



GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

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Date Mailed: July 8, 2020
MOAHR Docket No.: 20-000259
Agency No.: ██████████
Petitioner: ████████████████████

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 March 11, 2020. Catherine S. Reder, Attorney, represented the Petitioner. ██████████, the Petitioner, was present. ██████████, Caregiver, appeared as a witness for Petitioner. Monica Freier, Appeals Coordinator, represented the Respondent Department of Health and Human Services' Waiver Agency, Region VII Area Agency on Aging. ("Waiver Agency"). Angie Albertson, Registered Nurse (RN) Support Coordinator (SC); Ricardo Gomez, Social Worker (SW) SC; and Heidi Tweedie, RN Waiver Manager, appeared as witnesses for Respondent.

During the hearing proceeding, Respondent's Hearing Summary packet was admitted as Exhibit 1, pp. 1-24 and Petitioner's additional documentation was admitted as Exhibits A-F. Petitioner's Hearing request with attachments A-C is also included in the hearing record.

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 a Medicaid beneficiary and an ongoing recipient of services through the MI Choice Waiver program.
2. Petitioner was receiving 40 hours of CLS services per week. (Exhibit 1, p. 1)

3. On November 7, 2019, the Waiver Agency completed a reassessment with Petitioner in her home. The SCs determined that 21 hours of CLS per week is sufficient in amount, scope, and duration to reasonably meet Petitioner's service needs. (Exhibit 1, pp. 1-2 and 11-12)
4. On or about November 12, 2019, the Waiver Agency issued a written notice of the CLS reduction to Petitioner. (Hearing Request Attachment B)
5. On December 12, 2019, the Waiver Agency received Petitioner's request for an Internal Appeal. (Hearing Request Attachments A and B)
6. On January 13, 2020, a Notice of Internal Appeal Decision-Denial was issued to Petitioner upholding the reduction of CLS to 21 hours per week. (Hearing Request Attachment A)
7. On January 23, 2020, the Michigan Office of Administrative Hearings and Rules received Petitioner's hearing request. (Hearing Request)

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.

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 Medicaid Provider Manual (MPM) references the use of Minimum Operating Standards maintained and published by MDHHS, see MPM, January 1, 2020 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:

3. Service Need

SCs document the need for at least one MI Choice service, in addition to supports coordination, as a condition of participation in MI Choice. SCs determine initial and ongoing MI Choice service needs with participants and their allies using standardized assessment and reassessment tools and PCP practices.

*Minimum Operating Standards for MI Choice Waiver Program Services
Attachment K, FY 2020, page 26
(Exhibit 1, p. 6)*

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

2. The PAHP:

- a. Must endure the services are sufficient in amount, duration, or scope to reasonable achieve the purpose for which the services are furnished.
- b. May not arbitrarily deny or reduce the amount, duration, or scope of a required service solely because of diagnosis, type of illness, or condition of the participant.
- c. May place appropriate limits on a service on the basis of medical necessity or for the purpose of utilization control, provided that the services furnished can reasonable achieve their purpose, and are authorized in a manner that reflects the participant’s ongoing need for such services and supports.

(d.-f. omitted)

- g. Must authorize LTSS based on an enrollee's current needs assessment and consistent with the person-centered service plan.

(h. omitted)

*Minimum Operating Standards for MI Choice Waiver Program Services
Attachment C, FY 2020, page 28
(Exhibit A, p. 8)*

On November 7, 2019, the Waiver Agency completed a reassessment with Petitioner in her home. Petitioner and her Caregiver were present. The RN Waiver Manager's note from this visit states:

A Clinical over-site visit was conducted with [Petitioner], [RNSC], [SWSC], [RN Waiver Manager]. [Caregiver] was present but did not participate during the assessment. [Petitioner] was a very pleasant and active participant in her PSCP today. [Petitioner] has had no hospitalizations since 2016, and no falls since April 2017. She was noted to have utilized the stairs without assistance [from] caregiver upon our arrival and greeted Region VII at the door, then navigated back up the stairs without assistance. [Petitioner] reported that she is able to prepare meals with the microwave, sandwiches, but does not use the stove. She makes her bed, does her laundry, but only occasionally when [her son] doesn't do this. She also reported that she is able to toilet herself, bath herself with the use of her shower chair, dress herself gets in and out of the car, uses the phone, and manages her finances independently with the use of a calculator. [Petitioner] enjoys playing cards, reading, watching television, and going to her spiritual class when she can. [Petitioner] is paying \$300.00 for rent (her previously owned home), \$153 for electric and gas, \$155 car insurance, and \$100 for cable/internet/and telephone. She reported that [Caregiver (son's girlfriend)] is her self-determination worker, but did not know how many [hours] per week she was working. I inquired if she was signing time sheets and she reported that she had been but was not "paying attention" to the hours that was on them. When inquired about what tasks [Caregiver] assisted [her] with, she reported that [Caregiver] sets up her medications every 2 weeks in medication boxes, takes her to appointments, makes dinner sometimes, and completed homemaking

tasks. She was asked again if [Caregiver] assisted with personal care item by item on the assessment and [Petitioner] denied this assistance from [Caregiver] reporting independence. [Petitioner] was able to demonstrate safe transfers independently from chair, bed, and toilet. She explained how she bathes independently, and has shown a great deal of improvement from previous assessments. She is currently attending outpatient Physical Therapy 2-3 times each week. [Petitioner] improved 15 out of 20 ADL/IADL tasks since last assessment. [Petitioner] expressed that she would like to get out to the community more, and we discussed opportunities. [Petitioner] is willing to try Golden Horizon's on 11-15-19 to see if this is something she would enjoy, she was also offered to try caregivers through an agency to meet new people, and have back up if needed for [Caregiver]. She was agreeable to this idea also. It was explained that [Petitioner] has shown a great deal of improvement [in] her function and CLS would need to be reduced at this time. [Petitioner] was understanding, and the goals will [continue] to be developed to get her interacting within the community more.

