

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

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IN THE MATTER OF:

██████████,

Appellant

Docket No. 2009-7396 OB

Case No. ██████████

Load No. ██████████

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 ██████████ ██████████ (Appellant) personally appeared and testified on his own behalf. ██████████, Department of Community Health (DCH or Department) Manager of the ██████████ program, represented the Department.

ISSUE

Did the Department properly determine that the Appellant did not require Nursing Facility services, but may require other Mental Health services?

FINDINGS OF FACT

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

1. The Appellant is a ██████-year-old Medicaid beneficiary who has been a resident of a nursing facility since ██████████.
2. Appellant has a history of depression since the ██████████ and Appellant symptoms have included feeling helpless, easily upset and irritated; and Appellant has been verbally abusive and combative to nursing home staff. (Exhibit 1, p. 12 & 19)

3. Appellant was diagnosed with a major depressive disorder-recurrent-mild and posttraumatic stress disorder. (Exhibit 1, p. 20)
4. Appellant has a medical history of cellulites and non-healing and suspected self inflicted wound of the left knee; pain, hypertension, gastroesophageal reflux disease, anemia, MRSA, and seizures. (Exhibit 1, p. 15)
5. On [REDACTED] based on the Annual Resident Review (PASARR) Level II assessment, the Office of Specialized Nursing Home/OBRA Program Director issued a letter, requesting that Appellant be provided with notice of the following:

The individual does NOT qualify for the level of services provided by a nursing facility and does not require specialized mental health/developmental disabilities services but may need other mental health or health/developmental disabilities services.

The individual may NOT continue to reside in a nursing facility.

The individual does NOT qualify for the services provided by a nursing facility, but has mental health or developmental disabilities needs which may require services. (Department Exhibit 1/Exhibit B, p. 26)

6. The notice of the Annual Resident Review (PASARR) Level II assessment submitted by the OBRA Coordinator was sent to Appellant.
7. On [REDACTED], Appellant filed a hearing request, protesting the Department's determination that he does not require nursing facility services.

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.

Department policy related to preadmission screening was developed to comply with the federal Omnibus Budget Reconciliation Act of 1987 (OBRA). This Nursing Home Reform Act initiative mandated a Preadmission Screening and Annual Resident Review (PASARR).

The intent of PASARR is to require “preadmission screening and annual review of the need for admitting or retaining individuals with mental illness (MI) or mental retardation (MR) in nursing facilities (NF) that are certified for Medicaid [and, if so, whether they needed specialized services for their MI or MR]. Also included was a requirement...that States institute an appeals system for individuals who may transfer or discharged from Medicaid NF’s or who wish to dispute a PASARR determination. **The purpose of the statutory provisions is to prevent the placement of individuals with MI or MR in a nursing facility unless their medical needs clearly indicate that they require the level of care provided by a nursing facility.**” (Federal Register, November 30, 1999, pages 56450-56451). (Bold emphasis added by ALJ).

The Michigan Department of Community Health is the State mental health authority, mental retardation authority and Medicaid agency. The Director of the Department has assigned the responsibility of making PASARR determinations to the Department’s Office of Nursing Home/OBRA Programs.

Federal law requires that the state mental health or mental retardation authorities conduct PASARR reviews before a person is admitted to a nursing facility.

Specifically the Code of Federal Regulations (CFR) provides in pertinent part:

42 CFR 483.106 Basic Rule-

(a) Requirement. The State PASARR program must require—

(1) Preadmission screening of all individuals with mental illness or mental retardation who apply as new admissions to Medicaid NFs on or after January 1, 1989;

(2) Initial review, by April 1, 1990, of all current residents with mental retardation or mental illness who entered Medicaid NFs prior to January 1, 1989; and

(3) At least annual review, as of April 1, 1990, of all residents with mental illness or mental retardation, regardless of whether they were first screened under the preadmission screening or annual resident review requirements.

(c) Purpose. The preadmission screening and annual resident review process must result in determinations based on a physical and mental evaluation of each individual with mental illness or mental retardation, that are described in §§ 483.112 and 483.114.

ARR determinations of whether an individual requires the level of services provided by a NF and whether specialized services are needed—

- (1) For individuals with mental illness, must be made by the State mental health authority and be based on an independent physical and mental evaluation performed by a person or entity other than the State mental health authority; and
- (2) For individuals with mental retardation, must be made by the State mental retardation or developmental disabilities authority.

