RICK SNYDER
GOVERNOR

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

SHELLY EDGERTON
DIRECTOR

**IN THE MATTER OF:**

v

,
**Respondent**

______________________________/

**MAHS Docket No.:**

**Agency Case No.:**

**Case Type: PR**

**Issued and entered**
**this 8th day of March, 2017**
**by:**
**Steven Kibit**
**Administrative Law Judge**

**PROPOSAL FOR DECISION**

This matter is before the Michigan Administrative Hearing System (MAHS) pursuant to the provisions of the Michigan Medicaid State Plan, The Social Welfare Act, MCL 400.1 *et seq*., The Administrative Procedures Act, MCL 24.271 *et seq*., and Michigan Administrative Rules 400.3401 *et seq.* and 792.10101 *et seq.*

**SUMMARY**

This is an appeal of a decision by the Michigan Department of Health and Human Services (MDHHS or Department) to recover payments made to Petitioner for services provided to a Medicaid beneficiary through the Program of All-Inclusive Care for the Elderly (PACE) following a retrospective review by the Michigan Peer Review Organization (MPRO).

On June 22, 2016, Petitioner requested an Administrative Hearing. A Telephone Pre-Hearing Conference was held on August 10, 2016, and an Administrative Hearing was held on October 19, 2016.

, , appeared on Petitioner's behalf. , and ; ; testified as witnesses for Petitioner.

, was also present during the hearing.

Appeals Review Officer, represented the Respondent Department of Health and Human Services. , with the Department, and , testified as witnesses for Respondent.

During the hearing, Petitioner offered sixteen exhibits[1] that were admitted into the record:

| | |
|---|---|
| Petitioner's Exhibit A: | Record of Payments |
| Petitioner's Exhibit B: | Excerpt from Field Definition Guidelines |
| Petitioner's Exhibit C: | Excerpt from Field Definition Guidelines |
| Petitioner's Exhibit D: | Mini-Mental State Examination dated 12/10/14 |
| Petitioner's Exhibit E: | HCC Comprehensive Assessment dated 12/10/14 |
| Petitioner's Exhibit F: | Letter from RN dated 12/16/15 |
| Petitioner's Exhibit G: | Social Worker Assessment dated 12/11/14 |
| Petitioner's Exhibit H: | LOCD List |
| Petitioner's Exhibit I: | Excerpt from Region IV AAA Assessment |
| Petitioner's Exhibit J: | Progress Notes from AAA 1-B |
| Petitioner's Exhibit K | SOAP Note dated 12/11/14 |
| Petitioner's Exhibit L: | Letter from DO dated 12/14/15 |
| Petitioner's Exhibit M: | Medical Records dated |
| Petitioner's Exhibit N: | Excerpt from Journal Article |
| Petitioner's Exhibit O: | E-mail dated 9/22/16 |
| Petitioner's Exhibit P: | CV for Dr. |

Respondent also offered thirteen exhibits[3] that was admitted into the record:

| | |
|---|---|
| Respondent's Exhibit A: | MPRO LOCD Retrospective Review Summary |
| Respondent's Exhibit B: | Documentation Request Letter dated 4/14/15 |
| Respondent's Exhibit C: | Response to Documentation Request dated 5/13/15 |
| Respondent's Exhibit D: | Incomplete Documentation Letter dated 9/30/15 |
| Respondent's Exhibit E: | Response to Documentation Request dated 10/14/15 |
| Respondent's Exhibit F: | Retrospective Review Determination dated 10/21/15 |
| Respondent's Exhibit G: | Request for Preliminary Conference dated 12/15/15 |
| Respondent's Exhibit H: | Excerpt from Wikipedia Entry for MMSE |

