

[REDACTED]
[REDACTED], MI [REDACTED]

Date Mailed: February 24, 2020
MOAHR Docket No.: 19-013190
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 11, 2020. [REDACTED], Petitioner's Power of Attorney and Mother-in-law, appeared and testified on Petitioner's behalf. [REDACTED], Petitioner; [REDACTED], Home Care Provider; and [REDACTED], Petitioner's husband, appeared as witnesses.

Monica Freier, RN, Appeals Coordinator, represented the Department's Waiver Agency, Region VII Area Agency on Aging. (Waiver Agency or Region VII). Jessica Stothard, RN, Supports Coordinator and Janelle Sisco, 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 Lyme disease, MS with dementia, psychosis,

cataracts, and Bell's Palsy. Petitioner has a history of psychiatric hospitalization due to suicidal ideation and self-injurious behavior. (Exhibit A, p 8; Exhibit 2; Testimony)

4. Petitioner lives with her husband, who is also her durable power of attorney, and Petitioner's primary source of informal support. Petitioner has three grown children, but they are unable to provide much support because they have their own families. Petitioner's children do visit, however. Petitioner's mother-in-law lives nearby and serves as Petitioner's back-up power of attorney. (Exhibit A, pp 8-9; Testimony)
5. Petitioner participates in daily activities with her family and visits with them often. Petitioner talks on the phone with her sister frequently. Petitioner recently visited her sister in Florida. Petitioner attends church every Tuesday. Petitioner likes to go shopping to get out of the house. Petitioner enjoys crafts, baking and watching television. (Exhibit A, p 8; Testimony)
6. On October 29, 2019, the Waiver Agency's R.N. Supports Coordinator and Social Worker Supports Coordinator conducted an in-home reassessment with Petitioner, Petitioner's caregiver and Petitioner's mother-in-law. The reassessment occurred at Petitioner's mother-in-law's home. Petitioner reported no new medical concerns and had no hospitalizations in the 90 days preceding the assessment. It was reported that Petitioner wakes up at 5:30 a.m. each day, showers, takes her medications, then goes back to bed for a few hours. Petitioner is physically independent with her care needs but is unable to comprehend safety and needs supervision, cues and reminders to maintain safety. Petitioner requires assistance with meal preparation. Petitioner is able to toilet herself but wears pads just in case as she sometimes suffers from stress induced incontinence. Petitioner's caregiver supervises her with showers to remind her to wash all areas to ensure cleanliness. (Exhibit A, pp 8-11; Testimony)
7. Following the reassessment, the Waiver Agency determined that Petitioner's CLS hours would be reduced from 50 hours per week (10 hours per day, five days per week) to 30 hours per week (6 hours per day, five days per week) based on Petitioner's current needs for assistance and the availability of informal supports. (Exhibit A, pp 8-11; Testimony)
8. Following the reassessment¹, the Waiver Agency sent Petitioner a Notice of Adverse Benefit Determination indicating that CLS hours would be reduced from 50 hours per week to 30 hours per week. (Exhibit A, Exhibit 1; Testimony)

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.

9. On November 20, 2019, Petitioner's mother-in-law requested an Internal Appeal. (Exhibit A, Exhibit 1; Testimony)
10. On December 20, 2019, an Internal Appeal was completed. Following the Internal Appeal, the Waiver Agency determined that Petitioner's CLS would only be reduced from 50 hours per week to 40 hours per week. (Exhibit 1; Testimony)
11. On December 20, 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 December 30, 2019, 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 29, 2019, the Waiver Agency's R.N. Supports Coordinator and Social Worker Supports Coordinator conducted an in-home reassessment with Petitioner, Petitioner's caregiver and Petitioner's mother-in-law. The Appeals Coordinator indicated that Petitioner reported no new medical concerns and had no hospitalizations in the 90 days preceding the assessment. The Appeals Coordinator testified that it was reported that Petitioner wakes up at 5:30 a.m. each day, showers, takes her medications, then goes back to bed for a few hours. The Appeals Coordinator indicated that Petitioner is physically independent with her care needs but is unable to comprehend safety and needs supervision, cues and reminders to maintain safety and requires assistance with meal preparation. The Appeals Coordinator testified that Petitioner is able to toilet herself but wears pads just in case as she sometimes suffers from stress induced incontinence. The Appeals Coordinator also indicated that Petitioner's caregiver supervises her with showers to remind her to wash all areas to ensure cleanliness.

The Appeals Coordinator testified that following the reassessment, the Waiver Agency determined that Petitioner's CLS hours would be reduced from 50 hours per week (10 hours per day, five days per week) to 30 hours per week (6 hours per day, five days per

week) based on Petitioner's current needs for assistance and the availability of informal supports. The Appeals Coordinator indicated that following the Internal Appeal, she determined that Petitioner's CLS would only be reduced from 50 hours per week to 40 hours per week because the first proposed cut seemed to be too drastic all at once. The Appeals Coordinator indicated that on December 20, 2019, the Waiver Agency sent Petitioner a Notice of Internal Appeal Decision – Denial, which included Petitioner's appeal rights.

