

**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. 2009-5377 NHE

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, following the Appellant's request for hearing.

After due notice, an in-person hearing was held on ██████████, in ██████████. ██████████ and ██████████, Attorneys at Law, appeared on behalf of ██████████ (Appellant). Also appearing as witnesses for the Appellant were ██████████ and ██████████.

Appearing on behalf of the Department of Community Health (Department) was ██████████. Also appearing as witnesses for the Department were ██████████ and ██████████.

ISSUE

1. Did the Department's ██████████, Michigan Medicaid Nursing Facility Level of Care Determination properly conclude the Appellant was ineligible for the Nursing Facility Level of Care, under Doors 1 through 7?
2. Did the Department's ██████████, Michigan Medicaid Nursing Facility Level of Care Determination properly conclude the Appellant did 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. The Appellant, born [REDACTED], became a resident of the [REDACTED] [REDACTED], on [REDACTED]. At that time, she was admitted under private pay status, as she did not have a Medicaid application pending.
2. 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 1; B-2, B-3, C-1; Exhibit 3-Remand Docket No. 2009-6802 REM*)
3. Treatment notes from a [REDACTED], monthly re-check visit by the Appellant with [REDACTED], the Appellant's primary care physician, reveals the following subjective and objective findings and assessments:

"...Vitals: She weighs [REDACTED]. That is up about 5 pounds from admission. This indicates that she has been receiving adequate nutrition. Blood pressure 144/60. Oxygen saturation 95%. Respiratory rate 20. Pulse 70. Temperature 97.4. Lungs: Her lungs today reveal diminished air exchange. Heart: Heart is irregularly irregular." "...Assessment: Chronic atrial fibrillation. Decision made in the distant past to refuse anticoagulation therapy. Chronic obstructive pulmonary disease. Marked kyphosis of the spine."

(Exhibit 3-Remand Docket No. 2009-6802 REM)

4. Treatment notes from a [REDACTED], monthly re-check visit by the Appellant with [REDACTED] reveal the following subjective and objective findings and assessments:

"...Lungs: her lungs are clear, although air exchange is quite diminished." "...Assessment: Hypertension; atrial fibrillation; history of chronic obstructive airway disease; marked kyphosis."

(Exhibit 3-Remand Docket No. 2009-6802 REM)

5. Treatment notes from an [REDACTED], monthly re-check visit by the Appellant with [REDACTED] reveal the following subjective and objective

findings and assessments:

*“...**Lungs:** lungs reveal diminishment of air exchange.”*

*“...**Assessment:** hypertension, atrial fibrillation, COPD, kyphosis.”*

(Exhibit 3-Remand Docket No. 2009-6802 REM)

6. Treatment notes from a ██████████, monthly re-check visit by the Appellant with ██████████ reveal the following subjective and objective findings and assessments:

*“...**Subjective:** Seen today for recheck. She is doing well. This hotter, more humid weather is a little bit more difficult on her respiratory status. **Assessment:** COPD, Atrial Fibrillation, Hypertension, Scoliosis, Chronic Constipation.”*

(Exhibit 3-Remand Docket No. 2009-6802 REM)

7. Treatment notes from an ██████████ monthly re-check visit by the Appellant with ██████████ reveal the following subjective and objective findings and assessments:

*“...**Subjective:** ██████████ is seen for monthly recheck. She is pleasant and cooperative and doing fine. She states has had a little trouble breathing from time to time, but for the most part, is doing very well. She denies any other complaints. **Vitals:** her weight ██████████, which is actually up over the last year. Blood pressure 150/74, pulse 84, respiratory rate 20, temperature 96.7. **Lungs:** reveal diminished air exchange but no wheezing. **Heart:** heart sounds are irregular. **Extremities:** Trace Edema at the ankle area. **Assessment:** Hypertension, Atrial Fibrillation, COPD, Scoliosis, constipation.”*

(Exhibit 3-Remand Docket No. 2009-6802 REM)

8. On ██████████, ██████████, ██████████ ██████████ 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 ██████████, LOCD was performed at a time when the Appellant was Medicaid-eligible, but for nursing facility coverage, was, and is required to pay ██████████ monthly toward

the cost of long-term care.

