

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: August 13, 2020
MOAHR Docket No.: 20-003009
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 June 23, 2020. [REDACTED], the Petitioner, appeared on her own behalf. Linda Frost, Chief Clinical Officer, represented the Respondent, Department of Health and Human Services' Waiver Agency, Region 3B Area Agency. ("Waiver Agency"). Jacqueline Wagner, Clinical Manager of Social Work; and Brandy Aucunas, Program Analyst, appeared as witnesses for Respondent.

During the hearing proceeding, Respondent's Hearing Summary packet was admitted as Exhibit A, pp. 1- 73; and Petitioner's Hearing Request and additional documentation was admitted as Exhibit 1, pp. 1-27.

ISSUE

Did the Waiver Agency properly determine the effective date for the wage increase for Petitioner's Self-Determination (SD) worker?

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. On January 7, 2020, a Michigan Medicaid Level of Care Determination (LOCD) was completed. (Exhibit A, pp. 15-22)

3. On March 17, 2020, Petitioner spoke with the Clinical Manager by phone and requested a wage increase for her SD worker retroactive to January 7, 2020. (Clinical Manager Testimony)
4. On March 17, 2020, the wage increase form was emailed to Petitioner. (Clinical Manager Testimony)
5. On March 20, 2020, the Waiver Agency received the wage increase form back from Petitioner. (Clinical Manager Testimony)
6. On March 26, 2020, the Waiver Agency Claims and Contacts Department told the Clinical Manager that the wage increase can be made retroactive to March 16, 2020. (Clinical Manager Testimony)
7. On April 2, 2020, the Clinical Manager notified Petitioner of the decision. (Clinical Manager Testimony)
8. On April 3, 2020, Petitioner requested to appeal the decision. (Clinical Manager Testimony)
9. On April 7, 2020, a Notice of Adverse Benefit Determination was issued to Petitioner stating the request to have the SD worker's wage increase be effective January 7, 2020, was denied. The wage increase was approved effective March 16, 2020. (Exhibit A, pp. 2-5)
10. On April 8, 2020, the Waiver Agency received Petitioner's request for an Internal Appeal. (Exhibit A, pp. 6-11)
11. On May 6, 2020, a Notice of Internal Appeal Decision-Denial was issued to Petitioner upholding the decision to deny retroactive pay to January 7, 2020. The notice explained that the LOCD is not used as a tool to determine the rate of pay for caregivers. The LOCD helps determine eligibility for the MI Choice Waiver program. The progress notes did not show a request for a wage increase until March 17, 2020. The start date of March 16, 2020, was based on the beginning of the current pay period when the wage increase was requested. (Exhibit A, pp. 12-14)
12. On May 15, 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 Medicaid Provider Manual (MPM) addresses functional eligibility for the MI Choice Waiver program:

2.2 FUNCTIONAL ELIGIBILITY

The MI Choice waiver agency must verify an applicant's functional eligibility for program enrollment using the LOCD application in CHAMPS. Waiver agencies must conduct an LOCD in person with an applicant and submit that information in the LOCD application in CHAMPS, or the agency may adopt the current existing LOCD conducted by another provider. The information submitted is put through an algorithm within the application to determine whether the applicant meets LOCD criteria. Only the LOCD application in CHAMPS can determine functional eligibility for the nursing facility level of care. Additional information can be found in

the Nursing Facility Level of Care Determination Chapter and is applicable to MI Choice applicants and participants.

MPM, MI Choice Waiver Chapter,
April 1, 2020 version, page 26

The MPM also addresses SD:

6.3 SELF-DETERMINATION

Self-Determination provides MI Choice participants the option to direct and control their own waiver services. Not all MI Choice participants choose to participate in self-determination. For those that do, the participant (or chosen representative(s)) has decision-making authority over staff who provide waiver services, including:

- Recruiting staff
- Referring staff to an agency for hiring (co-employer)
- Selecting staff from worker registry
- Hiring staff (common law employer)
- Verifying staff qualifications
- Obtaining criminal history review of staff
- Specifying additional service or staff qualifications based on the participant's needs and preferences so long as such qualifications are consistent with the qualifications specified in the approved waiver application and the Minimum Operating Standards
- Specifying how services are to be provided and determining staff duties consistent with the service specifications in the approved waiver application and contract attachments
- Determining staff wages and benefits, subject to State limits (if any)
- Scheduling staff and the provision of services
- Orienting and instructing staff in duties
- Supervising staff
- Evaluating staff performance
- Verifying time worked by staff and approving timesheets
- Discharging staff (common law employer)
- Discharging staff from providing services (co-employer)
- Reallocating funds among services included in the participant's budget

- Identifying service providers and referring for provider enrollment
- Substituting service providers
- Reviewing and approving provider invoices for services rendered

Participant budget development for participants in self-direction occurs during the PCP process and is intended to involve individuals the participant chooses. Planning for the person-centered service plan precedes the development of the participant's budget so that needs and preferences can be accounted for without arbitrarily restricting options and preferences due to cost considerations. A participant's budget is not authorized until both the participant and the waiver agency have agreed to the amount and its use. In the event that the participant is not satisfied with the authorized budget, he/she may reconvene the PCP process. The waiver services of Fiscal Intermediary and Goods and Services are available specifically to self-determination participants to enhance their abilities to more fully exercise control over their services.

