

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

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IN THE MATTER OF:

██████████,

Appellant

Docket No. 2013-20266 NHE

Case 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 ██████████. ██████████, son, represented the Appellant. ██████████, Long Term Care Program Policy Specialist, represented the Department. ██████████, Nurse Reviewer with ██████████ (██████████) was present as a witness for the Department. ██████████, RN Unit Manager, ██████████, MDS Director, ██████████, Director of Social Services, and ██████████, Director of Nursing, all from ██████████ Senior Care and Rehab, appeared as witnesses for the Department.

ISSUE

Did the Department properly determine that the Appellant does not require 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 ██████ Senior Care and Rehab, a long-term care facility.
2. Medicaid policy requires nursing facility residents to meet the medical/functional criteria on an ongoing basis. The Michigan Medicaid Nursing Facility Level of Care Determination ("LOC") medical/functional criteria include seven domains of need: Activities of Daily Living, Cognitive Performance, Physician Involvement, Treatments and Conditions, Skilled Rehabilitation Therapies, Behavior, and Service Dependency. *Medicaid Provider Manual, Nursing Facility Coverages, July 1, 2012, Pages 9-11.*

3. A subsequent LOC must be completed when there has been a significant change in condition that may affect the resident's current medical/functional eligibility status. *Medicaid Provider Manual, Nursing Facility Coverages, July 1, 2012, Page 11.*
4. On or about ██████████, the Appellant was initially assessed under the LOC evaluation tool and was found to be eligible for nursing facility placement through Door 1. (Exhibit B)
5. On ██████████, the Appellant was re-assessed under the 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. (Exhibit C)
6. On ██████████, the West Oaks Senior Care and Rehab contacted MPRO to request an exception review and MPRO denied eligibility. (Exhibits D1, D1a and D2)
7. On ██████████, MPRO issued a notice to the Appellant stating she no longer qualified for nursing facility level services based on the LOC and services would be terminated in 90 days. (Exhibit D3)
8. On ██████████, the Michigan Administrative Hearing System received a Request for Hearing filed on the Appellant's behalf. The hearing request was re-submitted on ██████████ with the Appellant's signature. (Exhibit E)

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.

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

Section 5 of the Medicaid Provider Manual, Nursing Facilities Coverages Section, 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. *Medicaid Provider Manual, Nursing Facility Coverages, July 1, 2012 Pages 7-15.*

Section 5.1.D.1 of the Medicaid Provider Manual Nursing Facility Coverages Section references the use of an online Michigan Medicaid Nursing Facility Level of Care Determination (“LOC”) tool. *Medicaid Provider Manual, Nursing Facility Coverages, July 1, 2012 Pages 9-11.* The LOC is mandated for all Medicaid-reimbursed admissions to nursing facilities or enrollments in MI Choice or PACE. A subsequent LOC must be completed when there has been a significant change in condition that may affect the resident’s current medical/functional eligibility status. *Medicaid Provider Manual, Nursing Facility Coverages, July 1, 2012 Page 11.* A written form of the LOC, as well as field guidelines are found in the *MDCH Nursing Facility Eligibility Level of Care Determination, Pages 1-9, 3/07/05* and *MDCH Nursing Facility Eligibility Level of Care Determination Field Definition Guidelines, Pages 1-19, 3/15/05.* (Exhibits F and G)

The LOC 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. (Exhibit F)

In order to be found eligible for Medicaid nursing facility coverage the Appellant must meet the requirements of at least one Door. The [REDACTED] LOC assessment was the basis for the action at issue in this case:

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

The review period for Door 1 is 7 days.

(Exhibit F, pages 1-3)

For the [REDACTED] LOC assessment, the Appellant was scored as: independent for bed mobility, transfers and eating; and supervision for toilet use.

(Exhibit C)

The Appellant's son raised concerns with eating properly and toilet use. The Appellant takes her meals in bed and does not eat more than a few spoonfuls. The Appellant's family has been supplementing and encouraging her to eat. The Appellant will get the urge and eat something sugary, but then will feel bad later. The Appellant's son testified that overall the Appellant has lost weight. Regarding toilet use, the Appellant can have sudden urges to go to the bathroom, but may be too weak, in pain, or just not have the energy to get up and may end up soiling herself. (Son Testimony)

It is noted that eating, as described in the field guidelines, considers how and individual eats and drinks, or takes in nourishment by other means such as tube feeding or total parenteral nutrition. (Exhibit G, pages 5-6 of 19) The family bringing in food would not be considered as part of the activity of eating. Meal preparation is a separate activity that is not considered under Door 1.

