



GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

[REDACTED]
MI [REDACTED]

Date Mailed: July 1, 2020
MOAHR Docket No.: 20-000177
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, a telephone hearing began on June 24, 2020 and was completed on June 30, 2020. [REDACTED] Petitioner, appeared and testified on her own behalf.

Sheyenne Cole, LMSW, Waiver Director, appeared and testified on behalf of the Department's Waiver Agency, Senior Resources. (Waiver Agency or Senior Resources). Janis Hall, Quality Improvement Coordinator, appeared as a witness 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 1, 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 1; Testimony)
3. Petitioner is a [REDACTED]-year-old Medicaid beneficiary, born [REDACTED] 1959. (Exhibit 3; Exhibit 1; Testimony)
4. Petitioner is diagnosed with arteriovenous malformation of the spinal cord,

hypertension, osteoporosis, paraplegia, anxiety, depression, GERD, neuropathy, and neuromuscular dysfunction of the bladder. Petitioner is paralyzed from the waist down and uses a wheelchair for mobility. (Exhibits A, 4; Testimony)

5. Petitioner lives alone in an apartment. Petitioner lacks a supportive relationship with her family, but her brothers will assist her if needed and provide emotional support. Petitioner depends heavily on her caregivers. (Exhibits 2, 4; Testimony)
6. Petitioner wears briefs in case of incontinence but performs self-catheterization every eight hours. (Exhibits 2, 4; Testimony)
7. Petitioner has a power assist wheelchair, but she cannot use it in her apartment because the wheelchair is large, and the apartment is small. Petitioner also does not use the wheelchair out in public very often because it is difficult for her caregivers to take apart and move. (Exhibits 2, 4; Testimony)
8. On November 13, 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 maximal assistance with meal preparation, housework, shopping, and transportation. Petitioner is independent with managing finances, managing medications, and phone use. Petitioner is independent with set up only with bed mobility, transferring, toilet transferring, locomotion (with wheelchair), dressing, toilet use, and personal hygiene. Petitioner requires limited assistance with bathing and washing her hair. (Exhibits 2, 4; Testimony)
9. Following the reassessment, the Waiver Agency determined that it needed additional information from Petitioner regarding the current level of services, what tasks are completed, and how long it takes to complete each task. On November 26, 2019, Petitioner provided the requested information. (Exhibit 1; Testimony)
10. Following the reassessment, the Waiver Agency determined that Petitioner's CLS hours would be reduced from 35 hours per week (5 hours per day, seven days per week) to approximately 20 hours per week (2 hours per day, seven days per week with a 4 hour block one time weekly for errands/shopping and 5 hours monthly for appointments) based on Petitioner's current need for assistance. (Exhibits 1, 4; Testimony)
11. On December 13, 2019, the Waiver Agency sent Petitioner a Notice of Adverse Benefit Determination indicating that CLS hours would be reduced as indicated above. (Exhibit 5; Testimony)

12. On December 11, 2019, Petitioner requested an Internal Appeal. (Exhibit 6; Testimony)
13. On January 8, 2020, the Internal Appeal was completed. Following the Internal Appeal, the Waiver Agency increased Petitioner's CLS to 22 hours week (3 hours per day, 6 days per week and 4 hours 1 day per week for errands and shopping). (Exhibit 9; Testimony)
14. On January 8, 2020, the Waiver Agency sent Petitioner a Notice of Internal Appeal Decision – Denial. The Notice included Petitioner's appeal rights. (Exhibit 9; Testimony)
15. On January 16, 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 Director testified that on November 13, 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 Waiver Agency's Director indicated that Petitioner requires maximal assistance with meal preparation, housework, shopping, transportation. Petitioner is independent with managing finances, managing medications, and phone use. Petitioner is independent with set up only with bed mobility, transferring, toilet transferring, locomotion (with wheelchair), dressing, toilet use, and personal hygiene. Petitioner requires limited assistance with bathing and washing her hair.

