



RICK SNYDER
GOVERNOR

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

MIKE ZIMMER
DIRECTOR

[REDACTED]

Date Mailed: March 23, 2016
MAHS Docket No.: 16-000432
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Landis Lain

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 Petitioner's request for a hearing.

After due notice, a telephone hearing was held on [REDACTED]. Petitioner's Ex-husband, [REDACTED] and Petitioner appeared and testified at the hearing. [REDACTED], Hearings Coordinator appeared and testified on behalf of the MI Choice Waiver Program's Waiver Agency, [REDACTED] (Respondent).

ISSUE

Did the Department properly disqualify Petitioner from enrollment as a Home Health Services (HHS) provider?

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 currently receives Home and Community Based Waiver (HCBW) services through [REDACTED], since [REDACTED].
2. Under HCBW, Petitioner elected Self Determination (SD) which allows an individual to select the care provider with some restriction as to relationship to the participant and the individual (s) passing a criminal history screen.

3. Petitioner requested that [REDACTED] (Provider) be her care provider.
4. [REDACTED]'s own SD Employee Criminal Background Check Guideline state a Lifetime Ban – Person not eligible for employment – when that person has a felony involving intent to cause death or serious bodily impairment. (Respondent's Exhibit A pages 7-8)
5. The same policy also states a Lifetime ban – person not eligible for employment – when that person has more than one felony conviction. (Respondent's Exhibit A pages 7-8)
6. Michigan State Police ICHAT Criminal History Screen shows that the Provider was found guilty [REDACTED] of MCL 750.89 Felony Assault with Intent to Rob While Armed. (Respondent's Exhibit A pages 5-6)
7. Michigan State Police ICHAT Criminal History Screen shows that the Provider was found guilty July 25, 1973 of MCL 750.227 Felony Weapons – Carrying Concealed. (Respondent's Exhibit A pages 5-6)
8. On [REDACTED], Respondent sent Petitioner an Adequate Action Notice denying Petitioner's request to have [REDACTED] as a provider, stating: *The request for [REDACTED] to be your Self Determination Worker has been denied. This decision is based on the results of the criminal background. The legal basis for this decision is 42 CFR 440.230(d).* (Respondent's Exhibit A page 90)
9. On [REDACTED], the Michigan Administrative Hearing System received a Request for Hearing from Petitioner contesting the denial of certification for her provider.

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 Department Director has authority to establish policies related to enrolled Medicaid Providers, including that the provision of services and reimbursement of those services be for medically necessary services. MCL 400.111a.

Rule 400.3406 provides, in pertinent part:

Rule 6. (1) A provider or applicant is entitled to a hearing pursuant to chapter 4 of Act No. 306 of the Public Acts of 1969, being S24.271 et seq. of the Michigan Compiled Laws, in any case in which there has been a final determination of an adverse action as defined in R 400.3401, except where that action is predicated upon the situation described in subrule (2). Emphasis added.

All Medicaid providers are required to enter into Medicaid Provider agreements.

(4) A provider shall enter into an agreement of enrollment specified by the director.

(M.C.L. § 400.111b(4))

The Social Welfare Act, M.C.L. § 400.1 *et seq.*, provides that as a condition of participation in the Medicaid program a provider must meet all the requirements listed in M.C.L. § 400.111b.

(1) As a condition of participation, a provider shall meet all of the requirements specified in this section except as provided in subsections (25), (26), and (27).

(M.C.L. § 400.111b(1))

The Department Director has authority to establish policies related to enrolled Medicaid Providers, including that the provision of services and reimbursement of those services be for medically necessary services. M.C.L. § 400.111a.

The mere fact that a provider submits a claim or cost report for services rendered does not establish entitlement. M.C.L. § 400.111b(10) provides:

...Submission of a claim or claims rendered under the [Medicaid] program does not establish in the provider a right to receive payment from the program.

If the Department disputes the amount of payments the provider is entitled to an administrative hearing pursuant to M.C.L. § 400.111c. The burden to prove entitlement to Medicaid reimbursement is on the Petitioner. *Prechel v. MDSS*, 186 Mich. App. 547, 549; 465 N.W.2d 337 (1990).

The Michigan Department of Health and Human Services utilizes the authority extended to the State of Michigan 42 USC 1396t (k)(4) to meet the requirements under 42 CFR 441.570 to assure that “necessary safeguards have been taken to protect the health and welfare of enrollees.” Bulletin number MSA 14-40 extends the Medicaid provider criminal history screening and enrollment requirements to individuals who offer personal

care services through the Medicaid Home Help program. Additionally, it includes a list of excludable convictions as outlined in bulletin MSA 14-31 to include permissive exclusions. The screening requirements are to apply to all providers of Medicaid personal care services. The requirements apply to both individual providers and to those providing services as an employee of the provider agency.

MSA Bulletin 14-40 states in pertinent part:

Personal care services include services provided to a Medicaid beneficiary to assist the beneficiary with completing their Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs) while the beneficiary is in a home community-based setting. ADLs include eating, bathing, dressing, toileting transferring, mobility, walking, and personal hygiene. IADLs include financial management, shopping, telephone use, transportation, housekeeping, meal preparation and managing medications.

Beginning October 2, 2014, all new provider applicants must fully meet the provisions of Home Help Provider Bulletin MSA 14-40: Excludable Convictions for Medicaid Help Program Personal Home Service Providers before Being Enrolled to Provide Services. Providers Must Be Properly Enrolled Prior to being authorized, approved or reimbursed to provide personal care services for the Medicaid Home Help program. In Addition, all currently enrolled providers must be fully compliant with the provisions of the policy by March 31, 2015.

