

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. 2012-58505 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.* and upon Appellant's request for a hearing.

After due notice, a hearing was held on ██████████. Attorney ██████████ appeared on behalf of Appellant. ██████████, Appellant's daughter, testified as a witness. ██████████, Community Services Director, represented the Department of Community Health's Waiver Agency, the Valley Area Agency on Aging ("Waiver Agency" or "AAA"). ██████████ a social worker/supports coordinator for AAA, also testified as a witness.

ISSUE

Did the Waiver Agency properly reduce Appellant's homemaking and personal care services?

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 ██████████ who has been diagnosed with chronic airway obstruction, NEC; chronic obstructive pulmonary disease; arthritis; anxiety; urinary tract infections; and hypertension. (Respondent's Exhibit 2, pages 1, 7-8).
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 has been enrolled in and receiving MI Choice waiver services through AAA, including 59 hours per week of personal care services and 4 hours per week of homemaking services. In total, Appellant would receive

9 hours of services a day. (Respondent's Exhibit 4, pages 1-2; Respondent's Exhibit 5, page 1; Testimony of ██████████).

4. On ██████████ the Waiver Agency performed a reassessment of Appellant's services. (Respondent's Exhibit 2, pages 1-15).
5. Based that reassessment, the Waiver Agency found that Appellant's services should be reduced. Specifically, AAA decided to reduce Appellant's personal care services to 40 hours a week and her homemaking services to 2 hours a week. In total, Appellant was to receive 6 hours a day of services. (Respondent's Exhibit 4, pages 1-2; Respondent's Exhibit 5, page 1; Testimony of ██████████).
6. On ██████████, AAA sent Appellant written notice that her services would be reduced. The reduction was to be effective 12 days from the date of the notice. The notice did not, however, identify the specific reduction that would be made. (Respondent's Exhibit 1, page 1).
7. On ██████████ the Department received a Request for Hearing regarding the reduction in this case. Given that the request for hearing was received prior to the effective date of the negative action, the reduction was not implemented.
8. However, Appellant subsequently became Medicaid ineligible and the Waiver Agency stopped her services for that reason.
9. On ██████████ Appellant's attorney submitted a request to have Appellant's MI Choice Waiver Services maintained at their prior level pending a final decision in this matter.
10. On ██████████, Respondent's representative submitted a response to that request.
11. On ██████████ a prehearing conference was held with respect to Appellant's request. This Administrative Law Judge subsequently ordered the Waiver Agency to reinstate and maintain Appellant's services at their prior level until a final decision in this matter is reached.

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

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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 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).]

Types of services that may be offered include:

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).]

As a preliminary matter, this Administrative Law Judge would note that there were two types of services previously authorized in this case, *i.e.* homemaker services and

personal care services. With respect to those services, the Medicaid Provider Manual (MPM) states:

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, April 1, 2012, pages 9-10.]

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As described in the above policy, the two types of services in this case are very similar and have some overlap. ██████████ also testified that Appellant's homemaking needs can be covered by his personal care services and that, when Appellant's services were reinstated, all of the hours authorized were identified as personal care services. Consequently, the parties considered them together and identified the issue in this case as a reduction of services from 63 hours a week to 42 hours a week.

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 CFR 440.230.

Appellant bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in reducing his services. Given the evidence in this case, Appellant has failed to meet that burden.

First, this Administrative Law Judge would note that, given her testimony during the hearing, even Appellant's daughter agrees that Appellant does not need 9 hours a day of services. When describing the hours she believed were needed, Appellant's daughter only requested 8 hours and 30 minutes of services.

Moreover, the lack of medical necessity for 9 hours is also reflected by the undisputed fact that not all of the authorized hours were being used. Appellant reported to both her daughter and AAA staff that, at times, her aides were just sitting around and doing nothing. Appellant also reported that she did not want her aides there late at night, when they would just watch her watching television. Furthermore, Appellant would simply send her aides home early when daughter came over. Appellant's daughter also testified that, while workers are scheduled to be there, Appellant does not require any assistance during Appellant's two daily naps.¹

The Waiver Agency further based its reduction on its finding that Appellant's condition had improved and that she could ambulate better. However, while ██████████ testified regarding such changes, Appellant's plan of care documents state the exact opposite conclusions. Nevertheless, Appellant's daughter did testify that her mother can be left alone and that Appellant can get herself into bed at night.

During the hearing, Appellant's daughter appeared to be mainly concerned with how the hours were scheduled as she only wanted people there when needed. The exact schedules can be adjusted, however, and the issue in this case is how many hours are medically necessary.

¹ Some of Appellant's services, such as assistance with shopping, could be done while Appellant is sleeping. However, Appellant's daughter also testified that she does the shopping for her mother and the only assistance she requested was hands-on assistance while her mother is awake..

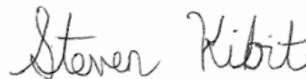
With respect to that number of hours, this Administrative Law Judge finds that Appellant has failed to meet her burden of proving that the Waiver Agency erred in reducing her services from 9 hours a day to 6 hours a day. Appellant was not using all of her authorized services, which suggests that they were not medically necessary. Moreover, while Appellant does want certain types of assistance, it appears that the assistance can be provided in 6 hours per day. Accordingly, the Waiver Agency's decision must be 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.

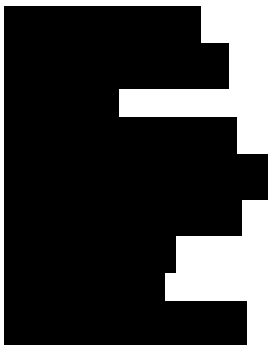
IT IS THEREFORE ORDERED that:

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



Steven J. Kibit
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

cc:



Date Mailed: 10/19/2012

***** 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.