RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Christopher Seppanen
Executive Director

SHELLY EDGERTON
DIRECTOR

[redacted]

Date Mailed: November 16, 2016
MAHS Docket No.: 16-011947
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Colleen Lack

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and upon the Petitioner's request for a hearing.

After due notice, a hearing was held on October 20, 2016. [redacted], daughter and Authorized Hearing Representative, appeared on behalf of the Petitioner. [redacted], the Petitioner, appeared and testified. [redacted], Assistant Director of MI Health Link and New Business Strategies, appeared on behalf of the Respondent, Area Agency on Aging 1-B ("Waiver Agency" or "AAA 1-B"). [redacted], Registered Nurse (RN) Supports Coordinator, and [redacted], Clinical Manager, appeared as witnesses for the Waiver Agency.

During the hearing proceeding, the Waiver Agency's Hearing Summary packet was admitted as Exhibit A, pp. 1-29.

ISSUE

Did the Waiver Agency properly deny Petitioner's request for an increase in Community Living Supports (CLS) 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. Petitioner is an ongoing recipient of services through the MI Choice Waiver program.

2. Petitioner is a [redacted] Medicaid beneficiary, date of birth [redacted], who lives in a private home with her daughter and her daughter's family. (Exhibit A, p. 10)

3. Petitioner has multiple diagnoses, including peripheral artery disease, depression with anxiety, hypertension, high cholesterol, arthritis, sleep apnea, a heart condition, cerebrovascular accident (stroke), diabetes, and seizure disorder. (Exhibit A, pp. 10, and 14-15)

4. Petitioner receives CLS under a self-determination arrangement. (Exhibit A, pp. 3 and 10)

5. Petitioner had been receiving 134 units (33.5 hours per week) of CLS. (Exhibit A, pp. 3 and 20)

6. On [redacted], an assessment was completed. In part, a request was made to increase the CLS to a total of 40 hours per week. Petitioner had been hospitalized for a seizure. It was reported that the neurologist wrote a letter saying Petitioner was not to be left alone and that she needs to be supervised. Petitioner's daughter was unable to find the letter at that time, but was going to have the neurologist fax a copy to the Waiver Agency. (Exhibit A, pp. 10 and 15)

7. On [redacted], the Supports Coordinator spoke with Petitioner's daughter by phone. In part, it was noted that the Waiver Agency had not received the letter from the neurologist. Petitioner's daughter was to mail in a copy. Petitioner's daughter asked about the request for an increase in CLS and was told the request was presented to the Clinical Manager who declined the increase. Further, if a decision from an administrative hearing that was pending at that time was not in Petitioner's favor, the Supports Coordinator would send hearing papers and a written denial of the request for an increase in CLS. Additionally, the Supports Coordinator stated she would re-present the request for an increase including that Petitioner is having seizures per Petitioner's daughter's request. (Exhibit A, p. 8)

8. On [redacted], an Adequate Action Notice denying the request for an increase in CLS hours was issued to Petitioner. The reason for the denial was that the Clinical Manager refused an increase in the CLS hours for Petitioner's daughter's travel time to and from her job noting that a personal emergency response (PERS) system was in place for Petitioner to use to call for emergency medical services if needed. (Exhibit A, pp. 7 and 26-27)

9. On [redacted], the Supports Coordinator spoke with Petitioner by phone. In part, Petitioner was reminded that the Waiver Agency still needed a copy of the letter from the neurologist. It was also noted that the request for the increase in CLS was denied on [redacted]. (Exhibit A, p. 7)

10. On [redacted], the Supports Coordinator spoke with Petitioner by phone. In part, it was noted that Petitioner was still requesting the increase in CLS hours and had her doctor fax over a prescription saying 24 hour supervision. Petitioner reported her last seizure was in [redacted]. The PERS unit was still in place and there were no notifications that it had been used to request emergency

services. The Support Coordinator was going to speak with the Clinical Manager about the request for an increase. (Exhibit A, p. 6)

11. On [redacted] the Waiver Agency received a copy of a prescription to increase Petitioner's seizure medication dated [redacted]. (Exhibit A, p. 6)

12. On [redacted], the Supports Coordinator spoke with Petitioner's daughter by phone. In part, Petitioner's daughter reported that they cannot find or did not get the [redacted], an Adequate Action Notice. The Supports Coordinator was going to re-send the notice. (Exhibit A, p. 6)

13. On [redacted], an Adequate Action Notice denying the request for an increase in CLS hours was issued to Petitioner. The reason for the denial was the Clinical Manager declined an increase in the CLS hours for the time Petitioner's daughter drives to and from work noting that a PERS system was in place for Petitioner to use to call for emergency medical services if needed. (Exhibit A, pp. 5 and 24-25)

14. On [redacted], MAHS received Petitioner's hearing request contesting the Waiver Agency's action. (Hearing Request)

CONCLUSIONS OF LAW

The Medical Assistance Program (MA) 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.

