



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

MARLON I. BROWN
DIRECTOR

[REDACTED]
MI [REDACTED]

Date Mailed: April 16, 2024
MOAHR Docket No.: 24-001544 & 24-001548
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 April 11, 2024. [REDACTED] mother, guardian and authorized hearing representative, appeared on Petitioners' behalf.

Attorney Leslie A. Dickinson appeared on behalf of the Department's Waiver Agency, Area Agency on Aging of Northwest Michigan (Respondent or Waiver Agency). Marci McCoon, Social Worker Supervisor; Amanda Molski, Director of Quality and Utilization Management; and Jessica Warpup, Social Worker Supports Coordinator, appeared as witnesses for Respondent.

EXHIBITS

Petitioner's Exhibits:

- Exhibit 1: Petitioners' Person-Centered Plans
- Exhibit 2: Generator Information and Policy
- Exhibit 3: Air Conditioning Information and Policy
- Exhibit 4: Case Law and Statutes
- Exhibit 5: Request for Hearing

Respondent's Exhibits:

- Exhibit A: Email, dated March 16, 2023
- Exhibit B: Case Notes, various dates

- Exhibit C: Notice of Internal Appeal Decision, dated February 16, 2024
- Exhibit D: Notice of Internal Appeal Decision, dated February 16, 2024
- Exhibit E: Adverse Benefit Determination, dated July 8, 2022
- Exhibit F: Adverse Benefit Determination, dated July 8, 2022
- Exhibit G: Adverse Benefit Determination, dated January 12, 2024
- Exhibit I: Notice of Internal Appeal Decision – Approval, dated April 6, 2021
- Exhibit J: Email
- Exhibit K: Decision and Order, dated October 11, 2023

ISSUE

Did the Waiver Agency properly deny Petitioners' request for annual maintenance of a generator and a second central air conditioning unit?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material, and substantial evidence on the whole record, finds as material fact:¹

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. On July 8, 2022, the Waiver Agency sent Petitioners a Notice of Adverse Benefit Determination denying Petitioners' request for annual service of a second air conditioning unit. (Exhibit E; Testimony.) Specifically, the Notice indicated, in relevant part:

Based on our assessment of appropriateness and the setting, we have identified that service maintenance of a second central air conditioning unit is not appropriate. Assessment and setting review indicates AAANM has provided AC unit maintenance and servicing for one air conditioning unit that was replaced by AAANM/MI Choice Waiver in Spring 2021. At time of replacement of the unit, it

¹ Petitioner's Proposed Findings of Fact dated April 14, 2021 are also included in these Findings of Fact and are adopted in their entirety.

was found that MI Choice Waiver was able to replace the unit as it provided appropriate temperature control for both beneficiaries living areas. Assessment data indicates no change to the living areas in which beneficiaries reside and AAANM has provided maintenance and servicing to the unit that was purchased to provide temperature control to the living areas where beneficiaries reside.

42 CFR 440.230(d) provides the basic legal authority for an agency to place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

(Id.)

4. On January 12, 2024, the Waiver Agency sent Petitioners a Notice of Adverse Benefit Determination denying Petitioners' request for continued yearly generator maintenance. (Exhibit G; Testimony.) Specifically, the Notice indicated, in relevant part:

This service was previously authorized by AAANM as allowed under Appendix K: Emergency Preparedness and Response and COVID-19 Addendum. This allowed for the temporary expansion of Goods and Services to be applicable to all MI Choice participants. The authority of Appendix K and its flexibilities ended on November 11, 2023 as stated by MDHHS.

Additionally, beneficiary's guardian was notified of the impending end date of Appendix K authority via email on March 16, 2023.

The beneficiary is not currently eligible for Goods and Services as defined in the MI Choice Waiver Chapter of the Medicaid Provider Manual. 4.1. I. Good and Services: Limitations - This service is only available to those participants choosing self-determination.

(Id.)

5. On February 16, 2024, following an internal appeal, the Waiver Agency sent Petitioners a Notice of Internal Appeal Decision – Not Applicable. (Exhibit D; Testimony.) Specifically, the Notice indicated, in relevant part:

Your Internal Appeal was thoroughly considered. This is to inform you that we found the request **Not Applicable** for internal appeal for the service/item listed below:

Medicaid MI Choice Waiver to provide payment for air conditioning unit maintenance for second unit. Air conditioning unit servicing beneficiaries' rental unit/residence has been approved and authorized for service coverage and maintenance.

Why did we find your Internal Appeal Not Applicable?

We found your appeal request to be Not Applicable for Internal Appeal for the service/item listed above because:

Review of records indicates this service request has been previously requested and denied - Please refer to Administrative Law Judge Decision and Order statement dated from 10/13/2023.