Petitioner's mother-in-law testified that the Waiver Agency Supports Coordinators only spent about an hour and a half with her and Petitioner for the reassessment, which is not enough time to get a full picture of Petitioner's needs. Petitioner's mother-in-law indicated that Petitioner actually needs to be redirected numerous times throughout the day. Petitioner's mother-in-law also indicated that because Petitioner is so agreeable, she will tell Waiver Agency workers what they want to hear, which is not always the truth. Petitioner's mother-in-law testified that Petitioner needs monitoring at all times. Petitioner's mother-in-law indicated that while Petitioner is currently home alone two hours per day, if she were alone any longer than that because of reduced CLS hours she would be very worried about Petitioner. Petitioner's mother-in-law provided daily logs from Petitioner's caregivers, which provide details about all of the care Petitioner receives and needs, as well as various safety concerns that have arisen over the years. (Exhibit 3).

Petitioner's mother-in-law discussed incidents where Petitioner got nail polish all over the bedroom, poked numerous holes in the bathroom wall when trying to hang a shelf, and made a mess doing laundry by using too much detergent. Petitioner's mother-in-law also discussed a recent issue Petitioner had with eczema on her hands, which Petitioner did not know how to deal with and kept picking at, which made it worse. Petitioner's mother-in-law testified that Petitioner also tries to get the mail on her own, which is dangerous because they live on a very busy road. Petitioner's mother-in-law indicated that Petitioner is very messy when eating and drinking and does not know how to clean up. Petitioner's mother-in-law testified that Petitioner also needs supervision and cuing in the shower because she does not wash herself completely. Petitioner's mother-in-law testified that Petitioner has trouble with her glasses and leaves pins all over the floor when sewing. Petitioner's mother-in-law also indicated that Petitioner burns garbage on her own, which she should not be doing without supervision. Petitioner's mother-in-law relayed an incident where Petitioner became upset when a class she was taking was cancelled and ran down the road. Petitioner's mother-in-law testified that while she lives only 1/8 of a mile down the road, she cannot keep her eye on Petitioner all the time, especially now that she is working herself again.

Petitioner's caregiver testified that she arrives each weekday at 5:30 a.m. and stays until 3:30 p.m. Petitioner's caregiver indicated that Petitioner's husband then gets home around 5:00 – 5:30 p.m., so Petitioner is alone for a couple of hours. Petitioner's caregiver testified that Petitioner requires constant redirection while she is there. Petitioner's caregiver indicated that she needs to supervise Petitioner showering, dressing, and eating. Petitioner's caregiver testified that Petitioner has serious issues

with impulse control and will jump from one thing to another very often. Petitioner's caregiver testified that Petitioner does not go back to sleep after she showers in the morning and suggested that this was something that a prior caregiver told the Waiver Agency, not something that was discussed at the most recent reassessment. Petitioner's caregiver reiterated that safety hazards caused by Petitioner as discussed by Petitioner's mother-in-law. Petitioner's caregiver testified that there are sometimes 20-minute stretches of time where she does not need to redirect Petitioner and that during these times she does cooking and cleaning.

Petitioner testified that she has a house phone and knows how to use it. Petitioner indicated that she does not have a cell phone and does not want one. Petitioner also indicated that she does not have an emergency alert button and does not want one. Petitioner testified that in case of emergency she would either call for help or go to the neighbor's house. Petitioner indicated that she recently visited her sister in [REDACTED]. Petitioner testified that she flew down with her sister and back by herself. Petitioner testified that she is home alone each weekday from 3:30 p.m. to 5:30 p.m. Petitioner indicated when left alone she watches television or sews. Petitioner testified that she does not go back to sleep in the morning after getting up but may sometimes take a half hour nap during the day. Petitioner testified that when alone she does get the mail and burn garbage in the burn barrel out back of the house.

Petitioner's husband testified that the latest he ever gets home is 5:30 p.m. and he is usually home by 5:00 p.m. Petitioner's husband indicated that when Petitioner became upset when her class was cancelled and ran down the road, he had to leave work to come home. Petitioner's husband reiterated the issues discussed above by Petitioner's mother-in-law and caregiver. Petitioner's husband testified that he is already worried that Petitioner is not safe when she is home alone in the afternoons and does not want her to be home alone any longer than that.

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 50 CLS hours per week to 40 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. Petitioner already spends two hours per day alone and it was noted during the hearing that most of the safety incidents raised occurred when Petitioner had a caregiver present. And, although it seems as if the reassessment was inaccurate in claiming that Petitioner would go back to bed for a couple of hours after showering in the morning, it still seems appropriate, given Petitioner's abilities, to attempt a reduction in Petitioner's CLS hours at this time. Petitioner is able to physically handle her care needs and seems to know how to stay safe each afternoon when she is alone. If this reduction leads to further incidents involving Petitioner's safety, Petitioner's family 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 50 CLS hours per week to 40 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 50 CLS hours per week to 40 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
48933

DHHS

Lacey Whitford
Isabella County DHHS
1919 Parkland Drive
Mt. Pleasant, MI
48858

Community Health Rep

Area Agency on Aging Region VII
1615 S Euclid Ave
Bay City, MI
48706

DHHS -Dept Contact

Brian Barrie
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