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:

[redacted],

Appellant

_____/

Docket No. 2012-798 EDW
Case No. 73476064

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 [redacted]. [redacted], Appellant's daughter, appeared and testified on Appellant's behalf. [redacted], Assistant Supervisor of Care Management, represented the Department of Community Health's Waiver Agency, The [redacted], Inc. ("Waiver Agency" or "[redacted]"). [redacted], Nurse Care Manger, also testified as a witness for the Waiver Agency.

ISSUE

Did the Waiver Agency properly deny Appellant's request for additional respite hours 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 a [redacted] year-old man and has been diagnosed with diabetes mellitus, congestive heart failure, coronary heart disease, hypertension, peripheral vascular disease, arthritis, a stroke, transient ischemic attack, depression, and renal failure. (Exhibit 1, pages 17, 24-25).

2. [redacted] 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.

3. Appellant is enrolled in and has been receiving MI Choice waiver services. Appellant is currently 56 hours of respite care services per week. (Exhibit

1, pages 35-36). A nurse also visits weekly and a doctor is available as needed. (Testimony of [redacted]).

4. Appellant's representative/daughter subsequently requested an additional 2 hours a day of respite services. (Testimony of [redacted]).

5. On [redacted], the Waiver Agency sent Appellant a notice that it was denying the request for additional respite hours. As stated in that notice, "[Appellant's] son [and] daughter were trained to care for him by staff at [redacted] Healthcare NH. It was determined that they should share caring for [Appellant]." (Exhibit 1, pages 11-12).

6. On [redacted], the Department received Appellant's request for an administrative hearing. In that request, Appellant's daughter wrote that Appellant requires around-the-clock care and she needs more help. (Exhibit 1, page 9).

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 [redacted], 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.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 and his caregiver have a need for respite care services and such services have continually been provided. 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 its argument that the respite care should be limited to 56 hours a week, the Waiver Agency noted that Appellant's representative agreed to that amount of time and that Appellant's medical needs have not changed since that authorization of services. (Testimony of [redacted]). He also testified that, even if the circumstances for Appellant's children have changed, the authorized time is adequate given the significant amount of time allocated. (Testimony of [redacted]). Moreover, the Waiver Agency's representative and witness both testified that the 8 hours of respite care would better utilized through two four-hour shifts rather than one eight-hour block. (Testimony of [redacted]; Testimony of [redacted]). According to [redacted], 8 hours of respite care per day is a significant amount of services already and, as described above, the goal of respite care is merely to provide the caregiver with relief. (Testimony of [redacted]).

Appellant's representative/daughter asserts that, even if broken into shifts, 8 hours of respite care per day is not enough given that her father requires two people with him at all times. (Testimony of [redacted]). Even when the respite care worker(s) are present, Appellant's representative is responsible for the medical assistance Appellant requires. (Testimony of [redacted]). Appellant's representative also testified that, while her brother underwent training in order to help their father, their mother's needs have made it impossible for him to help with Appellant. (Testimony of [redacted]). Nevertheless, Appellant's representative failed to provide any evidence in support of her

testimony regarding her mother's medical conditions or her brother's availability.

The burden is on Appellant to demonstrate by a preponderance of the evidence that the denial of additional respite hours was in error. Here, as described above, it is undisputed that Appellant requires some respite services through the MI Choice program. However, the amount, duration and scope of such services should be limited to what is medically necessary. 42 C.F.R. § 440.230(b)-(d). Given the extensive respite services Appellant already receives and the limited purpose for respite care, in addition to the lack of evidence regarding any change in circumstances justifying an increase in respite, this Administrative Law Judge finds that Appellant has failed to meet her burden of proving that the requested additional respite hours were medically necessary. Therefore, the denial 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 denied Appellant's request for additional respite hours.

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]

Date Mailed: 12/14/2011

***** 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.