Please note, MI Choice Waiver has authorized and will continue to provide payment for maintenance to air conditioning unit that was purchased by MI Choice Waiver in 2021.

*(Id., **Emphasis in original**)*

6. On February 16, 2024, following an internal appeal, the Waiver Agency sent Petitioners a Notice of Internal Appeal Decision – Denial. (Exhibit C; Testimony.) Specifically, the Notice indicated, in relevant part:

Your Internal Appeal was denied

Your Internal Appeal was thoroughly considered. This is to inform you that we **denied** your Internal Appeal for the service/item listed below:

Medicaid MI Choice Waiver to purchase generator maintenance.

Why did we deny your Internal Appeal?

We denied your Internal Appeal for the service/Item listed above because:

A request was made for MI Choice Waiver to provide payment for generator maintenance in Spring of 2021. At that time, the request was approved, with approval obtained through Appendix K pandemic exceptions that expanded services during the public health emergency. Appeal notice dated 4/6/2021 indicates approval of request for generator

maintenance under the allowed Appendix K temporary policy during the public health emergency. At that time, participant guardian was notified that this was allowable under a temporary coverage period, and that this exception and ability to provide coverage under the Medicaid MI Choice Waiver program was only allowable while the Appendix K exceptions were in place. Generator maintenance was provided on 4/22/2021, as authorized for request made under Appendix K temporary exceptions.

In February of 2022, another **request** for generator maintenance was requested. The service request was reviewed and approved, as allowable exceptions under Appendix K, temporary policy for the public health emergency, were still in place at time of request. Participant guardian was notified on 2/18/2022 that requested services for generator maintenance were currently allowable under the Appendix K exceptions and expanded services during the public health emergency, and upon termination of the public health emergency, the exceptions for expanded services allowable for the requested service would no longer be available and eligible for payment from Medicaid MI Choice Waiver. Generator maintenance was provided on 4/22/2022, as authorized for request made under Appendix, K temporary exceptions.

In March 2023, another request for generator maintenance was requested. The service request was reviewed and approved, as allowable exceptions under Appendix K, temporary policy for the public health emergency, were still in place at time of request. Participant guardian informed on 3/17/2023 that generator maintenance payment for service under the Medicaid MI Choice Waiver program was allowable per temporary policy exceptions as a result of the public health emergency. Participant guardian was notified that exceptions would be terminated as of May 12, 2023. Generator maintenance scheduled and provided for April 2023, as authorized for request made under Appendix K temporary exceptions.

In January 2024, another request for generator maintenance was requested. Service request was reviewed and denied, as allowable exceptions for this type of service were previously allowable under Appendix K temporary policy for the public health emergency, of which at time of request were no longer in place. An adverse benefit determination

was sent to participant guardian on 1/12/2024, notifying of denial of request for generator maintenance.

Request for appeal received, and upon record review and review of current services eligible in the program, per Medicaid Provider Manual, MI Choice Waiver chapter, version dated January 1, 2024, the exceptions and expanded services of which services were previously provided, from 2021-2023, are no longer available and the service request is not an eligible service under the Medicaid MI Choice Waiver program and therefore denied. Services were previously provided payment through MI Choice Waiver as part of the temporary Appendix K expansions and exceptions, covered through expanded services of "Goods and Services." At this time, beneficiaries not enrolled in the self-determination option and are not eligible for services of "Goods and Services" and service request is not eligible for payment. Per the Medicaid Provider Manual, MI Choice Waiver chapter, Section 4.1.1-Goods and Services, version dated January 1, 2024, it states:

"Goods and Services are only approved by CMS for participants choosing the self-determination option. Self-directed Goods and Services are purchased from the participant-directed budget. Experimental or prohibited treatments are excluded. Goods and Services must be documented in the person-centered service plan."

Participant guardian has been informed and notified of the expanded services and allowable payments from prior years between 2021 and 2023, with notification that the allowable service would be terminated when the exceptions from Appendix K, public health emergency, ended.

Additionally, the Habilitation Supports Waiver program is a separate and distinct program from the Medicaid MI Choice Waiver program, each functioning under different scopes of delivery and coverage eligibility, as defined within the Medicaid Provider Manual. Coverage and payment for service under one program does not equate to payment and services under the other program, as each function separately and distinctly with defined eligibility and service criteria per each individual program.

(Id., Emphasis in original)

7. Petitioner [REDACTED] bedroom is serviced by the second central air conditioning unit at issue in this appeal. (Exhibit C, p 35; Testimony.) The first central air conditioning unit serves Petitioner [REDACTED] bedroom, plus the Petitioners' living area. (*Id.*)
8. On February 20, 2024, Petitioner's request for hearing was received by the Michigan Office of Administrative Hearings and Rules. (Exhibit 5)

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.

