STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH
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(877) 833-0870; Fax: (517) 334-9505

IN THE MATTER OF:

[redacted],

Appellant
_____/

Docket No. 2009-6802 REM
Case No. [redacted]
Load No. [redacted]

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to an Order for Remand and Rescheduled Notice of Hearing issued by [redacted], State Office of Administrative Hearings and Rules for the Department of Community Health.

The Order for Remand was issued following the issuance by the [redacted] of a Stipulation and Order of Dismissal on [redacted]. The Stipulation and Order of Dismissal temporarily resolved an appeal by the Appellant after it was discovered that the tape of the original, [redacted], hearing did not record the proceedings, and no transcript was available to the Circuit Court for review.

After due notice, an in-person hearing was held on [redacted], in [redacted], [redacted] and [redacted], appeared on behalf of [redacted] (Appellant). Also appearing as witnesses for the Appellant were [redacted] and [redacted].

Appearing on behalf of the Department of Community Health (Department) was [redacted]. Also appearing as witnesses for the Department were [redacted], and [redacted].

ISSUE

1. Did the Department properly determine the Appellant ineligible for the Nursing Facility Level of Care, under Doors 1 through 7?

2. Did the Department properly determine the Appellant does not meet criteria under the Nursing Facility Level of Care Exception process?

FINDINGS OF FACT

Based upon the competent, material, and substantial evidence presented, I find, as material fact:

1. On [redacted], under [redacted], the [redacted], Administrative Law Judge, issued a Decision and Order affirming a Department of Community Health decision that the Appellant was ineligible for Medicaid-funded nursing facility coverage. The Department's decision was based on Nursing Facility Level of Care Determinations, conducted on [redacted], and [redacted].

2. Following the Decision and Order, the Appellant filed an [redacted], Request for Rehearing. On [redacted], under [redacted], State Office of Administrative Hearings and Rules for the Department of Community Health, issued an Order for Dismissal of Rehearing. The Order for Dismissal of Rehearing was appealed to the [redacted] County Circuit Court.

3. On [redacted], an Order for Remand and Rescheduled Notice of Hearing was issued by [redacted], State Office of Administrative Hearings and Rules for the Department of Community Health. The matter was assigned to Stephen B. Goldstein, Administrative Law Judge.

4. The purpose of the hearing conducted by Judge Goldstein on [redacted], is to adjudicate the issue of whether the Department's [redacted], and [redacted], Level of Care Determinations properly concluded the Appellant did not meet eligibility requirements for Medicaid-funded nursing facility coverage, under either Doors 1 through 7, or pursuant to the exception process.

5. The Appellant, born [redacted], became a resident of the [redacted], on [redacted]. At that time, she was admitted under private pay status, as she did not have a Medicaid application pending.

6. As of [redacted], the Appellant is diagnosed with Chronic Obstructive Pulmonary Disease (COPD), marked scoliosis and kyphosis of her spine, atrial fibrillation, and her skin reveals multiple seborrheic keratoses. *(Exhibit 3; p. 1).*

7. Treatment notes from an [redacted], visit by the Appellant with [redacted], the Appellant's primary care physician, reveals the following subjective and objective findings and assessments:

> *"…She is debilitated, living at home." "…She does have chronic obstructive pulmonary disease and atrial fibrillation." "…She gets short of breath very easily and can barely make a few steps. She also cannot lie flat, as she has orthopnea and most related to her back." "…**Lungs**: her lungs reveal marked diminishment of air exchange with scattered rhonchi." "**Musculoskeletal:** she has scoliosis and kyphosis of her spine, which is rather marked."*
>
> *(Exhibit 3, p. 1)*

8. Treatment notes from a [redacted], visit by the Appellant with [redacted] reveal the following subjective and objective findings and assessments:

> *"…**Lungs:** her lungs reveal marked diminishment of air exchange." "…**Musculoskeletal:** she has marked kyphosis and scoliosis of her back."*
>
> *(Exhibit 3; p. 1)*

9. Treatment notes from a [redacted], visit by the Appellant with [redacted] reveal the following subjective and objective findings and assessments:

> *"…**Lungs:** lungs reveal diminishment of air exchange." "…**Assessment:** general debility secondary to aging."*
>
> *(Exhibit 3; p. 2)*

10. Treatment notes from a [redacted], visit by the Appellant with [redacted] reveal the following subjective and objective findings and assessments:

