

██████████,

APPELLANT

v.

MARYLAND DEPARTMENT OF

HEALTH

* BEFORE TRACEE N. HACKETT,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MDH-MCP-12E-22-14633

* * * * *

DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSION OF LAW
ORDER

STATEMENT OF THE CASE

On March 30, 2022, the Maryland Department of Health (MDH or Department) notified ██████████ (Appellant) that it had determined the Appellant was not eligible for Plan of Service (POS) environmental adaptations to her home through the Community First Choice (CFC) program.¹ The Appellant filed an appeal on April 29, 2022.² The MDH transmitted the appeal to the Office of Administrative Hearings (OAH) on June 23, 2022.

I held a hearing at the OAH on August 2, 2022 via the Webex online videoconferencing platform.³ The Appellant was present and was represented by ██████████, Esquire. ██████████, Assistant Attorney General, represented the Department.

¹ Code of Maryland Regulations (COMAR) 10.09.84.18.
² COMAR 10.01.04.02A.
³ COMAR 10.01.04.06; COMAR 28.02.01.20.

The Administrative Procedure Act, the Procedures for Fair Hearing Appeals under the Maryland State Medical Assistance Program, and the Rules of Procedure of the Office of Administrative Hearings govern the procedure in this case.⁴

ISSUE

Did the Department improperly determine that the Appellant was not eligible for the environmental adaptations for installation of plumbing to code;⁵ connection of laundry; and installation of walk-in soaking tub, pursuant to the Department's CFC regulations?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Department's behalf:⁶

MDH Ex. 1 - interRAI,⁷ completed by [REDACTED], [REDACTED] County Department of Health, dated [REDACTED], 2021

MDH Ex. 2 - Environmental Assessment,⁸ completed by [REDACTED], M.S., OTR/L,⁹ dated [REDACTED], 2021

MDH Ex. 3 - Email from Ms. [REDACTED] to the Department regarding the environmental assessment, dated March 18, 2022

I admitted the following exhibits on the Appellant's behalf:

App. Ex. 1 - Letter from [REDACTED], M.D., [REDACTED], dated July 28, 2022

⁴ Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 10.09.84.28; COMAR 10.01.04; and COMAR 28.02.01.

⁵ The parties did not submit evidence regarding the type of code.

⁶ The Department submitted pre-marked exhibits 1-7 but changed the numbering on the exhibits during the hearing. MDH Ex. 1 was originally marked as Ex. 2; MDH Ex. 2 was originally marked as Ex. 3; and MDH Ex. 3 was originally marked as Ex. 4. The remaining pre-marked exhibits were not offered and therefore, not admitted. These exhibits have been retained for the record. COMAR 28.02.01.22C ("All exhibits marked for identification, whether or not offered in evidence and, if offered, whether or not admitted, shall be retained for purposes of judicial review.").

⁷ The International Resident Assessment Instrument (interRAI) is an annual assessment which provides information about the cognitive, social and functional abilities, diagnoses, and medications of the individual being assessed. *See* 42 Code of Federal Regulations (C.F.R.) § 441.535 (2021).

⁸ *See* COMAR 10.09.84.11; COMAR 10.09.84.19.

⁹ Master of Science and Occupational Therapist, Registered, Licensed (OTR/L).

App. Ex. 2 - Letter from [REDACTED], M.D., [REDACTED], dated July 27, 2022

App. Ex. 3 - Plan of Service (POS),¹⁰ created March 23, 2022¹¹

Testimony

The Appellant testified and did not present any other witnesses.

The Department presented the testimony of [REDACTED], LCSW-C,¹² MDH Clinical Consultant, who was accepted as an expert in utilization review.

FINDINGS OF FACT

Having considered the evidence presented, I find the following facts by a preponderance of the evidence:

1. The Appellant is sixty-seven years old, and lives by herself with her service dog in [REDACTED], Maryland.
2. The Appellant receives active treatment for irritable bowel syndrome (IBS); anxiety, depression, Post-Traumatic Stress Disorder (PTSD); adult sexual abuse; fibromyalgia; unspecified hip injury; unspecified asthma; intervertebral disc degeneration, lumbar region; radiculopathy, lumbar region; unspecified osteoarthritis; and chronic pain syndrome.
3. The Appellant has, among other things, the following additional diagnoses: hyperlipidemia, panic disorder, sensorineural hearing loss, [REDACTED], Vitamin D deficiency, [REDACTED], severe obesity, and obstructive sleep apnea.
4. The Appellant ambulates with the assistance of a rollator and a wheelchair, but also requires extensive assistance with moving between locations.
5. The Appellant cannot stand for more than five seconds without having to sit down due to her severe hip pain.

¹⁰ See 42 C.F.R. §441.540 (2021).

¹¹ This exhibit was pre-marked as the MDH's Ex. 1.

¹² Licensed Certified Social Worker-Clinical.

