

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

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IN THE MATTER OF:

██████████,

Appellant

Docket No. 2012-10283 EDW
Case No. 99104555

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 appeared and testified on her own behalf. ██████████, Appellant's aide, also testified on Appellant's behalf. ██████████, Community Services Director, represented the Department of Community Health's Waiver Agency, ██████████ Area Agency on Aging ("Waiver Agency" or "AAA"). ██████████, supports coordinator/social worker, ██████████, supports coordinator/social worker, and ██████████, senior supports coordinator/social worker, also testified as witnesses for the Waiver Agency.

ISSUE

Did the Waiver Agency properly reduce Appellant's homemaker/personal care services and terminate her home delivered meals 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 ██████ year-old woman and has been diagnosed with chronic obstructive pulmonary disease, congestive heart failure, hypertension, arthritis, osteoporosis, transient ischemic attack, anxiety, depression, and diabetes mellitus. (Exhibit 1, pages 19, 24-25).
2. 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.
3. Appellant is enrolled in and has been receiving MI Choice waiver services

through AAA. Specifically, Appellant had been receiving 3 hours a day of homemaker services, 2 hours a day of personal care services, and 50 miles per month of transportation. (Exhibit 1, page 27; Testimony of ██████).

4. AAA staff completed a reassessment of Appellant's services and determined that Appellant's needs could be met through a decreased amount of services. (Exhibit 1, pages 19-34; Testimony of ██████; Testimony of ██████).
5. On ██████████, AAA sent Appellant a notice that it was reducing her services to by 12 hours a week and that the remaining services, 23 hours a week, would now be classified as Community Living Supports (CLS). (Exhibit 1, pages 5, 47-48; Testimony of ██████). The effective date of the changes was identified as ██████████. (Exhibit 1, page 5).
6. On ██████████, the Department received Appellant's request for an administrative hearing. (Exhibit 2, page 1).

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))

Here, it is undisputed that the Appellant has a need for some services and she 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 C.F.R. § 440.230.

As a preliminary matter, this Administrative Law Judge would note that, while the reduction in hours is reviewable, the change in Appellant’s services from homemaker

and personal care services to Community Living Supports (CLS) is not an issue in this case. AAA's representative testified that it was merely an administrative change that would not affect any services. (Testimony of ████████). Appellant also failed to describe any changes in the types of services she was receiving. (Testimony of Appellant). Moreover, as described in the Medicaid Provider Manual, CLS would encompass the services Appellant was previously receiving:

4.1.B. HOME MAKER

Homemaker services include the performance of general household tasks (e.g., meal preparation and routine household cleaning and maintenance) provided by a qualified homemaker when the individual regularly responsible for these activities, i.e., the participant or an informal supports provider, is temporarily absent or unable to manage the home and upkeep for himself or herself. Each provider of Homemaker services must observe and report any change in the participant's condition or of the home environment to the supports coordinator.

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
October 1, 2011, pages 10-11)

4.1.I. COMMUNITY LIVING SUPPORTS

Community Living Supports (CLS) services facilitate an individual's independence and promote reasonable participation in the community. Services can be provided in the participant's residence or in a community setting to meet support and service needs.

CLS may include assisting, reminding, cueing, observing, guiding, or training with meal preparation, laundry, household care and maintenance, shopping for food and other necessities, and activities of daily living such as bathing, eating, dressing, or personal hygiene. It may provide assistance with such activities as money management, non-medical care (not requiring nurse or physician intervention), social participation, relationship maintenance and building community connections to reduce personal isolation, non-medical transportation from the participant's residence to community activities, participation in regular community activities incidental to meeting the individual's community living preferences, attendance at medical appointments, and acquiring or procuring goods and services necessary for home and community living.

CLS staff may provide other assistance necessary to preserve the health and safety of the individual so they may reside and be supported in the most integrated independent community setting.

CLS services cannot be authorized in circumstances where there would be a duplication of services available elsewhere or under the State Plan. CLS services may not be authorized in lieu of, as a duplication of, or as a supplement to similar authorized waiver services. The distinction must be apparent by unique hours and units in the individual's plan of service. Tasks that address personal care needs differ in scope, nature, supervision arrangements or provider type (including provider training and qualifications) from personal care service in the State Plan. The differences between the waiver coverage and the State Plan are that the provider qualifications and training requirements are more stringent for CLS tasks as provided under the waiver than the requirements for these types of services under the State Plan.