> *"…**Lungs:** marked diminishment of air exchange. **Musculoskeletal:** she has quite a lot of kyphosis of her spine." "…**Assessment:** COPD, General Debility Secondary to Aging, Atrial Fibrillation."*
>
> *(Exhibit 3, p. 2)*

11. On [redacted], [redacted], an options counselor with [redacted], conducted a Michigan Medicaid Nursing Facility Level of Care Determination (LOCD), to determine if the Appellant met the criteria for Medicaid-funded nursing facility coverage. The [redacted] LOCD was utilized as a planning tool, as the Appellant was not, at that time, a Medicaid beneficiary, and no Medicaid application was pending.

12. [redacted] determined that the Appellant did not meet criteria for Medicaid-funded nursing facility coverage, and provided the Appellant with an Adequate Action Notice of the determination.

13. On [redacted], the State Office of Administrative Hearings and Rules for the Department of Community Health received the Appellant's hearing request protesting the findings of the [redacted], LOCD.

14. By [redacted], the Appellant had a Medicaid application pending.

15. On [redacted], [redacted] conducted a second LOCD to determine eligibility for Medicaid-funded nursing facility coverage. The [redacted], LOCD again determined that the Appellant did not meet eligibility criteria under Doors 1 through 7 of the LOCD determination tool, and provided her with an Adequate Action Notice of the determination.

16. On or about [redacted], the Appellant's attorney requested that the [redacted] review the LOCD, and requested that the Appellant be considered for eligibility under the Nursing Facility Level of Care Exception Process.

17. On [redacted], [redacted], a Department employee who was not present at the [redacted], hearing and therefore provided no testimony about her findings, performed an evaluation of the Appellant's eligibility under the Nursing Facility Level of Care Exception Process. It provides, in pertinent part, as follows:

> *"Immediate review initiated by DPOA/Attorney for applicant, [redacted]. Per him, applicant is one person assist with bed mobility, uses w/c needs 5-10 min for transfers/completion of ADLs. Is consistently impacted by back pain and needs 5-10 min. rest after ADLs. Not known if falls. Nutrition, AP and/or med changes not known. No unusual behaviors; can be "caustic" and occasionally resists care. Contacted [redacted] counselor,since LOC not in system. Later in day, spoke with [redacted] in place and answered interview questions. Uses walker; needs 5 min. for*

> *ADLs. No falls. Wt [redacted]; [redacted]. No med changes. No unusual behaviors. Requested latest MDS, past 2 months of nurses and physician notes/orders, dx. Spoke with [redacted] counselor, requested her assessment tools. Review of all [redacted] materials; [redacted] was out of time frame. DX: HTN, atrial fib, chronic airway obstruct; scoliosis, abnormal posture, orthopnea. No [redacted] documentation supported verbal comments of applicants ADL needs. LM at Mr. [redacted]'s office to notify of denial. Informed [redacted] and [redacted] counselor of denial."*
>
> *[Tab 4 of Circuit Court Certification of Record (Exhibit 1- readmitted during [redacted] hearing)]*

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, Coverage(s) and Limitations Chapter, Nursing Facilities Section, April 1, 2005, 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, 2005, 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. All Medicaid beneficiaries who reside in a nursing facility on November 1, 2004, must undergo the evaluation process by their next annual MDS assessment date.

Nursing facilities, MI Choice, and PACE have multiple components for determining eligibility for services. The Medicaid Provider Manual Nursing Facilities Section and the *Nursing Facility Eligibility and Admission Process, November 1, 2004, Pages 1-7* explain the

components that comprise the eligibility and admission process for nursing facility eligibility and admission. The LOC is the assessment tool to be utilized when determining eligibility for admission and continued Medicaid nursing facility coverage. There are five necessary components for determining eligibility for Medicaid nursing facility reimbursement.

- Verification of Medicaid Eligibility
- Correct/timely Pre-Admission Screening/Annual Resident Review (PASARR)
- Physician Order for Nursing Facility Services
- Appropriate Placement based on Medicaid Nursing Facility Level of Care Determination
- Freedom of Choice.

See MDCH Nursing Facility Eligibility and Admission Process, Page 1 of 7, 11/01/04.