6. The Appellant suffers from severe PTSD and fibromyalgia as a result of her [REDACTED].
7. The Appellant also has a history of repeated falls.
8. As a result of the Appellant's fibromyalgia, she wakes up with stiff joints in the morning which also increases her risk of falling.
9. The Appellant has osteoarthritis in her knees and hip, and no use of her right hip.
10. As a result of her disc degeneration, the Appellant experiences pain and has difficulty with turning and moving due to lack of maneuverability in her lower spine and hip, placing her at a higher risk for falls.
11. The Appellant has difficulty with transfers due to pain from her hip and her fibromyalgia.
12. The Appellant has fallen while transferring to her bed, toilet, and while getting out of the bathtub and has knocked over her rollator as a result.
13. The Appellant requires extensive assistance and supervision with personal hygiene, maximum assistance with bathing.
14. The Appellant has frequent bladder incontinence and occasional bowel incontinence.
15. Due to the Appellant's IBS, she has problems with incontinence and is often alone in the house, where she cannot properly clean herself by bathing.
16. The Appellant has limited access to her home and the rooms in her home. Specifically, the Appellant is unable to access her only bathroom in the house because her rollator is too wide for the existing doorway and there is not enough space for her to safely turn around inside the bathroom with her rollator.

17. The Appellant transfers to the toilet, which is right next to the bathroom entrance, by placing her rollator close to the door, grabbing the doorknob, putting her hands on the toilet and “scooting” onto the toilet (App. testimony).

18. The Appellant cannot use the sink in her bathroom because her rollator cannot fit inside the bathroom.

19. The Appellant has been unable to properly clean herself for an unspecified amount of time because she needs to soak in the tub, cannot turn, and cannot always reach parts of her body to wash.

20. The Appellant benefits from soaking in a bath due to her fibromyalgia and chronic pain disorders.

21. The Appellant is approved for a total of thirty-five hours per week of home health aide/personal or attendant care assistance which is provided on Tuesdays, Wednesdays, and Thursdays.¹³

22. The Appellant receives eight hours per year of nurse monitoring services.

23. On ██████████, 2021, ██████████, an occupational therapist (OT) conducted an environmental assessment of the Appellant’s home,¹⁴ which recommended installation of home adaptation items including, *inter alia*, a walk-in soaking tub with accessible controls and a hand-held shower head.

¹³ App. Ex. 3, p. 7. The interRAI listed “7500 hours” (45 hours) per week but this is inconsistent with the POS, and Mr. ██████████’s testimony. MDH Ex. 1, p. 12. Additionally, the environmental assessment also appears to have different hours listed. (MDH Ex. 2, p. 1) (“However, her paid caregiver currently assists her with light housekeeping and bathing for two afternoons a week for five hours each visit.”).

¹⁴ See COMAR 10.09.84.11.

24. After Ms. ██████ completed the environmental assessment on ██████, 2021, she did not further contact or interview the Appellant or reassess her home or medical needs.¹⁵

25. On or around March 23, 2022, the Appellant through her support planner submitted the POS, which included, in relevant part, the walk-in tub, plumbing upgrades, and the laundry connection.

26. The POS reflected that the cost for the walk-in tub environmental adaptation from ██████ would be \$12,180.00 and also included the installation of a pocket door in the Appellant's bathroom.¹⁶

27. The POS also included unspecified durable medical equipment needed to use for bathing and disposable medical supplies for bladder and incontinence.

28. On March 18, 2022, Mr. ██████ contacted Ms. ██████ by phone to clarify the walk-in tub recommendation in her assessment.

29. On March 18, 2022, Ms. ██████ emailed Mr. ██████ and indicated that the walk-in tub would be the safest for the Appellant, but not "absolutely medically necessary" and that with other safety measures such as "a tub transfer bench, grab bars and a handheld shower," the Appellant could still perform "necessary hygiene tasks" and that if this proved too painful, a mechanical lift can be considered.¹⁷

30. Dr. ██████, who has been the Appellant's doctor for twenty years, supports the bathroom renovation recommendations in the environmental assessment with the

¹⁵ COMAR 10.09.84.19E ("Based on an inspection of the home and interviews with the participant and any individual requested by the participant, the provider shall complete a form, to be reviewed by the supports planner, which details the provider's findings and recommendations, especially relating to a participant's need for services.").

¹⁶ According to Mr. ██████'s testimony, the Department approved the installation of the pocket door.

¹⁷ MDH Ex. 3.

exception of the transfer bench and handheld shower, which Dr. [REDACTED] indicates is not appropriate for the Appellant's safety.

31. Dr. [REDACTED], who has been the Appellant's doctor for ten years, indicated that based upon the Appellant's illnesses, the in-home accommodations in the environmental assessment would improve the Appellant's quality of life and the changes to her living space would make it safer for her.

32. Dr. [REDACTED] also indicated that transfer benches and handheld showers would not suffice, but the walk-in tub would be the safest given that the Appellant's health conditions affect her balance and proper transferring.

DISCUSSION

Legal Framework

The CFC program is a Medicaid State Plan program administered by the Department.¹⁸ "The purpose of [CFC] 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."¹⁹

The CFC is designed to make home and community-based attendant services and supports available to eligible individuals to assist them in activities of daily living (ADLs),²⁰ instrumental activities of daily living (IADLs),²¹ and health-related tasks through hands-on

¹⁸ See COMAR 10.09.84.02B(8).

