

[REDACTED]

APPELLANT

v.

MARYLAND DEPARTMENT

OF HEALTH

* BEFORE LATONYA B. DARGAN,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MDH-MCP-11A-17-38769

* * * * *

DECISION

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STATEMENT OF THE CASE

On or around June 8, 2017, [REDACTED] (Appellant) submitted a Plan of Service (POS) for annual redetermination to the Maryland Department of Health (MDH or Department) under the Community First Choice Program (CFCP), a component of the Maryland Medical Assistance (MA) Program. In the POS, the Appellant requested eighty-four hours of Personal Assistance Services (PAS) per week. After reviewing the POS, the Department, by letter dated November 9, 2017, denied the Appellant's request on the basis the supporting documentation did not demonstrate a medical need for eighty-four PAS hours per week and some of the requested tasks for the PAS provider to complete were not covered under the PAS program. The Department approved the Appellant to receive sixty-six-and-one-half PAS hours per week. On November 11, 2017, the Appellant filed a request for hearing to challenge the Department's determination denying the requested service hours.

On May 10, 2018, I conducted a hearing at the Office of Administrative Hearings (OAH) in [REDACTED] Maryland. Code of Maryland Regulations (COMAR) 10.01.04.06. [REDACTED] [REDACTED] the Appellant's daughter, represented the Appellant, who was also present. Erin Reilly, Assistant Attorney General, represented the Department.

The contested case provisions of the Administrative Procedure Act, the procedures for Fair Hearing Appeals under the Maryland State MA Program, and the Rules of Procedure of the OAH govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); COMAR 10.01.04; COMAR 28.02.01.

ISSUE

Did the Department improperly deny the Appellant's request for eighty-four PAS hours per week?

SUMMARY OF THE EVIDENCE

Exhibits

The Appellant did not submit any exhibits.

I admitted the following exhibits for the Department:

MDH Ex. 1: interRAI™ Home Care Maryland Assessment Form, [REDACTED] 2017

MDH Ex. 2: Plan of Service-Summary, undated

MDH Ex. 3: The Daily Task Schedule for the Appellant's POS, undated

MDH Ex. 4: Notice Denying Annual Redetermination, November 9, 2017

MDH Ex. 5: Hearing Summary, undated

Testimony

[REDACTED] testified on behalf of the Appellant. The Department presented the testimony of Verna Hickinson, R.N.¹

¹ Registered Nurse

FINDINGS OF FACT

I find the following by a preponderance of the evidence:

1. The Appellant is seventy-six years old and has the following diagnoses: anxiety, depression, diabetes, epidemic vertigo, hyperlipidemia, hypertension, and hypothyroidism.
2. The Appellant is not a fall risk, but she does regularly experience dizziness due to the vertigo, and she has an unsteady gait. She uses an assistive device, such as a cane or walker, to ambulate. She does not drive.
3. The Appellant regularly experiences moderate back pain, which is controlled through medications such as acetaminophen and aspirin. She also regularly takes medications to control the symptoms of her medical and psychiatric conditions.
4. The Appellant is frequently incontinent of bladder and wears briefs. She is continent of bowel.
5. The Appellant requires maximal assistance to bathe or shower. With respect to her other activities of daily living (ADL), she requires extensive assistance with dressing, locomotion, and transferring to the toilet. She can independently attend to her personal hygiene and feeding herself, requiring only set-up assistance to perform those ADLs. She is totally independent in bed mobility.
6. The Appellant is totally dependent on the assistance of another person to attend to the following instrumental activities of daily living (IADL): meal preparation, housework, grocery and other shopping, and transportation. She requires maximal assistance to perform the IADLs of finance management and medication management, and she needs extensive assistance to navigate stairs. She can independently use the phone, with some set-up assistance. She is totally independent in decision-making.

7. The Appellant was receiving eighty-four hours of services weekly under the Department's Home and Community Based Waiver Program (Waiver Program), the pre-cursor to the CFCP when, in [REDACTED] 2017, it was time for her to undergo an annual redetermination assessment, to ascertain her continuing needs under the Maryland MA program. On [REDACTED] 2017, [REDACTED] of the [REDACTED] County Health Department conducted an in-person assessment of the Appellant using the interRAI™ Home Care Maryland Assessment Form (interRAI), a tool used to evaluate the Appellant's medical and physical conditions and capabilities, her mental faculties, and her emotional and social functioning.

