# Office of Medicaid
# BOARD OF HEARINGS

**Appellant Name and Address:**

[redacted]

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| **Appeal Decision:** | DENIED | **Appeal Number:** | 2301081 |
| **Decision Date:** | 4/4/2023 | **Hearing Date:** | 03/22/2023 |
| **Hearing Officer:** | Christopher Taffe | | |

**Appearance for Appellant:**
Appellant, pro se (by phone)

**Appearances for Element Care (PACE):**
(1) Carla Recinos Guzman - Project Manager, Participant Services;
(2) Danielle McKnight - Center Manager;
(3) Anna Miretsky - Physical Therapist;
(4) Natalie Neufeld - Occupational Therapist;
(5) Briana Fortado - Social Worker; and
(6) Dr. Soumya Chandrasekaran – Doctor
(all by phone)

*The Commonwealth of Massachusetts*
*Executive Office of Health and Human Services*
*Office of Medicaid*
*Board of Hearings*
*100 Hancock Street, Quincy, Massachusetts 02171*

# APPEAL DECISION

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| **Appeal Decision:** | DENIED | **Issue:** | PACES – PA – DME – Power Wheelchair |
| **Decision Date:** | 4/4/2023 | **Hearing Date:** | 03/22/2023 |
| **Respondent Reps.:** | C. Recinos Guzman | **Appellant's Rep.:** | Appellant, pro se |
| **Hearing Location:** | HarborSouth Tower, Quincy (Remote Hearing) | | |

## Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

## Jurisdiction

On January 20, 2023, Element Care, a PACE entity, informed Appellant, a MassHealth member, that its Internal Review Board (IRB) had processed Appellant's internal appeal and that IRB had denied coverage for a power wheelchair.[1] See Exhibit 1. Appellant filed a timely request for a Fair Hearing of this adverse action with the Board of Hearings on February 9, 2023. See 130 CMR 610.015(B); Exhibit 1. A MassHealth Managed Care Contractor's decision to deny a request for assistance is grounds for appeal to the Board of Hearings, see 130 CMR 610.032(B), and a PACE plan must allow for such external review of its coverage decisions. See 42 C.F.R. § 460.124.

[1] In Massachusetts, there is a Program of All-inclusive Care for the Elderly (PACE) which is administered by MassHealth and Medicare-related entities to provide a comprehensive range of medical, social, recreational, and wellness services to eligible participants over the age of 60 who live in the community and are classified as medically frail. See 130 CMR 519.007(B). Element Care is one such PACE program in the Commonwealth, and is the Managed Care Contractor (MCC) entity that made the administrative determination that was appealed here.

# Action Taken by Element Care

Element Care denied Appellant's request for a power wheelchair.

# Issue

Is there enough evidence and basis in law to overturn the decision of the PACE entity and support Appellant's request for a power wheelchair at the present time?

# Summary of Evidence

Appellant is a MassHealth member in her late 60s who lives in a community setting and has been enrolled with the PACE benefit administered by Element Care since 2019. Appellant appeared at hearing by phone, as did six members of Element Care, many of whom were, or are currently, part of Appellant's Interdisciplinary Team (IDT). Prior to the hearing, Element Care submitted a 6-page fax detailing some of the history of this claim.[2]

Element Care testified that on December 12, 2022, it received a request from Appellant for a power wheelchair. No specifics on the cost, model, or type of power wheelchair were provided by either party at hearing. On December 15, 2022 the Center Manager of Element Cares site in Beverly, Mass. sent a letter to Appellant stating that the IDT had denied the request for the power wheelchair because Appellant "*did not meet the 6 point criteria for a mobile wheelchair*." See Exhibit 3, page 2.

Element Care testified that its 6-point criteria had been previously prepared by Element Care employees, working in conjunction with its Medical Director. No regulatory or other source of the criteria was supplied by Element Care, but testimony was given suggesting that they believed it was consistent with federal law governing Medicare.[3]

A copy of the 6-point criteria appears on Exhibit 3, page 3. Per that document compiled in December 12, 2022, Appellant met 5 of the 6 criteria but did not satisfy criteria # 4. That criteria reads in its entirety as follows:

*Participant does have a mobility limitation that limits household ambulation and significantly*

[2] Although this 6-page submission is an unusually and relatively bare submission made by an acting entity to comply with 130 CMR 610.062(A), the paperwork and testimony from both parties at hearing were consistent and there were not many substantive facts in dispute which may affect the analysis of this appeal. Had there been a more good faith dispute about anything factual and relevant, it is likely that Element Care would have been asked to produce more substantial documentation.