¹⁹ COMAR 10.09.84.01; see also 42 C.F.R. § 441.500 (2021).

²⁰ COMAR 10.09.84.02B(1) defines ADLs as "tasks or activities that include, but are not limited to: bathing and completing personal hygiene routines; dressing and changing clothes; eating; mobility including transferring from a bed, chair, or other structure; moving turning and positioning the body while in bed or in a wheelchair, and moving about indoors or outdoors, and toileting including bladder and bowel requirements, routines associated with the achievement or maintenance of continence and incontinence care."

²¹ The Department considers instrumental activities of daily living to be preparing meals, performing light chores that are incidental to the personal assistance services provided to the participant, shopping for groceries, nutritional planning, traveling as needed, managing finances and handling money, using the telephone or other appropriate means of communication, reading, and planning and making decisions. COMAR 10.09.84.02B(15).

assistance, supervision, or cueing.²² The CFC services and supports generally involve personal assistance services provided by a person.²³

The services and supports available through the CFC may also include “items or services that increase a participant’s independence or substitute for human assistance, to the extent that expenditures would otherwise be made for the human assistance.”²⁴ These items “must be preauthorized in the participant’s plan of service as necessary to . . . prevent the participant’s institutionalization . . . and ensure the participant’s health, safety, and independence.”²⁵ The CFC regulations require that the modifications or items “[n]ot be prescribed primarily to provide comfort or convenience” and “must specifically related to ADLs or IADLs within the approved plan of service.”²⁶

Reimbursement for a service under the CFC program requires that the service be necessary to prevent the participant’s admission to an institution and is also “medically necessary” for the participant.²⁷ “Medically necessary” is defined in COMAR as:

- (a) Directly related to diagnostic, preventative, 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-effective 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.²⁸

²² 42 C.F.R. § 441.500(b) (2021).

²³ COMAR 10.09.84.02B(23).

²⁴ COMAR 10.09.84.18A.

²⁵ COMAR 10.09.84.18B(1).

²⁶ COMAR 10.09.84.18B(2), (6).

²⁷ COMAR 10.09.84.22A(1), D.

²⁸ COMAR 10.09.84.02B(17).

Pursuant to COMAR 10.09.84.23C(7), environmental adaptations to the home are not covered by the CFC program if they:

- (a) Are of general maintenance, such as carpeting, roof repair, and central air conditioning;
- (b) Are not of direct medical or remedial benefit to the participant;
- (c) Add to the home's total square footage; or
- (d) Modify the exterior of the home, other than the provision of ramps, lifts, sidewalks necessary to utilize a ramp or lift, and railings.

Burden of Proof

There is no clear statutory or regulatory authority establishing which party bears the burden of proof in this case.²⁹ When not otherwise provided by statute or regulation, the standard of proof in a contested case hearing before the OAH is a preponderance of the evidence, and the burden of proof rests on the party making an assertion or a claim.³⁰ To prove an assertion or a claim by a preponderance of the evidence means to show that it is “more likely so than not so” when all the evidence is considered.³¹ In this case, the Appellant bears the burden to show entitlement to the environmental adaptations by a preponderance of the evidence.³²

The Parties' Positions

The Appellant argued that the walk-in shower is not for her comfort or convenience as suggested by the Department's denial but is required for her safety based upon the opinion of her two medical doctors. It was the Appellant's position that the walk-in shower is medically necessary for her to bathe herself and will increase her independence. The Appellant also argued that the personal assistance hours do not meet this need because she needs to bathe herself at times when the assistant is not there, and this modification would allow her to maximize her

²⁹ See COMAR 10.01.04.01 through 10.01.04.12 (procedural rights, advice, and notifications).

³⁰ Md. Code Ann., State Gov't § 10-217 (2021); COMAR 28.02.01.21K; See also *Comm'r of Labor & Indus. v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996) (quoting *Bernstein v. Real Estate Comm'n*, 221 Md. 221, 231 (1959) (the burden of proof lies with the party asserting the affirmative of an issue)).

³¹ *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002); see also *Mathis v. Hargrove*, 166 Md. App. 286, 310 n.5 (2005).

³² COMAR 28.02.01.21K(1)–(2)(a).

independence and maintain her cleanliness. Lastly, she argued the denial was based upon inappropriate consideration of the costs, because medical necessity was not one of the bases listed in the denial letter. The Appellant did not submit any evidence or argument regarding the installation of plumbing or the laundry connection, but also did not withdraw this portion of her appeal. As relief, the Appellant requested that I reverse the Department's decision.

The Department argued that its determination was proper based upon its regulations. First, the Department argued that since the Appellant submitted no evidence regarding the plumbing or the laundry, she has not met her burden for these items. Additionally, it argued that these two items were properly denied as being for the purpose of general maintenance and therefore, were prohibited from reimbursement. Further, the Department argued that the walk-in tub was not medically necessary, not solely because of the cost consideration but also because such installation would still require human assistance and would not increase the Appellant's independence. The Department requested that I uphold its determination based upon COMAR 10.09.84.02, COMAR 10.09.84.18, and COMAR 10.09.84.23.

