[redacted]
MI [redacted]

Date Mailed: November 26, 2024
MOAHR Docket No.: 22-004097-R, 22-004098-R, 22-004806-R, 22-004807-R
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Steven Kibit

DECISION AND ORDER

The above-captioned four consolidated matters are before the Michigan Office of Administrative Hearings and Rules (MOAHR) and the undersigned Administrative Law Judge (ALJ) following an Order of Remand from [redacted] County Circuit Court.[1]

On October 1, 2024, a prehearing conference was held for the purpose of discussing preliminary matters. Attorney Craig Elhart represented the Petitioners [redacted] and [redacted] (Petitioners) at the conference and all times thereafter. Attorney Leslie Dickinson represented the Respondent Area Agency on Aging of Northwest Michigan (Respondent) at the conference and all times thereafter.

During the conference, the representatives for the parties and the ALJ confirmed the issues remanded by the circuit court. The representatives also indicated that they were attempting to resolve the remaining issues, and they and the ALJ agreed that the parties would submit a stipulation regarding what issues, if any, remained in dispute. The stipulation was to also indicate if the parties wanted a conference or a hearing scheduled following the stipulation.

On October 9, 2024, MOAHR received a Stipulated List of Issues from the parties in which they agreed that only two issues remained in dispute. The parties also indicated that the matters could be set for hearing. They further identified conflict dates for scheduling the hearing.

On October 11, 2024, the ALJ issued an Order and Notice of Hearing identifying a deadline for proposed exhibits and scheduling a telephone hearing for November 6, 2024.

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[1] Two other cases, Docket Nos. 23-004182-R and 23-004183-R, were also remanded at the same time. However, they were subsequently dismissed after Petitioners' representative confirmed on the record that the issues in them were moot.

On November 6, 2024, a consolidated hearing was held via telephone in the above-captioned consolidated matters and completed as scheduled.

During the hearing, the following witnesses testified:

Petitioners' witness:

[redacted] Petitioners' legal guardian

Respondent's witness:

Amanda Moleski, Respondent's Director of Quality and Utilization Management

The following exhibits were also admitted into the record without objection:

Petitioners' exhibits:

Exhibit #1: Documents related to Impulsators, pages 1-11

Exhibit #2: Letters of Medical Necessity and Requests for Travel Ventilators, pages 1-5

Exhibit #3: Excerpt from Medicaid Provider Manual (MPM), pages 1-2

Exhibit #4: Definitions from the United States Food and Drug Administration, pages 1-2

Respondent's exhibits:

Exhibit A: Email dated September 23, 2024, page 1

Exhibit B: Excerpt from MPM, pages 1-32

Exhibit C: Notice of Internal Appeal Decision-Denial, pages 1-3

Exhibit D: Compass Back-up Plans for Petitioners, pages 1-10

Exhibit E: Emails dated October 29, 2024 and October 31, 2024, page 1

Following completion of the consolidated hearing, the record closed.

ISSUES

As stipulated by the parties, the following issues remain in dispute:

(1) Whether Respondent properly denied Petitioners' requests for impulsators?

(2) Whether Respondent properly denied Petitioners' requests for travel/back-up ventilators?

FINDINGS OF FACT

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

1. Petitioners are enrolled in the MI Choice Waiver Program and receive services through Respondent pursuant to that program. (Exhibit D, pages 1-10).

2. Neither Petitioner can be left alone due to their medical needs, and they have been approved for around-the-clock nursing services. (Exhibit D, pages 1, 6; Testimony of Petitioner's guardian).

3. They both have respiratory issues and require the use of a ventilator daily, with Petitioner [redacted] requiring it more often. (Testimony of Petitioner's guardian).

4. Their home does have a generator as a back-up in case of a power failure. (Exhibit D, pages 2, 7).

5. Petitioners also have back-up oxygen tanks and ambu bags in their home to provide ventilation in case of an emergency. (Exhibit D, pages 2, 7; Exhibit E, page 1; Testimony of Petitioner's guardian).

