



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 24, 2020
MOAHR Docket No.: 20-003012
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 July 16, 2020. [REDACTED], the Petitioner, appeared on her own behalf. [REDACTED], Care Provider, appeared as a witness for Petitioner. Anne Beatty, Social Work (SW) Manager, represented the Respondent Department of Health and Human Services' Waiver Agency, Detroit Area Agency on Aging. ("Waiver Agency"). Jean Reinbold, Registered Nurse (RN) Support Coordinator (SC); Deborah Baitinger, Chief Compliance Officer; Dare Adewole, SW SC; and JoAnn T. Knasiak, RN Manager, appeared as witnesses for Respondent.

During the hearing proceeding, Respondent's Hearing Summary packet was admitted as Exhibits A-E and Petitioner's Hearing Request was admitted as Exhibit 1, pp. 1-10.

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 31 hours of CLS services per week, 5 hours per day Monday through Friday and 3 hours per day on Saturday and Sunday. (SW Manager Testimony)
3. On March 22, 2019, the Waiver Agency completed a reassessment with Petitioner in her home. (Exhibit A, pp. 1-17)
4. On or about March 7, 2020, the Waiver Agency determined that Petitioner's CLS hours would be reduced and a written notice was mailed to her. The CLS hours were reduced to three hours per day Monday through Friday. (SW Manager Testimony)
5. On March 9, 2020, the SW SC called Petitioner for a monthly contact and to inform her of the reduction in CLS hours. The SC explained the appeals process and a time was set up for a routine assessment. (Exhibit C p. 1)
6. On April 16, 2020, the SW SC spoke with Petitioner, who expressed frustration with her hours recently being reduced. (Exhibit C, p. 2)
7. On April 30, 2020, Petitioner spoke with the SW Manager. Petitioner stated she had not received written notice of the CLS reduction and explained that she needed CLS services on the weekends because she is wheelchair bound. The Waiver Agency restored 3 hours of CLS each day for Saturday and Sunday. (Exhibit C, p. 3)
8. On April 30, 2020, the Waiver Agency re-issued the Notice of Adverse Benefit Determination to Petitioner, which stated that CLS would be reduced because Petitioner has been stable with no reported hospitalizations. (Exhibit 1, p. 2)
9. On May 5, 2020, the Waiver Agency received Petitioner's request for an Internal Appeal. (Exhibit 1, p. 10)
10. On May 7, 2020, a Notice of Internal Appeal Decision-Denial was issued to Petitioner upholding the denial of CLS hours above three hours per day seven days per week. The denial was upheld because Petitioner's medical condition has remained stable; family support is adequate; Petitioner is not bed bound; and Petitioner does not require 24-hour care. (Exhibit 1, p. 10)
11. On May 15, 2020, the Michigan Office of Administrative Hearings and Rules received Petitioner's hearing request. (Exhibit 1, pp. 1-10)

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 CLS as a MI Choice Waiver service:

4.1.D. 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 includes 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.

CLS includes:

- Assisting, reminding, cueing, observing, guiding and/or training in household activities, Activities of Daily Living (ADL), or routine household care and maintenance.
- Reminding, cueing, observing or monitoring of medication administration.
- Assistance, support 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 assistance on activities that promote community participation such as using public transportation, using libraries, or volunteer work;
 - Transportation from the participant's residence to medical appointments, 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 service 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.

MPM, April 1, 2020 version,
MI Choice Waiver Chapter,
Pages 11-13

The MPM also references the use of Minimum Operating Standards maintained and published by MDHHS, see MPM, April 1, 2020 version, MI Choice Waiver Chapter, page 26. In support of their determination in the case, the Waiver Agency cited Attachment H of those operating standards, specifically the section pertaining to CLS. (Exhibit E, pp. 1-6)

In this case, the evidence indicates the Waiver Agency reduced Petitioner's CLS hours prior to completing her annual re-assessment. The initial determination to reduce the CLS to 3 hours Monday through Friday occurred on or about March 7, 2020. (SW Manager Testimony) At that time, the most recent assessment had been conducted on March 22, 2019. (Exhibit A, pp. 1-17) The reduction was based on the assessment indicating she received 18 hours of informal care in the last 3 days from her support system, her ADLs had been stable since her enrollment, and she had not been hospitalized since April 2016. (Hearing Summary and SW Manager Testimony)