Analysis

I. Plumbing Upgrades and Laundry Connections

The Department denied the plumbing upgrades and laundry connections on the basis that these environmental adaptations were for general maintenance,³³ were not covered under the CFC program,³⁴ did not substitute human assistance,³⁵ and did not comply with the policies and procedures defined by the Department.³⁶ I agree with the Department that these proposed modifications serve the purpose to fix and maintain the plumbing and mechanical equipment, and the laundry system in the Appellant's home and as such, are for general maintenance

³³ COMAR 10.09.84.23.

³⁴ COMAR 10.09.84.18.

³⁵ *Id.*

³⁶ *Id.*

purposes. The Appellant did not offer any evidence regarding these two recommendations from the environmental assessment. Therefore, I find that the Department properly denied these environmental adaptations.³⁷

II. Walk-In Tub

The Appellant testified that her goal is to remain in her home where she can bathe independently, and that the installation of the walk-in tub will serve this purpose. The Appellant explained her medical conditions in detail and how the walk-in tub is not for her comfort or convenience, but rather is necessary for her safety as it reduces the risk of falling, and alleviates her pain associated with her fibromyalgia and disc degeneration. The Appellant further explained that she has been unable to properly clean herself for quite some time due to several barriers. These barriers included the need to soak in the tub with the inability to turn or reach parts of her body; the inability to access her bathroom with her rollator due to its size; and being often alone in the house, where she could not properly clean herself following instances of incontinence. The Appellant also described her bathtub as being low to the ground, which prohibits her from getting in and out of it safely. The Appellant was emotional as she described these barriers, and I found her to be credible and genuine.

The Department presented the testimony of Mr. ██████ who was accepted as an expert in utilization review. Mr. ██████ testified that for the ADL of bathing, the walk-in tub is not medically necessary because the Appellant can access her current bathtub with alternatives such as a handheld shower, transfer bench and, if necessary, a mechanical lift. He also clarified that the walk-in tub would not replace the human support that the Appellant requires and will not increase her independence because she would still require assistance. Furthermore, Mr. ██████ indicated that the Appellant is approved for thirty-five hours of personal assistance hours which

³⁷ COMAR 10.09.84.18; COMAR 10.09.84.23.

includes bathing, although it is unclear what the caregivers are doing.³⁸ Additionally, he indicated that even though the walk-in tub may be therapeutic for the Appellant's fibromyalgia as a form of hydrotherapy or alternative therapy, that is beyond the scope of what is permitted under the CFC program. Lastly, Mr. ██████ clarified that medical necessity, which includes cost considerations, is only one component considered during the review process and that he considered the entire COMAR chapter when he denied this environmental adaptation requests in the POS.

The March 30, 2022 denial letter³⁹ indicated that the Department denied the walk-in tub on four bases under COMAR 10.09.84.18: (1) the item was not covered under the program; (2) does not substitute for human assistance; (3) does not comply with the policies and procedures defined by the Department. Additionally, the Department cited to COMAR 10.09.84.18B(6) as the fourth basis for denying this environmental adaptation because it "is prescribed primarily to provide comfort or convenience." I will address each reason for the denial below.

A. Coverage under CFC program

Environmental adaptations which are excluded from coverage under the CFC program are delineated under COMAR 10.09.84.23C(7) as referenced above. In this instance, the installation of a walk-in tub is not for the purpose of general maintenance, does not modify the exterior of the Appellant's home, or add to the total square footage.⁴⁰ Therefore, the only

³⁸ The appropriateness of the Appellant's personal assistant service hours or how they are currently being utilized are not issues before me.

³⁹ The parties did not offer the denial letter as an exhibit; however, it is a part of the record since it was transmitted by the Department to the OAH as part of the appeal.

⁴⁰ COMAR 10.09.84.23C(7)(a), (c), (d).

remaining issue is whether this requested item “is not of direct medical or remedial⁴¹ benefit to the participant.”⁴² In this instance, the POS states that:

[The Appellant] is not able to take a bath at this time due to bathtub being to [sic] low, and can’t reach water faucet due to it being to [sic] high. [The Appellant] attempted to take baths in the past but water starts to leak on the floor. With the tub being low[,] [the Appellant] can’t get in and out of the bathtub safely and [the Appellant] lives alone. A walk in jetted tub will be *beneficial for [the Appellant]* and she can be able to take a bath and enter and exit out of the tub safely. *The jetted tub will help with [the Appellant’s] fibromyalgia.*⁴³

Furthermore, the letter from Dr. ██████ indicated the “walk-in tub would be the safest due to [the Appellant’s] many health conditions that affect her balance and proper transferring.”⁴⁴ Similarly, Dr. ██████’s letter indicated that the changes to the Appellant’s bathroom, “will benefit her activities of daily living, prevent falls and avoid serious injuries.”⁴⁵ Ms. ██████ also noted that the Appellant “benefits from taking baths due to her fibromyalgia pain and her hip pain.”⁴⁶