When transportation incidental to the provision of CLS is included, it must not also be authorized as a separate waiver service. Transportation to medical appointments is covered by Medicaid through the State Plan.

Community Living Supports do not include the cost associated with room and board.

(MPM, MI Choice Waiver Chapter
October 1, 2011, pages 13-14)

Reduction in Hours

With respect to the reduction in the number of hours Appellant was receiving, it is undisputed that, on ██████████, AAA sent Appellant a notice that it was reducing her services to by 12 hours a week to 23 hours a week. (Exhibit 1, pages 5, 47-48; Testimony of ██████████). After Appellant filed her request for hearing, the reduction was not implemented and Appellant's services were reinstated pending the outcome of this appeal. (Testimony of ██████████). For the reasons discussed below, this Administrative Law Judge finds that Appellant has failed to meet her burden of proving by a preponderance of the evidence that the Waiver Agency erred in reducing her hours and that, consequently, the reduction should be sustained.

One area of dispute involves Appellant's ability to prepare meals. During the assessment, Appellant reported that she cannot prepare meals because she cannot stand for very long. (Exhibit 1, page 30). Appellant also testified that she makes her own lunch while her aide cooks twice a day. (Testimony of Appellant). Similarly, ██████████ testified that she prepares breakfast and either lunch or dinner for Appellant. (Testimony of ██████████). On the other hand, the Waiver Agency found that, while Appellant requires extensive assistance with meal preparation, Appellant can complete the majority of that task on her own. (Exhibit 1, pages 28-29). ██████████ and ██████████ also testified that Appellant should be preparing most of her meals, despite the fact that she has difficulty in standing and lifting. (Testimony of ██████████; Testimony of ██████████).

This Administrative Law Judge finds the testimony of ██████████ and ██████████ to be credible, especially in light of Appellant's undisputed ability to prepare at least one meal a day. While the meal Appellant prepares may be lighter and quicker than meals prepared by Appellant's aide, it still reflects her ability to perform most of the task and the lessened need for assistance from ██████████. Meal preparation does not necessarily require continuous standing/lifting and Appellant has failed to meet her burden of proving that she needs assistance with the majority of that task.

Additionally, it is undisputed that Appellant lives in a small, one-bedroom apartment. (Testimony of Appellant; Testimony of ██████████). Given the small size of Appellant's apartment, ██████████ testimony that she spends 3 hours a day doing housework

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(Testimony of [REDACTED]) appears to be unsupported and it does not justify additional hours of care.

Moreover, at some of the services Appellant's aide is providing are not covered by the MI Choice Waiver program. For example, [REDACTED] testified that she cleans Appellant's medical equipment every day. (Testimony of [REDACTED]). However, it is undisputed that such cleaning is not part of Appellant's care plan. (Testimony of [REDACTED]; Testimony of [REDACTED]).

Given the non-covered services, in addition to the size of Appellant's apartment and her ability to prepare meals, Appellant has failed to meet her burden of proof. Accordingly, the Waiver Agency's decision to reduce Appellant's services must be sustained as it is reflective of Appellant's medically necessary need for assistance.

Home Delivered Meals

As stated above, the home delivery of meals for Appellant was terminated by AAA on [REDACTED]. (Exhibit 2, page 5). [REDACTED] testified that the home delivered meals were terminated at Appellant's request as Appellant's aide was available to assist in meals. (Testimony of [REDACTED])

Appellant subsequently filed a request for hearing with respect to that termination. (Exhibit 2, pages 3-4). However, [REDACTED] also testified that, while Appellant's other services were reinstated pending the outcome of her appeals, Appellant specifically told [REDACTED] that she did not want her home delivered meal reinstated while the appeal was pending. (Testimony of [REDACTED]).

During the hearing, Appellant testified that, while she previously told AAA that she no longer wanted home delivered meals, she did in fact want such meals. (Testimony of Appellant). AAA's representative stated in response that she would reinstate Appellant's home delivered meals that day. (Testimony of [REDACTED]).

This Administrative Law Judge is limited to reviewing the Waiver Agency's decision in light of the information available at the time of the decision. Here, given Appellant's comments that she wished to end her home delivered meals, AAA properly terminated those meals. While Appellant subsequently changed her mind and the home delivered meals are going to be reinstated, those later events have no effect on the validity of the prior termination. Accordingly, the Waiver Agency's decision to terminate home delivered meals at Appellant's request is 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 services through the MI Choice waiver program and terminated her home delivered meals.

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:



Date Mailed: 2/1/2012

***** 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.