Petitioner assertions regarding when and how she found out about the reduction to her CLS hours were somewhat inconsistent. Petitioner asserted that the April 9, 2020, call with the SW SC did not occur. In the hearing request, Petitioner stated she found out about the reduction when her care provider showed her the earnings. (Exhibit 1, p. 3) However, in her testimony, Petitioner stated that she spoke with the SW SC on March 27, 2020. In part, during that call the SW SC told Petitioner the CLS hours had been reduced and that he had sent a letter on March 7, 2020; Petitioner stated she did not receive the letter and asked for it to be re-sent; and the SW SC told her he could not re-mail the letter because they are working for home. Then in April 2020, the home care agency let the Care Provider know his hours had been reduced and the care provider

showed Petitioner his check for the first time. Petitioner acknowledged speaking with the SW SC on April 16, 2020. However, Petitioner stated this was because she called to report that she was hurt after an accident in the house. (Petitioner Testimony)

However, it was uncontested that Petitioner spoke with the SW Manager on April 30, 2020, and that day, the CLS hours for Saturday and Sunday were restored. Accordingly, the reduced CLS hours were adjusted to 3 hours per day, seven days per week.

The SW Manager asserted that Petitioner stated the additional CLS hours were needed for outdoor work (lawn care/snow removal), attending appointments with her, and additional homemaking services. The SW Manager noted that the outdoor activities are not included in Petitioner's care plan and asserted that they are not covered as CLS services. (Exhibit D, p. 2; SW Manager Testimony) The CLS description in the MPM policy does not appear to allow for seasonal activities, such as lawn care and snow removal. The CLS description in Attachment H does indicate CLS can cover seasonal household care and maintenance. (Exhibit E, p. 1) However, it does not appear that lawn care or snow removal were included Petitioner's care plan as CLS covered services. (Exhibit D, p. 2) The SW Manager indicated that additional CLS hours could be requested as needed for attending appointments. However, as it is not a regular daily occurrence, it is not part of the daily CLS authorization. (SW Manager Testimony) Regarding the additional homemaking services, the SW Manager asserted that CLS only covers light housekeeping services. (SW Manager Testimony) Again, the MPM and Attachment H descriptions of CLS differ regarding CLS covering only routine household cleaning and maintenance or whether heavy household care and maintenance can be covered. (Exhibit E, p. 1)

Petitioner's testimony indicted the home care agency had contracted the lawn care/snow removal to be completed by another company. When that company was not completing the work, the agency gave the hours to her CLS Care Provider. (Petitioner Testimony) Accordingly, it is unclear whether the lawn care/snow removal had been authorized as a CLS service or as some other type of service. As noted above, lawn care/snow removal are not tasks included in Petitioner's CLS authorization. (Exhibit D, p. 2)

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. While it is unusual for a determination to reduce CLS services to be made almost a year after the last assessment, the available evidence supports the determination that 21 hours of CLS per week was sufficient in amount, scope, and duration to reasonably meet Petitioner's daily service needs for the authorized tasks at that time. The Waiver Agency's determination to reduce Petitioner's CLS hours is upheld based on the available information. As indicated by the SW Manager, additional hours can be requested as needed for attending appointments. The Waiver Agency should also clarify with the home care agency regarding how the lawn

care/snow removal services were previously authorized as it does not appear that this was included in the prior CLS authorization.

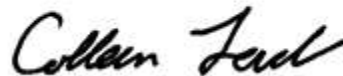
Any changes or clarifications regarding Petitioner's condition, functional abilities, and needs for assistance can be reported to the Waiver Agency and would be considered in determining the appropriate ongoing supports and services. Petitioner has not had an in-home assessment this year, however, that is understandable because in-home assessments are not presently being completed due to COVID-19.

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 at that time.

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 -Dept Contact

Brian Barrie
CCC 7th Floor
Lansing, MI 48919

DHHS -Dept Contact

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

Petitioner

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██████████
██████ MI ██████

Community Health Rep

Ronald Taylor
Detroit Area Agency on Aging
1333 Brewery Park Blvd
Detroit, MI 48207