

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARINGS 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. 2012-66459 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, [REDACTED], (Appellant) appeared and testified on his own behalf.

[REDACTED] Clinical Manager, appeared and testified on behalf of the Department's MI Choice Waiver Agency, Area Agency on Aging 1-B. (Waiver Agency or AAA 1-B)

ISSUE

Did the Waiver Agency properly deny the Appellant's request for 3 additional hours of care per day through self-determination?

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 Area Agency on Aging 1-B (AAA 1-B or Waiver Agency) to provide MI Choice Waiver services to eligible beneficiaries.
2. AAA 1-B must implement the MI Choice Waiver program in accordance to Michigan's waiver agreement, Department policy and its contract with the Department.
3. Appellant is a [REDACTED] Medicaid beneficiary, born [REDACTED]. (Exhibits A, p 3).
4. Appellant's primary diagnosis is renal failure. Appellant is also diagnosed with hypertension, arthritis, anxiety, depression and diabetes mellitus. (Exhibit A, p 11)

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5. Appellant resides alone in a gated condominium complex. Appellant's medical and accommodating equipment includes oxygen tanks, slide board, bedside commode, handheld shower, hospital bed with alternating pressure mattress to help reduce pressure point, trapeze attached to overhead frame on bed, partially electric wheelchair, and a borrowed Hoyer lift. (Exhibit A, p 8)
6. Appellant has a strong and supportive relationship with his family, who visit weekly. Appellant's brother ██████████ is also one of Appellant's self-determination workers. (Exhibit A, pp 6-7)
7. Appellant attends dialysis three times per week and physical therapy two times per week. (Exhibit A, p 18)
8. During his reassessment on ██████████ Appellant indicated that his doctor recommended that his care hours be increased by three hours per day because Appellant is at risk of falling and has had frequent falls in the past. (Exhibit A, p 18) Appellant reported two previously unreported falls: one on ██████████ when Appellant fell while being transferred to the stretcher to go to dialysis, and one on ██████████ when he fell in the van transporting him to physical therapy because his care workers failed to properly secure him. (Exhibit A, p 20)
9. On ██████████ Appellant's request for an additional 3 hours of care through self-determination was denied by the Waiver Agency. (Exhibit A, pp 18, 20).
10. Appellant's request for hearing was ██████████ received by the Michigan Administrative Hearing System on ██████████ (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 an Area Agency on Aging (AAA), function as the Department's administrative agency.

Waivers are intended to provide the flexibility needed to

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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 Waiver defines Personal Care services 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. . . .”

*Michigan Medicaid Provider Manual
MI Choice Waiver Section
July 1, 2012, Pages 9-11*

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.

Appellant requested that he receive an additional 3 hours per day of self-determination hours and therefore bears the burden of proving, by a preponderance of evidence, that those hours are medically necessary.

The Waiver Agency representative testified that Appellant's request for 3 additional hours of care per day through self-determination was denied because both of Appellant's recent falls occurred in the presence of care workers. As such, the Waiver Agency reasoned that additional hours would not prevent falls given that both of Appellant's most recent falls occurred while he was being assisted, and because Appellant does not transfer at all on his own. The Waiver Agency representative testified that Appellant's first recourse to prevent falling should be to work through his physical therapy to evaluate his transfers and assist with the training of workers to prevent falls.

Appellant testified that this decision should be based on his doctor's orders, not on the decisions of nurses and social workers. Appellant indicated also that his reporting of incidents, such as his falls, is not reliable because he cannot always remember things clearly and he often times has flaws in his thinking patterns. Appellant indicated that he has had several hospitalizations in the past due to falls and that his doctors have recommended that he always have two people assist him when he does transfers. Petitioner submitted two letters from his doctors, but neither letter directly supported his request for 3 additional hours of care per day. (Exhibit 2). The first letter was from ██████████ but was dated ██████████ or approximately three months after the denial in question here. As such, this letter is irrelevant. The second letter was from ██████████ was undated, and indicated that Appellant needs two persons to assist him when standing and transferring and “therefore needs 6 hrs/ day”. (Exhibit 2). Given

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that Appellant is already receiving 12 hours of care per day, it is unclear how this letter supports his request.

The Waiver Agency representative pointed out that the MI Choice Waiver Program is not operated under doctor's orders but rather according to policy found in the MI Choice Waiver Section of the Michigan Medicaid Manual and the Waiver Agency's contract with the Department of Community Health.

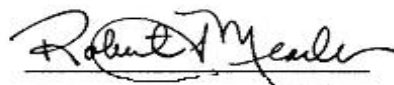
This ALJ finds the MI Choice Waiver Agency properly denied the Appellant's request for an additional 3 hours per day of care services. The evidence shows that additional care hours would not have prevented Appellant's most recent falls because Appellant was being assisted during those instances. Since Appellant does not transfer at all on his own, he will always be in the presence of a care worker while transferring. As such, additional hours of care would do nothing to alleviate Appellant's risk of falling. Accordingly, the Appellant has failed to meet his burden of showing by a preponderance of evidence that 3 additional care hours were medically necessary.

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 denied the Appellant's request for 3 additional care hours per day.

IT IS THEREFORE ORDERED that:

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



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

cc:



Date Mailed: 10/25/2012

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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.