

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
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. 2011-23675 NHE

██████████,

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 ██████████. The Appellant's daughter, ██████████ represented her at hearing. ██████████ represented the Department. Her witnesses included ██████████

ISSUE

Did the Department properly determine that the Appellant does not require a Nursing Facility Level of Care?

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 and resident of ██████████ long term care facility.
2. On ██████████, the Appellant was assessed under the NF LOC evaluation tool and was found to be ineligible for nursing facility placement based upon failure to qualify via entry through one of the seven doors.
3. On ██████████, the facility sought the LOC exception as conducted by the Michigan Peer Review Organization (MPRO). They found that the Appellant did not meet the exception criteria.
4. The Department then issued an Adequate Action Notice to the Appellant advising her of its determination and her further appeal rights.

5. The Appellant appealed the Notice [REDACTED].

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, 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 financial Medicaid eligibility
- PASARR Level I screening
- Physician-written order for nursing facility services
- A determination of medical/functional eligibility based upon a web-based version of the Michigan Medicaid Nursing Facility Level of Care Determination (LOCD) that was conducted online at the time the resident was either Medicaid eligible or Medicaid pending and conducted within the timeframes specified in the

Michigan Medicaid Nursing Facility Level of Care Determination subsection of this chapter.

- Computer-generated Freedom of Choice (FOC) form signed and dated by the beneficiary or the beneficiary's representative. **(revised 7/1/10)¹**

See MDCH Nursing Facility Eligibility and Admission Process, Page 6, 10/1/10.

The Level of Care Assessment Tool consists of seven-service entry Doors or domains. The doors are: Activities of Daily Living, Cognition, 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.

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

The LOC, page 3 of 9 provides that the Appellant must score at least six points to qualify under Door 1.

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**

The LOC, pages 3 – 4, provides that to qualify under Door 2 an Appellant must:

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

¹ This edition of the Medicaid Provider Manual is substantially similar to the version in place at the time of LOC assessment and appeal.

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 LOC indicates that to qualify under Door 3, the Appellant must:

... [M]eet either of the following to qualify under

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 LOC, page 5, indicates that in order to qualify under Door 4, the Appellant must receive, within 14 days of the assessment date, any one of the following health treatments or demonstrated any one 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 LOC, page 6, provides that 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

Door 6
Behavior

The LOC, page 6, provides a listing of behaviors recognized under Door 6: Wandering, Verbally Abusive, Physically Abusive, Socially Inappropriate/Disruptive, Resists Care.

The LOC, page 8, provides that the Appellant would qualify under Door 6 if the Appellant had a score under one 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.

Door 7
Service Dependency

The Appellant could qualify under Door 7 if there was evidence that [he/she] is currently being served in a nursing facility (and for at least one year) or by the MI Choice or PACE program, and required ongoing services to maintain her current functional status.

In this case, the Department determined the Appellant did not qualify due to failure to enter through any of the seven doors. Evidence of the Department score for each door was presented. The only entry doors contested by the Appellant are doors 2 and 6.

The Department witness testified that she interacted with the Appellant directly when conducting the assessment. Furthermore, she reviewed documentation revealing frequent room changes and her activity level. She testified the Appellant was able to keep track of room, locate it and she knew where the activities were located and where to go for meals. She determined that although the Appellant had initially been admitted with a diagnosis of senile dementia, she had improved. She scored the Appellant's short term memory as okay and indicated she is moderately impaired in her cognitive skills. She indicated she is able to make herself understood. The Appellant did not pass through entry door 2 as a result of the determination made at assessment.

The Appellant's daughter stated she disagrees with the determination at door 2 that her mother's memory is okay. She asserts that her mother asks the same questions over and over again and she gets the sequence of events wrong.

This ALJ must rely on the medical opinion proffered by the nursing facility MDS coordinator. The Department criteria does not afford for input to be provided by family

members regarding the memory or cognitive abilities of the loved ones residing in the nursing facility. The controlling criteria only considers the documentation as created by the nursing facility and assessment conducted by nursing facility staff who complete the LOC. There is no area of the LOC determination for input from family members concerning the resident's abilities, thus it cannot be considered part of the LOC criteria. This ALJ has no discretion to change Department policy or criteria. There is no legal basis upon which this ALJ could consider the testimony presented by the Appellant's daughter in this matter.

The Appellant's representative further contested the determination at door 6. Here the Department witness indicated the Appellant had resisted care one time during the look back period and also been physically abusive, thus scoring 1 point for that behavior. Entry through this door requires nursing facility documentation of behaviors including wandering, verbal abuse, physical abuse, socially inappropriate/disruptive or resisting care for four of the preceding seven days. There was not documentation of the requisite amount of behavior for the Appellant to enter through this door.

The Appellant's daughter testified she had been telephoned by the facility and informed of three incidents of the Appellant's socially inappropriate/ abusive conduct. She stated she had been informed her mother yelled at and raised her cane at another resident in the dining hall. Furthermore, she waved her cane in her roommate's face and was verbally abusive. When she sought out additional information at the facility about the incidents she was informed there was no documentation of the incidents that had been reported to her over the telephone. She did not provide a timeframe for the incidents, thus it is not established they occurred within the seven day look back period or within the month long period that could be considered in an MPRO exception request. . Finally, the Appellant's daughter testified credibly that her mother did not take care of herself at home and that is how she ended up dehydrated and in the hospital.

This ALJ has no authority to order a facility to create documentation of incidents that were reported to the Appellant's mother or order the Department to consider them. Again, this ALJ has no authority to alter the procedure or criteria established by the Department for determining whether a person meets level of care requirements, rather can only determine whether the criteria was applied in this case. For better or worse, the criteria was applied by the Department, who determined it had not been met. The medical assessment gathered by nursing facility personnel are the only relevant criteria as established by Department policy, thus this ALJ must consider it when making the narrow determination of whether the Department applied its own policy.

The ALJ finds that the Appellant failed to satisfy her burden of proof to establish that the Department failed to apply the LOC criteria when it reviewed her status on review.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department followed its own policy and criteria when it determined that the Appellant does not require a Medicaid Nursing Facility Level of Care.

[REDACTED]
Docket No. 2011-23675 NHE
Decision and Order

IT IS THEREFORE ORDERED that:

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

Jennifer Isiogu
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc:

[REDACTED]

Date Mailed: 5/27/2011

***** 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.