Medicaid policy in Michigan is contained in the Medicaid Provider Manual (MPM). With regard to the issues in this appeal, the MPM provides:

4.1.I. GOODS AND SERVICES

Definition Goods and Services are services, equipment or supplies not otherwise provided through either the MI Choice Waiver or the State Plan that address an identified need in the person-centered service plan (including improving and maintaining the participant's opportunities for full membership in the community) and meet the following requirements.

Requirements Each item or service specified in the PCSP must meet the following requirements:

- Decrease the need for other Medicaid services.
- Promote inclusion in the community.
- Increase the participant's safety in the home environment.
- The participant does not have the funds to purchase them or they are not available through another source.

Goods and Services are only approved by CMS for participants choosing the self-determination option. Self-directed Goods and Services are purchased from the participant-directed budget. Experimental or prohibited treatments are excluded. Goods and Services must be documented in the person-centered service plan.

Limitations This service is only available to those participants choosing self-determination.

This service excludes experimental or prohibited treatments.

4.1.O. SPECIALIZED MEDICAL EQUIPMENT AND SUPPLIES

Definition Specialized Medical Equipment and Supplies includes devices, controls, or appliances which enable participants to increase their abilities to perform ADL, or to perceive, control, or communicate with the environment in which they live. This service also includes items necessary for life support or to address physical conditions, along with ancillary supplies and equipment necessary to the proper functioning of such items. This includes durable and non-durable medical equipment and medical supplies not available under the State Plan that are necessary to address the participant's functional limitations. All items must be specified in the PCSP.

This service excludes those items that are not of direct medical or remedial benefit to the participant. Durable and non-durable medical equipment and medical supplies not available under the State Plan that are necessary to address the participant's functional limitations may be covered by this service. Medical equipment and supplies furnished under the State Plan must be procured and reimbursed through that mechanism and not through MI Choice. All items must be specified in the participant's PCSP.

All items must meet applicable standards of manufacture, design and installation. Coverage includes training the participant or caregiver(s) in the operation and maintenance of the equipment or the use of a supply when initially purchased. Waiver funds may also be used to cover the maintenance costs of equipment.

Requirements Waiver agencies may obtain some items directly from a retail store that offers the item to the public (i.e., Wal-Mart, Meijer, Costco, etc.). When utilizing retail stores, the waiver agency must ensure the item purchased meets the service standards. The waiver agency may choose to open a business account with a retail store for such purchases. The waiver agency must maintain the original receipts and maintain accurate systems of accounting to verify the specific participant who received the purchased item.

The waiver agency must document the medical or remedial benefit the equipment or supply provides to the participant in the participant's case record.

Where feasible, the waiver agency or direct service provider must seek affirmation of the need for the item provided from the participant's physician.

The waiver agency may provide liquid nutritional supplements as a specialized medical supply. The participant's physician or other health care professional must first order liquid nutritional supplements as described in the HDM service standards. When liquid nutrition supplements a participant's diet, the supports coordinator must ensure the physician or other health care professional renews the order for liquid nutritional supplements every six months.

Limitations The waiver agency may not authorize MI Choice payment for prescription medications not found on the Medicaid prescription drug formulary. If a participant requires a medication not found on the formulary, the waiver agency, participant, or pharmacy must seek prior authorization of payment through the State Plan. Regardless of approval or denial of State Plan prior authorization, MI Choice funds must not pay for the medication.

The waiver agency must not authorize MI Choice payment for herbal remedies or other over-the-counter medications for uses not authorized by the Food and Drug Administration (FDA).

*Medicaid Provider Manual
MI Choice Waiver Section
January 1, 2024, pp 34, 45-46
Emphasis added*

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.

Petitioners bears the burden of proving, by a preponderance of evidence, that the Waiver Agency erred in authorizing and/or delivering their medically necessary services.

Here, Petitioners argue that annual maintenance on a generator and a second central air conditioning unit are medically necessary for Petitioners. Petitioners argue that the generator is necessary to maintain life-support equipment in the home should the power go out and that the second air condition unit is necessary because it services Petitioner [REDACTED] room. Petitioners argue that temperature control is vitally important to their health, safety and well-being, and functioning air-conditioning is necessary to achieve this goal.

The Waiver Agency argues that coverage for maintenance of the generator is no longer covered because such coverage only existed during the public health emergency (PHE) when Goods and Services coverage was extended to all beneficiaries, not just beneficiaries on self-determination. The Waiver Agency notes that there was an actual billing code in Attachment K for generator maintenance during the PHE, but the code no longer exists.