6. The oxygen tanks and ambu bags are portable. (Testimony of Director of Quality and Utilization Management).

7. Their back-up plans with Respondent also provide for emergency services to be called when necessary. (Exhibit D, pages 1-10).

8. Outside of Petitioners' home, their medical transportation provides travel ventilators for Petitioners during trips to a hospital in [redacted] Michigan. (Testimony of Petitioners' guardian).

9. Petitioner [redacted] also receives a travel ventilator during transportation for local medical appointments and tests. (Testimony of Petitioners' guardian).

10. On July 23, 2022, Petitioners' guardian submitted a request for travel/back-up ventilators for Petitioners. (Exhibit #2, pages 1-5).

11. As part of that request, Petitioners' guardian wrote:

> **Service Requested:** I am [Petitioners'] legal guardian. Effective today, I request the following service to be provided so that a need can be met. That MICHOICE cover travel/back up ventilators for both [Petitioners] because no insurance will pay for them. [redacted] has had one provided by Carelinc for several years but has never been paid. An incident this week of emergency replacement of [redacted] ventilator that failed brought forth the need for him to also have a backup/travel ventilator. Dr. Singer very recently sent Carelinc a prescription for a backup/travel ventilator for [redacted] and so they are in the process of obtaining one. Please contact Carelinc and work with them on getting coverage for these back up/travel ventilators through MICHOICE.

Exhibit #2, page 3

12. The requests for ventilators were denied, and Petitioners filed an Internal Appeal with respect to those denials. (Testimony of Director of Quality and Utilization Management).

13. On September 1, 2022, Respondent sent Petitioners a Notice of Internal Appeal Decision-Denial stating that their requests for ventilators had been denied. (Exhibit C, pages 1-3).

14. With respect to the reason for the denials, the notice stated:

> Review of records indicate beneficiaries each have a ventilator, provided through Medicaid
>
> State Plan services. Assessment data supports medical necessity for ventilator, based on complex health conditions of beneficiaries and necessity of equipment to maintain living in the home setting. A back-up plan is in place with beneficiaries indicating medical equipment relies on power, and back-up systems are in place in case of power failure. A generator is available in the home to assist in continuation of use of equipment in the event of a power failure. Back up oxygen tanks and manual bag masks are reported to be present in the home to assist in continuation of adequate oxygenation and

> ventilation in the event of a power failure. Back up plan includes notification of the emergency medical response system (911 EMS) in case of an emergency and power failure that impacts the ventilation system. Twenty-four hour private duty nursing care with an RN is provided in the home for beneficiaries, to include ventilator management and use of manual ventilation systems, as needed. Due to adequate supports and services currently in place to meet complex care needs, with adequate back up plans established, an additional ventilator system is not indicated as necessary at this time to maintain living independently in the home setting.
>
> 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.

Exhibit C, pages 1-2

15. Petitioners requested a hearing with respect to the denials of ventilators, among other issues. *See* Docket Nos. 22-004097, 22-004098, 22-004808, and 22-004807.

16. The undersigned ALJ subsequently granted Respondent's Motion for Summary Disposition with respect to the portion of their requests involving ventilators. *See* Docket Nos. 22-004097, 22-004098, 22-004808, and 22-004807.

17. Petitioners appealed that decision to circuit court; the circuit court found in Petitioners' favor; and the cases were remanded back to MOAHR for further proceedings.

18. As of September 23, 2024, the denials of ventilators are still an issue between the parties. (Exhibit A, page 1).

19. In letters dated October 2, 2024, one for each Petitioner, Dr. Scott Selle, M.D., wrote in part:

> The above patient requires a second mechanical ventilator for travel to medical appointments both locally and to [redacted] travel to the emergency room, and other community access needs. The patient's home ventilator is a mounted unit that is difficult to transport and the ventilator circuit should not be opened except to change each month to reduce infection risk. Replacing the ventilator circuit

> for travel would increase cost and waste resources. The second ventilator needs to be on hand during travel since patient's respiratory status can deteriorate rapidly without notice to his chronic neuromuscular respiratory failure and dysautonomia.