The Department argued that although the walk-in tub may be therapeutic for the Appellant’s fibromyalgia, that is the not the purpose of the CFC program and this item is not covered. I disagree with the Department’s interpretation. Although the Appellant did not provide expert medical testimony during the hearing for me to determine the direct medical benefit, she testified that soaking in the tub relieves the pain and stiffness that she experiences in the morning related to her fibromyalgia. Additionally, her doctors’ letters support that installation of the walk-in tub is for safety measures that reduce the risk of falling related to her poor balance and proper transferring which are diminished by her health conditions. Obviously,

⁴¹ “Remedial means” “intended as a remedy” and “remedy” means “**1**: a medicine, application, or treatment that relieves or cures a disease; **2**: something that corrects or counteracts; **3**: the legal means to recover a right or to prevent or obtain redress for a wrong.” See Merriam-Webster’s Online Dictionary, <https://www.merriam-webster.com/dictionary/remedial> and <https://www.merriam-webster.com/dictionary/remedy> (last visited 8/20/2022).

⁴² COMAR 10.09.84.23C(b).

⁴³ App. Ex. 3, p. 7 (emphasis added).

⁴⁴ See App. Ex. 2.

⁴⁵ App. Ex. 1.

⁴⁶ MDH Ex 2, p. 5.

a walk-in tub cannot cure the Appellant's fibromyalgia, hip pain, or any of her other various medical illnesses, but it can *relieve* her pain and reduce fall risk. Therefore, I find that the walk-in tub would provide the Appellant with a remedial benefit and is not excluded under the CFC program for that reason.⁴⁷ Thus, the Department's denial on this basis was improper.

B. Human Assistance

The Department's regulations must be interpreted consistently with the federal regulations regarding the CFC program.⁴⁸ Under the federal regulations, the "Community First Choice [program] may not include . . . [h]ome modifications, other than those that meet the requirements at § 441.520(b) of this subpart."⁴⁹ In relevant part, 42 C.F.R. §441.520(b)(2) states that the program covers "expenditures relating to a need identified in an individual's person-centered service plan that increases an individual's independence *or* substitutes for human assistance, to the extent that expenditures would otherwise be made for the human assistance" (emphasis added). The state regulations mirror these requirements. Environmental adaptations permitted by Maryland's CFC program must *substitute* for the need for human assistance not simply reduce or minimize it.⁵⁰ Alternatively, the environmental adaptations can increase the individual's independence.⁵¹ Therefore, as the Appellant argued, the requirements for substitution of human assistance and increase of independence are not mutually exclusive.

In this case, I agree with the Department that the walk-in tub will not substitute the need for human assistance. The Appellant requires maximum assistance with bathing and extensive assistance with personal hygiene. Even with the addition of a walk-in tub, a personal assistant

⁴⁷ COMAR 10.09.84.23C.

⁴⁸ See COMAR 10.09.84.29; COMAR 10.09.36.10.

⁴⁹ 42 C.F.R. §441.525(e) (2021).

⁵⁰ See COMAR 10.09.84.18A.

⁵¹ *Id.*

will still need to be present while the Appellant bathes. The Appellant did not dispute this fact, but alternatively argued that the increase of independence was the dispositive factor.

The Appellant testified that she has been unable to bathe herself for “quite some time” even with the personal assistant due to the inaccessibility of her bathroom’s size for her rollator. She also clarified that her personal assistant is not always present when she needs to clean herself from an episode of incontinence. I found her testimony to be credible as it is corroborated by the statements in the POS and in the environmental assessment. Ms. ██████ determined that the tub was also not accessible unless the Appellant used a tub/transfer bench; however, the Appellant’s doctors noted in their letters that a transfer bench is not safe for the Appellant due to issues with balance, proper transferring, and risk of falling. In the past, when the Appellant has taken a bath, water leaked on the floor, which would increase a risk of potential slips/falls. The Appellant also cannot reach the faucet in her current tub. For the same safety reasons, the Appellant cannot use a handheld shower according to her doctors. Since the Appellant’s rollator cannot fit inside her current bathroom and she cannot stand for more than five seconds, she cannot currently use the bathroom sink to perform personal hygiene tasks, such as washing her face. Mr. ██████ clarified during his testimony that the Department approved the environmental adaptation in the POS for installation of a pocket door, which should enable the Appellant to fully access her bathroom moving forward. However, the issues with transfer and fall risks are not addressed by fixing the accessibility issues.

The ██████, 2021 interRAI did not reflect the Appellant’s ADL-Self Performance level for bathing as the activity did not occur during the three-day evaluation period, but the evaluator did note that she requires extensive assistance for personal hygiene, toilet transfer and use.⁵² The POS noted that the Appellant requires maximal assistance with bathing, but the

⁵² MDH Ex. 1, p. 5.

source of this determination is not clear.⁵³ The Appellant receives thirty-five hours of personal assistance per week on Tuesdays, Wednesdays, and Thursdays (approximately 11 ½ hours per day) for maximal assistance with housework and bathing; extensive assistance with meal preparation, shopping, hygiene, dressing, and toileting; and limited assistance with transportation and bed mobility.⁵⁴ On the days that the Appellant does not have the personal assistant, she is able to use the bathroom by pivoting on the toilet and she described her positioning and “scooting” process during her testimony. Given that the personal assistance is only present three days per week, the Appellant must still independently use the bathroom despite her need for extensive assistance.

