

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: November 18, 2020
MOAHR Docket No.: 20-006230
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 was held on November 17, 2020. [REDACTED], Guardian, appeared and testified on Petitioner's behalf. [REDACTED], Caregiver, appeared as a witness

Christine Schram, Social Worker Supports Coordinator, appeared and testified on behalf of the Department's Waiver Agency, Region 3B Area Agency on Aging. (Waiver Agency or Region 3B). Jacqueline Wagner, Clinical Manager, 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 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]. (Exhibit A, p 2; Testimony)

4. Petitioner is diagnosed with cerebral ischemia, Alzheimer's disease, hypertension, history of TIA, and cerebral infarctions. Petitioner receives hospice services and no longer wishes to pursue preventative health care. (Exhibit A, pp 26, 34-35, 39; Testimony)
5. Petitioner lives with her guardian and caregiver in a single-family home. Petitioner is ambulatory and uses a walker, but experiences severe fatigue and shortness of breath, requiring her to sit down to catch her breath when walking from room to room. (Exhibit A, p 39; Testimony)
6. Petitioner wears briefs in case of incontinence but is fully continent of bowel and bladder during the day. (Exhibit A, p 41; Testimony)
7. On September 15, 2020, the Waiver Agency's Social Worker Supports Coordinator conducted a telephone (due to COVID) reassessment with Petitioner's guardian. Petitioner is independent with the Activities of Daily Living (ADL's) of bed mobility, transferring, eating, and transferring on and off the toilet. Petitioner requires supervision with locomotion (walking), extensive assistance with transportation and limited assistance with dressing. Petitioner is totally dependent on others for the Instrumental Activities of Daily Living (IADL's) of meal preparation, housework, managing finances, managing medications, and shopping. Petitioner requires extensive assistance with stairs. (Exhibit A, pp 30-47; Testimony)
8. 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. This information was provided by Petitioner's caregiver. (Exhibit A, pp 3-4; Testimony)
9. Following the reassessment, the Waiver Agency determined that Petitioner's CLS hours would be reduced from 35 hours per week to 20 hours per week based on Petitioner's current need for assistance. The Waiver Agency reasoned that the reduction was appropriate based on Petitioner's informal supports, the fact that Petitioner was using CLS for services not covered by the Waiver, and the fact that Petitioner had hospice services providing some hands-on assistance with personal care tasks. (Exhibit A, pp 1, 5; Testimony)
10. On September 17, 2020, the Waiver Agency sent Petitioner a Notice of Adverse Benefit Determination indicating that CLS hours would be reduced as indicated above. (Exhibit A, pp 5-8; Testimony)
11. On or about September 22, 2020, Petitioner requested an Internal Appeal. (Exhibit A, p 12; Testimony)

12. On September 28, 2020, the Internal Appeal was completed. Following the Internal Appeal, the Waiver Agency increased Petitioner's CLS back to 30 hours per week. The Waiver Agency concluded that Petitioner's CLS would be reduced three hours per week due to Petitioner's caregiver providing medication administration and money management, which are not covered services under the Waiver. The Waiver Agency also concluded that Petitioner's CLS would be reduced two hours per week because Petitioner has a bath aide coming through hospice twice per week for one hour each time. As such, the Waiver Agency determined that Petitioner's CLS would be reduced from 35 hours per week to 30 hours per week. (Exhibit 1, p 5; Testimony)
13. On September 28, 2020, the Waiver Agency sent Petitioner a Notice of Internal Appeal Decision – Denial. The Notice included Petitioner's appeal rights. (Exhibit 1, pp 5-7; Testimony)
14. On October 6, 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
July 1, 2020, 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 Social Worker Supports Coordinator (SWSC) testified that on September 15, 2020, she conducted a telephone (due to COVID) reassessment with Petitioner's guardian. The Waiver Agency's SWSC testified that Petitioner is independent with the ADL's of bed mobility, transferring, eating, and transferring on and off the toilet and that Petitioner requires supervision with locomotion (walking), extensive assistance with transportation and limited assistance with dressing. The Waiver Agency's SWSC indicated that Petitioner is totally dependent on others for the IADL's of meal preparation, housework, managing finances, managing medications, and shopping and requires extensive assistance with stairs.

