

**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

P.O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax: (517) 334-9505

IN THE MATTER OF:

Docket No. 2009-16005 EDW

██████████,
Appellant
_____ /

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon the Appellant's request for a hearing.

After due notice, a hearing was held on ██████████. ██████████, represented Appellant. ██████████, Appellant's daughter/legal guardian appeared and testified as a witness for Appellant. ██████████, represented the Department's waiver agency, ██████████. ██████████, testified as a witness for the waiver agency.

ISSUE

Did ██████████ properly determine that Appellant no longer met the Nursing Facility Level of Care criteria effective ██████████?

FINDINGS OF FACT

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

1. Appellant is a ██████-year-old female with a history of advanced neurofibromatosis and chronic pain.
2. Appellant was a resident of a nursing home at all times relevant to this matter.
3. Appellant became a nursing home resident on ██████████.
4. Appellant has a past medical history of carotid stenosis, hypothyroidism, acute myocardial infarction, hypertension, coronary artery disease, hyperlipidemia,

lichen planus, chronic low back pain, depression, diabetes mellitus Type 2, macular degeneration, peripheral vascular disease, vascular dementia, and chronic venous stasis dermatitis.

5. According to a complete physical examination report dated ██████████ Appellant's chief complaint is progressive dementia over the past several years, which moderately limits Appellant's activities, and the "frequency of episodes is daily"; Appellant's test results revealed a severe cognitive impairment; and Appellant is unable to live safely in her home due to her dementia, "she is constantly taking her pain pills at odd times and sometimes takes several all together. She won't take the diabetes medication and the blood sugar is never under control. To this point she has not been on dementia medication consistently." (Exhibit D)
6. The waiver agency is a contract agent of the Michigan Department of Community Health (MDCH) and is responsible for determining clients' eligibility for Nursing Facility Level of Care services.
7. On ██████████ the waiver agency completed an assessment, using the approved MDCH Level of Care Determination Tool, for the purpose of determining whether Appellant met the Nursing Facility Level of Care criteria. (Agency Exhibit 2).
8. On ██████████, the waiver agency determined that Appellant does not meet the functional/medical eligibility criteria for Medicaid Nursing Facility Level of Care services because the Level of Care Assessment Tool indicated that she did not need a Nursing Facility Level of Care (Exhibits C14 - C21).
9. On ██████████, the waiver agency sent Appellant written notice of its eligibility determination. (Exhibit E)
10. On ██████████, the waiver agency completed a reassessment, using the approved MDCH Level of Care Determination Tool, for the purpose of determining whether Appellant required a Nursing Facility Level of Care.
11. On ██████████, the waiver agency determined that Appellant meets the criteria for a Nursing Facility Level of Care based on her score under Door 2-Cognitive Performance on the Level of Care Assessment Tool. (Exhibit C-13)
12. On ██████████ the State Office of Administrative Hearings and Rules received the Appellant's request for an administrative hearing, protesting the waiver agency's decision.

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.

Effective November 1, 2004, the Michigan Department of Community Health (MDCH) implemented revised functional/medical eligibility criteria for Medicaid nursing facility, MI Choice, and PACE services. Federal regulations require that Medicaid pay for services only for those beneficiaries who meet specified level of care criteria. Nursing facility residents must also meet Pre-Admission Screening/Annual Resident Review requirements.

The Medicaid Provider Manual, Coverages and Limitations Chapter, Nursing Facilities Section, April 1, 2006, lists the policy for admission and continued eligibility process as well as outlines functional/medical criteria requirements for Medicaid-reimbursed nursing facility, MI Choice, and PACE services.

Section 4.1 of the Medicaid Provider Manual Nursing Facilities Section references the use of an online Michigan Medicaid Nursing Facility Level of Care Determination tool (*Michigan Medicaid Nursing Facility Level of Care Determination, March 7, 2006, Pages 1 – 9 or LOC*). The LOC must be completed for all Medicaid-reimbursed admissions to nursing facilities or enrollments in MI Choice or PACE on and after November 1, 2004.