Likewise, the Appellant argued that given her needs to bathe when she is incontinent and the personal assistant is not there, she would be able to independently get into and out of the walk-in tub and soak to address her personal hygiene needs. Even though she still may not be able to completely bathe herself given her inability to turn around, wash certain areas, or reach the handheld shower, she could still soak and use the “accessible controls.”⁵⁵ In addition to bathing, ADLs also include “completing personal hygiene routines” and “routines associated with the achievement or maintenance of continence and incontinence care.”⁵⁶ The Appellant is not totally dependent in these areas and therefore, has the ability to do certain tasks related to these ADLs for herself. Unfortunately, she has no familial support or informal helpers to assist her when the personal assistant is not present. Even though she receives pads/briefs for incontinence, the Appellant must also be able to clean or rinse herself when she has lost control of her bladder or bowels. The Appellant has been unable to bathe for “quite some time” particularly as it relates to her IBS.

⁵³ App. Ex. 3, p. 7.

⁵⁴ *Id.*

⁵⁵ MDH Ex. 2, p.6.

⁵⁶ COMAR 10.09.84.02B(1).

I agree with the Appellant that going from no ability at all even with human assistance, to having the ability to get inside the walk-in tub, use the accessible controls that do not require reaching, soak in soapy water, and clean at least some areas of her body on her own, would be an increase of the Appellant's independence. However, the increase of independence must be accompanied by the decrease in expenditures made for human assistance, i.e., the PAS costs. Specifically, the federal and state regulations indicated that the CFC program covers "expenditures relating to a need identified in an individual's person-centered service plan that increases an individual's independence . . . to the extent that expenditures would otherwise be made for the human assistance" (emphasis added).⁵⁷ Although there is no requirement for 100% independence, the costs for the PAS hours would not diminish with this environmental adaptation, even though the Appellant would independently increase her ADLs of bathing and routines related to personal hygiene and incontinence care. The Appellant would use the walk-in tub at times that the personal assistant aide is not present, resulting in no reduction of expenditures. Although I am sympathetic to the Appellant's basic human need to bathe and be clean, I must adhere to the requirements of the state and federal laws. Therefore, I find that Department's denial of the installation of the walk-in tub on this basis was proper under its regulations.⁵⁸

C. Policies/Procedures

Mr. [REDACTED] testified that the Department considers the "COMAR chapter as a whole" when making its determinations and that based upon the Department's policies and procedures, it was his expert opinion that the walk-in tub is not medically necessary. The Appellant argued that there is no indication in the denial letter that medical necessity was one of the bases for the

⁵⁷ 42 C.F.R. §441.520(b)(2) (2021); COMAR 10.09.84.18.

⁵⁸ 42 C.F.R. §441.525(e) (2021); 42 C.F.R. §441.520(b)(2) (2021); COMAR 10.09.84.18A.

denial. The Appellant is correct; the denial letter does not have any reference to COMAR 10.09.84.22D regarding the requirement that items be medically necessary for reimbursement purposes or to COMAR 10.09.84.02B(17) which includes the definition of medically necessary. The Department did not specify any other policies or procedures that prohibit reimbursement for this item. It is curious why the Department did not include these “medically necessary” provisions as the reasons for its decision, as it typically does in other denial letters. However, the Department’s Hearing Summary dated July 14, 2022, includes lack of medical necessity as one of the bases for the denial and cited to COMAR 10.09.84.02B(17)(d).

When the Department takes action to deny environmental adaptations requested under the CFC program, it must provide adequate notice of that action to the participant.⁵⁹ Thus, in the case of the Department, it is the denial letter that sets forth the factual and legal basis supporting the denial of a request for CFC services and benefits. Furthermore, the Department must include in its “Notice of a Fair Hearing,” in relevant part, a statement of the action the Program, intends to take; the reasons for the intended action; and the specific regulations that support the action.⁶⁰ The appropriate remedy for any notice failure would have been a postponement for additional time to prepare.

On July 26, 2022, the Appellant requested a postponement to have additional time to prepare, which the OAH Clerk’s Office denied on July 28, 2022. At the beginning of the hearing, I clarified whether or not the Appellant still intended to request a postponement, but the Appellant indicated that she was prepared to proceed. As the Appellant set forth this notice argument, asked questions about medical necessity, and entered one of the MDH’s proposed exhibits as her own, it is clear that the Appellant was aware prior to the start of the hearing that

⁵⁹ Md. Code Ann., State Gov., §10-207(a) and (b); COMAR 10.04.01.03.