8. As part of the interRAI, Ms. [REDACTED] conducted the Brief Interview for Mental Status (BIMS) with the Appellant. Although the Appellant displayed some limitations with respect to her short-term memory, her overall BIMS score was a "14," indicating the Appellant was cognitively intact.

9. On or around June 8, 2017, and as part of the annual redetermination, the Appellant submitted a POS to the MDH, in which she requested eighty-four PAS hours per week. Included with the POS was a proposed Daily Task Schedule (DTS), which outlined the tasks the PAS care provider would perform throughout the day to assist the Appellant with her ADLs and IADLs, and the anticipated amount of time necessary to complete each task.

10. Upon its review of the results of the interRAI and the DTS, as well as any other supporting documentation attached to the POS, the Department determined the Appellant did not require eighty-four PAS hours per week. The Department further determined the Appellant's needs could be safely met if she received sixty-six-and-one-half PAS hours per week.

DISCUSSION

The CFCP

The CFCP is a Medicaid State Plan program administered by the MDH. *See* COMAR 10.09.84.02B(8). “The purpose of [the CFCP] is to provide certain home and community-based services and supports, as an alternative to institutional placements, to individuals who have been determined to require an institutional level of care.” COMAR 10.09.84.01; *see also* 42 Code of Federal Regulations (C.F.R.) § 441.510(c) (2015).² A central aspect of the CFCP is PAS which, by definition, provides as follows:

(23) Personal Assistance Services.

(a) “Personal assistance services” means assistance specific to the functional needs of a participant with a chronic illness, medical condition, or disability.

(b) “Personal assistance services” includes:

(i) Assistance with activities of daily living and instrumental activities of daily living³; and

(ii) The performance of delegated nursing function[s].⁴

COMAR 10.09.84.02B(23).⁵

Consequently, the CFCP provides, as follows:

A. The Program covers [PAS] that are approved in the [POS] and rendered to a participant by a qualified provider in the participant’s home or a community setting.

² Unless otherwise noted, all citations to title 42 of the C.F.R. are to the 2015 volume.

³ Instrumental activities of daily living (IADLs) are activities that are incidental to the ADLs. For example, cleaning up the bathroom is incidental to taking a bath so the task of cleaning up the bathroom is an IADL.

⁴ COMAR 10.09.84.02B(11) defines “delegated nursing functions” as “nursing services provided to a participant by an enrolled personal assistance worker under the supervision of a: (a) Registered nurse in accordance with COMAR 10.27.11; or (b) Nurse practitioner in accordance with COMAR 10.27.07.”

⁵ *Compare with* 42 C.F.R. § 441.500(b), which provides:

[CFC] is designed to make available home and community-based attendant services and supports to eligible individuals, as needed, to assist in accomplishing activities of daily living (ADLs), instrumental activities of daily living (IADLs), and health-related tasks through hands-on assistance, supervision, or cueing.

“Health-related tasks” means “specific tasks related to the needs of an individual, which can be delegated or assigned by licensed health-care professionals under State law to be performed by an attendant.” 42 C.F.R. § 441.505.

B. The Program covers the following services when provided by a personal assistance provider:

- (1) Assistance with [ADLs];
- (2) Delegated nursing functions if this assistance is:
 - (a) Specified in the participant's [POS]; and
 - (b) Rendered in accordance with the Maryland Nurse Practice Act, COMAR 10.27.11, and other requirements of the Maryland Board of Nursing;
- (3) Assistance with tasks requiring judgment to protect a participant from harm or neglect;
- (4) Assistance with or completion of [IADLs], provided in conjunction with the services covered under §B(1)—(3) of this regulation; and
- (5) Assistance with the participant's self-administration of medications, or administration of medications or other remedies, when ordered by a physician.

C. [PAS] may not include:

- (1) Services rendered to anyone other than the participant or primarily for the benefit of anyone other than the participant;
- (2) The cost of food or meals prepared in or delivered to the home or otherwise received in the community; or
- (3) Housekeeping services, other than those incidental to services covered under §B of this regulation.

COMAR 10.09.84.14.

The terms ADL and IADL are defined, as follows:

(1) "Activities of daily living" means tasks or activities that include, but are not limited to:

- (a) Bathing and completing personal hygiene routines;
- (b) Dressing and changing clothes;
- (c) Eating;
- (d) Mobility, including:
 - (i) Transferring from a bed, chair, or other structure;
 - (ii) Moving, turning, and positioning the body while in bed or in a wheelchair; and
 - (iii) Moving about indoors or outdoors; and
- (e) Toileting, including:
 - (i) Bladder and bowel requirements;
 - (ii) Routines associated with the achievement or maintenance of continence; and
 - (iii) Incontinence care.

