RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Christopher Seppanen
Executive Director

MIKE ZIMMER
DIRECTOR

[redacted]

Date Mailed: [redacted]
MAHS Docket No.: 15-022386 NHE
[redacted]

ADMINISTRATIVE LAW JUDGE: Steven Kibit

DECISION AND ORDER

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

After due notice, a hearing was held on [redacted], Petitioner's granddaughter, appeared and testified on behalf of the Petitioner. [redacted], a family friend, also testified as a witness for Petitioner. [redacted], Appeals Review Officer, represented the Respondent Department of Health and Human Services (Department). [redacted] Long Term Care Program Policy Specialist with the Department; [redacted] a MDS nurse with [redacted] and [redacted] an administrator at Heartland; testified as witnesses for the Department.

ISSUE

Did the Department properly determine that the Petitioner 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. Petitioner is a [redacted] Medicaid beneficiary who has been admitted as a resident at [redacted] (Exhibit A, page 10; Testimony of Petitioner's representative).

2. On [redacted], around the time of her admission, [redacted] staff conducted a conducted a Michigan Medicaid Nursing Facility Level of Care Determination ("LOCD") for Petitioner. (Exhibit A, pages 10-17).

3. In that LOCD, Petitioner was found to be eligible to receive Medicaid reimbursable services at the facility by passing through Door 1 of the LOCD

evaluation tool due to her need for limited assistance with bed mobility and transferring. (Exhibit A, pages 10-17).

4. On [redacted] staff conducted another LOCD for Petitioner. (Exhibit A, pages 18-26).

5. In that second LOCD, Petitioner was found to be ineligible for Medicaid nursing facility care based upon her failure to qualify via entry through one of the seven doors of that tool. (Exhibit A, pages 18-26).

6. That same day, [redacted] provided Petitioner, and Petitioner signed, a Freedom of Choice form indicating that the facility had determined that she no longer qualified for services and provided her with notice of her right to appeal that determination. (Exhibit A, page 31).

7. On [redacted] sent Petitioner written notice that, based on a review of her long care needs, it had determined that Petitioner did not qualify for nursing facility level services. (Exhibit A, page 27).

8. The [redacted] notice also informed Petitioner of her right to request an administrative hearing. (Exhibit A, page 27).

9. On [redacted], the Michigan Administrative Hearing System (MAHS) received the Request for Hearing filed in this matter. (Exhibit A, pages 28-32).

CONCLUSIONS OF LAW

The Medical Assistance Program (MA) 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 Health and Human Services (MDHHS) 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 (MPM), Nursing Facilities Coverages Chapter, describes the policy for admission and continued eligibility for Medicaid-reimbursed nursing facility, MI Choice, and PACE services. Specifically, the five components that determine beneficiary eligibility and Medicaid nursing facility reimbursement include a verification of financial Medicaid eligibility; a PASARR Level I screening; a 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); and a signed and dated computer-generated Freedom of Choice (FOC) form signed and dated by the beneficiary or the beneficiary's representative. *See* MPM, October 1, 2015 version, Nursing Facility Coverages Chapter, page 7.

A LOCD is therefore mandated for all Medicaid-reimbursed admissions to nursing facilities or enrollments in MI Choice or PACE. *See* MPM, October 1, 2015 version, Nursing Facility Coverages Chapter, pages 9-11. Moreover, even after admission, a nursing facility resident must also continue to meet the outlined criteria in the LOCD on an ongoing basis. *See* MPM, October 1, 2015 version, Nursing Facility Coverages 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. *See* MPM, October 1, 2015 version, Nursing Facility Coverages Chapter, page 11.

The [redacted] LOCD was the basis for the action at issue in this case. In order to be found eligible for Medicaid nursing facility coverage the Petitioner 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, the Department and the facility determined that Petitioner did not pass through any of the [redacted] Doors in the [redacted] LOCD and was therefore ineligible for a Medicaid reimbursable nursing facility level of care.

In support of that decision, Dixon, a MDS nurse, testified that she performed the [redacted] LOCD and that it was conducted because there had been significant changes and improvement in Petitioner's condition since her arrival in the facility. [redacted] also testified that she made her findings based on several different sources, including documentation from nursing assistants, MDS assessments from [redacted] and [redacted], progress notes, assessment charts, physician orders, and an interview with Petitioner; and that her findings demonstrated that Petitioner no longer met the criteria for services. [redacted] further testified that no significant assistance from Petitioner's family was documented and that, while Petitioner does have dementia, she can make daily decisions and knows how to get back to her room and when it is time to eat.

[redacted] administrator, also testified that she visits with Petitioner daily and has observed Petitioner ambulating freely through the use of her walker, transferring out of bed, and feeding herself.