[3] The Hearing Officer indicated during questioning that he was not aware of any Medicaid-pertinent rules or, more specifically, MassHealth documents or guidance, such as MassHealth Guidelines for Medical Necessity Determination for power mobility devices. No member of the Element Care team was aware or testified of any such Medicaid standard, so the focus in questioning eventually turned to Medicare. No specific citation was given by Element Care.

*impairs their ability to participate in / complete mobility related activities of daily living (MRADLs) such as toileting, feeding, grooming, and bathing and customary locations in the home and that the mobility limitation cannot be sufficiently and safely resolved by the use of a lesser restrictive ambulatory device such as a walker or cane. Participant also demonstrates insufficient upper extremity strength and function in order to self-propel a manual wheelchair in the home to perform MRADLs.*

There are two notes from one of the doctors (Dr. Chan) of the IDT dated December 12, 2022 and December 13, 2022 within the assessment papers in Exhibit 3. One of the notes states that Appellant "*is using manual wheelchair inside her apartment without any issues"* and the other states that Appellant "*can use manual wheelchair at home but has a lot of trouble self-propelling the manual wheelchair up the ramp into her apartment and wants to precede* (sic) *with request."* See Exhibit 3, pages 3 and 5.

After the December 15, 2022 denial, Appellant requested an internal appeal, and the Internal Review Board (IRB) issued a decision on January 20, 2023 after meeting with both Appellant and her IDT on January 17, 2023. The IRB issued a decision upholding the IDT's denial, stating as the reason that *"you do not have a mobility limitation that limits household ambulation and significantly impairs your ability to participate in / complete mobility related activities of daily living.*" See Exhibit 3, page 6.

The representatives at hearing from the IDT testified that Appellant does not currently receive Personal Care Attendant services at hearing, in part because Appellant declined them because she believed she was independent for them. In addition to a manual wheelchair, Appellant uses items such as a Rollator (4-wheeled walker device) and other items around the house, such as grab bars and a shower chair to complete her various Activities of Daily Living (ADLs). Appellant also has a hospital bed. Appellant testified that she is still currently independent in that she can still shower, toilet, move herself around her small residence, and dress herself independently although as some of her vascular diseases and conditions progress as age, it is either getting more difficult at the present time or she just do so more slowly and carefully. She testified that she no longer uses the Rollator as much, but relies more on the wheelchair and then the bars in the bathroom or other household structures, such as the walls, doorframes, or counters, to navigate and do activities. She still does minor activities in the kitchen such as food prep or minor washing but often will have to rest or rely on the counter for support during such tasks.[4]

The parties discussed how the main motivation behind the request for the power wheelchair is Appellant wants to be able to more easily and more regularly go down the "ramp" outside her

[4] One member of the IDT for therapy services also raised concerns about Appellant's mental acuity, in that she has shown a slight cognitive decline, at least in comparison to when she first joined the program, and as evidenced in her annual MoCA (Montreal Cognitive Assessment) scores. Concerns were also raised about her eyesight and peripheral vision which may be factors in using such a power mobility device safely, as Appellant's eyesight was apparently in the bottom 2% of individuals her age. Despite that testimony, Exhibit 3, page 4 indicates that the criteria related to both "judgment and cognitive capacity" and "adequate coordination, vision and hearing" (which are two of the other points in the 6-point criteria) were met and satisfied by the IDT in its initial decision. Regardless, the 6-point assessment request used by Element Care requires all 6 elements of the criteria to be satisfied, so the decision will focus on the unsatisfied criteria related to MRADLs.

residential building, so that she can navigate to the designated smoking area for smoking cigarettes. Appellant testified that she is a long-time smoker, who has smoked since her teenage years, and she probably smokes on average 4 times a day. It is difficult for her to propel her wheelchair safely up and down the ramp. Members of the IDT testified that Appellant reportedly will have to raise her hands and use the railing bar for guidance when traveling on the ramp, and that is very difficult for her to self-propel the wheelchair up the ramp. Appellant stated that currently at time, she often has to wait for a friend to get assistance traveling up and down the ramp. Appellant admitted that she can use the wheelchair inside, in her current residence, with no issues, and that the need for the power wheelchair is predominantly for navigating outdoor terrain.