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[1] While admitted separately, Petitioner's Exhibits A through O were numbered collectively as pages 1 to 83 and the undersigned Administrative Law Judge will refer to those general numbers when citing to those exhibits.
[2] The undersigned Administrative Law Judge mislabeled the CV for as Petitioner's Exhibit M when admitting it on the record.
[3] Respondent's Exhibit I through M are numbered collectively as pages 1-31 and the undersigned Administrative Law Judge will refer to those general numbers when citing to those exhibits

| | |
|---|---|
| Respondent’s Exhibit I: | Excerpt from MPM |
| Respondent’s Exhibit J: | LOCD Field Definition Guidelines |
| Respondent’s Exhibit K | Recovery Letter dated 11/19/15 |
| Respondent’s Exhibit L: | Record of Payments |
| Respondent’s Exhibit M: | Record of Payments |

## ISSUE

Was the Department’s decision to recover payments made to Petitioner for PACE services provided to a Medicaid beneficiary with the initials J.N. (“JN”) proper?

## FINDINGS OF FACT

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

1. JN is a fifty-seven-year-old Medicaid beneficiary who was enrolled in PACE through Petitioner on January 1, 2015 pursuant to an agreement signed between JN and Petitioner on December 16, 2014. (Respondent’s Exhibit C, page 5; Respondent’s Exhibit E, page 4-7)

2. At that time, Petitioner determined that JN qualified for PACE by passing through Door 2 of the applicable Level of Care Determination (LOCD) criteria. (Respondent’s Exhibit E, page 4-7).

3. Door 2 was the same door that JN had previously been found to pass through in order to qualify for the MI Choice Waiver Program on September 10, 2013 by the Region IV Area Agency on Aging and on November 18, 2014 by the Area Agency on Aging 1-B. (Petitioner’s Exhibit H, page 45).

4. Prior to the agreement with Petitioner, JH underwent a number of assessments with Petitioner, including a comprehensive assessment completed by a registered nurse (RN) on December 10, 2014. (Petitioner’s Exhibit E, pages 14-30).

5. During that assessment, the RN identified JN’s health concerns as including high blood pressure; anemia; short term memory issues, including an inability to remember how to get back or telephone numbers; three strokes, in the years 2008, 2009 and 2010 respectively, with the second stroke causing memory loss; mood disorder; and an anxiety disorder. (Petitioner’s Exhibit E, pages 15, 29).

6. The comprehensive assessment further provided that JN does remember events from one day to the next and is able to remember when to take her medications. (Petitioner's Exhibit E, page 21).

7. JN was also found to have slightly impaired reasoning; occasional poor judgment; occasional difficulty in understanding her own needs; mild difficultly in understanding others; and mild difficulty in expressing ideas and needs. (Petitioner's Exhibit E, pages 21-22).

8. With respect to Activities of Daily Living (ADLS), JN was found to be independent in grooming, dressing, toileting and feeding/eating; and, while she does bathe herself, she needed assistance getting in-and-out of the bathtub. (Petitioner's Exhibit E, page 23).

9. With respect to Instrumental Activities of Daily Living (IADLS), the RN found that JN independently plans and prepares light meals, but that she sometimes forgets that she is cooking and her husband has to monitor her to prevent burning food; JN's husband does the chores; JN occasionally goes shopping, with her husband doing most of the shopping; JN's husband does the housekeeping and laundry; and JN needs some assistance taking oral medications. (Petitioner's Exhibit E, pages 24-25).

10. With respect to telephone use, the comprehensive assessment indicated that JN dials telephone numbers and answers calls appropriately and as desired, but that she uses a cell phone; does not remember phone numbers; and does not know her home number or the number for the Comcast phone line in home. (Petitioner's Exhibit E, page 25).

11. With respect to environmental safety, the comprehensive assessment also provided that, while JN has a history of strokes and memory/cognitive deficits, she is capable of answering the phone; locating and activating emergency call systems; reading and following instructions; and taking medications as instructed. (Petitioner's Exhibit E, page 28).