Excludable convictions fall into two categories. Mandatory exclusion as discussed in bulletin MSA 14 – 31 are those set forth in the Social Security act 42 USC 1320a-7[a]. Permissive exclusions are allowed under part(b) of that section. Mandatory exclusions are:

Convictions associated with program related fraud and patient of use, healthcare fraud, and felony controlled substance crimes. These exclusions are mandated and defined under 42 USC 1320a-7 and articulated in Bulletin MSA 14 – 31.

Convictions of crimes directly relatable to neglect, physical and sexual abuse, financial exploitation, inappropriate in voluntary restraint, providing qualified healthcare services and other crimes identified by MDCH. The list of specific crimes shall be the same as those defined for nursing facilities, County medical care facilities, hospices, and other long-term service and support providers as set out in defined in the Public Health: Act 368 of 1978, specifically Public Act 28 section 20173a(1). This list includes, but is not limited to crimes that:

- involve the intent to cause death or serious impairment of bodily function;

- result in death or serious impairment of bodily function;
- involve the use of force or violence;
- involve cruelty or torture;
- involve criminal sexual conduct;
- involve abuse and neglect;
- involve the use of a firearm or a dangerous weapon;
- involve larceny, theft, or embezzlement;
- involve a felony driving under the influence (DUI);
- involving assaults, sensory, or the threat thereof;
- involve a crime against a “vulnerable adult”;
- involve retail fraud; or
- states that the conviction of a felony reduced to a misdemeanor.

For purposes of the last mentioned above, an individual or entity is considered to have been convicted of a criminal offense when:

- a judgment of conviction has been entered against the individual or entity by a federal, state, local court, regardless whether an appeal is pending or whether the judgment of conviction or other record relating to conduct have been expunged;
- a finding of guilt by judge or jury against the individual or entity by a federal, state or local court; or
- a plea of guilty or nolo contendere by the individual or entity has been accepted by federal, state, local court.

The criminal history screening will be conducted by Michigan Department of Health and Human Services through a reputable and reliable data source. Screenings for any provider may be updated on a schedule set by the MDC age for as deemed necessary for the construction of a Medicaid beneficiary.

Provider Application or Agreement calling any individual wishing to provide personal care services through the Medicaid Home Help program, including those providing such services as an employee of the provider agency, must submit a properly formatted approved application or service agreement to MDCH that:

- Provides notification of a criminal history screening will be performed on the applicant provider;
- provides the general categories of convictions that will be screened;
- provides adequate information and determined by MDCH to conduct such a screening;

- notifies the applicant or provider that the results of the screening will be shared with the applicant, pertinent program participants, pertinent program staff; and
- is signed by the applicant or provider.

Providers are reminded that they must notify MDC age within 10 days of any change to the enrollment information. Failure to do so will result in termination of provider enrollment.

Specifications: MDCH will notify applicants or providers within 10 business days of an ineligible criminal history screening. The Department will concurrently notified all affected program participants and Department of human services staff of all criminal history information discovered through the screening process. The notice shall include a statement that the applicant or provider has a right to appeal the information relied upon by MDC age in making its decision regarding his or her employment eligibility based on the criminal history screening. The notice shall also include information describing the appellate procedures.

A participant receiving personal care services through the Medicaid Home Health program may select any family member or other individual to provide such services subject to the following restrictions:

- The provider does not have a disqualifying conviction that is one of the four mandatory exclusions under 42 USC 1320a-7.
- The provider is not legally responsible for the participant.
- The provider is capable of providing the required services and is otherwise qualified to do so.
- The provider has successfully undergone a criminal history screening conducted by the MDC age and has received notification of a successful determination.

A participant may request to select a provider who has been determined ineligible as a result of a permissive exclusion identified through the criminal history screening process. The request must be submitted on a form specified by MDC age. The participants must provide a signed acknowledgment that indicates receipt of notification of the criminal offense which prompted the exclusion must indicate the selection of the provider to deliver services. The selection shall not be considered effective until the signed acknowledgment has been received, process, recorded by MDCH can communicate to DHS. A personal choice selection may not be applied to the federally mandated exclusions that are described under 42 USC 1320a-7.

██████████'s own SD Employee Criminal Background Check Guideline state a Lifetime Ban – Person not eligible for employment – when that person has a felony involving intent to cause death or serious bodily impairment. (Respondent's Exhibit A pages 7-8) The same policy also states a Lifetime ban – person not eligible for employment – when that person has more than one felony conviction. (Respondent's Exhibit A pages 7-8)

Petitioner argues that she was determined to be eligible to receive payment for the services she really needs the help and her ex-husband is the only person she trusts. She is very picky about who wipes her bottom and would not feel comfortable with another provider. Her chosen provider should be paid for his services.

Respondent argues that the denial is based upon the criminal history screening results that revealed the Petitioner's proposed provider has been convicted of crime(s) that disqualify the provider from participating in the program as a provider.

The facts are not in dispute.

Petitioner's proposed provider does have a disqualifying conviction that is one of the four mandatory exclusions under 42 USC 1320a-7. He also has more than one felony criminal conviction which disqualifies him from being paid as a provider under the circumstances.

The Department has established by a preponderance of the evidence that it was acting in accordance with Department policy when it denied the enrollment of the Petitioner's proposed Provider in the MI Choice Waiver Program as a Home Help Provider based upon a mandatory felony conviction exclusion.

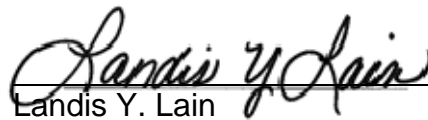
DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the MI Choice Waiver agency properly denied Petitioner's request for enrollment of [REDACTED] as a provider for Petitioner's as a direct care worker.

IT IS THEREFORE ORDERED that:

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

LL [REDACTED]



Landis Y. Lain
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]

Petitioner

[REDACTED]

Community Health Rep

[REDACTED]