# Findings of Fact

Based on a preponderance of the evidence, I find the following:

1. Appellant is a MassHealth member who receives comprehensive health care benefits through a PACE plan administered by Element Care. (Testimony and Exhibit 3)

2. Appellant lives in the community in her own residence by herself. (Testimony)

3. Appellant made a request to Element Care for a power wheelchair in December of 2022. This request was denied by Appellant's IDT in December 2022. After requesting an internal appeal process, this decision to deny the power wheelchair was upheld by Element Care's Internal Review Board, and Appellant timely appealed this denial to the Board of Hearings. (Testimony and Exhibits 1 and 3)

4. In making its decision, Element Care applied and relied on a 6-point test which lays out a criteria for qualifying for a power mobility device. Element Care stated that Appellant did not satisfy or meet all 6 required parts of the criteria. (Testimony and Exhibit 3)

    a. Specifically, Element Care found that Appellant did not satisfy the criteria of having a mobility limitation that limited her ability to navigate within her home and which significantly impaired her ability to participate and complete Mobility-Related Activities of Daily Living. (Testimony and Exhibit 3)

5. Appellant does not have a PCA to help her with ADLs, and she lives independently. She is able to transfer and move around the house with use of current assistive devices and medical equipment, including her manual wheelchair. She also has a hospital bed and grab bars around the home which she uses. (Testimony)

6. Appellant is currently able to navigate around all inside areas of her residence and she is also able to independently bathe, toilet, dress and undress herself and do some basic meal preparation. (Testimony)

7. The request for the power wheelchair is motivated by the need to go outside the home and

smoke cigarettes in a designated outside smoking area. (Testimony)

8. To go to and from the smoking area, Appellant does not have the strength to propel her manual wheelchair up the wheelchair accessible ramp. She often has to use her hands on the guard rail to guide herself when in the manual wheelchair and she may rely on others to navigate the ramp. (Testimony)

# Analysis and Conclusions of Law

There are several Medicaid waiver programs that allows state Medicaid agencies, such as MassHealth, to experiment with different reimbursement methods and care mechanisms for providing healthcare to frail and elderly populations. PACE is one of those MassHealth waiver options that works with elder members of the state to help keep them living in the community setting. See 130 CMR 519.007 which states in relevant part:

*519.007: Individuals Who Would Be Institutionalized*
*130 CMR 519.007 describes the eligibility requirements for MassHealth Standard coverage for individuals who would be institutionalized if they were not receiving home- and community-based services.*

…
*(C) Program of All-Inclusive Care for the Elderly (PACE).*
*(1) Overview. The PACE program is a comprehensive health program that is designed to keep frail, older individuals who are certified eligible for nursing-facility services living in the community.*
*(a) A complete range of health-care services is provided by one designated community-based program with all medical and social services coordinated by a team of health professionals.*
*(b) The MassHealth agency administers the program in Massachusetts as the Elder Service Plan (ESP).*
*(c) Persons enrolled in PACE have services delivered through managed care*
*(i) in day-health centers;*
*(ii) at home; and*
*(iii) in specialty or inpatient settings, if needed.*

There is no dispute in this matter that Appellant is currently a MassHealth member receiving PACE benefits through Element Care.

A PACE organization must *"[e]stablish an interdisciplinary team at each PACE center to comprehensively assess and meet the individual needs of each participant."* See 42 C.F.R. § 460.102(a)(1). The IDT must be comprised of at least: a primary care physician; a registered nurse; a master's level social worker; a physical therapist; an occupational therapist; an activity coordinator or recreational therapist; a dietitian; a PACE center manager; a home care coordinator; a personal care attendant or his or her representative; and a Driver or his or her representative. See id. at § 460.102(b)(1)-(11).