The Waiver Agency's Director indicated that following the reassessment, the Waiver Agency determined that it needed additional information from Petitioner regarding the current level of services, what tasks are completed, and how long it takes to complete each task. On November 26, 2019, Petitioner provided the requested information. The Waiver Agency's Director testified that based on this information, the Waiver Agency determined that Petitioner's CLS hours would be reduced from 5 hours per day, seven days per week to 2 hours per day, seven days per week with a 4 hour block 1 time weekly for errands/shopping and 5 hours monthly for appointments based on

Petitioner's current need for assistance. The Waiver Agency's Director testified that Petitioner then requested an Internal Appeal and following the Internal Appeal, the Waiver Agency determined that Petitioner's CLS hours would be increased to 3 hours per day for 6 days per week, plus 4 hours one day per week for errands and shopping.

Petitioner testified that she did not improve from the May 2019 assessment, as the Waiver Agency claimed, because nerve pain never improves. Petitioner indicated that unless there is some great advancement in the medical field, her condition will never improve. Petitioner provided information on her medical condition in Exhibit A. Petitioner testified that she did not think that the LOCD adequately addresses the issue of pain, which is her main health problem. Petitioner indicated that she has all three types of nerve pain and the pain starts within 30 seconds of any movement and becomes debilitating within a short period of time. Petitioner testified that she can get a few things done during the day, such as bathing and getting dressed, but that she has then used up all her pain quotient for the day and cannot do any more. Petitioner indicated that she has learned to mask her pain over the years and tries to be at the top of her game when she has visitors, such as for a reassessment.

With regard to her wheelchair, Petitioner testified that the wheel chair is power assist, not fully electric, and while it would allow her to go a little farther, she rarely uses the chair because it is too big for her apartment and too heavy for her caregivers to take apart and transport in their cars. Petitioner indicated that her shoulders are also in constant pain from all the pushing in her wheelchair.

Regarding the text messages that the Waiver Agency found concerning, Petitioner testified that she told her caregiver to only do a couple of the tasks before the Waiver Agency representative arrived because she thought the Waiver Agency representative was there to watch the caregiver perform her usual tasks to see how long those tasks take. Petitioner also indicated that she was not trying to coach her caregiver prior to the interview, but just wanted the caregiver to be prepared as the caregiver was nervous about the interview and not used to dealing with such things. Petitioner indicated that she is a very detailed person and wanted to make sure everything was covered.

Petitioner testified that when the Waiver Agency first contacted her about what tasks her caregivers were doing for her and how long those tasks take, she had been asleep and just answered quickly off the top of her head. Petitioner indicated that she usually has all of the tasks written on a white board and takes a picture of the tasks for the Waiver Agency. Petitioner testified that the assistance she needs is not just a matter of cooking and cleaning. Petitioner indicated that her caregivers work very hard to make sure she has everything she needs close by when they leave so she can reach things while she is along over the next 20 plus hours.

Regarding the time and task list the Waiver Agency prepared (Exhibit 9), Petitioner testified that the Waiver Agency underassessed both what needs to be done and how long those tasks take. Petitioner provided her own time and task list in her Exhibit A. Petitioner testified that her time and task list is based on her tracking everything for the

past six months. Petitioner indicated that she would never lie and would never ask her caregiver to lie.

In response, the Waiver Agency's director indicated that the improvement they mentioned with regard to Petitioner meant an improvement in her independence, not an improvement in her medical condition. The Waiver Agency's Director testified that this improvement in independence can be seen between the two most recent assessments in May 2019 and November 2019.

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. The evidence presented demonstrated that the Waiver Agency did a thorough job of reviewing Petitioner's needs and authorizing CLS, while also considering Petitioner's improved independence over time. As indicated, Petitioner is independent with most of her ADL's and requires assistance with her Instrumental Activities of Daily Living. The hours allocated by the Waiver Agency should be sufficient to take care of Petitioner's small apartment and make sure Petitioner has what she needs when she is alone. Frankly, the number of tasks that Petitioner would like her caregiver to perform are beyond what most people would consider reasonable to maintain a small apartment. Based on the information provided, 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 35 hours per week (5 hours per day, seven days per week) to 22 hours per week (3 hours per day, 6 days per week, plus 4 hours once a week for errands and shopping).

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 35 CLS hours per week to 22 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.

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DHHS -Dept Contact

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Petitioner

[REDACTED]
MI