

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:

Docket No. 2012-59132 EDW
Case No. [REDACTED]

[REDACTED]

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 [REDACTED]. Appellant appeared and testified on his own behalf. [REDACTED], caregiver, appeared as a witness for Appellant.

[REDACTED] LBSW, Contracts Manager, appeared and testified on behalf of the Department's Waiver Agency, Region 2 Area Agency on Aging (Region 2 AAA or Waiver Agency).

ISSUE

Did the Waiver Agency properly reduce Appellant's Community Living Supports (CLS) hours from 28 to 21 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. The Department contracts with Region 2 AAA to provide MI Choice Waiver services to eligible beneficiaries. (Testimony)
2. Region 2 AAA must implement the MI Choice Waiver program in accordance with Michigan's waiver agreement, Department policy and its contract with the Department.
3. The Appellant is a [REDACTED], born [REDACTED]. Appellant's diagnoses include arthritis. Appellant was injured at work several years ago and has gained a significant amount of weight since that time, making him extremely immobile. (Testimony)

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4. The Appellant lives alone in a small, one-bedroom apartment. Appellant's caregiver sometimes stays at the apartment with him. (Exhibit A, Testimony)
5. Following a home visit in [REDACTED], Appellant's Supports Coordinator, [REDACTED] determined that Appellant was not using his 28 CLS hours per week efficiently because Appellant's home was not kept orderly or clean. (Exhibit A, Testimony)
6. On [REDACTED] [REDACTED] completed a new Care Plan Worksheet, which determined that Appellant only met the medical necessity criteria for 21 CLS hours per week. (Exhibit A, pp 5-7). Mr. Keaster did not appear or testify at the hearing.
7. On [REDACTED] Region 2 AAA notified Appellant that it had determined that his CLS hours would be reduced from 28 to 21 hours per week. (Exhibit A, p 9; Testimony).
8. On [REDACTED] the Michigan Administrative Hearing System received a request for hearing from the Appellant. (Exhibit 1). In his request for hearing, Appellant stated:

Due to the fact my caregiver hours have been reduced from 28 hrs to 21 hrs. In the conversation [REDACTED] [REDACTED] from Region Two said he was working on proving [sic] more hours for my caregiver ([REDACTED]). My caregiver works past the allotted 28 hours to help myself out. My caregiver is looking to move out due to his hours being cut.
(Exhibit 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.

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 Medicaid (formerly HCFA) to the Michigan Department of Community Health (Department). Regional agencies, in this case the Region 2 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.

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 Policy Chapter to the *Medicaid Provider Manual, MI Choice Waiver*, July 1, 2012, provides in part:

4.1 COVERED WAIVER SERVICES

In addition to regular State Plan coverage, MI Choice participants may receive services outlined in the following subsections. [p. 9].

4.1.I. COMMUNITY LIVING SUPPORTS

Community Living Supports (CLS) services facilitate a participant'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, nonmedical 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 participant'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 participant so they may reside and be supported in the most integrated and 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 cannot 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 plan of services. 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.

The MI Choice Waiver Program 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 Waiver Agency performs periodic assessments.

The Appellant bears the burden of proving, by a preponderance of evidence, that 28 hours per week of CLS hours are medically necessary.

██████████ LBSW, Contracts Manager at Region 2 AAA, testified that Appellant's former Supports Coordinator/Care Manager, ██████████, felt that Appellant was not using his 28 CLS hours per week efficiently because Appellant's apartment was not clean or orderly. ██████████ testified that the Supports Coordinator/Care Manager was not sure what Appellant was using the CLS hours for, given the state of the apartment, so he completed a new Care Plan Worksheet, which showed that only 21 CLS hours per week were medically necessary for Appellant. ██████████ also testified that the Waiver Agency learned that Appellant's caregiver had threatened to move out if the CLS hours were reduced.

Appellant testified that his caregiver did not threaten to move out because the CLS hours were reduced, but rather would have to move out if Appellant's CLS hours were reduced because he no longer would be able to afford to live there. Appellant indicated that he is extremely immobile, cannot control when he has a bowel movement, and cannot clean himself. Appellant testified that he disagreed with the scoring in the Care Plan Worksheet completed by ██████████ in the areas of Transferring, Locomotion, Eating, and Toileting. Appellant indicated that, in his opinion, Transferring should have been scored a 4 because he does need help getting up on some occasions due to his weight; Locomotion should have been scored a 4 because he does need limited assistance with locomotion, also because of his weight; Eating should have been scored a 2 because he does need help setting up his meals; and Toileting should have been scored a 6 because Appellant cannot control his bowel movements and cannot clean himself after a bowel movement.

Appellant testified that he is scheduled for gastric bypass surgery and that as he loses weight his condition will improve and he will need less CLS hours. Appellant testified that his apartment may be cluttered due to all of the medical equipment he has, but that it is clean.

██████████ Appellant's caregiver, also testified that he does keep Appellant's apartment clean, but that it is difficult due to all of Appellant's medical equipment and the small size of the place.

This ALJ finds the Waiver Agency improperly reduced Appellant's CLS hours from 28 to 21 per week because the Waiver Agency did not present substantial evidence to support its conclusion. The Appellant established by a preponderance of the evidence that 28 CLS hours per week were medically necessary. Appellant pointed out that several of the areas in the Care Plan Worksheet were scored inadequately to meet his needs and the Waiver Agency did not rebut Appellant's testimony. The person who completed the Worksheet, ██████████ did not testify at the hearing, and ██████████, the Waiver Agency's witness, did not rebut the testimony when given an opportunity. The Care Plan Worksheet itself offers no rationale for any of its scores, so it too cannot be relied upon to rebut Appellant's testimony. If Appellant's Care Plan Worksheet was scored according to Appellant's testimony, he would be entitled to 28 CLS hours per week. It also appears that as Appellant's condition improves, he will require fewer and fewer CLS hours.

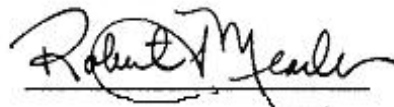
DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Michigan Waiver Agency improperly reduced Appellant's CLS hours from 28 to 21 hours per week.

The Waiver Agency shall reinstate Appellant's CLS hours to 28 hours per week.

IT IS THEREFORE ORDERED that:

The Department's decision is REVERSED.



Robert J. Meade
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc:

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██████████

Date Mailed: 8/31/2012

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***** 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.