Generally, a PACE participant is entitled to all of the Medicare- and Medicaid-covered items and services that they would receive if not enrolled in the PACE plan. 42 C.F.R. § 460.92. However, the IDT is given broad latitude to assess a participant's needs for particular services. See 42 C.F.R. §§ 460.102-460.106. MassHealth's regulations do not provide additional guidance regarding how a PACE's IDT is to review a participant's request for services or how an IDT's decision should be reviewed. See 130 CMR 519.007(C)(1).

The PACE organization must provide participants with the opportunity to appeal such decisions through a grievance and appeals process. See 42 C.F.R. §§ 460.121-460.122. In addition to an internal appeal process, a PACE participant is entitled to an external review depending on their Medicare and Medicaid status. See 42 C.F.R. § 460.124. If a member chooses to exercise their appeal rights through the state Medicaid agency, they are entitled to a fair hearing from the state administering agency; thus, the Board of Hearings has jurisdiction over this appeal.

A power wheelchair a form of Durable Medical Equipment, or DME. MassHealth has DME regulations at 130 CMR 409.000. Although mobility equipment (including a power wheelchair) is a potentially covered benefit, see 130 CMR 409.413(B), all such DME must be found to be medically necessary and appropriate if it is approved. See 130 CMR 409.414(B); 130 CMR 409.417; 130 CMR 450.204.

Relevant portions of those regulations and standards appear below:

*409.414: Non-covered Services*
*The MassHealth agency does not pay for the following:*
*…*
*(B) DME that is determined by the MassHealth agency not to be medically necessary pursuant to 130 CMR 409.000, and 130 CMR 450.204: Medical Necessity. This includes, but is not limited to, items that:*

> *(1) cannot reasonably be expected to make a meaningful contribution to the treatment of a member's illness, disability, or injury;*
> *(2) are more costly than medically appropriate and feasible alternative pieces of equipment; or*
> *(3) serve the same purpose as DME already in use by the member, with the exception of the devices described in 130 CMR 409.413(D);*

*409.417: Medical Necessity Criteria*
*(A) All DME covered by MassHealth must meet the medical necessity requirements set forth in 130 CMR 409.000 and in 130 CMR 450.204: Medical Necessity, and any applicable medical necessity guidelines for specific DME published on the MassHealth website.*
*(B)* ***For items covered by MassHealth for which there is no MassHealth item-specific medical necessity guideline, and for which there is a Medicare Local Coverage Determination (LCD) indicating Medicare coverage of the item under at least some circumstances, the provider must demonstrate medical necessity of the item consistent with the Medicare LCD.*** *However, if the provider believes the durable medical equipment is medically necessary even though it does not*

*meet the criteria established by the local coverage determination, the provider must demonstrate medical necessity under 130 CMR 450.204: Medical Necessity.*
*(C) For an item covered by MassHealth for which there is no MassHealth item-specific medical necessity guideline, and for which there is a Medicare LCD indicating that the item is not covered by Medicare under any circumstance, the provider must demonstrate medical necessity under 130 CMR 450.204: Medical Necessity.*

*450.204: Medical Necessity*
*The MassHealth agency does not pay a provider for services that are not medically necessary and may impose sanctions on a provider for providing or prescribing a service or for admitting a member to an inpatient facility where such service or admission is not medically necessary.*
*(A) A service is medically necessary if*

> *(1)* ***it is reasonably calculated to prevent, diagnose, prevent the worsening of, alleviate, correct, or cure conditions in the member*** *that endanger life, cause suffering or pain, cause physical deformity or malfunction, threaten to cause or to aggravate a handicap, or result in illness or infirmity; and*
>
> *(2)* ***there is no other medical service or site of service, comparable in effect, available, and suitable for the member requesting the service, that is more conservative or less costly to the MassHealth agency****. Services that are less costly to the MassHealth agency include, but are not limited to, health care reasonably known by the provider, or identified by the MassHealth agency pursuant to a prior-authorization request, to be available to the member through sources described in 130 CMR 450.317(C), 503.007: Potential Sources of Health Care, or 517.007: Utilization of Potential Benefits.*

*(B) Medically necessary services must be of a quality that meets professionally recognized standards of health care, and must be substantiated by records including evidence of such medical necessity and quality. A provider must make those records, including medical records, available to the MassHealth agency upon request. (See 42 U.S.C. 1396a(a)(30) and 42 CFR 440.230 and 440.260.)*

(**Bolded** emphasis added.)

