



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS
DIRECTOR

[REDACTED]
[REDACTED], MI [REDACTED]
Date Mailed: February 24, 2020
MOAHR Docket No.: 20-000039
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Robert J. Meade

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9, 42 CFR 431.200 *et seq.* and 42 CFR 438.400 *et seq.* upon Petitioner's request for a hearing.

After due notice, an in-person hearing was held on February 19, 2020. [REDACTED], Petitioner, appeared and testified on her own behalf. [REDACTED], Petitioner's daughter and caregiver, appeared as a witness.

Monica Freier, RN, Appeals Coordinator, represented the Department's Waiver Agency, Region VII Area Agency on Aging. (Waiver Agency or Region VII). Megan Cottrelle, RN, Supports Coordinator and Ricardo Gomez, Social Worker Supports Coordinator, appeared as witnesses for the Waiver Agency.

ISSUE

Did the Waiver Agency properly reduce Petitioner's Community Living Supports (CLS)?

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 the Waiver Agency to provide MI Choice Waiver services to eligible beneficiaries. (Exhibit A, Testimony)
2. The Waiver Agency must implement the MI Choice Waiver program in accordance with Michigan's waiver agreement, Department policy and its contract with the Department. (Exhibit A; Testimony)
3. Petitioner is a [REDACTED]-year-old Medicaid beneficiary, born [REDACTED]. Petitioner is diagnosed with advanced multiple sclerosis. (Exhibit A, p 30; Exhibit 1; Testimony)

4. Petitioner lives with her husband, who is also her primary source of informal support, and her two dogs. Petitioner's husband works long hours as a nurse at McLaren Hospital and is not home often. Petitioner's husband also attends school. Petitioner's daughter is her paid caregiver through self-determination and also provides informal support. Petitioner has a strong and supportive relationship with her family. (Exhibit A, p 26; Testimony)
5. Petitioner is able to manage her own finances using a stylus and her tablet. Petitioner is going to school online at Saginaw Valley State University and is excelling in her courses for criminal justice. Petitioner would like to travel and enjoys watching forensic files and unsolved mystery shows. (Exhibit A, p 25; Testimony)
6. On October 17, 2019, the Waiver Agency's R.N. Supports Coordinator and Social Worker Supports Coordinator conducted an in-home reassessment with Petitioner and Petitioner's caregiver. Petitioner requires total assistance with her Activities of Daily Living and Instrumental Activities of Daily Living due to her advanced multiple sclerosis. Petitioner's caregivers prepare her meals and complete all homemaking tasks. Petitioner has a suprapubic catheter, which is changed twice per month. Petitioner transfers with caregiver assistance and a Hoyer lift. Petitioner uses an electric wheelchair. Petitioner's caregivers bathe her in bed every other day and shower Petitioner every other day. (Exhibit A, pp 26-31; Testimony)
7. Following the reassessment, the Waiver Agency determined that Petitioner's CLS hours would be reduced from 70 hours per week (10 hours per day, seven days per week) to 56 hours per week (8 hours per day, seven days per week) based on Petitioner's current needs for assistance and the availability of informal supports. (Exhibit A, pp 26-31; Testimony)
8. Following the reassessment¹, the Waiver Agency sent Petitioner a Notice of Adverse Benefit Determination indicating that CLS hours would be reduced from 70 hours per week to 56 hours per week. (Exhibit A, Exhibit 1; Testimony)
9. On November 12, 2019, Petitioner requested an Internal Appeal. (Exhibit A, Exhibit 1; Testimony)
10. On December 19, 2019, an Internal Appeal was completed. Following the Internal Appeal, the Waiver Agency upheld the determination to reduce Petitioner's CLS hours from 70 hours per week to 56 hours per week.

¹ The Notice was not included in the evidence presented at the hearing, so it is unclear in the record exactly when the Notice was sent. In the future, the Waiver Agency should include all notices with the Hearing Summary.

(Exhibit 1; Testimony)

11. On December 19, 2019, the Waiver Agency sent Petitioner a Notice of Internal Appeal Decision – Denial. The Notice included Petitioner's appeal rights. (Exhibit 1; Testimony)
12. On January 6, 2020, the Michigan Office of Administrative Hearings and Rules received Petitioner's request for hearing. (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.

Here, 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 Health and Human Services (MDHHS). 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)*.

According to *42 CFR 440.180(b)*, 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.

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
October 1, 2019, pp 14-15*

The MI Choice Waiver Program is a Medicaid-funded program and its Medicaid funding is a payor of last resort. In addition, Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services. *42 CFR 440.230*. 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 the Waiver Agency erred in taking the instant action.

