

**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) 373-4147

IN THE MATTER OF:

Docket No. 2013-42695 REM

██████████,
Appellant

_____ /

DECISION AND ORDER

This case was returned to the Michigan Administrative Hearing System (MAHS) pursuant to the ██████████ Order of the Honorable ██████████, Circuit Court for the County of ██████████.

After due notice, an In-Person Hearing was held on ██████████ at the ██████████ Medical Care Facility.

Attorney ██████████, represented the Appellant. ██████████, the Appellant was present. ██████████, daughter, and ██████████, son in law, appeared as witnesses for the Appellant.

██████████, Assistant Attorney General, represented the Department on REMAND. ██████████, Michigan Department of Community Health Long Term Care Program Policy Specialist, and ██████████, RN Review Coordinator with Michigan Peer Review Organization ("MPRO") appeared as witnesses for the Department. From ██████████ Medical Care Facility, ██████████, RN MDS Coordinator, ██████████, Director of Nursing, and ██████████, Administrator, appeared as witnesses for the Department.

ISSUES

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 ██████████ Medical Care Facility, 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 Doors or 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, April 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, April 1, 2012, Page 11.*
4. There is also an LOC Exception Review available for Medicaid financially pending or Medicaid financially eligible beneficiaries who do not meet medical/functional eligibility based on the web-based LOC Determination criteria, but demonstrate a significant level of long term care need. *Medicaid Provider Manual, Nursing Facility Coverages, April 1, 2012, Page 12.*
5. On [REDACTED] the Appellant was 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. (Certified Record, Tab 2, Exhibit B)
6. On [REDACTED], the Appellant’s daughter contacted MPRO and requested an Exception Process review for the Appellant. (Certified Record, Tab 2, Exhibit C)
7. On [REDACTED], MPRO issued a notice to the Appellant stating she no longer qualified for nursing facility level services based on the LOC Determination. (Certified Record, Tab 2, Exhibit E)
8. On [REDACTED], the Michigan Administrative Hearing System received the Appellant’s Request for Hearing. (Certified Record, Tab 2, Exhibit F)
9. On [REDACTED] a hearing was held and on [REDACTED], ALJ [REDACTED] issued a Decision and Order. (Certified Record, Tab 1)
10. On [REDACTED], the Honorable [REDACTED], Circuit Court for the County of [REDACTED] issued an Order remanding this matter for a re-hearing on the merits with the Petitioner being present at said hearing. (Circuit Court Order)

11. On [REDACTED], Administrative Law Manager [REDACTED] issued an Order for Remand and Notice of Rehearing pursuant to the Circuit Court Order indicating a telephone hearing would be scheduled. (Order for Remand and Notice of Rehearing)
12. On [REDACTED], the Michigan Administrative Hearing System (MAHS) issued a Notice of Rehearing scheduling a telephone hearing for [REDACTED] at [REDACTED]. ([REDACTED] Notice of Rehearing)
13. On [REDACTED], pursuant to the requests received from both parties, MAHS issued a Notice of Rescheduled Hearing for [REDACTED] at [REDACTED], In-Person at the [REDACTED] County Medical Care Facility. ([REDACTED] Notice of Rescheduled 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.

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, April 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, April 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, April 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.

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. (*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*)

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

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.

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."

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.

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

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.

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.

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.

(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)

In this case, the nursing facility completed the LOC assessment on ██████████ and determined that the Appellant did not qualify due to failure to enter through any of the seven Doors. (Certified Record, Tab 2, Exhibit B) The RN MDS coordinator explained the Appellant's for each Door. (RN MDS Coordinator Testimony)

The Appellant asserted that Door 3 was not scored accurately. The Appellant was scored as having no physician visits and no physician order changes in the 14 days prior to ██████████. (Certified Record, Tab 2, Exhibit B) The Appellant submitted a ██████████ Operative Report documenting that she saw a physician at ██████████ that date and a lumbar epidural steroid injection procedure was performed.