Petitioner is seeking 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 to the Michigan Department of Health and Human Services. Regional agencies, in this case the Respondent, 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. *See* 42 CFR 430.25(c)(2).

Types of services that may be offered through the waiver program 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)

The Medicaid Provider Manual addresses services through the MI Choice Waiver Program, including CLS:

> **SECTION 4 – SERVICES**
>
> The array of services provided by the MI Choice program is subject to the prior approval of CMS. Waiver agencies are required to provide any waiver service from the federally approved array that a participant needs to live successfully in the community, that is:
>
> - indicated by the current assessment;

- detailed in the plan of service; and

- provided in accordance with the provisions of the approved waiver.

Services must not be provided unless they are defined in the plan of service and must not precede the establishment of a plan of service. Waiver agencies cannot limit in aggregate the number of participants receiving a given service or the number of services available to any given participant. Participants have the right to receive services from any willing and qualified provider.

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4.1.H. COMMUNITY LIVING SUPPORTS

Community Living Supports (CLS) facilitate an individual's independence and promote participation in the community. CLS can be provided in the participant's residence or in community settings. CLS include assistance to enable participants to accomplish tasks that they would normally do for themselves if able. The services may be provided on an episodic or a continuing basis. The participant oversees and supervises individual providers on an ongoing basis when participating in self-determination options. Tasks related to ensuring safe access and egress to the residence are authorized only in cases when neither the participant nor anyone else in the household is capable of performing or financially paying for them, and where no other relative, caregiver, landlord, community/volunteer agency, or third party payer is capable of or responsible for their provision. When transportation incidental to the provision of CLS is included, it shall not also be authorized as a separate waiver service for the participant. Transportation to medical appointments is covered by Medicaid through MDHHS.

CLS includes:

- Assisting, reminding, cueing, observing, guiding and/or training in household activities, ADL, or routine household care and maintenance.

- Reminding, cueing, observing and/or monitoring of medication administration.

- Assistance, support and/or guidance with such activities as:

  - Non-medical care (not requiring nurse or physician intervention) – assistance with eating, bathing, dressing, personal hygiene, and ADL;

  - Meal preparation, but does not include the cost of the meals themselves;

  - Money management;

  - Shopping for food and other necessities of daily living;

  - Social participation, relationship maintenance, and building community connections to reduce personal isolation;

  - Training and/or assistance on activities that promote community participation such as using public transportation, using libraries, or volunteer work;

  - Transportation (excluding to and from medical appointments) from the participant's residence to community activities, among community activities, and from the community activities back to the participant's residence; and

  - Routine household cleaning and maintenance.

- Dementia care including, but not limited to, redirection, reminding, modeling, socialization activities, and activities that assist the participant as identified in the individual's person-centered plan.

- Staff assistance with preserving the health and safety of the individual in order that he/she may reside and be supported in the most integrated independent community setting.

- Observing and reporting any change in the participant's condition and the home environment to the supports coordinator.

> These service needs differ in scope, nature, supervision arrangements, or provider type (including provider training and qualifications) from services available 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.
>
> CLS services cannot be provided in circumstances where they would be a duplication of services available under the State Plan or elsewhere. The distinction must be apparent by unique hours and units in the approved service plan.
>
> Medicaid Provider Manual, MI Choice Waiver Chapter, April 1, 2016, pp. 10 and 14-15.

While CLS is a Medicaid covered service, Medicaid beneficiaries are still only entitled to medically necessary Medicaid covered services. The MI Choice Waiver did not waive the federal Medicaid regulation that requires that authorized services be medically necessary. See 42 CFR 440.230.

In this case, the contested action is the Waiver Agency's denial of the request to increase Petitioner's CLS from 33.5 hours per week to 40 hours per week to allow for someone to be with Petitioner during the time her daughter is getting to and from work. (Exhibit A, pp. 3, 5-8, 10, 15, and 24-27)

The Waiver Agency's documentary evidence establishes that the request for the increase in CLS was initially made during the April 26, 2016, assessment. This assessment followed a March 2016 hospitalization for a seizure. It was also reported that the neurologist wrote a letter saying Petitioner was not to be left alone, that she needs to be supervised. Petitioner's daughter was unable to find the letter at that time, but was going to have the neurologist fax a copy to the Waiver Agency. (Exhibit A, pp. 10 and 15)