Exhibit 1, pp. 11-12

There is also a similar note from the SW SC from the November 7, 2019, assessment. (Exhibit 1, p. 12) The RN SC testified that she did not see any signs or symptoms of hypoglycemia during the assessment. Petitioner reported that she checks her own sugar and when she checked it that morning it was 120. Petitioner also demonstrated that she was able to: get in and out of her bed on her own; transfer herself from sitting to standing; and get on and off the toilet independently. Petitioner showed the RN SC her shower, shower bench, handheld shower, and grab bars and explained how she is able to shower and get dressed independently. (RN SC Testimony) The SW SC testified that he assessed Petitioner's cognitive functioning during the assessment. Petitioner was able to answer questions appropriately and was able to recall three words after 10-15 minutes. (SW SC Testimony) The RN Waiver Manager noted that Petitioner's Caregiver did interject a couple of times during the assessment and the information she provided was considered along with the information from Petitioner. (RN Waiver Manager Testimony)

Based on the information reported for this assessment, the SCs determined that 21 hours of CLS per week was sufficient in amount, scope, and duration to reasonably meet Petitioner's service needs. (Exhibit 1, pp. 1-2 and 11-12) The 21 hours includes assistance with homemaking, transportation, meal preparation, and laundry. Assistance with activities that would be considered skilled services are not included in the CLS authorization, such as medication administration. Petitioner's Caregiver was providing that as an informal support at this was Petitioner's preference. The biggest difference

from the 40 hours per week previously authorized related to the improvements reported for this assessment, such as with personal care activities. The additional hours of CLS did not appear to be needed. (RN Waiver Manager and RN SC Testimony)

Petitioner testified that when the assessment occurred, they did not really get the big picture of what is involved to take care of her. Petitioner described her daily routine as well as the assistance she receives with many activities in detail. Petitioner stated she did not recall walking down the three steps to let the Waiver Agency in for the assessment. Petitioner was not sure if some of the information she provided for the assessment was accurate at that time, such as the concerns with the Caregiver doing as much housework as she should be doing. Petitioner agrees that the Caregiver does assist her with housework. Further, the Caregiver has been helping Petitioner for five years, so they have a routine. There are some things that when Petitioner was asked about them, she just took them as automatic and did not give much thought to the assistance her Caregiver provides. Petitioner described her physical restrictions, affecting her shoulders and arms as well as not being able to stand for long periods of time. Petitioner acknowledged that she signed the Caregiver's timesheets but does not check what the Caregiver puts down. The hours per day may vary as needed, but the assistance does add up to 40 hours per week. (Petitioner Testimony)

Petitioner's Caregiver agreed with Petitioner's testimony regarding the assistance she provides Petitioner on a daily basis. Petitioner's Caregiver further agreed that as they have been together about five years and things have become automatic and routine. Petitioner's Caregiver explained that she has been providing all of Petitioner's transportation. Petitioner has not taken a bus or used other transportation. Petitioner may not be able to verbalize the assistance she needs and is used to for transportation. Petitioner's caregiver can also tell when Petitioner needs to check her sugar from Petitioner's behavior, tone of voice, the words she uses, her attitude, etc. For example when they are out at appointments or if Petitioner has been more physical, after a nap, or at night. There are times Petitioner has been unable to check her sugar, so the Caregiver will check it and has had to give Petitioner insulin. Petitioner's Caregiver actually does more for Petitioner than even the 40 hours of CLS included. Petitioner's Caregiver stated that she was not asked to participate in this assessment, though she has participated in assessments in the past. Petitioner's Caregiver believes that it would have made a difference if she had been allowed to participate. (Caregiver Testimony)

Petitioner bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in their determination to reduce the CLS services. Given the record in this case, the undersigned Administrative Law Judge finds that Petitioner has not met that burden of proof. Petitioner acknowledged that she has been in this program since 2014 and has participated in a number of these assessments. Petitioner understands that it is important to be upfront and clear so the SCs understand what her needs are. (Petitioner Testimony) While Petitioner's Caregiver testified that she was not invited to participate in this assessment, she was present, has participated in assessments in the past, and did interject at times during this assessment. (Caregiver

and RN Waiver Manager Testimony) If Petitioner is not providing accurate information, for example because daily activities have become so routine that she does not think about the assistance that is needed, or if Petitioner is displaying signs of hypoglycemia that her Caregiver is familiar with and may not be obvious to others, Petitioner's Caregiver should let the SCs know and provide the additional/clarifying information. The Waiver Agency relies upon the information provided during an assessment to determine the appropriate ongoing supports and services. When the information reported indicates increased independence with many activities, such as personal care, a reduction in CLS hours that had been authorized to assist with those activities is appropriate. Accordingly, the Waiver Agency's determination to reduce Petitioner's CLS hours is upheld based on the information provided for this assessment.

As noted during the hearing proceeding, any changes with Petitioner's condition, functional abilities, and needs for assistance can be reported to the Waiver Agency and would be considered in determining the appropriate ongoing supports and services.

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 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

Kim Cates
1399 W. Center Road
Essexville, MI 48732

DHHS -Dept Contact

Brian Barrie
CCC 7th Floor
Lansing, MI 48919

Counsel for Petitioner

Catherine S Reder
900 Center Avenue, Lower Level
Bay City, MI 48708

DHHS -Dept Contact

Elizabeth Gallagher
400 S. Pine 5th Floor
Lansing, MI 48909

Petitioner

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

Community Health Rep

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