The participant may, at any time, modify or terminate the self-determination option. The most effective method for making changes is the PCP process in which individuals chosen by the participant work with the participant and the supports coordinator to identify challenges and address problems that may interfere with the success of self-determination. The decision of a participant to terminate participation in self-determination does not alter the services and supports identified in the person-centered service plan, with the exception of the termination of the self-determination only services, Fiscal Intermediary, and Goods and Services. When the participant terminates self-determination, the waiver agency has an obligation to assume responsibility for ensuring the provision of all other services identified in the person-centered service plan through its provider network.

A waiver agency may terminate self-determination for a participant when problems arise due to the participant's inability to effectively direct services and supports. Prior to terminating self-determination (unless it is not feasible), the waiver agency informs the participant in writing of the issues that have led to the decision to terminate this option. The

waiver agency will continue efforts to resolve the issues that led to the termination.

MPM, MI Choice Waiver Chapter,
April 1, 2020 version, page 26
(Underline added by ALJ)

On March 17, 2020, Petitioner spoke with the Clinical Manager by phone and requested a wage increase for her SD worker, her daughter, retroactive to January 7, 2020, the date an LOCD was completed. The wage increase form was emailed to Petitioner that same day. On March 20, 2020, the Waiver Agency received the wage increase form back from Petitioner. (Clinical Manager Testimony) On March 26, 2020, the Waiver Agency Claims and Contacts Department told the Clinical Manager that the wage increase can be made retroactive to March 16, 2020. (Clinical Manager Testimony)

Petitioner requested an internal appeal of the determination. (Exhibit A, pp. 6-11; Clinical Manger Testimony) On May 6, 2020, a Notice of Internal Appeal Decision-Denial was issued to Petitioner upholding the decision to deny retroactive pay to January 7, 2020. The notice explained that the LOCD is not used as a tool to determine the rate of pay for caregivers. The LOCD helps determine eligibility for the MI Choice Waiver program. The progress notes did not show a request for a wage increase until March 17, 2020. The start date of March 16, 2020, was based on the beginning of the current pay period when the wage increase was requested. (Exhibit A, pp. 12-14)

In February 2020, Petitioner had an agency come in to provide care for a portion of her weekly hours and found out how much the agency worker was paid at that time. Petitioner subsequently requested the same rate of pay for her SD worker. Petitioner asserts that the agency rate of pay was based on the January 7, 2020, LOCD, which showed an increase in her care needs and level of care compared to a January 11, 2019, LOCD. Petitioner argued that if she had access to CHAMPS she would have seen an increase in the level of care/services her caregiver would have to perform and would have been aware that she could request an increase in the wage. Therefore, Petitioner requested that the wage increase for her SD worker be made retroactive to January 7, 2020. (Exhibit A, pp. 15-30; Exhibit 1; Petitioner Testimony) Petitioner also referenced a change in scoring from 2B in 2019 to 2A in 2020. (Exhibit 1; Petitioner Testimony) This scoring relates to the service need level listed on Petitioner's back-up plan. (Exhibit A, p. 34; Clinical Manger Testimony)

As indicated in the above cited MPM policy, the LOCD is used to determine whether an individual requires nursing facility care, which is an eligibility requirement for the MI Choice Waiver program and other long-term care (LTC) programs. The Freedom of Choice section on the coverage with the LOCD lists the various LTC programs Petitioner would be eligible to receive services/supports through based on meeting the LOCD criteria. Petitioner chose to receive services/supports though the MI Choice Waiver program. (Exhibit A, pp. 15 and 23)

The Clinical Manager confirmed that the LOCD is not considered in determining wages. Further, the Waiver Agency pays provider agencies a flat rate, and does not determine the rate of pay for the worker(s) from the provider agencies. For SD workers, the Waiver Agency would ask the participant when they sign up for SD what rate of pay they would like for their worker(s), typically it starts between \$10 and \$12 per hour. When an increase is desired, there is a form that is completed to implement the wage increase. (Clinical Manager Testimony)

Petitioner bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in their determination regarding the start date for the wage increase for her SD worker. Given the record in this case, the undersigned Administrative Law Judge finds that Petitioner has not met that burden of proof. Pursuant to the above cited MPM policy, as an SD Participant Petitioner has decision-making authority over staff who provide waiver services. This includes determining staff wages. Petitioner and the Waiver Agency would have agreed to the amount and use of Petitioner's budget when it was authorized, which would include the wage for her SD worker. Further, Petitioner would have been aware of what services her SD worker provides for her and discussed those needs during assessments with the Waiver Agency. When Petitioner requested a wage increase for her SD worker, it was promptly reviewed and approved effective the beginning of the current pay period. Accordingly, the Waiver Agency's determination that the wage increase would be effective March 16, 2020, is upheld.

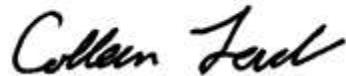
DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly determined the effective date for the wage increase for Petitioner's SD worker 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 -Dept Contact

Heather Hill
CCC 5th Floor
Lansing, MI 48909

Community Health Rep

Area Agency on Aging Region 3B
200 W. Michigan Ave, Suite 102
Battle Creek, MI 49017

DHHS -Dept Contact

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CCC 7th Floor
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Petitioner

[REDACTED]
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[REDACTED] MI [REDACTED]