The MDS Director reviewed the Appellant's weights during the time she has been at the nursing facility. The Appellant's weight has been relatively consistent between ██████ pounds and ██████ pounds. (MDS Director Testimony)

The evidence was not sufficient to establish that the Appellant scored high enough to qualify through Door 1. There was no evidence presented contesting the determinations regarding bed mobility and transfers. Accordingly, the Appellant scored one point for each of those activities. Regarding eating, the nursing facility scored the Appellant as independent with this activity during the seven day review period, which is also one point. The Appellant's son's testimony indicates the family has been providing some supervision and encouragement with eating. However, the scoring is the same for eating whether the Appellant was independent or required supervision, and would remain as one point. The nursing facility scored the Appellant as needing supervision with toilet use, which is also one point. The Appellant's son's testimony indicated there may be some occasions with soiling. The field guidelines provide a description of the types of assistance and frequency assistance was received to scoring as receiving limited assistance, extensive assistance, or total dependence with this activity. (Exhibit G, pages 4-5 of 19) The Appellant's son's testimony did not establish the frequency of incidents nor that the Appellant requires more than supervision, i.e. physical help, weight bearing support, or full performance by another, to care for her toileting needs. There was insufficient evidence for the Appellant to score more than the one point for supervision with toilet use. Accordingly the Appellant's score remains at the total of 4 points, which is not sufficient to qualify through Door 1.

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."

(Exhibit F, pages 3-4)

The Appellant was scored as having a short term memory problem, modified independence with cognitive skills, and able to make herself understood. (Exhibit C) No evidence was presented contesting these determinations. Accordingly, the Appellant did not meet the criteria to qualify through Door 2.

Door 3 **Physician Involvement**

Scoring Door 3: The applicant must meet either of the following to qualify under Door 3

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.

(Exhibit F, pages 4-5)

The Appellant was scored as having 1 physician visit exam and no physician order changes during the 14 day review period for the [REDACTED] LOC assessment. (Exhibit C) No evidence was presented contesting the number of physician visit exams or physician order changes during the relevant review period for this LOC assessment. With 1 physician visit exam and no physician order changes during the relevant review period, the Appellant did not meet the criteria to qualify through Door 3.

Door 4 **Treatments and Conditions**

Scoring Door 4: The applicant must score "yes" in at least one of the nine categories above and have a continuing need to qualify under Door 4.

In order to qualify under Door 4 the applicant 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

(Exhibit F, page 5)

No evidence was presented indicating that the Appellant received any of the specified treatments or demonstrated any of the specified health conditions during the relevant time period to meet the criteria for Door 4 for the ██████████ LOC assessment.

Door 5 **Skilled Rehabilitation Therapies**

Scoring Door 5: The applicant must have 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. (Exhibit F, pages 5-6)

No evidence was presented indicating that the Appellant received any skilled therapies during the relevant time period for the ██████████ LOC assessment. Accordingly, the Appellant did not meet the criteria to qualify through Door 5.

Door 6 **Behavior**

Scoring Door 6: The applicant must score under one of the following 2 options to qualify under Door 6.

- 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.

(Exhibit F, pages 6-7)

The Appellant was scored as not displaying any of the behavioral symptoms or problem conditions considered to qualify under Door 6. (Exhibit C)

The Appellant’s son’s testimony raised some issues regarding resisting care. The Appellant’s son visits the Appellant every other day. The Appellant’s son has seen the Appellant object, argue or refuse taking insulin tests or bathing. The Appellant’s son noted that the Appellant also did this prior to her stay in the nursing facility. Regarding medications, the Appellant’s son stated the Appellant does not appear resistive, but has a passive way of not taking them, such as missing her mouth and medications ending up in her bedding. Further, the Appellant’s son indicated that the Appellant does not admit when she is in pain to the nursing facility staff. The Appellant has complained to

her son about pain, such as shoulder pain. The Appellant's son explained that the Appellant has chronic pain from a prior hip replacement. Therefore, the Appellant does not want any invasive actions, such as an exploratory surgery that has been discussed. (Son Testimony)

The Long Term Care Program Policy Specialist noted that LOC criteria does allow for a resident's right to refuse care. (Exhibit G, page 15 of 19) Accordingly, the Appellant can make informed choices to refuse care including taking medications, bathing, or eating, without scoring as resisting care.