12. That same day, December 10, 2014, JN was also given a Mini-Mental State Examination (MMSE) in which her total raw score was a twenty-four. (Petitioner's Exhibit D, pages 8-12).

13. A total raw score of twenty-four indicates normal cognition. (Respondent's Exhibit H, pages 1-2).

14. On ████████ ██ ████, JN underwent another comprehensive assessment with a different RN. (Respondent's Exhibit E, pages 53-54).

15. JN was the primary source of information for that assessment and, while she reported that has memory loss and/or dementia due to her strokes,

the RN also noted that she was reliable and alert and oriented to self, place and time. (Respondent's Exhibit E, pages 54-56, 59).

16. The RN also found that JN remembers events from one day to the next and is able to take her medications, but that she has slightly impaired reasoning skills; she occasionally exhibits lapses in reasoning and requires redirection; her judgment is occasionally poor; and she sometimes has difficulty understanding own needs. (Respondent's Exhibit E, page 59).

17. The RN further found that JN has no impairments in understanding others and that she is able to express complex ideas. (Respondent's Exhibit E, page 59).

18. With respect to ADLs, JN was found to be independent in bathing; grooming; dressing; feeding; and eating. (Respondent's Exhibit E, pages 61-62).

19. With respect to IADLs, the RN found that JN was independent in planning and preparing light meals; she does not do any heavy chores, but can perform light housekeeping tasks; she shops, but needs some assistance; she does not do any laundry; she takes oral medications, but needs some assistance; and did dials telephone numbers and answers calls appropriately and as desired. (Respondent's Exhibit E, pages 62-63).

20. JN also underwent a Social Worker Comprehensive Assessment on December 11, 2014. (Petitioner's Exhibit G, pages 34-43).

21. During that assessment, JH was the primary source of information, but her husband did answer some questions for her, which caused her to become agitated. (Petitioner's Exhibit G, pages 37, 39).

22. No integral mental health history was reported but JN did state that, although she has not been diagnosed, she is depressed. (Petitioner's Exhibit G, page 38).

23. JN's husband also stated that she started exhibiting memory loss about two years prior. (Petitioner's Exhibit G, page 38).

24. The Social Worker Assessment further found that JN does not remember events from one day to next and she only remembers to take her medications sometimes, but that she is independent in structured and unstructured activities and she presented as alert and oriented x3. (Petitioner's Exhibit G, pages 40-41).

25. On December 11, 2014, a SOAP note was entered by a Dr. [redacted] [redacted] in which she found that JN was oriented to person; she had normal affect and insight; and she was the primary and reliable source of information. (Respondent's Exhibit E, pages 17, 19).

26. The SOAP note also indicated that JN had a history of anxiety disorder; memory loss; a history of depression; and three past three cerebrovascular accidents, with the last in 2010 and the only residual deficit being cognitive impairment with short term memory loss. (Respondent's Exhibit E, pages 18, 21).

27. JN also participated in a Physical Therapy (PT) Assessment on December 11, 2014 during which it was found that she needs to be supervised in structured and unstructured activities, with occasional verbal cues to redirect attention to task, but that she has the ability to follow directions and her safety awareness is fair. (Respondent's Exhibit E, page 46).

28. On December 11, 2014, Petitioner also completed a LOCD with respect to JN in which it found that she qualified for the PACE program through Door 2 on the basis of short-term problems and moderately-impaired cognitive skills for daily decision-making. (Respondent's Exhibit C, pages 5-10).

29. On April 14, 2015, MPRO sent Petitioner a letter stating that it was conducting a Retrospective Review of the Michigan Medicaid Nursing Level of Care Determination for random cases and advising Petitioner of what case records it must provide for review. (Respondent's Exhibit B, page 1).

30. JN's case was identified as a case to be reviewed and, on May 13, 2015, Petitioner submitted documents with respect to her case, including the LOCD dated December 11, 2014; plans of care; physician and nurse practitioner notes; physician and nurse practitioner orders; nursing assessment notes; and therapy notes. (Respondent's Exhibit C, pages 1-159).