(Certified Record, Tab 5, ██████████ Operative Report) The RN MDS Coordinator indicated that when the LOC was completed on ██████████, she was not aware of the ██████████ doctor visit because the nursing facility did not have documentation of the visit. The RN MDS Coordinator stated that when a resident goes out for a physician visit, they send a form requesting documentation be sent back to the nursing facility. The RN MDS Coordinator explained that if the nursing facility does not receive the requested documentation, they cannot count the physician visit for the LOC. (RN MDS Coordinator Testimony)

The ██████████ Operative Report establishes that the Appellant had one physician visit during the 14 days prior to ██████████. However, one physician visit is not sufficient for the Appellant to meet the LOC scoring criteria for Door 3. Rather, the scoring criteria require: at least one physician visit exam and at least four physician order changes in the last 14 days; or at least two physician visit exams and at least two Physician Order changes in the last 14 days. (*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*) There was no evidence establishing any additional physician visit exams or any physician order changes in the relevant two week look back period. Accordingly, even with adjusting the scoring to reflect one physician visit during the 14 days prior to ██████████, the Appellant did not meet the criteria to meet Door 3 of the LOC.

The Department's evidence concerning the remaining LOC entry Doors was materially uncontested. The evidence supports the determination that the Appellant did not qualify due to failure to meet the scoring criteria of the LOC's seven entry Doors at the time of the ██████████ evaluation. However, on ██████████ the Appellant's daughter contacted MPRO requesting an immediate review, which was completed ██████████. (Exhibit C)

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,
April 1, 2012 Page 12.*

The Nursing Facility Level Of Care Exception Process criteria is set forth below:

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
- Applicant's performance is impacted by consistent shortness of breath, pain or debilitating weakness during any activity
- 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:

- Wandering
- Verbal or physical abuse
- Socially inappropriate behavior
- Resists care

Treatments

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

(Certified Record, Tab 2 Exhibit D)

The MPRO RN Review Coordinator went through each of the exception criteria and the summary notes of the MPRO review. MPRO considered the information provided by the Appellant's daughter during the ██████████ phone call, the documentation received from the nursing facility, and from staff interviews that MPRO completed because of the discrepancies between the information provided by the Appellant's daughter and the records from the nursing facility. MPRO determined that the Appellant did not meet any of the exception criteria. (MPRO RN Review Coordinator Testimony; Certified Record, Tab 2, Exhibits C and D)

The Appellant raised issues with the several of the Frailty exception criteria.

The second frailty exception criterion addresses performance being impacted by consistent shortness of breath, pain or debilitating weakness during any activity. The MPRO review note indicates that that Appellant's daughter reported shooting pain stops the Appellant for 3-5 minutes when transferring/toileting and a history of restless leg syndrome. However, the MPRO review note indicates no pain was noted by the nursing facility staff and they indicated the shots were working. The medical record reviewed by MPRO documented "chronic pain, unspecified myalgia, pathologic fracture of vertebrae, difficulty walking, pain clinic, pain occasional/mild to severe, no prn pain rx given in last 7 days, 8 x in 2 months, on analgesics around the clock, hurts a little bit, variable, not limiting activities, medication effective." (Certified Record, Tab 2, Exhibit C, page 2) The information the Appellant's daughter provided to MPRO about the Appellant's performance of transferring/toileting being impacted by pain was not fully supported by the Appellant's medical record or the information provided to MPRO from staff interviews. While the information MRPO received indicated that the Appellant is receiving treatment for pain, it did not establish the Appellant's performance during any activity was being impacted consistently because of pain. Rather, the information from staff interviews and the medial records indicated pain was occasional, variable, and additionally that the medications and shots were working. Further, the medical record specifically documented pain was "not limiting activities." (Certified Record, Tab 2, Exhibit C, page 2) This frailty criterion cannot be met by the Appellant receiving treatment for pain. The criterion specifically requires performance being impacted by

consistent shortness of breath, pain or debilitating weakness during any activity. The evidence supports MPRO's determination that the Appellant did not meet this frailty criterion.