The Level of Care (LOC) Assessment Tool consists of seven-service entry Doors. The doors are: Activities of Daily Living, Cognition Performance, Physician Involvement, Treatments and Conditions, Skilled Rehabilitative Therapies, Behavior, or Service Dependency. In order to be found eligible for Medicaid Nursing Facility placement, the Appellant must meet the requirements of at least one Door. The Medicaid Provider Manual explicitly provides that a nursing home resident must meet the Level of Care criteria on an ongoing basis. The period of review is narrow, in some cases, over a 7-day period prior to the date of assessment. *(Medicaid Provider Manual, Nursing Facility Coverages; Version Date: October 1, 2007)*

The Appellant bears the burden of establishing, by a preponderance of evidence, that she meets the Level of Care criteria, by scoring sufficient points under one of seven (7) separate and distinct eligibility "doors" below.

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

[redacted] conducted the [redacted], and [redacted], LOCDs. She testified the [redacted], LOCD was conducted for planning purposes only because at that time the Appellant did not intend to utilize Medicaid assistance to fund her stay at the facility. However, that later changed, and the [redacted], LOCD was conducted to determine eligibility.

[redacted] testified that, for both the [redacted], and [redacted], LOCDs, the Appellant needs supervision only, in the areas of bed mobility, toileting, transfers, and eating. She stated the Appellant was observed talking independently in her room, and was observed walking to and from the toilet and telephone independently. [redacted] further testified she reviewed nursing facility medical documentation (e.g., progress notes), which appeared to corroborate her personal observations.

[redacted] testified that, because the Appellant scored two (2) points under Door 1, and needed six points to qualify for eligibility under Door 1, she failed to meet criteria under this door.

The Appellant's attorney argued that, although the Appellant may be capable of performing ADLs independently, her physical ailments prevent her from accomplishing those tasks in a reasonable amount of time.

Because the amount of time it takes an individual to complete ADLs is not a relevant inquiry under this portion of the LOCD, this argument has little or no merit. The argument, however, will be considered under my discussion of whether the Appellant may satisfy eligibility criteria under the Nursing Facility Level of Care Exception Process.

Door 2
Cognitive Performance

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."

[redacted] testified that the Appellant's memory was fine, no deficits were noted, and that the Appellant could make herself understood. The Appellant's attorney does not contest [redacted] finding in this regard.
Having scored an insufficient number of points, I conclude the Appellant has not met the nursing facility level of care criteria under Door 2.

Door 3
Physician Involvement

The Level of Care (LOC) tool indicates that to qualify under Door 3 the Appellant must:

> …[M]eet either of the following to qualify:
>
> 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.

According to [redacted], [redacted], and [redacted], LOCD, the Appellant had no physician visits or physician order changes within the 14 days preceding the assessment. The Appellant's attorney provided no evidence this finding is incorrect. Accordingly, the Appellant does not qualify for the nursing facility level of care under Door 3.

Door 4
Treatments and Conditions

The LOC 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

According to [redacted], the Appellant suffers from none of the above-listed health conditions. The Appellant's attorney provided no evidence the findings of [redacted] were inaccurate in this regard. Therefore, the Appellant does not qualify for the nursing facility level of care under Door 4.

Door 5

Skilled Rehabilitation Therapies

The LOC tool provides the Applicant must:

> …[H]ave required at least 45 minutes of active ST, OT or PT (scheduled or delivered) in the last 7 days and continues to require skilled rehabilitation therapies to qualify under Door 5

According to the [redacted], and [redacted], LOCDs, the Appellant did not receive any of the above-cited therapies within the relevant look-back period. The Appellant's attorney did not contest the findings in this regard. The Appellant therefore does not qualify for the nursing facility level of care under Door 5.

Door 6
Behavior

The LOC tool provides a listing of behaviors recognized under Door 6: Wandering, Verbally Abusive, Physically Abusive, Socially Inappropriate/Disruptive, Resists Care. It provides that the Appellant would qualify under Door 6 if she scored under the following two 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.

According to the [redacted], and [redacted], LOCDs, the Appellant neither presently nor during the seven days preceding the assessment, engaged in verbally abusive or socially inappropriate behavior. There is also no mention that the Appellant experienced episodes of wandering, or resisting care for at least 4 of the last 7 days before these assessments.

The Appellant's attorney did not contest [redacted] findings in this regard. Accordingly, the Appellant does not qualify for the nursing facility level of care under Door 6.

