

GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED] MI [REDACTED]

Date Mailed: March 4, 2020
MOAHR Docket No.: 19-012542
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Colleen Lack

DECISION AND ORDER

Following Petitioner's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 *et seq*; 42 CFR 438.400 *et seq*; and Mich Admin Code, R 792.11002.

After due notice, a hearing was held on February 4, 2020. [REDACTED], ex-husband and Authorized Hearing Representative (AHR) represented the Petitioner. [REDACTED], the Petitioner, appeared and testified. Stefanie Parks, Social Worker Supports Coordinator (SWSC), represented the Respondent Department of Health and Human Services' Waiver Agency, Region 2 Area Agency on Aging ("Waiver Agency"). Kara Lorenz-Goings, Assistant Director; and Kelly Naughton, Clinical Supervisor, appeared as witnesses for Respondent.

During the hearing proceeding, Respondent's Hearing Summary packet was admitted as Exhibit A, pp. 1-89; Petitioner's Hearing Request was admitted as Exhibit 1, pp. 1-11; and Petitioner's additional documentation was admitted as Exhibit 2, pp. 1-11.

ISSUE

Did the Waiver Agency properly deny Petitioner's requests for a ramp, low rise steps, and an increase in Community Living Supports (CLS) services 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 Medicaid beneficiary and an ongoing recipient of services through the MI Choice Waiver program.

2. During an October 14, 2019, home assessment, a ramp, low rise steps, and an increase in CLS services for Petitioner were discussed. (Exhibit A, p. 74)
3. On October 16, 2019, the agency providing CLS services notified the SWSC that Petitioner is not seen on her side of the home due to fall/safety risk of piled items in the home; Petitioner is seen on the AHR's side of the home, but there is no hot water so Petitioner is not taking a shower; and there appears to be no service need at this time since they are only sitting with Petitioner at the home. (Exhibit A, p. 73)
4. On October 16, 2019, the SWSC noted that a ramp cannot be installed on the front porch because it would go up the driveway due to limited space. (Exhibit A, p. 73)
5. On October 24, 2019, a Notice of Adverse Benefit Determination was issued to Petitioner. (Exhibit A, p. 71)
6. Petitioner requested an internal appeal. (Exhibit A, p. 70)
7. On November 5, 2019, the SWSC spoke with a CLS aide regarding the conditions of both sides of the duplex. The CLS aide also indicated they mostly sit with Petitioner and are unable to provide the intended CLS services when they are there. (Exhibit A, p. 67)
8. On November 7, 2019, the agency providing CLS services notified the SWSC that they have no other aides to go back to the home. (Exhibit A, p. 65)
9. On November 15, 2019, the Waiver Agency issued a Notice of Internal Appeal Decision-Denial regarding a ramp for Petitioner. (Exhibit A, pp. 1-3)
10. On November 15, 2019, the Waiver Agency issued a Notice of Internal Appeal Decision-Denial regarding low rise steps for Petitioner. (Exhibit A, pp. 5-7)
11. On November 15, 2019, the Waiver Agency issued a Notice of Internal Appeal Decision-Denial regarding an increase in CLS services for Petitioner. (Exhibit A, pp. 8-10)
12. On December 5, 2020, the Michigan Office of Administrative Hearings and Rules received Petitioner's hearing request. (Exhibit 1)

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, 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/IID (Intermediate Care Facility for Individuals with Intellectual Disabilities) and is reimbursable under the State Plan. See 42 CFR 430.25(c)(2).

The MPM references the use of Minimum Operating Standards maintained and published by MDHHS, see MPM, October 1, 2019 version, MI Choice Waiver Chapter, page 26. In support of their determination in the case, the Waiver Agency cited Attachment K of those operating standards, specifically:

B. PARTICIPANT MANAGEMENT OF RISK

Waiver agencies may require participants to acknowledge when their choices pose risks for their health and welfare. MDHHS does not obligate the waiver agency to authorize services believed to be harmful to the participant.