The fourth frailty criterion requires continuing difficulties managing medications despite the receipt of medication set-up services. It was asserted that the Appellant would not be able to manage her medications with the receipt of medication set up services. It was uncontested that the Appellant's medications are administered by the nursing facility staff. Extremely limited vision precluding the ability to identify medications, end stage glaucoma, age related macular degeneration, and legal blindness was documented in the additional records submitted by the Appellant. (Certified Record, Tab 5, ██████████ letter from Dr. ██████████) This ALJ is limited to reviewing whether or not the Appellant met the Department's criteria and does not have any authority to change or override the criteria. The criterion requires an individual to have continuing difficulties despite the receipt of medication set-up services. (Certified Record, Tab 2 Exhibit D; MPRO RN Review Coordinator Testimony) As written, this criterion does not allow an individual to be granted a frailty exception when there was not a current or very recent trial of medication set-up services. As written, this criterion could not be met even if the nursing facility would not attempt a trial of medication set-up services because it is clear that the individual would not be able to manage their medications with set-up services based on the Appellant's history with managing medications before her admission to the nursing facility and progression the Appellant's conditions, including severe visual impairments. Accordingly, the Appellant cannot meet this exception criterion because it is uncontested that there was been no current or recent trial with medication set-up services.

The sixth frailty criterion allows MPRO to count emergency room visits for clearly unstable conditions in addition to the physician visits and order changes during the same 14 day review period for the LOC Door 3. MPRO received documentation from the nursing facility on ██████████, that appears to have been printed ██████████. The documentation MPRO received does include one physician visit. (Certified Record, Tab 2 Exhibit C, page 2; MPRO RN Review Coordinator Testimony) It appears that after the nursing facility completed the LOC on ██████████, they received documentation of a doctor's visit in the two week look back period, which was forwarded to MPRO. However, there still is no evidence establishing any additional physician visit exams, any physician order changes, or any emergency room visits in the relevant two week look back period. Accordingly, with only one physician visit exam, no physician order changes, and no emergency room visits in the 14 day review period, the Appellant cannot meet this frailty exception criterion.

The Appellant's daughter provided testimony regarding the Appellant's history with her leg condition, pain and treatments. The Appellant's daughter stated that the Appellant had quite a few falls at home, before the Appellant's admission to the nursing facility. Additionally, even with medication set-up services provided by her daughter, the Appellant had difficulty taking medications correctly, which contributed to some of the

falls. Eye drops were particularly difficult due to the Appellant's severe visual impairment. The Appellant's daughter testified that the Appellant's condition, including the problems with her eyes and the pain in her legs, have worsened in the years since she was admitted to the nursing facility. Lastly, the Appellant's daughter testified that there was a fall at the nursing facility during the 14 day review period in ██████████ that was never reported or documented. The Appellant's daughter based this on noticing re-bandaging of a pre-existing wound on the Appellant's leg. The Appellant's daughter testified she went to the RN MDS Coordinator and there was nothing in her notes either to explain the re-bandaging. (Daughter Testimony)

The Appellant's daughter's testimony regarding the Appellant's history and decline in the condition raised very understandable concerns. However, as noted above, this ALJ is limited to reviewing whether or not the Appellant met the Department's criteria during the relevant time period for this LOC determination and does not have any authority change or override the criteria. The only additional criterion addressed by the Appellant's daughter's testimony was the alleged undocumented fall sometime between ██████████ and ██████████.

The third frailty criterion requires at least two falls in the home in the past month. The Appellant's daughter did not witness a fall. Rather, the Appellant's daughter's assertion of an incident occurring during that time frame is based on noticing re-bandaging of a pre-existing wound on the Appellant's leg and the re-bandaging was not documented or explained. (Daughter Testimony) The MPRO review note indicates documentation of two remote falls in ██████████ and ██████████, and that staff reported no recent falls. (Certified Record, Tab 2, Exhibit C2) Further, even if one fall between ██████████ and ██████████ could be established, this would not be sufficient to qualify for an exception. This frailty criterion requires at least two falls within the past month.

The Appellant asserted that another LOC evaluation should have been completed since ██████████. Again, this ALJ is limited to only reviewing the ██████████ LOC determination and has no authority to consider whether another LOC should have occurred since.

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 ██████████ LOC 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 ██████████ LOC assessment was completed.

[REDACTED]
Docket No. 2013-42695 REM
Decision and Order

IT IS THEREFORE ORDERED THAT:

The Department's decision is AFFIRMED.

/s/

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

[REDACTED]
Date Signed: 7/22/2013

Date Mailed: 7/22/2013

cc:

[REDACTED]

***** 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.