Door 7
Service Dependency

The Appellant was admitted to [redacted] on [redacted]. The LOCDs at issue were conducted on [redacted], and [redacted]. She therefore had not been a facility resident for one (1) year or more, and is ineligible for Medicaid-reimbursable admission to the facility under Door 7.

Michigan Medicaid Nursing Facility Level of Care Exception Process

Following [redacted], LOCD, the Appellant's attorney requested an immediate review by the [redacted]). [redacted] reviewed medical documentation in the facility file, and, on [redacted] issued a determination that the Appellant met none of the exceptions provided in the Nursing Facility Level of Care Exception Process.

The Michigan Medicaid Nursing Facility Level of Care Determination Nursing Facility Level of Care Exception Process provides, in pertinent part, as follows:

> **4.1.D.2.** An exception process is available for those applicants who have demonstrated a significant level of long term care need but do not meet the Michigan Medicaid Nursing Facility LOC Determination criteria. The Nursing Facility LOC Exception Process is initiated when the nursing facility telephones the MDCH designee and requests review after the applicant has been determined ineligible using the electronic web-based tool.
>
> ***Michigan Medicaid Provider Manual***
> ***Nursing Facility Coverage(s)***
> ***Version Date: April 1, 2007***
> ***Page 10***

Michigan Medicaid Nursing Facility Level of Care Determination Nursing Facility Level of Care Exception Process

The following guidelines describe the second level review criteria for those applicants who did not meet the Michigan Medicaid Nursing Facility Level of Care Determination through the electronic web-based form. These criteria are used by the Michigan Department of Community Health (MDCH) or its designee on a provider's request to evaluate long term care program needs and appropriateness for Medicaid-reimbursed nursing facility care, the MI Choice Program, or the Program of All Inclusive Care for the Elderly (PACE).

Applicants who exhibit the following characteristics and behaviors may be admitted to programs requiring the Nursing Facility Level of Care definition. An applicant need trigger only one element to be considered for an exception.

Frailty

The applicant has a significant level of frailty as demonstrated by at least one of the following categories:

- *Applicant performs late loss ADLs (bed mobility, toileting, transferring, and eating) independently but requires an unreasonable amount of time; (emphasis supplied by ALJ)*
- *Applicant's performance is impacted by consistent shortness of breath, pain, or debilitating weakness during any activity; (emphasis supplied by ALJ)*
- Applicant has experienced at least two falls in the home in the past month;
- Applicant continues to have difficulties managing medications despite the receipt of medication set-up services;
- Applicant exhibits evidence of poor nutrition, such as continued weight loss, despite the receipt of meal preparation services;
- Applicant meets criteria for Door 3 when emergency room visits for clearly unstable conditions are considered

Behaviors

The applicant has at least a one month history of any of the following behaviors, and has exhibited two or more of any these behaviors in the last seven days, either singly or in combination (emphasis supplied by ALJ):

- Wandering;
- *Verbal or physical abuse; (emphasis supplied by ALJ)*
- Socially inappropriate behavior;
- *Resists care (emphasis supplied by ALJ)*

Treatments

The applicant has demonstrated a need for complex treatments or care.

Michigan Medicaid Nursing Facility Level of Care Determination
11/01/04 Nursing Facility Level of Care Exception Process; Page 1 of 1

[redacted], was the individual who performed the exception review process, and who issued the [redacted], decision upholding [redacted] determination of ineligibility. However, according to the Department's attorney, [redacted] is no longer employed in this capacity. Neither she nor any other Department employee appeared at the [redacted], hearing to provide testimony as to how it concluded the Appellant was ineligible under the exception process. This factor effectively deprived the Appellant of an opportunity to cross-examine the witnesses against her.

By contrast, the Appellant produced several witnesses, including [redacted]

[redacted], and others who testified regarding the Appellant's overall physical status, which existed both at the time of the [redacted], and [redacted], LOCDs, and for months before that, to include her admission to the facility in [redacted].