⁶⁰ COMAR 10.04.01.03B.

the Department intended to argue that the walk-in tub was not medically necessary. As noted above, the Department included medical necessity in its hearing summary, attached to the exhibits that the Appellant received in advance of the hearing. Therefore, despite the denial notice not containing this information, there is no actual prejudice to the Appellant as a result of this omission.

Additionally, as the MDH delegated this matter to the OAH to issue a final decision, as the ALJ, I am bound by the existing policies and regulations of the agency⁶¹ and may consider not only the information submitted to the Department but also any additional information submitted during the hearing.⁶² Therefore, I may consider the Department's evidence submitted during the hearing regarding medical necessity.

According to Mr. ██████, he contacted Ms. ██████ to clarify the walk-in tub recommendation in her environmental assessment because it did not include alternative methods and he wanted clarification as to whether it was medically necessary. Mr. ██████ testified that this is standard practice to follow up with an assessor to request further clarification. Mr. ██████ testified that in his experience, he did not know of any time that a walk-in tub has been covered. Based upon the conversation, Ms. ██████ indicated that "a tub transfer bench, grab bars and a handheld shower," could be used so that the Appellant could still perform "*necessary hygiene tasks*" and that if this proved too painful, a mechanical lift can be considered.⁶³ Ms. ██████ did not indicate in her email that these alternatives would allow the Appellant to bathe.

⁶¹ See Md. Code Ann., St. Gov't §10-214(b) (2021).

⁶² See *Berkshire Life Insurance Company v. Maryland Insurance Administration*, 142 Md. App. 628 (2002) ("When [the agency] delegates the hearing responsibility to an [administrative law judge] ALJ, the ALJ becomes an extension of [the agency]."); see also *Albert S. v. Department of Health and Mental Hygiene*, 166 Md. App. 726 (2006).

⁶³ MDH Ex. 3.

She clarified that the walk-in tub is not “absolutely medically necessary” but would still be the safest option for the Appellant.⁶⁴

Despite the Department’s reference to this email as a “supplement,” Ms. ██████ did not revise her report, did not submit a supplemental report or the form required by the Department, and titled the email as a “statement” not a supplement.⁶⁵ Although the regulations require Ms. ██████ to conduct interviews of the participant and any other individuals requested by the participant, she did not do so when making this email statement.⁶⁶ Additionally, pursuant to the Department’s regulations, the environmental assessment must detail the provider’s findings and recommendations and are *reviewed by the support planner*.⁶⁷ Although I can appreciate the Department’s need for clarification of information it relies upon to make its decision, given the collaborative nature of the CFC program under the state and federal regulations, I agree with the Appellant’s argument that she should have been involved in the process for additional recommendations. This might have enabled her doctors to be interviewed, the safety concerns with these alternatives to be discussed, and the formal supplemental process to be followed. The failure to do so does not mean that I will discount this email statement. Rather, I have considered it, but have given more weight to the safety concerns in the Appellant’s doctors’ letters.⁶⁸

The parties only addressed one portion of the medically necessary definition, i.e., whether the walk-in tub was “the most cost-effective service that can be provided without sacrificing

⁶⁴ *Id.*

⁶⁵ See MDH Ex. 3; COMAR 10.09.84.11C (“To participate in the Program as a provider of environmental assessments under Regulation .19 of this chapter, the provider shall [d]ocument the provider’s findings and recommendations on a form approved by the Program.”).

⁶⁶ COMAR 10.09.84.19E (“Based on an inspection of the home and interviews with the participant and any individual requested by the participant, the provider shall complete a form, to be reviewed by the supports planner, which details the provider’s findings and recommendations, especially relating to a participant’s need for services.”).

⁶⁷ *Id.*

⁶⁸ I considered the safety concerns in these letters. I did not consider the doctors’ letters as “expert opinions” as they were not present nor did either doctor indicate that the opinions expressed were to a degree of medical certainty. See COMAR 28.02.01.21D.

effectiveness or access to care.”⁶⁹ The only cost provided was the \$12,180.00 for the walk-in tub installation. Based upon the record before me, there is no evidence of any costs for the alternative equipment solicited by Mr. [REDACTED] in his follow-up conversation with Ms. [REDACTED]. The Appellant proved through her doctors’ letters that the transfer bench and handheld shower would sacrifice the effectiveness or access to care because they pose a safety risk for falling.⁷⁰ However, because the Appellant’s doctors did not comment on the mechanical lift or grab bars, I am unable to determine whether these items would also sacrifice her access to care because they pose a safety risk or if it is even a plausible alternative for the mechanical lift to fit into the bathroom with or without the new pocket door. In other words, the doctors’ letters are more persuasive but are incomplete.

