



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 17, 2016
MAHS Docket No.: 16-011546
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Janice Spodarek

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 Petitioner's request for a hearing.

After due notice, a telephone hearing was held on 10/26/16. Petitioner appeared and testified. [REDACTED] appeared as a witness.

[REDACTED], Quality Specialist and [REDACTED] Acting Director of Care Management Program appeared as witnesses on behalf of the Department of Health and Human Services subcontractor, The [REDACTED], Respondent or Waiver Agency.

ISSUE

Did the Waiver Agency properly reduce Petitioner's Community Living Supports (CLS) from 91.5 hours to 77.5 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 [REDACTED] to provide MI Choice Waiver services to eligible beneficiaries. (Exhibit A, Testimony)
2. [REDACTED] must implement the MI Choice Waiver program in accordance with Michigan's waiver agreement, Department policy and its contract with the Department. (Testimony)

3. Petitioner is a [REDACTED] Medicaid beneficiary, born [REDACTED]. Petitioner is diagnosed with osteoporosis, multiple sclerosis, anxiety. Petitioner is wheelchair bound, has a history of malignant melanoma. Petitioner has incontinence. (Exhibit A).
4. Petitioner lives with a roommate. (Exhibit A).
5. Petitioner has had a MI Choice Waiver case since 2003. (Exhibit A).
6. On [REDACTED], the Waiver Agency conducted an in-person visit review. During the assessment, the Respondent noted improvements in abilities and overall self-sufficiency, and health. Specifically, the Respondent's assessment went from totally dependent to extensive in the following categories: transfer on and off commode; dressing lower body; dressing upper body; toilet use; bathing. Petitioner's abilities were noted to improve as to moving from and between surfaces, The Respondent noted that Petitioner's status improved as to overall self-sufficiency. (Exhibit A).
7. Following the reassessment, the Waiver Agency determined that Petitioner's CLS hours would be reduced from 91.5 hours to 77.5 hours per week based on Petitioner's current needs for assistance. (Exhibit A;; Testimony)
8. On [REDACTED], the Waiver Agency sent Petitioner an Advance Action Notice informing her that her CLS hours would be reduced from to 77.5 hours per week. (Exhibit A; Testimony).
9. On [REDACTED], the Michigan Administrative Hearing System received a request for hearing from Petitioner. (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 Petitioner 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 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)*.

With regard to Community Living Supports, the Medicaid Provider Manual provides in pertinent part:

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 Section
January 1, 2016, pp 14-15*

The MI Choice Waiver Program is a Medicaid-funded program and its Medicaid funding is a payer 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.

Petitioner bears the burden of proving, by a preponderance of evidence, that 91.5 hours per week are medically necessary.

The Waiver Agency's R.N. Supports Coordinator testified that Petitioner's CLS hours were reduced based on a reassessment conducted on 7/28/16 in which she determined that Petitioner's needs could be met with 77.5 hours per week. In support, the Respondent submitted the prior assessment to demonstrate the reassessment showing Petitioner's rating went from total to extensive in the categories of transferring on and off commode; dressing lower body; dressing upper body; toilet use, and bathing. In addition, the Respondent indicated that Petitioner has had an improvement in the ability to bear weight during transfers and an ability to self-transfer at times. The assessment determined that Petitioner's long term care supports and services needs have improved, supporting less service dependency.

Petitioner argues that she cannot support herself with any greater weight bearing than her previous assessment, that she cannot stand up on her own, and that her knees buckle if she attempts to stand on her legs. Petitioner also alleges that she has had no change in her medical condition, or as the Respondent indicated, in her "health."

The Waiver Agency's R.N. Supports Coordinator indicated that it did not appear that Petitioner's condition or diagnoses significantly changed from the prior authorization period; rather the Waiver Agency's R.N. Supports Coordinator opined based on her clinical judgment that Petitioner never would have been medically eligible 16 CLS hours per day.

Based on the above findings of fact and conclusions of law, this administrative law judge (ALJ) finds that the Waiver Agency properly reduced Petitioner's CLS hours from 91.5 to 77.5 per week. While this ALJ would agree with Petitioner's contention that there has been no medical diagnoses change, nevertheless, this ALJ finds that the assessment of an increase in ability and/or strength was supported by the functional assessment conducted by the Respondent at the in-person review. The assessment conducted on 7/28/16 was supported by credible and substantial evidence of record, and combined with the Waiver Agency's R.N. Supports Coordinator credibly opined, based on her training and experience, that 77.5 hours per week support the medically necessary criteria required by law and policy at the time of the assessment done in [REDACTED]. Of course, if Petitioner's condition has worsened since [REDACTED], then she may be entitled to additional CLS hours.

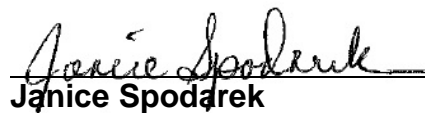
DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the MI Choice Waiver agency properly reduced Petitioner's CLS hours from 91.5 to 77.5 hours per week.

IT IS THEREFORE ORDERED that:

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

JS/cg



Janice Spodarek

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]