[redacted] credibly testified, both by affidavit *(Exhibit 4)*, and live, that he has been the Appellant's primary care physician continuously since 1992. His affidavit contains a recitation of the following medical conditions: *(a) hypertension; (b) chronic history of atrial fibrillation; (c) advanced chronic obstructive pulmonary disease; (d) asthma; (e) significant scoliosis; (f) significant kyphosis of the spine; (g) chronic back pain; (h) orthopnea; (i) arthritis of all of her joints and back; (j) general debility secondary to aging; (k) markedly diminished air exchange; (l) occasional constipation; (m) extremely anemic. (Exhibit 3; p. 1)*

[redacted] further testified by affidavit, and live, that the Appellant easily becomes short of breath, and that, for all practical purposes, cannot walk more than a few steps. He indicated that, as a result, she must use a wheelchair for all significant transfers that require ambulating even minor distances, and, due to progressive weakness, spinal and breathing problems, is not self-sufficient in a wheelchair. Other witnesses credibly testified it takes the Appellant between 5 and 10 minutes to ambulate from her bed to her bathroom.

[redacted] medical documentation corroborates his affidavit and the sworn testimony of other witnesses, and supports an inference that the Appellant not only suffers from frailty, but also shows a tendency toward resisting care, and engaging in verbally abusive behavior.

[redacted] medical records, as well as [redacted] progress notes, clearly reflect the Appellant has a tendency to resist care, one of the above-cited criteria. It is also documented that, on at least one occasion, the Appellant "lashed out" at her nephew and was heard yelling at him. *(Exhibit 1-Tab 5 of Certified Record; Progress Notes)*.

As the above-described documentation was part of the record before [redacted], I may reasonably infer it existed at the time of the exception determination process, and was available for review by the Department. Yet, it was either overlooked, or considered but given no weight. In my opinion, this oversight, or inconsideration of such evidence, gives rise to a conclusion that the Department did not carefully consider all available evidence when deciding the Appellant was ineligible under the exception process.

For example, [redacted], note indicates the Appellant was debilitated living at home, that she suffers from chronic obstructive pulmonary disease, that she can barely make a few steps, that she becomes short of breath very easily, that she can barely lie flat, as she has orthopnea—mostly related to her back; COPD, advanced, atrial fibrillation. *(Exhibit 3, p. 1)*

[redacted], note indicates marked diminishment of air exchange,

marked kyphosis and scoliosis of the back, COPD, atrial fibrillation. His [redacted], note indicates the Appellant's lungs reveal diminishment of air exchange; his assessment indicates she suffers from general debility secondary to aging. His [redacted], note indicates the Appellant has an upper respiratory infection, which she *"… really does not want treated at this time." (Emphasis Supplied by ALJ)* *(Exhibit 3, p. 1)*

Continuing, [redacted], note further indicates her lungs reveal marked diminishment of air exchange; his assessment indicates COPD, general debility secondary to aging, atrial fibrillation. *(Exhibit 3; p. 2)*

The medical evidence presented also supports a conclusion that the Appellant's performance of ADLs is consistently impacted by shortness of breath, pain and debilitating weakness. [redacted] live testimony and affidavit clearly support a conclusion there is no realistic likelihood the Appellant's condition will improve due to her physical incapacity. The medical evidence further supports a conclusion that, due to her medical ailments, the Appellant is increasingly becoming weaker, more fragile, and that her physical capabilities are deteriorating on a day-to-day basis. *(Exhibit 4)*

Because neither [redacted], nor any other Department witness was available to be cross-examined regarding this or any other evidence it relied upon in upholding the denial of eligibility, and, because the Appellant produced significant evidence to the contrary, I conclude the Appellant has met her burden of establishing eligibility for Medicaid-funded nursing facility coverage under the exception process, specifically, frailty and behaviors.

At one point during the hearing, the Department's attorney asked the Administrative Law Judge if she should contact a Department witness who could testify regarding the exception denial. The Administrative Law Judge chose to continue the testimony of the witness who was already testifying. The Department's attorney never raised the issue of the Department's witness after that point.

Under Federal law, it is the role of the Administrative Law Judge to provide litigants with the opportunity for a fair, impartial, and unbiased hearing. It is not the role of the Administrative Law Judge to assist either party in the presentation of proofs, or to remind either party if and/or when they have neglected to produce any particular witness.

DECISION AND ORDER

Based on the above findings of fact and conclusions of law, I decide the Department's determination that the Appellant does not require the nursing facility level of care under the exception process is erroneous, in violation of clearly articulated policy.

IT IS THEREFORE ORDERED that:

With regard to Issue #1, the Department's decision is AFFIRMED.

With regard to Issue #2, the Department's decision is REVERSED.

Stephen B. Goldstein
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 4/15/2009

***** 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.