Exhibit #2, pages 1-2

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. 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.

Petitioners have been approved for services through the Department of Health and Human Services' Home and Community Based Services for Elderly and Disabled. The waiver is called MI Choice in Michigan. The program is funded through the federal Centers for Medicare and Medicaid to the Michigan Department of Health and Human Services. Regional agencies, in this case Respondent, function as the Department's administrative agency.

> Waivers are intended to provide the flexibility needed to enable States to try new or different approaches to the efficient and cost-effective delivery of health care services, or to adapt their programs to the special needs of particular areas or groups of beneficiaries. 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 beneficiaries 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. *See* 42 CFR 430.25(c)(2).

Here, as discussed above, the parties stipulated that two issues remain in dispute in these consolidated cases: (1) whether Respondent properly denied Petitioners' requests for impulsators; and (2) whether Respondent properly denied Petitioners' requests for travel/back-up ventilators. Each of these two issues will be addressed in turn.

Impulsators

During the hearing, the parties resolved the dispute over the denials of impulsators and agreed that, going forward, Petitioners' plans of care would identify Respondent as a tertiary provider of impulsators for Petitioners, but that Petitioners still must request them with documentation that the primary and secondary providers had denied or refused coverage. Respondent would then approve or deny requests; and, if a request was denied, send an Adverse Benefit Determination (ABD) with respect to any denial. Petitioners could then file Internal Appeals with respect to any ABD and, if the ABD was upheld upon appeal or Petitioners' appeal rights were otherwise exhausted, request a State fair hearing.

Travel/Back-up Ventilators

The parties did not resolve the dispute over the denials of travel/back-up ventilators during the hearing.

Regarding services through Respondent, including the specialized medical equipment and supplies like the ones requested in these cases, the Medicaid Provider Manual (MPM) outlines the applicable criteria for the MI Choice Waiver Program and states in part:

> **SECTION 4 – SERVICES**
>
> The array of services provided by the MI Choice program is subject to the prior approval of CMS. Waiver agencies are required to authorize all approved waiver services that a participant needs to live successfully in the community that are:
>
> - indicated by the current assessment;
> - detailed in the person-centered service plan (PCSP); and
> - authorized in accordance with the provisions of the approved waiver.
>
> Services must not be authorized unless they are defined in the PCSP and must not precede the establishment of a

PCSP. Waiver agencies cannot limit in aggregate the number of participants receiving a given service or the number of services available to any given participant. Participants have the right to receive services from any willing and qualified provider within the waiver agency's provider network. When the waiver agency does not have a willing and qualified provider within their network, the waiver agency must utilize an out-of-network provider at no cost to the participant until an in-network provider can be secured. (Refer to the Providers section of this chapter for information on qualified provider standards.)

MDHHS, waiver agencies, and direct service providers must not impose a copayment or any similar charge upon participants for waiver services. MDHHS and waiver agencies do not impose a premium, enrollment fee, or similar cost-sharing arrangement on waiver participants.

Although MI Choice participants must have services approved by the waiver agency, participants have the option to select any participating provider in the waiver agency's provider network, thereby ensuring freedom of choice.

Services paid for with MI Choice funds must not duplicate nor replace services available through the State Plan. Where applicable, the participant must use State Plan, Medicare, or other available payers first. MI Choice is the funding source of last resort. The participant's preference for a certain provider is not grounds for declining another payer in order to access waiver services.

Providers must have previous relevant experience or training for the tasks specified and authorized in the PCSP. The waiver agency must deem the chosen provider capable of performing the required tasks.

For services involving transportation paid for with MI Choice funds, the Secretary of State must appropriately license all drivers and vehicles, and all vehicles must be appropriately insured as required by law.

Healthcare Common Procedure Coding System (HCPCS) codes for each service can be found in the Directory Appendix of the Medicaid Provider Manual.

4.1 COVERED WAIVER SERVICES

In addition to regular State Plan coverage, MI Choice participants may receive services outlined in the following subsections.

* * *

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).

