

**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:

██████████,

Appellant

Docket No. 2014-32816 NHE

██████████ ██████████

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37, and upon the Appellant's request for a hearing.

After due notice, a hearing was held on ██████████, Appellant's daughter, appeared and testified on Appellant's behalf. Appellant also testified on her own behalf. ██████████, Long Term Care Program Policy Specialist, represented the Department of Community Health ("DCH" or "Department"). ██████████, a registered nurse and project manager at the Michigan Peer Review Organization ("MPRO"), ██████████, a registered nurse and nurse manager at the ██████████; ██████████, a social worker at ██████████; ██████████, a registered nurse and MDS coordinator at ██████████; and ██████████, the facility administrator at ██████████; also testified as witnesses for the Department.

ISSUE

Did the Department properly determine that the Appellant does not require a Medicaid reimbursable 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. Appellant is an ██████ year-old Medicaid beneficiary who has been diagnosed with hyperthyroidism; atrial fibrillation; urinary tract infections; irritable bowel syndrome; essential tremors; macular degeneration; and vascular dementia. (Petitioner's Exhibit 2, pages 9-13; Respondent's Exhibit D, page 1).

2. Appellant was admitted as a resident at ██████████ a long-term care facility, on ██████████. (Testimony of ██████████).
3. Medicaid policy requires nursing facility residents to meet the outlined medical/functional criteria found in the Michigan Medicaid Nursing Facility Level of Care Determination (“LOCD”) evaluation tool on an ongoing basis. (Medicaid Provider Manual (MPM), January 1, 2014 version, Nursing Facility Chapter, pages 7-16).
4. On ██████████, Appellant was assessed under the LOCD evaluation tool and was found to be eligible for nursing facility placement. (Respondent’s Exhibit B, page 1).
5. On ██████████, Appellant was again assessed under the LOCD evaluation tool, but this time she was found to be ineligible for nursing facility placement based upon her failure to qualify via entry through one of the seven doors of that tool. (Respondent’s Exhibit C, page 1).
6. Appellant’s daughter then contacted ██████████ and requested an Exception Process review for the Appellant. (Testimony of ██████████).
7. ██████████ requested Appellant’s medical records from the facility and, on ██████████, reviewed Appellant’s case. (Respondent’s Exhibit D, page 1; Testimony of ██████████).
8. That same day, ██████████ issued a notice to the Appellant stating she no longer qualified for nursing facility level services and her services would be terminated in ██████████ days from the date of the notice. (Respondent’s Exhibit F, page 1).
9. On ██████████, the Michigan Administrative Hearing System received Appellant’s Request for Hearing in this case. (Petitioner’s Exhibit 1, pages 1-3; Respondent’s Exhibit F, pages 1-3).

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 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 (MPM), Nursing Facility Chapter, describes the policy and process for admission and continued eligibility, as well as outlines functional/medical criteria requirements for Medicaid-reimbursed nursing facility, MI Choice, and PACE services. (MPM, January 1, 2014 version, Nursing Facility Chapter, pages 7-16).

Section 5.1.D.1 of the Coverages Section of the Nursing Facility Chapter of the MPM references the use of an online Michigan Medicaid Nursing Facility Level of Care Determination (“LOCD”) tool. A LOCD is mandated for all Medicaid-reimbursed admissions to nursing facilities or enrollments in MI Choice or PACE. (MPM, January 1, 2014 version, Nursing Facility Chapter, pages 9-11).

A subsequent LOCD must be completed when there has been a significant change in condition that may affect the resident’s current medical/functional eligibility status and a nursing facility resident must meet the outlined criteria on an ongoing basis. (MPM, January 1, 2014 version, Nursing Facility Chapter, page 11).

The LOCD 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. (MPM, January 1, 2014 version, Nursing Facility Chapter, page 11).

The ██████████ LOCD 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 have met 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

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 [Stage 3-4 pressure sores; Intravenous or parenteral feedings; Intravenous medications; End-stage care; Daily tracheostomy care, daily respiratory care, daily suctioning; Pneumonia within the last 14 days; Daily oxygen therapy; Daily insulin with two order changes in last 14 days; Peritoneal or hemodialysis] and have a continuing need to qualify under Door 4.

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 has been a participant for at least one (1) year] and demonstrate service dependency under Door 7.