31. On September 30, 2015, MPRO sent Petitioner a letter indicating that Petitioner's documentation was incomplete and requesting information on JN's PACE enrollment date; documentation that JN met the Door 2 criteria for moderate cognitive impairment; and all physician notes and orders from the date of PACE enrollment to March 27, 2015. (Respondent's Exhibit D, pages 1-2).

32. On October 14, 2015, Petitioner submitted additional documentation to MPRO. (Respondent's Exhibit E, pages 1-161).

33. Regarding the Door 2 determination, the submitted documentation included the December 11, 2014 LOCD; the SOAP Note dated December 11, 2014; the Comprehensive Assessment report dated December 10, 2014; the MMSE report dated December 10, 2014; the PT assessment report dated December 11, 2014; the RN Comprehensive Assessment report dated December 11, 2014; and a Progress Note regarding a clinic visit on [redacted]. (Respondent's Exhibit E, pages 9-72).

34. On October 21, 2015, MPRO sent Petitioner written notice of the determination it had made following the retrospective review:

> **The agency determined the beneficiary as eligible through Door 2. The medical record documentation does not support eligibility through Door 2. The documentation does not support eligibility through any Door of the LOC Determination from 11/27/2014 on (in continuation). Therefore, the beneficiary did not meet the LOC Determination's Medicaid criteria to validate reimbursement of Medicaid services rendered from November 27, 2014 on (in continuation).**

*Respondent's Exhibit F, page 1*

35. On November 19, 2015, the Department sent Petitioner written notice that it intends to take adverse action to recover payments made with respect to JN because it had been determined that JN did not meet nursing facility level of care requirements. (Respondent's Exhibit K, pages 28-29).

36. The specific recovery amount was noted to be $[redacted] for the time period of November 27, 2014 forward, with the caveat that the recovery amount may be more if encounters/claims were submitted/processed for payments after the issue of the notice. (Respondent's Exhibit K, page 28).

37. On December 14, 2015, [redacted] drafted a letter regarding a Pre-Enrollment Assessment she had completed the year before with respect to JN. (Petitioner's Exhibit L, page 69).

38. On December 15, 2015, the Social Worker Comprehensive Assessment report dated December 11, 2014 was amended in order to provide additional explanation and clarification regarding the answers that were provided. (Petitioner's Exhibit G, page 43).

39. On December 16, 2015, the RN who completed the December 10, 2014 Comprehensive Assessment drafted a letter in which she described the

assessment she had conducted the year prior. (Petitioner's Exhibit F, page 32).

40. On December 17, 2015, Petitioner submitted a request for a Preliminary Conference with the Department regarding the decision to take action to recover payments for JN from Petitioner following a retrospective review. (Respondent's Exhibit G, pages 1-89).

41. In that request, Petitioner first notes that, while the notice from MPRO cites November 27, 2014 as being the start date of JN's services with Petitioner, the actual start date was January 1, 2015 and Petitioner was not paid for JN's care in November or December of 2014. (Respondent's Exhibit G, page 1).

42. Petitioner also agreed that it had received [redacted] in total from Medicaid through December 15, 2015 for JN's care. (Respondent's Exhibit G, page 1).

43. Petitioner also argued that MPRO's decision was incorrect as JN passed through Doors 2 and 7 of the LOCD. (Respondent's Exhibit G, pages 1-5).

44. On April 7, 2016, Petitioner completed another LOCD with respect to JN and again found that she meet the criteria for Door 2. (Petitioner's Exhibit H, page 45).

45. On June 22, 2016, the Michigan Administrative Hearing System (MAHS) received the request for hearing filed in this matter, in which Petitioner indicated that it would like to withdraw its request for a Bureau Conference and move directly to an administrative hearing.