9. On [REDACTED], [REDACTED] conducted an initial assessment of the Appellant's long-term care needs, the findings of which would be included in her eventual [REDACTED], LOCD. The assessment included the following actions: (1) telephone conversations with [REDACTED] staff in charge and assisting the Appellant, with the Appellant and her nephew, [REDACTED]; (2) case review at [REDACTED] specifically nursing home chart information and consultation with [REDACTED]; and (3) review of weekly and monthly weight charts, rehabilitation screening documents and a list of the Appellant's medications. *(Exhibit 1, Attachments B2 and B3)*
10. [REDACTED], Contact Note provides, in pertinent part, as follows:

"...Completed a case review this day." "...Nursing home chart information: [REDACTED] documents that [REDACTED] long and short term memory is OK. She is independent with daily decision making. There is no change in cognitive status, she makes herself understood, and understands others. [REDACTED] documents the following: memory-OK, daily decision-making and making self understood-independent, pain symptoms-no pain, accidents/falls-none, weight change-no. Overall change in care needs=improved-receives fewer supports, needs less restrictive level of care." Hallucinations-no, modes of transfer-no transfer aide (slide board, cane, walker, trapeze, brace, manual lift), stable condition, #of medications-5, continent of B&B, bed side rails-no. The last physician note, dated [REDACTED] reports that [REDACTED] is pleasant and cooperative and is doing fine. She states she has a little trouble breathing from time to time, but for the most part is doing fine. She denies any other complaints. Her weight is [REDACTED], trace edema at ankle area, heart sounds are irregular. Diagnosis: Hypertension, Atrial Fibrillation, COPD, Scoliosis, constipation. No change in care at this time. Physician note dated [REDACTED]-02 stats are 96% on room air. Nurse note dated [REDACTED] SOB w/activity. Edema. "Refuses to elevate legs, stating it hurts her back." Albuterol inhaler found in her room. [REDACTED] stated she was using it 5 to 10, or more times a day. No order from her

physician for the inhaler. Physician ordered inhaler on ██████████. Chart notes—██████████ was upset about removal of non-prescribed inhaler. When the physician ordered an inhaler ██████████ said, 'unless I can keep it in my hand, I'm not taking it.' Social Services notes: ██████████ Resident is ██████████, pleasant and cooperative. Mini Mental Exam was completed w/no errors. Resident is own decision maker and sets her own goals. Denies feeling down/depressed. States sleeps OK, appetite OK. Social Services Note 1 ██████████, reads newspaper daily and watches TV. Family visits frequently, she eats breakfast and lunch in dining room, eats supper in own room." "... ██████████ weight on ██████████ was ██████████ (admission date ██████████). Her weight on ██████████ was ██████████. Physician note indicated some edema in ██████████ legs. Consulted with RN ██████████ regarding ██████████ needs at the nursing home. ██████████ described the following regarding ██████████ assistance w/transfers, mobility. ██████████ will ring the buzzer for staff, staff go in ██████████ room and set up the w/c (locks the wheels), ██████████ seats herself in the w/c without staff's physical assistance, staff push her to and from the dining room. ██████████ then transfers herself out of the w/c in her room and walks to her recliner. ██████████ stated ██████████ needs have not increased or changed over the past year. ██████████ shared that ██████████ has not had any increased needs."

(Exhibit 1, Attachments C-1 and C-2)

11. ██████████, Contact Notes provide, in pertinent part, as follows:

"...Each are of the LOC was discussed with ██████████. Her nephew and attorney also added information. This OC reviewed the frailty criteria with ██████████ and ██████████. ██████████ demonstrated her ability to transfer, ambulate to and from the bathroom, and toilet herself (██████████ was out of the room at this time). ██████████ rose carefully from her chair, walked across her room holding on to objects (dresser, bed) and into the bathroom in approximately 1 minute 30 seconds. ██████████ exhibited shortness of breath after she sat in her recliner. Recover time for this was 1 minute. This information was shared with ██████████. Other concerns