*Minimum Operating Standards for MI Choice Waiver Program Services
Attachment K, FY 2020, pages 44-45*

The Waiver Agency also cited Attachment H of those operating standards, specifically:

Environmental Accessibility Adaptations

Minimum Standards for Traditional Service Delivery

4. The case record must contain documented evidence that the adaptation is the most cost-effective and reasonable alternative to meet the participant's need. An example of a reasonable alternative, based on the results of a review of all options, may include changing the purpose, use, or function of a room within the home or finding alternative housing.
5. Each waiver agency must develop working relationships with the weatherization, chore, and housing assistance service providers, as available in the program area to ensure effective coordination of efforts.
6. The participant, with the direct assistance of the PAHP supports coordinator when necessary, must make a reasonable effort to access all available funding sources, such as housing commission grants, Michigan State Housing Development Authority (MSHDA) and community development block grants. The participant's record must include evidence of efforts to apply for alternative funding sources and the acceptances or denials of these funding sources. The MI Choice waiver is a funding source of last resort.

*Minimum Operating Standards for MI Choice Waiver Program Services
Attachment H, FY 2020, pages 31-38
(Bold emphasis added by ALJ)*

In this case, the contested actions are the Waiver Agency's determinations to deny Environmental Accessibility Adaptations, specifically a ramp or low rise steps, as well as an increase in CLS services for Petitioner.

The testimony of Petitioner's AHR indicates there has been a long history of requests for a ramp for Petitioner, back to December 2016 or January 2017. However, there is no jurisdiction to review the history of all requests and denials for these services for Petitioner. The available evidence supports that there have been somewhat recent denials, for example a May 10, 2019, Notice of Adverse Benefit Determination regarding a ramp. Petitioner's AHR sent a fax to the Waiver Agency requesting additional information indicating he was considering appealing this denial. (Exhibit 2, pp. 3-4) Similarly, there were August 9, 2019, progress notes indicating an Adverse Benefit Determination was issued regarding a ramp. An August 12, 2019, progress note indicated Petitioner's AHR was advised that they would be receiving an Adverse Benefit Determination regarding a ramp and Petitioner's AHR was encouraged to follow the appeals process and to call for any needs, updates, or concerns. (Exhibit A, p. 81) September 16-19, 2019, progress notes indicate the appeals process was explained to Petitioner's AHR again, and had been explained to him multiple times in the past. Further, the manager who handles the appeals had tried to contact Petitioner's AHR, but was unable to reach him or leave a message. (Exhibit A, pp. 78-79) Overall, there is insufficient evidence to establish that Petitioner exhausted, or could be deemed to have exhausted, the internal appeal process to proceed with a state fair hearing regarding these earlier denials.

There is jurisdiction to address November 15, 2019, notices of denials from the internal appeal process for the ramp, low rise steps, and increase in CLS services.

On October 8, 2019, the SWSC set up a time to come look at the outside of the home for a ramp or wider step options. (Exhibit A, p. 74) During an October 14, 2019, home assessment, a ramp, low rise steps, and an increase in CLS services for Petitioner were discussed. It was noted that there were numerous items in the back yard and front porch that Petitioner's AHR had not addressed in months. Petitioner was not home, so the SWSC was unable to see Petitioner's side of the home. However Petitioner's AHR stated that it was no different than the last time a SC was there. It was noted that there are numerous items in the home that cause potential fire/fall hazard. Regarding the increase in CLS hours, it was noted that Petitioner's AHR stated he has not been able to get to his doctor appointments as he has been taking care of Petitioner's needs. (Exhibit A, p. 74) Progress notes around that time were reviewed. On October 16, 2019, the agency providing CLS services notified the SWSC that Petitioner is authorized for CLS services through the MI Choice Waiver and that Petitioner is not seen on her side of the home due to fall/safety risk of piled items in the home; Petitioner is seen on the AHR's side of the home but there is no hot water so Petitioner is not taking a shower; and there appears to be no service need at this time since they are only sitting with Petitioner at the home. On October 16, 2019, the SWSC also noted that a ramp cannot be installed on the front porch because it would go up the driveway due to limited space. (Exhibit A, p. 73) Early November 2019, progress notes document contacts with a CLS aide and the agency providing CLS services. Again, issues with the conditions of the home, on both sides of the duplex were noted. The CLS aide also indicated they mostly sit with Petitioner and are unable to provide the intended CLS services when

they are there. The agency providing CLS services notified the SWSC that they have no other aides to go back to the home (Exhibit A, pp. 65- 67)