The Waiver Agency argues that maintenance on the second air conditioning unit is not necessary because the Waiver Agency has already purchased and maintains an air conditioning unit that serves the Petitioners' portion of the home. The Waiver Agency also argues that a request for an assessment for temperature control in Petitioner [REDACTED] bedroom was made in 2023 and denied and the denial was upheld following an administrative hearing. (See Exhibit K.) The Waiver Agency also argues that nothing has changed with Petitioners' situation since that denial so there is no reason to revisit the topic.

Petitioners bear the burden of proving by a preponderance of the evidence that the Waiver Agency erred in denying their request for maintenance on a generator and a second central air conditioning unit. Based on the evidence presented, Petitioners have proven by a preponderance of the evidence that the Waiver Agency erred in denying these requests.

Regarding the generator, it appears that the Waiver Agency is confusing how it bills Medicaid for such a service with the medical necessity of that service. There is no question that Petitioners have life support systems in the home that must be available 24/7, even during power outages. The Waiver Agency has agreed that such maintenance is medically necessary as it has provided the service in the past, and, while the service may no longer be billed to Medicaid under the Appendix K exceptions to Goods and Services, that does not mean that the service is no longer medically necessary. The medical necessity of the generator is also supported by the fact that the current generator was purchased by Medicaid, albeit through a different agency.

The above Specialized Medical Equipment and Supplies policy states, "This service also includes items necessary for life support or to address physical conditions, along with ancillary supplies and equipment necessary to the proper functioning of such items." And, "Waiver funds may also be used to cover the maintenance costs of equipment." Here, a generator is necessary to maintain life support equipment for Petitioners, so the maintenance of that generator is also covered under this policy.

Regarding the second air conditioning unit, it appears that the Waiver Agency is relying on an assessment of Petitioners' living conditions that was conducted by a Heating and Cooling specialist in 2021. According to the Waiver Agency, this specialist opined that the central air conditioning unit serving [REDACTED] bedroom and Petitioners' living area was sufficient to also cool [REDACTED] bedroom. The Waiver Agency did not provide this report to Petitioners or present it at the hearing.

At the hearing, Petitioners' guardian testified in a credible manner that the central air conditioning unit covering [REDACTED] bedroom and Petitioners' living area does not extend to [REDACTED] bedroom because [REDACTED] bedroom is carved out of an original part of the family's 1940's home. According to Petitioner's guardian, when central air conditioning was installed in the 1990's addition that includes [REDACTED] bedroom and Petitioners' living area, it was determined that it would not be possible to extend that air conditioning into the old portion of the home because that portion of the home is constructed of cinder block. (See also Exhibit C, p 35.)

Based on the evidence presented, it is more likely that Petitioners' guardian's testimony is correct and the central air conditioning unit covering [REDACTED] bedroom and Petitioners' living area does not extend to [REDACTED] bedroom. While the Waiver Agency refers to an assessment of Petitioners' living areas, that assessment was not included in the evidence or provided to Petitioners. Also, because of the unusual set up of having [REDACTED] bedroom carved out of the old part of the house (and the only internal access to that bedroom being through the 1990's addition), it would be easy for someone to assume that his room was covered by the first central air conditioning unit. Given that temperature regulation is also part of Petitioners' life support systems, maintenance of the second central air conditioning unit should also be covered.

Respondent's arguments to the contrary are not persuasive. First, Respondent argues that the 2023 Decision and Order already addressed and upheld the denial of a second central air conditioning unit. However, the undersigned does not agree that the prior Decision and Order (Exhibit K) is dispositive here. That decision dealt with a request for an assessment to improve the temperature control in [REDACTED] bedroom, not a request to maintain the central air conditioning unit that serves his bedroom. There is also no mention in that decision of the unusual set up of [REDACTED] bedroom, as discussed above. Finally, the fact that Petitioners have 24/7 care in the home seems irrelevant to Petitioners' temperature control, *i.e.*, monitoring someone's temperature is not the same as controlling that person's temperature.

Therefore, based on the evidence presented, Petitioners have proven by a preponderance of the evidence that the Waiver Agency's actions were improper. The Waiver Agency must annually maintain Petitioners' generator and second central air conditioning unit.

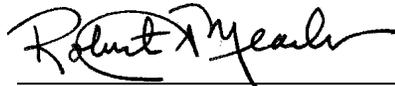
DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency's actions were improper.

IT IS THEREFORE ORDERED that:

The Waiver Agency's decision is **REVERSED**.

Within 10 days of the issuance of this Decision and Order, the Waiver Agency must certify that it has taken steps to authorize the annual maintenance of Petitioners' generator and second central air conditioning unit.



Robert J. Meade
Administrative Law Judge

RM/sj

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

PROOF OF SERVICE

I certify that I served a copy of the foregoing document upon all parties, to their last known addresses in the manner specified below, this 16th day of April 2024.

S. James

S. James
**Michigan Office of Administrative
Hearings and Rules**

Via Electronic And First Class Mail:

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