The Level of Care Assessment Tool consists of seven service entry Doors. (Exhibit 2). The doors are: Activities of Daily Living (ADLs), Cognitive Performance, Physician Involvement, Treatments and Conditions, Skilled Rehabilitative Therapies, Behavior, and Service Dependency. In order to be found eligible for Medicaid Nursing Facility placement, the Appellant must meet the requirements of at least one Door.

Door 1 **Activities of Daily Living (ADLs)**

Scoring Door 1: The applicant must score at least six points to qualify under Door 1.

(A) Bed Mobility, (B) Transfers, and (C) Toilet Use:

- Independent or Supervision = 1
- Limited Assistance = 3
- Extensive Assistance or Total Dependence = 4

- Activity Did Not Occur = 8
- (D) Eating:**
- Independent or Supervision = 1
 - Limited Assistance = 2
 - Extensive Assistance or Total Dependence = 3
 - Activity Did Not Occur = 8

Door 2
Cognitive Performance

In order to qualify under Door 2:

Scoring Door 2: The applicant must score under one of the following three options to qualify under Door 2.

1. "Severely Impaired" in Decision Making.
2. "Yes" for Memory Problem, and Decision Making is "Moderately Impaired" or "Severely Impaired."
3. "Yes" for Memory Problem, and Making Self Understood is "Sometimes Understood" or "Rarely/Never Understood."

Door 3
Physician Involvement

The Michigan Medicaid Nursing Facility Level of Care Determination tool indicates that to qualify under Door 3, the Appellant must have either of the following:

1. At least one Physician Visit exam AND at least four Physician Order changes in the last 14 days, OR
2. At least two Physician Visit exams AND at least two Physician Order changes in the last 14 days.

Door 4
Treatments and Conditions

The Michigan Medicaid Nursing Facility Level of Care Determination tool indicates that in order to qualify under Door 4, the Appellant must receive, within 14 days of the assessment date, any of the following health treatments or demonstrated any of the following health conditions:

- A. Stage 3-4 pressure sores
- B. Intravenous or parenteral feedings
- C. Intravenous medications

- D. End-stage care
- E. Daily tracheostomy care, daily respiratory care, daily suctioning
- F. Pneumonia within the last 14 days
- G. Daily oxygen therapy
- H. Daily insulin with two order changes in last 14 days
- I. Peritoneal or hemodialysis

Door 5
Skilled Rehabilitation Therapies

The Michigan Medicaid Nursing Facility Level of Care Determination tool indicates that to qualify under Door 5, the Applicant must:

Have required at least 45 minutes of active Speech Therapy, Occupational Therapy or Physical Therapy (scheduled or delivered) in the last 7 days and continues to require skilled rehabilitation therapies to qualify under Door 5.

Door 6
Behavior

The Michigan Medicaid Nursing Facility Level of Care Determination tool indicates that in order to qualify under Door 6, Appellant had to score under the following two (2) options:

1. A "Yes" for either delusions or hallucinations within the last 7 days.
2. The applicant must have exhibited any one of the following behaviors for at least 4 of the last 7 days (including daily): Wandering, Verbally Abusive, Physically Abusive, Socially Inappropriate/Disruptive, or Resisted Care.

Door 7
Service Dependency

The Michigan Medicaid Nursing Facility Level of Care Determination tool indicates that to qualify under Door 7, there must be evidence that the Applicant is currently being served in a nursing facility (and for at least one year) or by the MI Choice or PACE program, and requires ongoing services to maintain her current functional status.

Appellant disputes the determination that she did not the meet a Nursing Facility Level of Care effective [REDACTED], under Door 2. The waiver agency determined that with regard to Cognitive Performance, Appellant was "Modified Independent" in her ability to make decisions regarding tasks of daily life during the last 7 days; she was

having short-term memory problems; and she was able to usually make herself understood. A client is considered to have modified independent Cognitive Skills for daily decision making if the client has an organized daily routine and is able to make safe decisions in familiar situations. (See p. 3 of the Michigan Medicaid Nursing Facility Level of Care Determination Tool). The Options Counselor who completed the assessment, ██████████, testified that Appellant was not very cooperative in answering questions asked of her. ██████████ testified that she had to get most of the information that she needed to complete her assessment from the nursing facility staff. She testified that she spoke to the Director of Nursing and two nurses aides who have worked with Appellant while she has been a resident of the nursing facility.