Regarding the home adaptations, the Waiver Agency witnesses explained that Petitioner is ambulatory, so they would not normally consider putting a ramp on the residence. Further, there was no good placement for a ramp on the front of the house. As an alternative, low rise steps on the back of the home was considered. However, there was no way to get Petitioner safely in and out of the home at that time due to the conditions inside and outside of the home. A portable ramp for the back of the home was also discussed once or twice, but Petitioner and her AHR were not interested in this. It was also noted that the current services in place include snow removal services. (Waiver Agency Testimony; see also Exhibit A, pp. 78-79)

Regarding CLS, the Waiver Agency witnesses explained that there was an agency in the home providing CLS services, but they could no longer go there due to the situation inside the home. The Waiver Agency is unable to find an agency to provide CLS services for Petitioner in the current setting. The Waiver Agency also wanted to address some of the clutter in the home before increasing CLS hours. Heavy chore services were offered. Additionally, respite for Petitioner's AHR were offered. Petitioner and her AHR did not want those services at the time. Past agencies providing CLS services have also reported that they have not been able to address the clutter, rather they have been asked to do more socialization tasks rather than hands on care, cleaning, or homemaking tasks. (Waiver Agency Testimony)

Petitioner's AHR provided documentation from Petitioner's doctor regarding the addition of a ramp to the home. These letters indicate Petitioner ambulates with a rolling walker that cannot be used on stairs. (Exhibit 2, pp. 1-2)

The AHR indicated the need for a ramp is only in the winter. The first-year snow removal services were provided, the shoveled path was not wide enough for Petitioner to use and the back of the home was not shoveled. Exiting from the back of the house also requires Petitioner to walk an even longer distance. The second year the driveway was plowed, but this still left ice behind. (AHR Testimony)

Regarding CLS, a copy of a schedule was submitted indicating that at the time of the October 2019, home assessment, Petitioner was to receive 2 hours of CLS services twice per week. (Exhibit 2, p. 5) Petitioner's AHR described problems with the CLS aides. (Exhibit 2, pp. 6-7; AHR Testimony) The progress notes indicates that the Waiver Agency followed up with the agency providing the CLS services regarding these concerns. Further, Petitioner's AHR started by stating the agency does not cover the schedule reliably, to stating it had only happened a few times. When offered a change in what agency provides the services, Petitioner's AHR did not want to find a new agency for the CLS services. (Exhibit A, pp. 77 and 79-80)

Petitioner bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in their determination to deny the requests for a ramp, low rise steps, and an increase in CLS services. Given the record in this case, the undersigned

Administrative Law Judge finds that Petitioner has not met that burden of proof. The evidence indicates there is insufficient space for a ramp off the front of the home. Reasonable alternatives were also considered, such as low rise steps. However, conditions at the home at the time of this determination did not allow for this environmental accessibility adaption either. The denial of the request for an increase in CLS services was appropriate as the CLS provider agency was reporting that the current CLS authorization was not being utilized for the intended CLS services. Further, there were also safety concerns regarding the conditions of the home. Again, reasonable alternatives, such as utilizing heavy chore services to address the conditions of the home, and respite to allow Petitioner's AHR time to get to his doctor, were offered but declined. Accordingly, the Waiver Agency's November 15, 2019, determinations to deny a ramp, low rise steps, and an increase in Community Living Supports (CLS) hours are upheld based on the information available at that time.

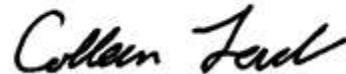
DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly denied Petitioner's requests for a ramp, low rise steps, and an increase in Community Living Supports (CLS) hours through the MI Choice Waiver program based on the available information.

IT IS THEREFORE ORDERED that:

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

CL/dh



Colleen Lack
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 48933

DHHS

Tamara Little
301 E. Louis Glick Hwy.
Jackson, MI 49201

DHHS -Dept Contact

Brian Barrie
CCC 7th Floor
Lansing, MI 48919

DHHS Department Rep.

Claire Warner
PO Box 189
Brooklyn, MI 49230

Community Health Rep

Claire Warner
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Petitioner

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Authorized Hearing Rep.

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