choice Waiver Program list services available under the waiver program and address the standards expected for each service. The Operating Standards include personal care services, the service for which Appellant was approved to receive six to seven hours per day.

The MI Choice waiver defines Personal Care as follows:

“...assistance with eating, bathing, dressing, personal hygiene, and other activities of daily living. This service may include assistance with the preparation of meals but does not include the cost of the meals. 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 care furnished, or which are essential to the health and welfare of the individual, rather than the individual’s family. . . .”

MI Choice Waiver, Appendix C, July 2009

The MI Choice waiver is a Medicaid-funded program and its Medicaid funding is a payor of last resort. In addition, Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services. 42 CFR 440.230. In order to assess what MI Choice waiver program services are medically necessary, and therefore Medicaid-covered, the MI Choice waiver program performs periodic assessments.

The Appellant was receiving 8 hours per day (56 hours per week) personal care service through the MI Choice waiver. The Appellant bears the burden of proving, by a preponderance of evidence, that the 56 hours per week are medically necessary.

In ██████████, the MI Choice waiver program reassessment team performed an in-person reassessment for the Appellant. During full reassessment the MI Choice waiver social worker and nurse asked the Appellant questions and observed the Appellant. Based on the Appellant’s answers, the MI Choice waiver social worker and nurse determined that 40 hours per week of personal care was medically necessary.

The MI Choice waiver program reached its determination after completing a Care Plan Worksheet that calculated that Appellant required 50 hours per week of assistance to meet her needs. The MI Choice waiver program then reduced this amount by 10 hours per week given that Appellant’s spouse is home throughout the day and is able to provide care to Appellant, as evidenced by Appellant’s request to have her husband hired as her caregiver. (Exhibit 1, p 2)

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The Appellant testified that she has had three strokes and several mini strokes that she felt were not taken into consideration during the assessment. However, the evidence shows clearly that Appellant's history of strokes was taken into account as it is listed under her diagnosis in the assessment. The Appellant and her husband testified that Appellant is no longer mobile, has a very high anxiety level due to her condition, has very high pain, has no feeling on her left side, brittle bones in her feet and is blind in her left eye. The Appellant's husband testified that Appellant is in the end stages of diabetes and will not be getting better.

The MI Choice waiver agency witnesses testified that Appellant's personal care services were only increased to 56 hours per week due to the bed rest order entered by her physician after her foot surgery in ██████████. Given that the bed rest order was lifted in ██████████, the agency determined that the additional hours were no longer needed. The agency pointed out that Appellant has been provided a lift to assist her to get out of bed and has been provided physical therapy on two separate occasions since her surgery, in order to help her be more mobile.

This ALJ finds the MI Choice agency did authorize 40 hours per week as an appropriate number of personal care service hours to meet the medically necessary needs of the Appellant. The Appellant failed to establish by a preponderance of the evidence that 56 personal care hour per week were medically necessary. Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services, thus additional personal care services cannot be authorized for the Appellant based upon the evidence of record. *42 CFR 440.230.*

The MI Choice waiver program did institute the reduction to 40 hours per week on ██████████ as Appellant chose to accept the reduced services pending the outcome of the hearing so as to not risk having to pay for the services should she not prevail at the hearing.

DECISION AND ORDER

Based on the above findings of fact and conclusions of law, this Administrative Law Judge finds the MI Choice Waiver Agency properly reduced the Appellant's personal care hours to 40 per week.

IT IS THEREFORE ORDERED that:

The MI Choice Waiver Agency's decision is **AFFIRMED**.



Robert J. Meade
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc:

[REDACTED]

Date Mailed: 2012-5566 EDW

***** 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.