In looking at the appropriateness of the decision, the DME regulations above require us to first see if there is a MassHealth item-specific medical necessity guideline. See 130 CMR 409.417(B). The current MassHealth guidelines may be found at https://www.mass.gov/lists/masshealth-guidelines-for-medical-necessity-determination (last viewed on March 30, 2023), and, while there are items such as standers and diabetic management devices (like insulin pumps), there are no such guidelines for mobility equipment. Thus, the medical necessity of the requested item must be consistent with any Medicare-related LCD, if one such LCD exists. See id.

The federal Centers for Medicare and Medicaid Services (CMS) does have an LCD (L33789) for Power Mobility Devices.[5]

[5] See https://www.cms.gov/medicare-coverage-database/view/lcd.aspx?LCDId=33789&ContrID=140 (last viewed on March 30, 2023).

Some highlight of that LCD include the general criteria for coverage at the beginning, which indicates that Elemental Care's own criteria, which focus on the need for help and ability to do Mobility-Related ADLs, seems reasonable, consistent, and well founded, especially with the emphasis in the LCD on use within the home.

A. *The beneficiary has a mobility limitation that significantly impairs his/her ability to participate in one or more mobility-related activities of daily living (MRADLs) such as toileting, feeding, dressing, grooming, and bathing in **customary locations in the home**. A mobility limitation is one that:*
    - *Prevents the beneficiary from accomplishing an MRADL entirely, or*
    - *Places the beneficiary at reasonably determined heightened risk of morbidity or mortality secondary to the attempts to perform an MRADL; or*
    - *Prevents the beneficiary from completing an MRADL within a reasonable time frame.*

B. *The beneficiary's mobility limitation cannot be sufficiently and safely resolved by the use of an appropriately fitted cane or walker.*

C. *The beneficiary does not have sufficient upper extremity function to self-propel an optimally-configured manual wheelchair in the home to perform MRADLs during a typical day.*
    - *Limitations of strength, endurance, range of motion, or coordination, presence of pain, or deformity or absence of one or both upper extremities are relevant to the assessment of upper extremity function.*
    - *An optimally-configured manual wheelchair is one with an appropriate wheelbase, device weight, seating options, and other appropriate nonpowered accessories*

(**Bolded** emphasis added.)

Perhaps most importantly the LCD also makes mention of how use, outside the home, should be a non-factor and cannot be used to justify an approval for a request. That section from the LCD specifically reads as follows:

> Although beneficiaries who qualify for coverage of a power mobility device may use that device outside the home, because **Medicare's coverage of a wheelchair or POV is determined solely by the beneficiary's mobility needs within the home**, the encounter must clearly distinguish the beneficiary's abilities and needs within the home from any additional needs for use outside the home.

(**Bolded** emphasis added.)

Accordingly, I find that Element Care's standard and decision to deny Appellant's request to be reasonable, consistent, and justified. Appellant's need and desire for the mobility wheelchair is clearly focused on being able to use it to get outside, predominantly to help her get to and from her

smoking breaks,[6] but there is no indication of her currently needing it for activities inside the home. I thus conclude that there is no medical necessity for this requested DME, and I find no reason to overrule the decision made by Element Care. This appeal is therefore DENIED.

## Order for Element Care

None.

## Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

Christopher Taffe
Hearing Officer
Board of Hearings

cc: Element Care
ATTN: Carla Recinos Guzman
37 Friend Street
Lynn, MA 01902

[6] It is also difficult to entertain any further argument under 130 CMR 409.417 on the use of the equipment being medically necessary, as the habit of smoking cigarettes is clearly not something that one can rationally say is an act that will "*alleviate, correct, or cure conditions in the member.*"