In this case, ██████████ and the Department determined that Appellant did not pass through any of the 7 Doors and was therefore ineligible for a nursing facility level of care.

Given the LOCD and the testimony during the hearing, it is clear that the nursing facility’s decision with respect to Doors 1 and 3-7 are essentially undisputed and should be sustained. At the time of the LOCD, Appellant was stable and, while she was receiving limited assistance with eating, she was not receiving any other assistance related to the tasks identified in Door 1. Similarly, while Appellant has medical problems, none of her conditions met the criteria for passing through Doors 4, or 6 and the medical treatment Appellant was receiving did not reach the levels required by Doors 3, 4, or 6. Finally, with respect to Door 7, Respondent properly noted that Appellant had not been a program participant for over a year and, consequently, did not qualify through that door.

Appellant’s representative does dispute the facility’s and Department’s determination regarding Door 2. As described above, in order to qualify under Door 2, an applicant must be (1) “Severely Impaired” in Decision Making; (2) “Yes” for Memory Problem, and Decision Making is “Moderately Impaired” or “Severely Impaired.”; or (3) “Yes” for Memory Problem, and Making Self Understood is “Sometimes Understood” or “Rarely/Never Understood.”

Here, it is undisputed that Appellant has memory problems and, while Appellant's representative testified that Appellant sometimes has difficulties finishing thoughts, Appellant's representative also acknowledged that Appellant is usually able to make herself understood.

Accordingly, Appellant would only qualify under Door 2 if she is at least moderately impaired in daily decision making. Appellant's representative believes that she is while the facility/Department determined that Appellant is modified independent in that area.

With respect to Door 2 in general and the issue of daily decision making in particular, the Field Guidelines utilized by the Department provide in part:

The Michigan nursing facility level of care definition is meant to include applicants who need assistance based on cognitive performance. Door 2 uses the Cognitive Performance Scale to identify applicants with cognitive difficulties, especially difficulties with short-term memory and daily decision-making, both essential skills for residing safely in the community.

The applicant's ability to remember, think coherently, and organize daily self-care activities is very important. The focus is on performance, including a demonstrated ability to remember recent events and perform key decision-making skills.

Questions about cognitive function and memory can be sensitive issues for some applicants who may become defensive, agitated, or very emotional. These are common reactions to performance anxiety and feelings of being exposed, embarrassed, or frustrated when the applicant knows he/she cannot answer the questions cogently.

Be sure to interview the applicant in a private, quiet area without distraction (not in the presence of others, unless the applicant is too agitated to be left alone). Using a nonjudgmental approach to questioning will help create a needed sense of trust. Be cognizant of possible cultural differences that may affect your perception of the applicant's response. After eliciting the applicant's responses to questions, return to the family or specific caregivers as appropriate to clarify or validate information regarding cognitive function over the last 7 days. For applicants with limited communication skills or who are best understood by family or specific caregivers, you would need to carefully consider family insights in this area.

- Engage the applicant in general conversation to help establish rapport.
- Actively listen and observe for clues to help you structure your assessment. Remember: repetitiveness, inattention, rambling speech, defensiveness, or agitation may be challenging to deal with during an interview, but these behaviors also provide important information about cognitive function.
- Be open, supportive, and reassuring during your conversation with the applicant.

An accurate assessment of cognitive function can be difficult when the applicant is unable to verbally communicate. It is particularly difficult when the areas of cognitive function you want to assess require some kind of verbal response from the applicant (memory recall). It is certainly easier to perform an evaluation when you can converse with the applicant and hear responses that give you clues as to how the applicant is able to think, if he/she understands his/her strengths and weaknesses, whether he/she is repetitive, or if he/she has difficulty finding the right words to tell you what they want to say.

* * *

Cognitive Skills for Daily Decision Making

The intent of this section is to record the applicant's actual performance in making everyday decisions about the tasks or activities of daily living. This item is especially important for further assessment in that it can alert the assessor to a mismatch between the applicant's abilities and his/her current level of performance, or that the family may inadvertently be fostering the applicant's dependence.