(15) "Instrumental activities of daily living" means tasks or activities that include, but are not limited to:

- (a) Preparing meals;
- (b) Performing light chores that are incidental to the [PAS] provided to the participant;
- (c) Shopping for groceries;

- (d) Nutritional planning;
- (e) Traveling as needed;
- (f) Managing finances and handling money;
- (g) Using the telephone or other appropriate means of communication;
- (h) Reading; and
- (i) Planning and making decisions.

COMAR 10.09.84.02B(1), (15).

Finally, reimbursement for a service under the CFC requires that the service, including PAS, be necessary to prevent the participant's admission to an institution and is also "medically necessary" for the participant. COMAR 10.09.84.22A(1), D. "Medically necessary" means that the service or benefit is:

- (a) Directly related to diagnostic, preventive, curative, ameliorative, palliative, or rehabilitative treatment of an illness, injury, disability, or health condition;
- (b) Consistent with current accepted standards of good medical practice;
- (c) The most cost efficient service that can be provided without sacrificing effectiveness or access to care; and
- (d) Not primarily for the convenience of the participant, the participant's family, the provider, or the worker.

COMAR 10.09.84.02B(17).

In order to comply with federal law and its State plan, Maryland employs medical professionals who conduct utilization reviews to determine whether the provision of covered medical services, including private PAS, are medically necessary. Federal law authorizes the Department to "place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures." 42 C.F.R. § 440.230.

Burden of Proof

There is no clear statutory or regulatory authority establishing which party bears the burden of proof in this case. See COMAR 10.01.04.01 through 10.01.04.12 (procedural rights, advice, and notifications). Under State common law principles, the burden of proof lies with the party asserting the affirmative of an issue, or seeking to change the status quo, before an

administrative body. *Md. Comm'r of Labor & Indus. v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996). This matter concerns the Appellant's challenge to the Department's decision denying her request for eighty-four PAS hours per week. Essentially, the Appellant argues the Department improperly denied her request. The Appellant, as the party asserting the affirmative of the issue, bears the burden of proof to demonstrate the Department's decision was improper.

The standard of proof is by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014). To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so," when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002) (quoting Maryland Pattern Jury Instructions 1:7 (3d ed. 2000)). Under this standard, if the supporting and opposing evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. *Id.* For the reasons that follow, I find the Appellant has not satisfied her burden.

The Merits of this Case

There is no dispute between the parties that the Appellant requires PAS during the week; indeed, the Department approved the Appellant to receive sixty-six-and-one-half PAS hours. The parties disagree as to the number of hours the Appellant requires to safely attend to her ADLs and IADLs during the week.

██████████ the Appellant's daughter, testified on behalf of the Appellant. She explained there are a significant amount of things the Appellant cannot do on her own because of the pain she experiences in her back, and her vertigo diagnosis. For example, it is difficult for the Appellant to navigate stairs by herself, and she cannot stand for extended periods to prepare dinner. Ms. ██████████ expressed dismay and frustration at the fact the Appellant was previously deemed to need eighty-four service hours per week, but with the most recent redetermination, the

MDH reduced the number of service hours. According to Ms. [REDACTED] the Appellant's medical diagnoses have not changed and her physical condition has deteriorated. Ms. [REDACTED] explained that as the Appellant gets older, the symptoms of her various diagnoses have become more persistent. As a result, she argued, the Appellant needs more, rather than less, assistance to attend to her ADLs and IADLs.

The MDH explained the calculation of service hours under the CFCP and the PAS program differs from how service hours were calculated under the Waiver Program. As a result, some MA recipients experienced a change in the number of service hours for which they were eligible when evaluated under the requirements for the CFCP, even if the *type* of services remained the same. The MDH further explained that upon reviewing plans of service and their associated DTS, tasks are measured by the amount of time it would take an average person to complete a particular task. Additionally, payment for tasks is made based on fifteen-minute units of service. COMAR 10.09.84.24E. The MDH presented Verna Hickinson, R.N., whom I accepted as an expert in Nursing, to explain its rationale for denying the Appellant's request for eighty-four hours of PAS.