(e) Delegation of responsibility—

- (1) The State mental health and mental retardation authorities may delegate by subcontract or otherwise the evaluation and determination functions for which they are responsible to another entity only if-
 - (i) The State mental health and mental retardation authorities retain ultimate control and responsibility for the performance of their statutory obligations;
 - (ii) The two determinations as to the need for NF services and for specialized services are made, based on a consistent analysis of the data; and
 - (iii) The entity to which the delegation is made is not a NF or an entity that has a direct or indirect affiliation or relationship with a NF.

42 CFR 483.128 PASARR evaluation criteria.

(a) Level I: Identification of individuals with MI or MR. The State's PASARR program must identify all individuals who are suspected of having MI or MR as defined in § 483.102. This identification function is termed Level I. Level II is the function of evaluating and determining whether NF services

and specialized services are needed. The State's performance of the Level I identification function must provide at least, in the case of first time identifications, for the issuance of written notice to the individual or resident and his or her legal representative that the individual or resident is suspected of having MI or MR and is being referred to the State mental health or mental retardation authority for Level II screening.

(e) The State's PASARR program must use at least the evaluative criteria of § 483.130 (if one or both determinations can easily be made categorically as described in § 483.130) or of §§ 483.132 and 483.134 or § 483.136 (or, in the case of individuals with both MI and MR, §§ 483.132, 483.134 and 483.136 if a more extensive individualized evaluation is required).

Appellant was diagnosed with a history of depression since the ██████████ and Appellant symptoms have included feeling helpless, easily upset and irritated; and Appellant has been verbally abusive and combative to nursing home staff. Appellant was diagnosed with a major depressive disorder-recurrent-mild and posttraumatic stress disorder. Therefore, the PASARR provisions apply to his case. After a PASARR level II assessment, the Department determined that Appellant does not require the services of a nursing facility, but he may need other mental health or health/developmental disabilities services. This Administrative Law Judge must decide whether the Appellant requires other mental health services instead of nursing facility level of care.

CMH or one of its contractors is charged with the responsibility of contacting the individual or guardian, and conducting the screening for the Department. The Department Office of Specialized Nursing Home/OBRA Programs then makes the determinations required by federal law, including whether or not the individual requires nursing home services.

42 CFR 483.132 Evaluating the need for NF services and NF level of care (PASARR/NF).

(a) Basic rule. For each applicant for admission to a NF and each NF resident who has MI or MR, the evaluator must assess whether—

(1) The individual's total needs are such that his or her needs can be met in an appropriate community setting;

(2) The individual's total needs are such that they can be met only on an inpatient basis, which may include the option of placement in a home and community-based services waiver

program, but for which the inpatient care would be required;

(3) If inpatient care is appropriate and desired, the NF is an appropriate institutional setting for meeting those needs in accordance with § 483.126; or

(4) If the inpatient care is appropriate and desired but the NF is not the appropriate setting for meeting the individual's needs in accordance with § 483.126, another setting such as an ICF/MR (including small, community-based facilities), an IMD providing services to individuals aged 65 or older, or a psychiatric hospital is an appropriate institutional setting for meeting those needs.

(b) Determining appropriate placement. In determining appropriate placement, the evaluator must prioritize the physical and mental needs of the individual being evaluated, taking into account the severity of each condition.

(c) Data. At a minimum, the data relied on to make a determination must include:

(1) Evaluation of physical status (for example, diagnoses, date of onset, medical history, and prognosis);

(2) Evaluation of mental status (for example, diagnoses, date of onset, medical history, likelihood that the individual may be a danger to himself/herself or others); and

(3) Functional assessment (activities of daily living).

(d) Based on the data compiled in § 483.132 and, as appropriate, in §§ 483.134 and 483.136, the State mental health or mental retardation authority must determine whether an NF level of services is needed.

██████████, OBRA/PASARR Manager, testified on behalf of the Department that Appellant does not require nursing facility level of care because he is a person with a mental illness and was medically stable at the time of the assessment. ██████████ testified that Appellant can be served in a less restrictive setting.

§42 CFR 483.108 Relationship of PASARR to other Medicaid processes.

(b) In making their determinations, however, the State mental health and mental retardation authorities must not use criteria relating to the need for NF care or specialized services that

are inconsistent with this regulation and any supplementary criteria adopted by the State Medicaid agency under its approved State plan.