MPM, October 1, 2024 version
MI Choice Waiver Chapter, pages 18, 45-46

Here, as discussed above, Respondent denied Petitioners' request for travel/back-up ventilators pursuant to the above policies and on the basis that the requested equipment was not medically necessary.

In appealing those decisions, Petitioners bears the burden of proving by a preponderance of the evidence that Respondent erred.

Given the record and applicable policies in this case, Petitioners have failed to meet their burden of proof; and Respondent's decisions must therefore be affirmed.

As a preliminary matter, the undersigned ALJ would note that the requests at issue are requests for ventilators for both travel and as a back-up in Petitioners' home. That is the initial request that was made to Respondent. Moreover, while Respondent stated in its Prehearing Statement on Remand that only back-up ventilators were at issue, with travel ventilators being a separate item, it rescinded that position during the hearing itself. It also indicated that its position on both travel and back-up ventilators is the same.

In that position, Respondent argued that the ventilators are not medically necessary as Petitioners' needs can be met without the items. Specifically, as provided in the notice of appeal denial and testified to by Respondent's witness, Respondent found that Petitioners have been approved for around-the-clock nursing; they have a generator in their home in case of power failures; they have backup oxygen tanks and manual ambu bags that can provide temporary ventilation at home or during travel; and their backup plan calls for Petitioners' caregivers to contact emergency services when necessary.

Upon review, the undersigned ALJ finds that Petitioners have failed to meet their burden of proof with respect to Respondent's findings and decisions.

For example, within the home, the current supports are sufficient, with the back-up plan adequately addressing emergencies such as power failures or failures with the ventilators Petitioners do have. At most, Petitioners' guardian testified that the ambu bags identified by Respondent are temporary measures that cannot be used for as long as Respondent's witness indicated; require specific settings; and can only be used by trained professionals. However, that testimony is unsupported and the letters of medical necessity submitted by Petitioners' doctor notably failed to identify any need for additional ventilators in the home. Moreover, even if there is a dispute about how long they last, Respondent's witness' testimony accounted for the ambu bags being a temporary measure, with emergency services to be called as needed, and Petitioners are authorized to have a trained nurse with them at all times.

Petitioners have also failed to show any need for ventilators outside of the home. Petitioners' guardian initially testified that the ventilators are needed for trips to a hospital in [redacted] Michigan, that can take hours. However, she later testified that travel ventilators are already provided by Petitioners' medical transportation and, as such, those trips provide no justification for approval here. Similarly, for more local medical appointments, Petitioners' guardian eventually testified that Petitioner [redacted] who requires more respiratory assistance, is already provided a travel ventilator; and, given her inconsistent testimony, the undersigned ALJ does not find the guardian's claims regarding Petitioner [redacted] needs not being met to be credible.

Moreover, while Petitioners' guardian testified that the ventilators are necessary to allow Petitioners to access the community, such as going to church, that testimony is likewise unpersuasive. Neither the request for ventilators itself of the letters of medical necessity drafted by Petitioners' doctor identified such a need or support Petitioners' guardian's testimony.

To the extent Petitioners have additional or updated information to provide, then they can always request ventilators again in the future along with that information. With respect to the decisions at issue in this case however, Respondent's decisions must be affirmed given the undisputed information and applicable policies.

DECISION AND ORDER

The Administrative Law Judge based on the above findings of fact and conclusions of law, decides that: (1) the dispute over the past denials of impulsators is resolved and moot given the agreement of the parties on the record; and (2) Respondent properly denied Petitioners' request for travel/back-up ventilators.

IT IS THEREFORE ORDERED that:

Petitioners' requests for hearing regarding the denials of their requests for impulsators are **DISMISSED.**

The Respondent's decisions with respect to the denials of Petitioners' requests for travel/back-up ventilators are **AFFIRMED**.

Steven Kibit

SK/sj

Steven Kibit
Administrative Law Judge

NOTICE OF APPEAL: Petitioners 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 26th day of November 2024.

S. James

S. James
Michigan Office of Administrative Hearings and Rules

Via Electronic & First Class Mail:

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[redacted]
[redacted] MI [redacted]
[redacted]

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