Ms. Hickinson presented as a knowledgeable and compassionate witness, one with experience in assisting disabled and elderly individuals in attending to their ADLs. She explained that when a request for PAS hours is made, the Department reviews the proposed POS, which includes a DTS, in which the CFCP applicant or recipient lays out what services are needed during the day and the amount of time it takes to complete each task. (*See MDH Ex. 3.*) Ms. Hickinson explained she reviewed the Appellant's proposed DTS and allocated the amount of time which, in her professional nursing opinion, each task could be safely performed in light of the Appellant's needs. The Appellant's DTS identified tasks for Mondays through Sundays, from 7:00 a.m. to 7:00 p.m. Based on her professional experience, including her experience

assisting individuals in attending to their ADLs, Ms. Hickinson determined the Appellant's needs, with respect to her ADLs, could be safely met with fifty-five PAS hours per week.

Using the Appellant's proposed DTS, Ms. Hickinson determined that for one day, the Appellant required 465 minutes of assistance to attend to her ADLs. Ms. Hickinson then divided that number by sixty minutes, to obtain the number of hours per day. She multiplied the number of hours per day by seven to obtain the total hours of service per week the Appellant required to attend to her ADLs, then rounded up to the next whole number.⁶ Additionally, Ms. Hickinson determined a total amount of eight hours per week was appropriate to enable the Appellant and her caregivers to attend to any of the Appellant's IADLs.

Ms. Hickinson calculated that during the week, the Appellant needed a total of sixty-three hours of PAS to attend to her ADLs and IADLs. In her opinion, to a reasonable degree of medical certainty, the Appellant's needs could be safely met if she received PAS in that amount. The Department ultimately approved the Appellant for a total of sixty-six-and-one-half PAS hours per week. In Ms. Hickinson's opinion, to a reasonable degree of medical certainty, sixty-six-and-one-half PAS hours per week is more than medically appropriate for the Appellant's needs in attending to her ADLs and IADLs.

I am sympathetic to Ms. [REDACTED]'s belief the Appellant requires more hours. It was clear how much she cares about and does for the Appellant, and that the Appellant's well-being is a priority for her. The PAS program of the CFCP, however, has a limited purpose and scope. The Appellant did not challenge the Department's expert evidence that her needs, with respect to attending to her ADLs and IADLs, can be safely met in sixty-six-and-one-half service hours per week. The preponderance of the evidence does not establish the Appellant has a need for eighty-four PAS hours per week. Based on the totality of the evidence presented, I find the

⁶ $465 \div 60 = 7.75 \times 7 = 54.25$.

Department properly denied the Appellant's request for a total of eighty-four PAS hours per week.

CONCLUSION OF LAW

Based on the Findings of Fact and Discussion above, I conclude as a matter of law the Maryland Department of Health properly denied the Appellant's request for eighty-four Personal Assistance Services hours per week. COMAR 10.09.84.14.

ORDER

I **ORDER** the Maryland Department of Health's November 9, 2017 decision denying the Appellant's request for eighty-four Personal Assistance Services hours per week is **AFFIRMED**.

Signature Appears on Original

June 11, 2018
Date Decision Mailed

Latonya B. Dargan
Administrative Law Judge

LBD/cmg
#174088

REVIEW RIGHTS

This is the final decision of the Maryland Department of Health. A party aggrieved by this final decision may file a written petition for judicial review with the Circuit Court for Baltimore City, if any party resides in Baltimore City or has a principal place of business there, or with the circuit court for the county where any party resides or has a principal place of business. Md. Code Ann., State Gov't § 10-222(c) (Supp. 2017). The original petition must be filed in the circuit court within thirty (30) days of the date of this decision, with a copy to David Lapp, Office of the Attorney General, Suite 302, 300 W. Preston St., Baltimore, MD 21201. Md. Rules 7-201 through 7-210.

The petition for judicial review should identify the Maryland Department of Health, which administers the Medicaid program, as the agency that made the decision for which judicial review is sought. The address of the Maryland Department of Health should be included on the petition: 201 W. Preston St., Room 511C, Baltimore, MD 21201.

A separate petition may be filed with the court to waive filing fees and costs on the ground of indigence. Md. Rule 1-325. No fees may be charged to Medical Assistance Program recipients, applicants, or authorized representatives for transcription costs or for preparation or delivery of the record to the circuit court.

The Office of Administrative Hearings is not a party to the judicial review process.

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