This Administrative Law Judge finds that Appellant established by a preponderance of evidence that she met the Nursing Facility Level of Care criteria under Door 2 based on the following reasons:

Appellant's daughter/legal guardian testified that Appellant had her first stroke ██████ years ago. She testified credibly that prior to be admitted into the nursing facility, Appellant had poor memory, poor judgment, she was misusing her medications, and she was mentally incapable of dialing 911 in case of an emergency. There is medical documentation from a qualified medical source that supports the testimony of Appellant's legal guardian. Appellant underwent a complete physical and mental status examination just prior to being admitted into the nursing home. According to a medical examination report dated ██████████, Appellant was described as having chronic and worsening dementia, which moderately limits her ability to do her activities of daily living. Dementia (means "deprived of mind") is the progressive decline in cognitive function due to damage or disease in the body beyond what might be expected from normal aging; and it is progressive deterioration in intellectual function and other cognitive skills, leading to a decline in the ability to perform activities of daily living. The prevalence of dementia doubles every 5 yrs after age 60 until about age 90. (See Merck Manual of Geriatrics) Appellant's treating physician stated in his medical examination report that: Appellant has severe dementia; "the frequency of episodes is daily"; and Appellant is no longer able to live in her home environment safely.

At all times relevant to this matter, Appellant was a ██████ year old woman who had been diagnosed with "chronic", "worsening", "severe" dementia. The preponderance of evidence provided by Appellant establishes that it is implausible and highly unlikely that on ██████████, she was "Modified Independent" in her cognitive ability for decision making given the severity of her dementia prior to be admitted into the nursing facility. Treatments to reverse or halt the progression of most dementias affecting elderly individuals are not available. (See Merck Manual of Geriatrics)

Secondly, the Department failed to provide any documentation such as nurses notes from the 7-day look-back period to establish that it was able to make an accurate and thorough assessment of Appellant's cognitive ability effective ██████████. The same Options Counselor did a second assessment of Appellant on ██████████,

approximately two weeks later, using the same Nursing Facility Level of Care Tool. [REDACTED] determined that Appellant **did meet** the Nursing Facility Level of Care criteria under Door 2. [REDACTED] testified that during the second assessment of Appellant: she was able to obtain additional information from Appellant's daughter/legal guardian; she spent more time with Appellant and was able solicit more responses from her; more information concerning Appellant's functional ability was brought out; and she was able to make a complete analysis of Appellant's cognitive skills. Further, there is no evidence to establish that there was a rapid decline in Appellant's cognitive ability over the two week time period or between the time of the first and second assessment of Appellant. What the preponderance of evidence establishes is that the second assessment was a more accurate and thorough assessment of the Appellant's medical condition and functional ability at all times relevant to this matter.

In conclusion, Appellant established that she met the Nursing Facility Level of Care criteria at the time relevant to this matter. Accordingly the Department's eligibility determination cannot be upheld.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that [REDACTED] failed to establish that Appellant no longer met the Nursing Facility Level of Care criteria effective [REDACTED].

IT IS THEREFORE ORDERED that

The Department's decision is **REVERSED**.

Marya A. Nelson-Davis
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc: [REDACTED]

[REDACTED]
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Date Mailed: 6/1/2009

***** NOTICE *****

The State Office of Administrative Hearings and Rules may order a rehearing on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. The State Office of Administrative Hearings and Rules will not order a rehearing on the Department's motion where the final decision or rehearing cannot be implemented within 90 days of the filing of the original request. The Appellant may appeal the Decision and Order to Circuit Court within 30 days of the receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt of the rehearing decision.