The State Medicaid agency has adopted the Michigan Medicaid Nursing Facility Level of Care Determination tool as “consistent” criteria for all its long-term services, including nursing facility, MIChoice and PACE services. (*MSA Bulletin 04-15, October 1, 2004, page 1*). The tool’s seven door criteria must be met by all nursing facility participants in order to receive Medicaid reimbursement. (*Michigan Medicaid Nursing Facility Level of Care Determination, March 7, 2005, Pages 1 – 9 or LOC*). In addition:

Nursing facility residents must also meet pre-Admission Screening/Annual Resident Review requirements.

(*MSA Bulletin 04-15, October 1, 2004, page 1*).

In this case, the Michigan Medicaid Nursing Facility Level of Care Determination tool revealed the following:

Door 1 Activities of Daily Living

Appellant would need to score at least 6 points to qualify under Door 1. Under Door 1, the department established that Appellant is independent in his ability to do his activities of daily living, and Appellant did not qualify under this Door.

Door 2 Cognitive Performance

Based on the evidence on the record, Appellant does not qualify under Door 2 as there was no evidence of any short term memory problems, problem with Appellant’s cognitive skills for daily decision-making or any problems with making self understood. Therefore Appellant did not qualify under Door 2.

Door 3 Physician Involvement

The Department established that Appellant had only routine physician visits and physician orders. Therefore, he would not qualify under Door 3.

Door 4 Treatments and Conditions

The evidence on the record fails to establish that 14 days prior to the assessment, Appellant’s medical treatment or condition included any one of the following:

- 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

Therefore, Appellant would not qualify for nursing facility level of care under Door 4.

Door 5 Skilled Rehabilitation Therapies

Appellant did not have speech, occupational or physical therapies ordered by his physician or receive any of these services in the 7 days prior to the assessment. Therefore, Appellant would not qualify for nursing facility level of care under Door 5.

Door 6 Behavior

Based on the evidence on the record, Appellant did not have any of the following identified behavioral symptoms in the 7 days prior to the assessment: Wandering, Verbally Abusive, Physically Abusive, Socially Inappropriate/Disruptive, or Resists Care. Therefore, Appellant would not qualify for nursing facility level of care under Door 6.

Door 7 Service Dependency

Appellant has received nursing facility services for at least one year. However, the department provided substantial evidence to establish that Appellant does not require nursing facility level of care to maintain his current functional status, and there are community, residential or other informal services that could meet his needs.

The Appellant's placement in a nursing facility may only be considered appropriate if the Appellant's needs are such that he meets the minimum standards for admission and his needs do not exceed the level of Nursing Facility services or exceed the level of services provided through the Nursing Facility supplemented by specialized non-nursing facility services:

Sec. 483.126 Appropriate placement.

Placement of an individual with MI or MR in a NF may be considered appropriate only when the individual's needs are such that he or she meets the minimum standards for admission and the individual's needs for treatment do not exceed the level of services which can be delivered in the NF to which the individual is admitted either through NF services alone or, where necessary, through NF services supplemented by specialized services provided by or arranged for by the State.

Appellant testified that he has been in and out of the nursing home for the last █ years due to a recurring infection in his leg. However, Appellant failed to provide the necessary evidence to establish that there are current acute medical interventions, special treatments or procedures which require him to have ongoing nursing intervention or monitoring. Appellant did provide evidence to establish that it was recommended that he undergo knee surgery. This information was not made available to the Department at the time of the assessment, and it fails to establish that Appellant's physical needs cannot be met outside of a nursing facility. Further, Appellant has mental health needs that cannot be met in a nursing facility, and he appears to need other mental health services. The federal regulations as well as the state law and policy bind the Department and prohibit Medicaid from paying for nursing facility placement for those people that may have mental health needs, but do not have a level of physical need that can only be met in a nursing facility. The Department's substantial evidence supports the determination that Appellant's mental health service needs exceed the level of services a nursing home is capable of providing, and Appellant's needs can be met in a less restrictive setting such as an Adult Foster Care home. Since the Department established that nursing facility placement is not medically necessary or appropriate for Appellant's needs, its eligibility determination must be upheld.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly determined that the Appellant does not require Nursing Facility services but may require other Mental Health services.

IT IS THEREFORE ORDERED THAT:

The Department's decision is AFFIRMED.

IT IS FURTHER ORDERED THAT:

The Department shall immediately terminate Medicaid reimbursement to the Nursing Facility for services provided to the Appellant effective the date of this DECISION and ORDER

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

[REDACTED]
Docket No. 2009-7396
Decision and Order

cc:

[REDACTED]

Date Mailed: 3/13/2009

***** 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.