I am left with the remainder of Mr. [REDACTED]’s expert testimony--that the mechanical lift and grab bars are cost effective, that the mechanical lift could be used if the other items were too painful, and that the walk-in tub is not medically necessary for these reasons. There is no evidence to refute this credible testimony; I found Mr. [REDACTED]’s knowledge of the regulations to be appropriate and thorough. Therefore, the Appellant has not proven that the walk-in tub is the “most cost-effective service that can be provided without sacrificing effectiveness or access to care”⁷¹ and as such, I find that the walk-in tub installation is inconsistent with the Department’s policies and procedures.⁷² By no means do I intend to diminish the Appellant’s safety concerns

⁶⁹ COMAR 10.09.84.02B(17)(d). *See* also 42 CFR 441.560(c) (2021) (“The State must have procedures in place that will provide safeguards to individuals when the budgeted service amount is insufficient to meet the individual’s needs.”) which justifies the need for the Department to make financial decisions that do not sacrifice effectiveness or access to care.

⁷⁰ Neither doctor mentioned the grab bars or the mechanical lift in each of their respective letters.

⁷¹ COMAR 10.09.84.02B(17)(d).

⁷² COMAR 10.09.84.18.

or extensive medical needs; however, the regulations simply do not permit reimbursement of costs for items not medically necessary.

D. Comfort or Convenience

The Department's last basis for denial is that the walk-in tub is primarily for the Appellant's comfort⁷³ or convenience.⁷⁴ Although I am sure that a soaking walk-in tub with jets would provide the Appellant with a satisfying/enjoyable experience, it is not primarily for her comfort or convenience. Through her testimony, the environmental assessment, the POS, and the doctors' letters, the Appellant has proven that the walk-in tub is primarily for her safety to prevent risk of falls due to her poor balance and other documented medical illnesses. Secondarily, it will improve her stiffness and pain. Just because this environmental adaptation might have ancillary effects of comfort does not mean that this is the primary purpose. Under the federal regulations,

States must provide Community First Choice to individuals: (a) On a statewide basis. (b) In a manner that provides such services and supports in the most integrated setting appropriate to the individual's needs, and without regard to the individual's age, type or nature of disability, severity of disability, or the form of home and community-based attendant services and supports that the individual requires to lead an independent life.⁷⁵

In this instance, the walk-in tub supports the Appellant's ability to desire to lead an independent life in the community, specifically in her own home; and is primarily for the purpose of her own safety when bathing; and is not primarily prescribed for her comfort or convenience.⁷⁶

⁷³ Comfort means "strengthening aid; assistance, support; consolation in time of trouble or worry; solace; a feeling of relief or encouragement; contented well-being; a satisfying or enjoyable experience; one that gives or brings comfort." *See* Merriam-Webster's Online Dictionary, <https://www.merriam-webster.com/dictionary/comfort> (last visited August 20, 2022).

⁷⁴ Convenience means "fitness or suitability for performing an action or fulfilling a requirement; something (such as an appliance, device, or service) conducive to comfort or ease . . . designed for quick and easy preparation or use." *See* Merriam-Webster's Online Dictionary, <https://www.merriam-webster.com/dictionary/convenience> (last visited August 20, 2022).

⁷⁵ 42 C.F.R. § 441.515 (2021).

⁷⁶ COMAR 10.09.84.18B(6).

Therefore, the Department's denial of this environmental adaptation for this purpose was improper.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Department properly determined that the Appellant was not eligible for the plumbing upgrades and laundry connection environmental adaptations through the Community First Choice program. COMAR 10.09.84.18; COMAR 10.09.84.23.

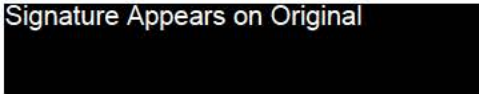
I further conclude as a matter of law that the Department properly determined that the Appellant was not eligible for the walk-in tub environmental adaptation through the Community First Choice program. COMAR 10.09.84.02B(17); 10.09.84.18A, B(3).

ORDER

I hereby ORDER that the determination of the Maryland Department of Health be **AFFIRMED**.

August 24, 2022
Date Decision Mailed

Signature Appears on Original



Tracee N. Hackett
Administrative Law Judge

TNH/ja
#200289

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) (2021). The original petition must be filed in the circuit court within thirty (30) days of the date of this decision, with a copy to [REDACTED], 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.

Copies Mailed To:

[REDACTED]
[REDACTED]
[REDACTED]

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[REDACTED]

[REDACTED] (Emailed)
[REDACTED]

██████████,

APPELLANT

v.

MARYLAND DEPARTMENT OF

HEALTH

* BEFORE TRACEE N. HACKETT,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH No.: MDH-MCP-12E-22-14633

* * * * *

FILE EXHIBIT LIST

I admitted the following exhibits on the Department’s behalf:

MDH Ex. 1 - interRAI, completed by ██████████, ██████████ County Department of Health, dated ██████████ 2021

MDH Ex. 2 - Environmental Assessment, completed by ██████████, M.S., OTR/L, dated ██████████ 2021

MDH Ex. 3 - Email from Ms. ██████████ to the Department regarding the environmental assessment, dated March 18, 2022

I admitted the following exhibits on the Appellant’s behalf:

App. Ex. 1 - Letter from ██████████, M.D., ██████████, dated July 28, 2022

App. Ex. 2 - Letter from ██████████, M.D., ██████████, dated July 27, 2022

App. Ex. 3 - Plan of Service (POS), created March 23, 2022