Process

It is suggested that you consult with the applicant first, then, if possible, a family member. Observations of the applicant can also be helpful. Review events of the last 7 days. The 7-day look-back period is based on the date of the eligibility determination. The inquiry should focus on whether the applicant is actively making his/her decisions, and not

whether there is a belief that the applicant might be capable of doing so. Remember, the intent of this item is to record what the applicant is doing. When a family member takes decision-making responsibility away from the applicant regarding tasks of everyday living, or the applicant does not participate in decision making, whatever his/her level of capability, the applicant should be considered to have impaired performance in decision making.

Examples of Decision Making

- Choosing appropriate items of clothing
- Knowing when to go to meals
- Knowing and using space in home appropriately
- Using environmental cues to organize and plan the day (clocks and calendars)
- Seeking information appropriately (not repetitively) from family or significant others in order to plan the day
- Using awareness of one's own strengths and limitations in regulating the day's events (asks for help when necessary)
- Knowing when to go out of the house
- Acknowledging the need to use a walker, and using it faithfully

Field 34: Independent

Select this field when the applicant's decisions were consistent and reasonable (reflecting lifestyle, culture, values); the applicant organized daily routine and made decisions in a consistent, reasonable, and organized fashion.

Field 35: Modified Independent

The applicant organized daily routines and made safe decisions in familiar situations, but

experienced some difficulty in decision-making when faced with new tasks or situations.

Field 36: Moderately Impaired

The applicant's decisions were poor; the applicant required reminders, cues, and supervision in planning, organizing, and correcting daily routines.

Field 37: Severely Impaired

The applicant's decision-making was severely impaired; the applicant never (or rarely) made decisions.

Respondent's Exhibit H, pages 6-9

Given the above guidelines, the Department's determination that Appellant is only modified independent in daily decision making, and therefore does not pass through Door 2 in light of the other undisputed findings, must be affirmed.

Appellant's evidence demonstrates that Appellant was diagnosed with dementia as early as ██████████ and Appellant's credibly testified that Appellant cannot handle her own finances; did not understand what the negative action notice issued in this case was when she received it; and failed to immediately show that notice to her daughter/representative. However, while such evidence may demonstrate some difficulty in decision making when faced with new tasks or situations, it does not reflect any poor daily decisions or routine need for assistance. Moreover, Appellant's representative also confirmed that Appellant dresses herself and chooses appropriate items of clothing to wear; chooses to eat alone and have her meals brought to her; is relatively stable in nursing facility; knows to rely on her daughter/representative in important matters such as finances; and acknowledges the need to use a walker and knows to use it. Appellant therefore appears to organize her daily routines and make safe decisions in familiar situations, but experience some difficulty in decision making when faced with new tasks or situations. Consequently, she should be deemed modified independent in daily decision making.

In addition to challenging the LOCD, Appellant's representative also indicated disagreement with the Exception Process criteria. The Department's policy related to level of care exception eligibility for nursing facility services is found in the MPM:

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.

*MPM, January 1, 2014 version
Nursing Facility Chapter, page 12*

The facility completed the LOCD on ██████████ and determined that the Appellant did not qualify. (Respondent's Exhibit C). Appellant's representative subsequently contacted ██████████ requesting an immediate review, which was completed ██████████ (Respondent's Exhibit D).

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.

Respondent's Exhibit D

Here, the ██████████ Nurse Reviewer went through each of the exception criteria and the summary notes of the ██████████ review. ██████████ determined that the Appellant did not meet any of the exception criteria based on the information provided by the nursing facility. (Testimony of ██████████; Respondent's Exhibit D).

In response, Appellant's representative focused on Appellant's general health rather than the specific areas of the exception. Appellant's representative also argues that any improvement Appellant has shown is due to her being in the nursing facility and that she will regress and be in danger if discharged. However, the existence of Appellant's medical conditions is not in dispute and the above policy is clear that Appellant must meet the specific criteria identified in policy. The nursing facility properly applied that policy and Appellant failed to demonstrate that she met any of the standards required for an exception.

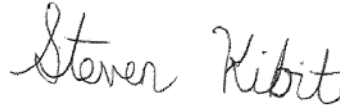
Based on the information available at the time of the exception review, the Department properly found that Appellant also did not meet the criteria for exception eligibility for nursing facility services as described in the Medicaid Provider Manual.

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 Appellant does not require a Medicaid Nursing Facility Level of Care.

IT IS THEREFORE ORDERED that:

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



Steven Kibit
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

SK/db

Date Signed: [REDACTED]

Date Mailed: [REDACTED]

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.