On [redacted], the Supports Coordinator spoke with Petitioner's daughter by phone. In part, it was noted that the Waiver Agency had not received the letter from the neurologist. Petitioner's daughter was to mail in a copy. Petitioner's daughter asked about the request for an increase in CLS and was told the request was presented to the clinical manager who declined the increase. Further, if a decision from an administrative hearing pending at that time was not in Petitioner's favor, the Supports Coordinator would send hearing papers and a written denial of the request for an increase in CLS. Additionally, the Supports Coordinator stated she would re-present the request for an increase including that Petitioner is having seizures per Petitioner's daughter's request. (Exhibit A, p. 8)

On [redacted] an Adequate Action Notice denying the request for an increase in CLS hours was issued to Petitioner. The reason for the denial was that the Clinical Manager refused an increase in the CLS hours for Petitioner's daughter's travel time to and from her job noting that a PERS system was in place for Petitioner to use to call for emergency medical services if needed. (Exhibit A, pp. 7 and 26-27)

On [redacted] the Supports Coordinator spoke with Petitioner by phone. In part, Petitioner was reminded that the Waiver Agency still needed a copy of the letter from the neurologist. It was also noted that the request for the increase in CLS was denied on [redacted] (Exhibit A, p. 7)

On [redacted], the Supports Coordinator spoke with Petitioner by phone. In part, it was noted that Petitioner was still requesting the increase in CLS hours and had her doctor fax over a prescription saying 24 hour supervision. Petitioner reported her last seizure was in [redacted]. The PERS unit was still in place and there were no notifications that it had been used to request emergency services. The Support Coordinator was going to speak with the Clinical Manager about the request for an increase. (Exhibit A, p. 6)

On [redacted], the Waiver Agency received a copy of a prescription to increase Petitioner's seizure medication dated [redacted]. (Exhibit A, p. 6)

On [redacted] the Supports Coordinator spoke with Petitioner's daughter by phone. In part, Petitioner's daughter reported that they cannot find or did not get the [redacted], an Adequate Action Notice. The Supports Coordinator was going to re-send the notice. (Exhibit A, p. 6)

On [redacted], an Adequate Action Notice denying the request for an increase in CLS hours was issued to Petitioner. The reason for the denial was the Clinical Manager declined an increase in the CLS hours for the time Petitioner's daughter drives to and from work noting that a PERS system was in place for Petitioner to use to call for emergency medical services if needed. (Exhibit A, pp. 5 and 24-25)

Petitioner's daughter testified that the dosage increase for Petitioner's seizure medication actually occurred during the March 2016 hospitalization. Petitioner's daughter also stated the neurologist was the one who did not want Petitioner to be left at the house by herself. If Petitioner was having a seizure, she would not be able to press the PERS button to let anyone know. This was the reason the increase in CLS hours was requested. Petitioner's daughter explained that it is about an hour and a half lapse time five days per week between her off time and when the CLS staff has to leave. Petitioner's daughter needs to work the extra hours to provide for her family. However, Petitioner's daughter has been coming home and not working those hours during the last six months because there is no one there with Petitioner. Petitioner has not been left alone at all in the last six months. (Daughter Testimony)

Petitioner bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in denying the requested increase in CLS services. Given the record in this case, the undersigned Administrative Law Judge finds that Petitioner has failed to meet that burden of proof. The documentary record establishes that the Waiver Agency repeatedly requested a copy of the letter from Petitioner's doctor stating Petitioner needs 24 hour supervision. The evidence does not establish that this requested verification was ever provided to support the medical necessity of the increase. Multiple requests for this letter were made between the [redacted] assessment and the phone conversations with Petitioner and her daughter in [redacted]. While the [redacted], note from the phone conversation between the Supports Coordinator and Petitioner indicates Petitioner thought her doctor's office faxed over a prescription saying 24 hour supervision, what the Waiver Agency actually received on [redacted] was a prescription showing the seizure medication was increased dated [redacted] (Exhibit A, p. 6) Accordingly, the Waiver Agency's determination is upheld based on the information available at the time of this determination.

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 Petitioner's request for an increase in Community Living Supports (CLS) hours through the MI Choice Waiver program based on the available information.

IT IS THEREFORE ORDERED that

The Waiver Agency's decision is AFFIRMED.

Colleen Lack

CL/cg

Colleen Lack
Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088; Attention: MAHS Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings
Reconsideration/Rehearing Request
P.O. Box 30763
Lansing, Michigan 48909-8139

DHHS -Dept Contact [redacted]

DHHS -Dept Contact [redacted]

Community Health Rep [redacted]

Authorized Hearing Rep. [redacted]

Petitioner [redacted]