The Waiver Agency's SWSC testified that following the reassessment, she determined that she needed additional information from Petitioner regarding the current level of services, what tasks are completed, and how long it takes to complete each task so she requested this information from GT Financial. The Waiver Agency's SWSC indicated that this information was provided by Petitioner's caregiver. The Waiver Agency's SWSC testified that based on this information and the information provided at the assessment she determined that Petitioner's CLS hours would be reduced from 35 hours per week to 20 hours per week based on Petitioner's current need for assistance. The Waiver Agency's SWSC reasoned that the reduction was appropriate based on Petitioner's informal supports, the fact that Petitioner was using CLS for services not covered by the Waiver, and the fact that Petitioner had hospice services providing bathing to Petitioner twice per week.

The Waiver Agency's SWSC testified that following the Internal Appeal, the Waiver Agency increased Petitioner's CLS to 30 hours per week, reasoning that Petitioner's CLS would be reduced three hours per week due to Petitioner's caregiver providing medication administration and money management, which are not covered services under the Waiver. The Waiver Agency's SWSC also noted that it was determined that Petitioner's CLS would be reduced two hours per week because Petitioner has a bath aide coming through hospice twice per week for one hour each time.

Petitioner's guardian testified that most everything the Waiver Agency's SWSC testified to is true, except that Kathy, the family friend who moved in with them, does not provide any direct or informal care to Petitioner but is rather a co-resident of the home. Petitioner's guardian testified that the resident may converse with Petitioner or play a game with her, but his wife is Petitioner's exclusive caregiver. Petitioner's guardian testified that Petitioner needs 24/7 care and monitoring. Petitioner's guardian also noted that the previous SWSC had informed him that Petitioner's CLS hours would be increased to 42 hours per week. Petitioner's guardian testified that he has reviewed Petitioner's CLS time over the past three years, and it has fluctuated up to 40 hours per week.

Petitioner's guardian testified that it was his understanding that the main reason Petitioner's CLS hours were reduced was because they were giving her medicine and hospice was providing Petitioner baths twice per week. Petitioner's guardian testified that taking away hours for those services does not add up to the original reduction. Petitioner's guardian indicated that they would take away the bath aide through hospice so that they could get those hours back through CLS. Petitioner's guardian testified that they are grateful for any hours that they get but that taking care of Petitioner is not an easy task. Petitioner's guardian also noted that getting Petitioner's CLS hours to where they were was not an easy task and now they will have to work hard to get those hours back. Petitioner's guardian testified that Petitioner has been on hospice for four years and has been getting the bath aide the whole time. Petitioner's guardian questioned how this could be an issue suddenly.

Petitioner's caregiver testified that the new resident does not provide any care to Petitioner and does not watch Petitioner when they go out. Petitioner's guardian indicated that this resident is a family friend that they are taking care of. Petitioner's guardian also noted that they have since cancelled the bath aide through hospice in the hopes of getting Petitioner's CLS hours reinstated.

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 needs and the other services available to her. As indicated, Medicaid is the payor of last resort, so Petitioner cannot cancel her bath aide through hospice and then request the same service through the Waiver Agency. It also appears that Petitioner's guardian was informed of this fact during a telephone call with the Waiver Agency's SWSC on October 5, 2020. (Exhibit A, p 11.) As such, the Waiver Agency was correct in reducing Petitioner's CLS by two hours per week to account for the hospice bath aide. Further, the Waiver Agency was correct in reducing Petitioner's CLS by three hours per week because CLS was being used for money management and medication administration, two services not covered by the Waiver.

It should also be noted that Petitioner cannot use the appeals process to request an increase in CLS, as it appears she is doing here. The undersigned is limited to reviewing the Waiver Agency's decision based on the information available to the Waiver Agency at the time the decision was made. If Petitioner needs an increase in CLS, she must make a formal request through the Waiver Agency after the appeal process is over.

Based on the information provided, the reduction in CLS was appropriate. As indicated, 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 to 30 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 35 CLS hours per week to 30 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 -Dept Contact

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