The evidence presented was insufficient to establish that the Appellant exhibited any of the listed behaviors for at least 4 of the 7 days of the review period. The Appellant's son raised concerns with resisting care, but the neither the frequency of this occurring during the seven day review period nor that the behavior was not an informed choice to refuse treatment were established. It appears the Appellant is able to make informed choices, such as not wanting the invasive action of exploratory surgery in light of the chronic pain from her prior hip replacement surgery. Accordingly, the evidence was not sufficient to establish that the Appellant met the criteria to qualify through Door 6.

Door 7 **Service Dependency**

Scoring Door 7: The applicant must be a current participant and demonstrate service dependency under Door 7.

The assessment provides that the applicant could qualify under Door 7 if he is currently (and has been a participant for at least one (1) year) being served by either the MI Choice Program, PACE program, or Medicaid reimbursed nursing facility, requires ongoing services to maintain current functional status, and no other community, residential, or informal services are available to meet the applicant's needs.

(Exhibit F, page 7)

The Appellant had not been a participant for at least one year when the ██████████ LOC assessment was completed. (Exhibit C; MDS Director Testimony) Accordingly, the Appellant could not qualify through Door 7.

The Appellant did not qualify through any of the seven Doors on the ██████████ LOC assessment. (Exhibit C) However, an exception review was requested by the West Oaks Senior Care and Rehab on ██████████.

Exception Process

The Nurse Reviewer with MPRO testified and provided documentation that MPRO received the LOC Exception Process request from the nursing facility. (PACER Project Manager Testimony and Exhibits D1, D1a and D2)

The Michigan Department of Community Health policy related to LOC exception eligibility for nursing facility services is found in its Medicaid Provider Manual:

5.1.D.2 Nursing Facility Level Of Care Exception Process

The Nursing Facility Level of Care (LOC) Exception Review is available for Medicaid financially pending or Medicaid financially eligible beneficiaries who do not meet medical/functional eligibility based on the web-based Michigan Medicaid Nursing Facility LOC Determination criteria, but demonstrate a significant level of long term care need. The Nursing Facility LOC Exception Review process is not available to private pay individuals. The Nursing Facility LOC Exception Review is initiated only when the provider telephones the MDCH designee on the date the online Michigan Medicaid Nursing Facility LOC Determination was

conducted and requests the Nursing Facility LOC Exception Review on behalf of a medically/functionally ineligible beneficiary. The Nursing Facility LOC Exception Criteria is available on the MDCH website. A beneficiary needs to trigger only one of the LOC Exception criteria to be considered as eligible under the Exception Review.

*Medicaid Provider Manual,
Nursing Facility Coverages,
July 1, 2012 Page 12.*

The exception process considers frailty, behaviors and treatments. The Nurse Reviewer went through each of the exception criteria in detail. The Appellant did not meet any of the exception criteria based on the information provided by the nursing facility. (Nurse Reviewer Testimony; and Exhibits D1, D1a and D2)

The Nurse Reviewer with MPRO explained that the Appellant did not meet the criteria for any of the Doors 1 – 7 of the LOC assessment or an exception, therefore, a final denial letter was issued on [REDACTED]. (Exhibit D3)

As discussed above, the Appellant's son testimony raised concerns with eating, toileting, weight loss, and resisting care. The Appellant's son stated the Appellant needs professional assistance. (Son Testimony) However, the right to refuse care must be considered and these choices would not score as resisting care. Additionally, the testimony regarding the Appellant's weight indicates some gains and losses, but

overall her weight has been relatively consistent, between [REDACTED] pounds and [REDACTED] pounds.
(MDS Director Testimony)

The Appellant's son testified he understood the LOC criteria, but he does not agree with it. (Son Testimony) However, this ALJ does not have any authority to change or override the criteria set out in the Medicaid Provider Manual policy. Based on the available information, it is decided that the Department correctly determined the Appellant did not meet the criteria for Medicaid Nursing Facility Level of Care at the time the [REDACTED] assessment and MPRO exception review were completed. Therefore, the Appellant was not eligible for Medicaid nursing facility services.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department correctly determined that the Appellant did not meet the criteria for Medicaid Nursing Facility Level of Care at the time the [REDACTED], LOC assessment was completed.

IT IS THEREFORE ORDERED that:

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

Colleen Lack
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

cc:

[REDACTED]

Date Mailed: 4/25/2013

***** NOTICE *****

The Michigan Administrative Hearing System 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 Michigan Administrative Hearing System 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.