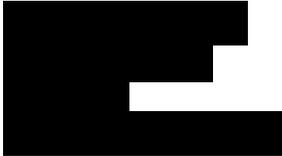




RICK SNYDER
GOVERNOR

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

SHELLY EDGERTON
DIRECTOR



Date Mailed: March 6, 2017
MAHS Docket No.: 16-013986
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 January 18, 2017. [REDACTED], the Petitioner, appeared on his own behalf. [REDACTED], Registered Nurse (RN) Case Manager through Community Mental Health (CMH), appeared as a witness for Petitioner. [REDACTED], Hearing Coordinator, represented the Department of Health and Human Services' Waiver Agency, [REDACTED] ("NEMCSA" or "Waiver Agency"). [REDACTED], RN; [REDACTED], Case Manager; and [REDACTED], Supervisor; appeared as witnesses for the Waiver Agency.

During the hearing proceedings, the Waiver Agency's Hearing Summary packet was admitted as Exhibit A, pp. 1-57. The hearing record was left open for 10 days for Petitioner to provide copies of the journal/log pages from the two weeks prior to the [REDACTED], assessment date. The only additional documentation received was forwarded from the Waiver Agency on Petitioner's behalf and has been admitted as Exhibit 1, pp. 1-38.

ISSUE

Did the Waiver Agency properly reduce Petitioner's 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] year-old Medicaid beneficiary, date of birth [REDACTED], who lives in his own apartment. (Exhibit A, pp. 7 and 26)
3. Petitioner has multiple diagnoses, including stage 2-3 kidney disease and diabetes. (Exhibit A, pp. 30-31)
4. Petitioner had been receiving 8 hours of CLS per day. (Exhibit A, p. 51)
5. On [REDACTED], an assessment was completed. In part, it was noted that Petitioner had been able to maintain being independent with activities of daily living (ADLs). (Exhibit A, pp. 2 and 15-50)
6. On [REDACTED], an Advance Action Notice was issued to Petitioner stating the CLS hours would be reduced from 8 hours per day to 7 hours per day effective [REDACTED]. The reason for the reduction was "hours in the home are based on need, it is felt at this time that 8 hours per day are not needed d/t the participant's ability to be independent while in the home." (Exhibit A, pp. 51-52)
7. On [REDACTED], the Michigan Administrative Hearing System received Petitioner's hearing request contesting the Waiver Agency's action. (Exhibit A, p. 3)

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 NEMCSA, 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.

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,
July 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 determination to reduce Petitioner's CLS hours from 8 hours per day to 7 hours per day. (Exhibit A, pp. 51-52)

On [REDACTED], an assessment was completed. In part, it was noted that Petitioner was able to independently get around his apartment. The assessment notes indicate that this was the same as or improvement from the [REDACTED], assessment, at which time Petitioner was able to walk about 140 feet before having to rest, could do many ADLs independently, and needed encouragement to do as much for himself as possible. Further, at the time of the [REDACTED] assessment a Michigan Medicaid Nursing Facility Level of Care Determination (LOCD) was completed. In part, Petitioner was scored as independent with the four ADLs considered under Door 1, and met the criteria for Door 7 to remain eligible for the MI Choice Waiver program at that time. It was noted that as of the time of the [REDACTED], assessment, Petitioner remained independent with the four ADLs considered under the Door 1 LOCD criteria, and would continue to meet the criteria for Door 7 to remain eligible for the MI Choice

Waiver program. (Exhibit A, pp. 2 and 7-50; Hearing Coordinator Testimony) Accordingly, on [REDACTED], an Advance Action Notice was issued to Petitioner stating the CLS hours would be reduced from 8 hours per day to 7 hours per day effective [REDACTED]. The reason for the reduction was "hours in the home are based on need, it is felt at this time that 8 hours per day are not needed d/t the participant's ability to be independent while in the home." (Exhibit A, pp. 51-52)

Petitioner disagrees with the reduction. Petitioner described several changes in his condition since late summer, including severe bladder problems that are ongoing, severe leg pains, severe cramping, increased leg swelling, and a new diagnosis from a vascular surgeon. Petitioner explained that he has been ordered to keep his feet up more and he is having increasing difficulties with walking. Petitioner has had bad bouts of diarrhea and nausea with different antibiotics he has had to take. Petitioner has also had severe dreams and anxiety over the last month and a half. When asked what needs would not be met with the one hour reduction of CLS, Petitioner indicated that if he has severe diarrhea at night he could end up out of clothes until his caregivers had time to do the wash. Petitioner's additional concerns with the one hour reduction all related to the changes in his condition, including: shortness of breath from current lung conditions; the increasing difficulties with walking and leg swelling due to his vascular condition; and that he has been having severe bladder spasms. (Petitioner Testimony)

Petitioner's CMH RN Case Manager explained that Petitioner's mental condition is ongoing and there is a strong correlation with his physical health when Petitioner is under stress from either a medical illness or any change in status. Petitioner has a tendency to become very stressful and anxious, which can manifest in physical conditions such as the diarrhea or bladder spasms. It was also noted that Petitioner has had the dreams on and off for years. When Petitioner is under more stress he has more complains of nightmares, dreams, less sleep, and more daytime fatigue, which then cause more stress and anxiety. (CMH RN Case Manager Testimony)

The Client In-Home Journal pages submitted on Petitioner's behalf have been reviewed. For example, the pages document some soft and/or loose stools. However, these journal pages do not indicate any needs for increased hours for extra laundry. (Exhibit 1, pp. 1-38)

Petitioner bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in reducing his CLS hours. Given the record in this case, the undersigned Administrative Law Judge finds that Petitioner has failed to meet that burden of proof. The Waiver Agency's documentation indicates that at the time of the [REDACTED], assessment, Petitioner's medically necessary needs for assistance could be met with the reduced CLS authorization of 7 hours per day. Petitioner was independent with ambulation around his apartment and continued to be independent with the ADLs considered under Door 1 of the LCOD. The additional hour of CLS cannot be justified on an ongoing basis based on the possibility that at some point Petitioner may have another bout of diarrhea and have increased needs at that time. Further, the Supervisor testified that the Waiver Agency could consider a one hour

exception when something comes up, for example if Petitioner is sick and there is additional laundry. (Supervisor Testimony) Additionally, the more recent changes with Petitioner's condition since the [REDACTED] assessment could not have been considered by the Waiver Agency at the time of the determination at issue for this appeal. Accordingly, the Waiver Agency's determination is upheld based on the information available at the time of this assessment.

As noted, Petitioner's testimony indicated there have been some changes with his condition since the [REDACTED] assessment, which are affecting his functional abilities and needs for assistance. These changes can be considered by the Waiver Agency in determining the appropriate ongoing supports and services for Petitioner.

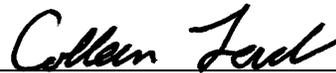
DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly reduced Petitioner's Community Living Supports (CLS) hours through the MI Choice Waiver program based on the information available at the time of the [REDACTED], assessment.

IT IS THEREFORE ORDERED that

The Waiver Agency's decision is AFFIRMED.

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]

Petitioner

[REDACTED]