expressed by ██████ is that ██████ eyesight is not good. This OC shared that, using the parameters of the Michigan Medicaid Nursing Facility Level of Care Determination, vision [in and of itself], was not an eligibility category. It was noted by this OC that ██████ appeared to have no difficulty holding onto her dresser, bed, and other objects as she walked across her room. A factor may be that ██████ is familiar with her environment. Nursing home chart information, and verbal input from the Social Worker, indicated that ██████ enjoys reading the newspaper. I inquired during the meeting with ██████ if ██████ could use a walker or cane to assist her, rather than holding onto objects in the room. ██████ declined stating, 'if I can't do it my way the hell with it.' ██████ shared that it was hard for ██████ to be up in the w/c due to it being too uncomfortable. I discussed the possibility of ordering a wheelchair to ██████ physical specifications. ██████ currently uses the facility's w/c." "...Other areas addressed: pain issue—██████ said "2 Tylenol can help a little'. She does not want other pain medication. ██████ felt it was because she did not want to become addicted to it. Falls--██████ stated, and chart information confirmed, that she has not had any falls at ██████. Weight--██████ has not had any weight loss. She has had continual slow weight increases with larger increases in ██████. Emergency Room visits, behaviors---none as reported by ██████ and nursing home chart."

"...The LOCD was provided to ██████ at ██████ to enter into their State system. This OC, with ██████ present, then called ██████ ██████, to request an Exception for ██████. ██████ was not able to attend this phone meeting. I offered assistance with future planning for ██████ which ██████ declined. The review was conducted with ██████ from ██████. This OC provided information as requested by ██████. Topics included aspects of the Level of Care criteria along with the frailty criteria. ██████ stated that ██████ did not meet the State's Exception criteria. She informed ██████ that the finding and the information for the appeal process will be sent in the mail. It was requested by ██████ that the information be sent to him vs. ██████. This was shared with ██████ who confirmed the request with ██████

[REDACTED] ...”

(Exhibit 1; Attachments F-1 and F-2)

12. Following the [REDACTED], LOCD, the Appellant was provided with an Adequate Action Notice of the determination. *(Exhibit 1; Attachment M-5)*
13. On [REDACTED], the Appellant, by and through counsel, filed her Request for Hearing with the State Office of Administrative Hearings and Rules for the Department of Community Health.
14. The Department failed to produce [REDACTED], the individual who determined the Appellant ineligible under the Medicaid Nursing Facility Level of Care Exception Process, at the [REDACTED], hearing. She therefore was unable to either provide direct testimony as to how she arrived at her conclusions. Furthermore, the Appellant was deprived of her opportunity to cross-examine this witness.

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

██████████ testified ██████████, LOCD found that 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, although ambulating from her bed to the toilet within her own room took 1 ½ minutes to complete. ██████████ further testified she reviewed nursing facility medical documentation (e.g., progress notes), which appeared to corroborate her personal observations.

██████████ 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 reasonably timely manner. He also argues the look-back period is insufficient to accurately portray the Appellant's true abilities in this regard.

Because the amount of time it takes an individual to complete ADLs is not a relevant inquiry under this portion of the LOCD, the Appellant's argument, under a Door 1 analysis, has little or no merit.

The Appellant's assertions, however, are relevant under the Exception process, and shall be addressed under my discussion of whether the Appellant meets eligibility criteria under the Michigan Medicaid Nursing Facility Exceptions 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."

██████████, LOCD indicates the Appellant's memory was OK, that no deficits were noted, and that the Appellant could make herself understood. The Appellant's attorney does not contest ██████████ findings 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], 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 ██████████, LOCD, the Appellant received none 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 ██████████, LOCD, 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 ██████████ 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 ██████████ on ██████████. The LOCD at issue was conducted on ██████████. She has therefore been a facility resident for in excess of one (1) year.

Under Door 7, an individual is deemed eligible for the nursing facility level of care if a

nursing home resident for one (1) year or more, and requires ongoing services to maintain current functional status. Eligibility through Door 7 also requires a showing that there exist no other community, residential or informal services to meet the Appellant's needs.

