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: February 27, 2017
MAHS Docket No.: 17-000008
Agency No.: [redacted]
Petitioner: [redacted]

DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE: Janice Spodarek

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 hearing was held on February 21, 2017. [redacted] Petitioner's Hearing Representative appeared on behalf of Petitioner. [redacted], Director of Quality, RN, appeared on behalf of the Respondent, [redacted], subcontractor with Michigan Department of Health and Human Services, the Department's MI Choice Waiver Agency.

ISSUE

Did the Waiver Agency properly close Petitioner's Community Living Supports (CLS) case on the grounds that Petitioner was receiving duplicate hours from the VA Aide and Attendance benefits?

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 Reliance to provide MI Choice Waiver services to eligible beneficiaries. (Testimony)

2. Reliance Home Health Care 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 an [redacted] year-old Medicaid beneficiary, born [redacted]. Petitioner's medical history is unknown as the Respondent failed to submit a timely evidentiary packet.

4. On [redacted] the Respondent issued a notice to Petitioner that his case will close on the grounds that "Receiving VA Aide and Attendance benefit for CLS at 16 hours per week." (Testimony).

5. On [redacted] Petitioner filed a hearing request stating in part: "…the VA gave me 16 hours because they thought I needed more hours Shelly took 9 hours away from me…I have had legs and bad ankle…"

6. On [redacted] MAHS issued a Notice of Hearing to all parties, requiring the Respondent to issue any and all exhibits "at least seven days before the hearing date"

7. The Respondent failed to submit a hearing packet to MAHS and/or to the Petitioner. Petitioner's hearing was scheduled for 9:00 AM on [redacted]. Just prior to the administrative hearing, MAHS received a request from Petitioner that was faxed the day before—when the State of Michigan offices were closed - requesting an adjournment to attend a funeral. Pursuant to instructions from the supervisory ALJ, the undersigned contacted all parties at the time and place of the administrative hearing a few minutes later. The Respondent indicated that she was out of town, and had submitted an evidentiary packet. Neither the Petitioner nor the ALJ had received any evidence. The Respondent did not have a Proof of Service on either party. The ALJ denied the adjournment request and went forward with the administrative hearing.

8. Unrefuted evidence of record is that the Petitioner was receiving ADLs and IADLs assistance from the Respondent. Unrefuted evidence is the VA program will only assist a veteran with ADLs. (Unrefuted Testimony).

9. Subsequent to the administrative hearing, the undersigned ALJ received a Hearing Summary without any supporting documentation, and without a Proof of Service.

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 Chapter
April 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. In addition, the MPM explicitly denies a beneficiary duplicate benefits and services.

Petitioner bears the burden of proving, by a preponderance of evidence, that 12 CLS hours per day are medically necessary.

Here, the Respondent stipulated that the VA only offers ADL assistance; the Respondent on the other hand offers IADLs as well as ADLs. Thus, the services could not be entirely duplicative. However, as the Respondent failed to submit an evidentiary packet, and/or bring forth any testimony as to the type of care the agency CLS hours entail, the record was inadequate for the Respondent to rebut the burden of proof that shifted to the Respondent. General evidentiary rules and due process requires the Respondent to give an individual an opportunity to review the evidence used in making a determination. Here there was none. While Petitioner may not be eligible, Petitioner met his burden of proof when he established that the Respondent's CLS hours may be both ADLs and IADLs, but that the VA only grants ADL care. Given that the burden shifted at that point to the Respondent, the Respondent failed to meet its burden to show at that point that its action was correct. Under these facts, and given this evidentiary record, the action cannot be upheld. However, the Respondent can do a reassessment.

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 did not properly close Petitioner case under these facts.

IT IS THEREFORE ORDERED that:

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

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]

Authorized Hearing Rep. [redacted]