The Waiver Agency's Appeals Coordinator (Appeals Coordinator) testified that on October 17, 2019, the Waiver Agency's R.N. Supports Coordinator and Social Worker Supports Coordinator conducted an in-home reassessment with Petitioner and Petitioner's caregiver. The Appeals Coordinator testified that Petitioner requires total assistance with her Activities of Daily Living and Instrumental Activities of Daily Living due to her advanced multiple sclerosis. The Appeals Coordinator indicated that Petitioner's caregivers prepare her meals and complete all homemaking tasks. The Appeals Coordinator indicated that Petitioner has a suprapubic catheter, which is changed twice per month, that Petitioner transfers with caregiver assistance and a Hoyer lift, and that Petitioner uses an electric wheelchair. The Appeals Coordinator indicated that Petitioner's caregivers bathe her in bed every other day and shower Petitioner every other day.

Regarding Petitioner's claim that her husband no longer lives with her, the Appeals Coordinator pointed to numerous instances in the record where it was reported that Petitioner's husband still lives with her and still provides substantial informal support. (See Exhibit A, pp 9-17). The Appeals Coordinator indicated that Petitioner's CLS hours were increased to 10 hours per day, seven days per week back in 2018 when Petitioner reported that she and her husband were separating, but again, there is evidence in the record that Petitioner's husband continues to live with her and provide informal support. As such, the Appeals Coordinator indicated that a reduction back to 8 CLS hours per day, which Petitioner had been receiving before the 2018 increase, was appropriate at this time.

Petitioner testified that her CLS hours were awarded to her based on her condition, which has not changed, so her CLS hours should not be reduced. Petitioner testified that she is stable at this time because of the CLS hours she receives and is concerned that her condition will worsen if her care hours are reduced. Specifically, Petitioner is concerned that she will develop pressure sores if her hours are reduced because there will not be a caregiver available to reposition her when needed. Petitioner testified that she would be willing to accept 9 CLS hours per day as a compromise. Petitioner indicated that her support system has decreased in recent years because her parents are getting older and cannot provide as much help. Petitioner also indicated that her daughter now has her own child so she cannot help as much. Regarding her husband, Petitioner indicated that he no longer lives with her and now will only provide support if no-one else is available to help. Petitioner also indicated that her husband has his own health issues, which limit his ability to help. Petitioner testified that her husband has been back and forth living with her since 2011 but now he has a girlfriend, so he is definitely out of her house. Petitioner indicated that her daughter now changes her catheter and that her husband trained her to do so.

In response, the Appeals Coordinator indicated that it is very unusual for a Waiver client to have 10 uninterrupted hours of care every day. The Appeals Coordinator indicated that Petitioner could try breaking the 8 CLS hours up each day, possibly from 10:00 a.m. to 2:00 p.m. and then from 5:00 p.m. to 9:00 p.m. The Appeals Coordinator also indicated that if the reduction does not work out and Petitioner's condition worsens, she can always request a reassessment at any time.

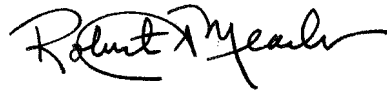
Based on the above findings of fact and conclusions of law, this Administrative Law Judge (ALJ) finds that Petitioner has failed to prove, by a preponderance of the evidence, that the Waiver Agency erred in reducing her CLS hours from 70 CLS hours per week to 56 CLS hours per week. The evidence presented demonstrated that the Waiver Agency did a thorough job of reviewing Petitioner's needs and authorizing CLS, while also considering Petitioner living situation and the availability of informal supports. As indicated, Petitioner's CLS was increased back in 2018 because it was reported that her husband was moving out. However, it is clear from the record that this did not happen and there are numerous reports in the most recent reassessment in October 2019 that Petitioner's husband was still living with her and providing informal support at that time. This ALJ can only review the Waiver Agency's decision based on the information available at the time the decision was made. Based on that information, specifically that Petitioner's husband was still living with her and providing informal support, the reduction in CLS was appropriate. If this reduction leads to a decline in Petitioner's condition, Petitioner can always request that the hours be reinstated. However, based on the information available at the time of the most recent assessment, it is determined that the Waiver Agency properly reduced Petitioner's CLS hours from 70 CLS hours per week to 56 CLS hours per week.

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 CLS hours from 70 CLS hours per week to 56 CLS hours per week.

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED.



RM/sb

Robert J. Meade
Administrative Law Judge
for Robert Gordon, 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 Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR 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. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

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

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

DHHS Department Rep.

Heather Hill
400 S. Pine 5th Floor
Lansing, MI
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DHHS

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Petitioner

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