██████████ credibly testified, both by affidavit (*Exhibit 4-Remand Docket No. 2009-6802*), 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-Remand Docket No. 2009-6802*; p. 1)

██████████ further testified that, before her admission to the nursing facility on ██████████, she was considerably underweight, due to a lack of adequate nutrition. He opined that, since residing in the nursing facility, she has gained a significant amount of weight, likely due to the nutritional assistance the facility is providing. (*Exhibit 4-Remand Docket No. 2009-6802*; p. 2)

██████████ medical record, affidavit and sworn testimony also supports a conclusion that, prior to her admission to the nursing facility, the Appellant had difficulty managing her medications, and has needed assistance managing her medications while there, that she was disheveled, disoriented and non-compliant and debilitated while living in her home, and is doing reasonably well, but only since residing at the nursing facility. His medical record, affidavit and sworn testimony also establishes that there is no realistic likelihood the Appellant's condition is likely to improve, or that she will overcome her physical incapacity, in view of her advanced age. He recommends against transferring the Appellant to any other facility, for fear she would not adapt well. (*Exhibit 4, Remand Docket No. 2009-6802*; p. 2)

██████████ affidavit and sworn testimony establishes support for the further conclusion that the Appellant is extremely anemic, and due to an iron deficiency, is increasingly becoming more weak and fragile, with her physical capabilities deteriorating on a day-to-day basis. For example, evidence of record indicates that the Appellant is extremely weak and requires assistance with weight bearing support for any ambulation. His affidavit specifically provides that the Appellant can use furniture or other stationery objects for support to ambulate very short distances (10-15 feet), but that for longer distances, is dependent upon a wheelchair. This fact is corroborated by ██████████, who specifically states the Appellant is capable of ambulating within her own room, but must hold onto objects in order to avoid falling.

The preponderance of the medical evidence presented does not support the Department's contention of ineligibility for nursing facility reimbursement under Door 7. To the contrary, the evidence presented supports a conclusion it would be unsafe for the Appellant to be moved from the nursing facility to an assisted living facility, or back to her home in the

community. Rather, the evidence presented supports a conclusion that she requires a continuation of nursing facility services in order to maintain her current level of functioning.

I therefore conclude the Appellant meets eligibility for the nursing facility level of care under Door 7, rendering erroneous the Department's ██████████, determination of ineligibility for Medicaid-reimbursable nursing facility coverage.

For the following reasons, I further conclude the Appellant meets eligibility for Medicaid-reimbursable nursing facility coverage under the Michigan Medicaid Nursing Facility Level of Care Exception Process.

Michigan Medicaid Nursing Facility Level of Care Exception Process

Following ██████████, ██████████, LOCD, the Appellant's attorney requested an immediate review by the ██████████. ██████████, of ██████████ 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***

Because the Department failed to produce ██████████ at the ██████████, hearing, I

was unable to ascertain how and/or why the Department concluded the Appellant was ineligible under the exception process. The failure by the Department to produce a witness on this issue also effectively deprived the Appellant of an opportunity to meaningfully cross-examination the Department as to how it arrived at its conclusions.

By contrast, the Appellant produced several witnesses, including ██████████ her primary care physician, and others who testified regarding the Appellant's overall physical status, which existed both at the time of the ██████████, LOCD, and for at least 2-3 months prior to that time.

██████████ testified by affidavit, and live, that the Appellant is consistently impacted by shortness of breath during any activity, and that, for all practical purposes, cannot walk more than a few steps before having to rest. His records consistently note her lungs reveal marked diminished air exchange. ██████████ testified the Appellant 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 while using a wheelchair.

Other witnesses credibly testified it takes the Appellant between 5 and 10 minutes to ambulate from her bed to her bathroom. ██████████ testified it took the Appellant 1 minute 30 seconds to ambulate between her bed and the bathroom located only a few feet away.

In my opinion, 1 minute 30 seconds to ambulate 20-30 feet is an "unreasonable" amount of time to transfer from a bed to a bathroom located within the same confined space.

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

██████████ medical records, as well as ██████████ 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. Other progress notes indicate the Appellant refused to use her inhaler unless it was in her hands at all times. In my opinion, this behavior evidences a tendency toward resisting care. (*Exhibit 1-Tab 5 of Certified Record; Progress Notes*).

As the above-described documentation was part of the record before ██████████, 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.

The Department produced neither ██████████ nor any other witness, either by telephone or live, to be cross-examined regarding evidence it relied upon in upholding the denial of eligibility under the exception process. The Department's attorney referenced a witness was available by telephone, but could not articulate when the witness would be available to testify.

At one point during the hearing, the Department's attorney asked the Administrative Law Judge if she should contact the witness. 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.

Because the Appellant produced significant evidence challenging and refuting the Department's conclusions of ineligibility, 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.

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 REVERSED.

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

[REDACTED]
Docket No. 2009-5377 NHE
Hearing Decision & Order

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.







