

**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.** 2014-20527 REM  
**Case No.** [REDACTED]

[REDACTED]

Appellant

\_\_\_\_\_ /

**DECISION AND ORDER ON REMAND**

This case was returned to the Michigan Administrative Hearing System (MAHS) pursuant to a [REDACTED] Remand Order of the Honorable [REDACTED], Circuit Court Judge, [REDACTED] County. The case had previously been returned to MAHS for re-hearing by Judge [REDACTED] or [REDACTED].

After due notice, a telephone hearing was held on [REDACTED].

Attorney [REDACTED], represented the Appellant.

[REDACTED], Assistant Attorney General, represented the Michigan Department of Community Health (MDCH or Department). [REDACTED], MDCH Long Term Care Program Policy Specialist, and [REDACTED], RN Review Coordinator with [REDACTED] ([REDACTED]) appeared as witnesses for the Department.

**ISSUES**

The remand Order instructed MAHS to consider Appellant's continued visits to Michigan Pain Specialists as evidence of doctor visits for the Medicaid Nursing Facility Level of Care (NFLOC) and evidence of continued pain for the frailty exception of the NFLOC. The remand Order further instructed MAHS to consider the above evidence whether the nursing home or review coordinator had those records at the time they conducted their respective reviews.

**FINDINGS OF FACT**

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

1. Appellant is a [REDACTED]-year-old Medicaid beneficiary and resident of [REDACTED] 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 ██████████ 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 ██████████, Appellant’s daughter contacted ██████████ and requested an Exception Process review for the Appellant. (Certified Record, Tab 2, Exhibit C)
7. On ██████████ 2012, ██████████ issued a notice to Appellant stating she no longer qualified for nursing facility level services based on the LOC Determination. (Certified Record, Tab 2, Exhibit E)
8. On ██████████, the Michigan Administrative Hearing System received Appellant’s Request for Hearing. (Certified Record, Tab 2, Exhibit F)
9. On ██████████ a hearing was held and on ██████████, ALJ ██████████ issued a Decision and Order. (Certified Record, Tab 1)
10. On ██████████, the Honorable ██████████, Circuit Court Judge for the County of ██████████ 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]. ([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)
14. On [REDACTED], ALJ [REDACTED] issued a Decision and Order which affirmed the Department's decision.
15. On [REDACTED], the Honorable [REDACTED], Circuit Court Judge for [REDACTED] County issued an Order remanding this matter to MAHS. The remand Order instructed MAHS to consider Appellant's continued visits to Michigan Pain Specialists as evidence of doctor visits for the Medicaid Nursing Facility Level of Care (NFLOC) and evidence of continued pain for the frailty exception of the NFLOC. The remand Order further instructed MAHS to consider the above evidence whether the nursing home or review coordinator had those records at the time they conducted their respective reviews.
16. On [REDACTED], Administrative Law Manager [REDACTED] issued an Order for Remand pursuant to the Circuit Court Order indicating that a telephone hearing would be held on [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.

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 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 are 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)

On remand, MAHS was instructed to consider Appellant's continued visits to ██████████ as evidence of doctor visits for the Medicaid Nursing Facility Level of Care (NFLOC) and evidence of continued pain for the frailty exception of the NFLOC. The remand Order further instructed MAHS to consider the above evidence whether the nursing home of review coordinator had those records at the time they conducted their respective reviews.

The ██████████ RN Review Coordinator testified that she reviewed records from ██████████, which showed that Appellant had visits and/or treatment on ██████████, ██████████, ██████████, ██████████, and ██████████. With regard to scoring under Door 3, the ██████████ RN Review Coordinator indicated that while the ██████████

██████████ Operative Report establishes that Appellant had one physician visit during the 14 days prior to ██████████, 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*) Here, even considering all reports from ██████████, 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.

With regard to consideration of the frailty exception in light of Appellant's visits with ██████████, the ██████████ RN Review Coordinator testified that those visits would not have changed her determination that Appellant failed to meet the frailty exception. The ██████████ RN Review Coordinator testified that the frailty exception only allows a two month look back period, so she could only consider the ██████████ and the ██████████ visits with ██████████. The ██████████ RN Review Coordinator indicated that those reports from ██████████ show that Appellant received relief from pain following her treatments, usually until just before her next visit. Because the treatments offered Appellant relief from pain for significant periods of time, the ██████████ RN Review Coordinator determined that the pain could not be considered consistent and debilitating, as required by the frailty exception criteria. In support of this determination, the ██████████ RN Review Coordinator pointed out that there were no new orders for prescription pain medication following Appellant's ██████████ treatment at ██████████, which supports the assertion that Appellant received relief from pain following the visits and was relatively stable following those visits.

Appellant's representative argues that the procedure for determining NF eligibility is baffling. Generally, Appellant's representative argues that the fact that Appellant is ██████████ years old, blind, in a wheel chair, and receiving pain treatments on a regular basis, approximately once per month, indicates that her pain is consistent and debilitating and she should qualify for NFLOC through the frailty exception. In other words, if Appellant's pain were not consistent, she would not require consistent pain treatment. Appellant's representative also argues that Appellant should meet NFLOC criteria through Door 3 because of the ██████████ physicians visit.

Based on the evidence in this record, the Department's decision must be upheld. Clearly, Appellant does not meet NFLOC criteria through Door 3 because she only had 1 physician visit within 14 days of the LOCD. Without at least 4 physician change orders to go along with the 1 physician visit, Appellant simply does not meet the criteria.

With regard to the frailty exception, consideration of Appellant's visits to [REDACTED] does not change the determination that Appellant fails to meet the Medicaid nursing facility level of care criteria. So long as the treatment Appellant is receiving for pain is providing her relief from the pain, it simply cannot be said that Appellant is in consistent and debilitating pain. Appellant may be in debilitating pain between her treatments at [REDACTED], anywhere from a few days to one week per month, but being in pain a few days to a week per month cannot be considered consistent pain under any definition.

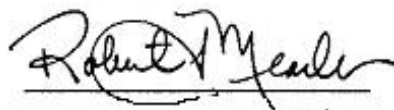
In some ways, the relief Appellant seeks is equitable in nature. Appellant argues that she is very old, she is blind, she is confined to her bed or a wheel chair, she needs to receive regular treatment for pain, she has resided in a nursing home for several years and exhausted her assets – so Medicaid should pay for her nursing home care. However, neither the Department nor this ALJ have equitable powers and neither the Department nor this ALJ can waiver from established Department policy. (*See Huron Behavioral Health v Department of Community Health*, 293 Mich App 491 (2011) and *Delegation of Authority*, dated February 22, 2013). Appellant does have other avenues for seeking relief.

### **DECISION AND ORDER**

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that, even considering Appellant's continued visits to [REDACTED] as evidence of doctor visits for the Medicaid Nursing Facility Level of Care (NFLOC) under Door 3, and evidence of continued pain for the frailty exception of the NFLOC, Appellant is not eligible for nursing facility services paid for by Medicaid.

### **IT IS THEREFORE ORDERED THAT:**

The Department's decision is AFFIRMED.



Robert J. Meade  
Administrative Law Judge  
for James K. Haveman, Director  
Michigan Department of Community Health

[REDACTED]  
Docket No. 2014-20527 REM  
Decision and Order

cc:

[REDACTED]

Date Signed: January 31, 2014

Date Mailed: January 31, 2014

**\*\*\* 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.