In response, Petitioner's representative testified that Petitioner's conditions have not changed since admission and that she needs care[redacted] hours a day, [redacted] days per week. Petitioner's representative also testified that family members have been providing the necessary assistance with feeding, bathing, dressing, toileting, and transferring Petitioner. Petitioner's representative further testified that Petitioner has memory and cognitive problems, and that Petitioner did not know what the Freedom of Choice form was when she signed it and that she wanders at night. Overall, Petitioner's representative testified that she is appalled at treatment Petitioner has received and how, despite the fact that Petitioner's representative has a Power of Attorney over Petitioner, the family is never present for assessments.

[redacted] a friend of Petitioner, also testified that she has come to assist Petitioner and brings meals, but that Petitioner does not eat much and mainly just survives on bread.

Petitioner bears the burden of proving by a preponderance of the evidence that Respondent erred in terminating her services.

Given the evidence in this case, Petitioner has failed to meet that burden of proof and Respondent's decision must be affirmed.

Per policy, Respondent is required to look at the specific criteria and look-back periods outlined in the LOCD and, given that criteria, the findings regarding most of the doors are undisputed. For example, there is no evidence that Petitioner's medical conditions or the effects of those conditions meet the criteria for passing through Door 4; any medical treatment Petitioner receives does not meet the criteria required by Doors 3, 4, or 5; and Petitioner does not pass through Door 7 because she has not been a program participant for at least [redacted] year.

The parties do dispute Door 1 and, as discussed above, to qualify through Door 1, a beneficiary must require a sufficient amount of assistance in any or all of the four listed tasks: bed mobility, transferring, toilet use, and eating. Here, the facility found that Petitioner is independent in all four tasks while Petitioner's representative testified that Petitioner needs assistance with at least transferring, toileting and eating. However, both parties do agree that the records and reports relied upon by the facility fail to reflect any assistance, though Petitioner's representative argues that they only do so because the family, and not the facility, has been providing the necessary assistance. Moreover, Petitioner's representative's unsupported testimony is very general and fails to provide any specific details regarding the exact assistance Petitioner needs with transferring, toileting and eating, as opposed to just a general need for supervision, while the testimony of Petitioner's other witness fails to reflect any assistance at all with the specific tasks covered by Door 1. Given the lack of support for Petitioner's representative's testimony in the form of either corroborating documents or testimony, in addition to the lack of sufficient detail and the fact that it conflicts with the credible testimony of Respondent's witnesses, the undersigned Administrative Law Judge finds that Petitioner has failed to meet her burden of proving by a preponderance of the evidence that she passes through Door 1.

The parties also dispute Door 2 and, as discussed above, to qualify through Door 2, a beneficiary must be either (1) "Severely Impaired" in decision making; (2) have a memory problem and be "Moderately Impaired" in decision making; or (3) have a memory problem and be only "Sometimes Understood" or "Rarely/Never Understood." Here, it is undisputed that Petitioner has a memory problem, but can be understood. Therefore, Petitioner must be at least "Moderately Impaired" in her cognitive skills for daily decision making to pass through Door 2.

With respect to cognitive skills for daily decision making, the Field Definition Guidelines for the LOCD provides:

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.

Exhibit A, page 41

Given those field definitions, Petitioner also did not pass through Door 2. Even Petitioner's representative suggests that Petitioner does well in structured or routine environments and only has difficulties with new developments or unfamiliar environments, which confirms the facility's finding that Petitioner is only "Modified Independent" in her cognitive skills for daily decision making and which is insufficient for her to pass through Door 2.

The parties further dispute Door 6 and, as discussed above, to qualify through Door 6, a beneficiary must either have had delusions or hallucinations within the last 7 days or exhibited any of the following behaviors for at least 4 of the last 7 days: Wandering, Verbally Abusive, Physically Abusive, Socially Inappropriate/Disruptive, or Resisted Care. Here, Petitioner's representative testified that Petitioner wanders at night. However, that testimony is unsupported; it conflicts with the credible testimony of the witnesses from the facility; and there is no suggestion that, even if Petitioner wandered at some point in the past, that she meets the specific criteria and look-back period for Door 6 outlined in the LOCD, which requires that she have wandered on at least 4 of the last 7 days prior to the LOCD. Therefore, Petitioner's representative's testimony is insufficient to demonstrate that Petitioner passed through Door 6.

Accordingly, Respondent properly terminated Petitioner's services pursuant to the above policy and on the basis that she no longer met the functional eligibility criteria for the program.

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

IT IS, THEREFORE, ORDERED that:

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

Steven Kibit

SK/db

Steven Kibit
Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088; Attention: MAHS Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings
Reconsideration/Rehearing Request
P.O. Box 30763
Lansing, Michigan 48909-8139

[redacted]