46. Through September of 2016, Petitioner has received [redacted] in payments from Medicaid with respect to JN. (Petitioner's Exhibit A, page 2; Respondent's Exhibit M, page 31).

**CONCLUSIONS OF LAW**

The Michigan Department of Health and Human Services is the single state agency responsible for health policy, the purchase of health care services, and accountability of those services to ensure only appropriate, medically necessary services are provided to the Medicaid population or paid for by the Department.

Section 1902(a)(30)(A) of the Social Security Act (the Act) requires that State Medicaid Agencies provide methods and procedures to safeguard against unnecessary utilization of care and services and to assure payments are consistent with "efficiency, economy and quality of care . . ." Under section 1902(d), a State can contract with an entity that

meets the requirements of section 1152 of the Act to perform medical or utilization review functions requires under the Act.

MPRO is the entity contracted by the Department to conduct retrospective reviews of LOCDs and eligibility for PACE services pursuant to the provisions of the Medicaid Provider Manual (MPM):

> **3.7 RETROSPECTIVE REVIEW AND MEDICAID RECOVERY**
>
> At random and whenever indicated, MDHHS will perform retrospective reviews to validate the Michigan Medicaid Nursing Facility Level of Care Determination. If the participant is found to be ineligible for PACE services, MDHHS will recover all Medicaid payments made for PACE services rendered during the period of ineligibility.

*MPM, July 1, 2015 version*
*PACE Chapter, page 5*

The MPM also requires that appeal rights be given to providers who have received notice of adverse determinations following a retrospective review:

> **3.12 PROVIDER APPEALS**
>
> A Retrospective Review of the Michigan Medicaid Nursing Facility Level of Care Determination that results in a denial is an Adverse Action for PACE when MDHHS proposes to recover payments made for services rendered to the beneficiary for whom the Retrospective Review was conducted. If the PACE organization disagrees with the MDHHS Adverse Action Notice, the PACE organization may appeal if their written request is received by the Michigan Administrative Hearing System within 30 calendar days from the date of the MDHHS Adverse Action Notice. Information regarding the MDHHS appeal process is available in the General Information for Providers Chapter and on the MDHHS website. (Refer to the Directory Appendix for website information.)

*MPM, July 1, 2015 version*
*PACE Chapter, page 7*

In making such an appeal, a provider has the burden of proof and the burden of establishing via auditable documentation that the retrospective review and decision to

recover payments were erroneous. Providers must comply with MCL 400.1 *et seq*, state-published manuals and certain relevant federal principles, all of which state the conclusion that the provider bears the burden of proof. The statute provides: "Submission of a claim or claims for services rendered under the (Medicaid) program does not establish in the provider a right to receive payment from the program." MCL 400.111b (10). And, "[b]efore billing for any medical services," MCL 400.111b(6), (7), (8) require the provider to have records to support each claim for Medicaid reimbursement. MCL 400.111b(6) states in pertinent part: "A provider shall maintain records necessary to document fully the . . . cost of services, supplies, or equipment provided to a medically indigent individual."

Thus, it is up to Petitioner to establish by a preponderance of the evidence that the audit adjustment at issue in this appeal was improper. See Director's Final Order in *Ciena Healthcare Management, et al v Dep't of Health and Human Services*, MAHS Docket No. 2010-37557-AAH, *et al*, dated March 6, 2013. See also *Prechel v Dep't of Social Services*, 186 Mich App 547; 465 NW2d 337 (1990) (holding that placing the burden of proof on audited Medicaid providers is consistent with the legislative scheme underlying the program).

Policy with respect to PACE is contained in the MPM and, with respect to the program in general and eligibility for it specifically, the applicable version of the MPM provides in part that:

> **SECTION 1 – GENERAL INFORMATION**
>
> The Program of All-Inclusive Care for the Elderly (PACE) is an innovative model of community-based care that enables elderly individuals, who are certified by their state as needing nursing facility care, to live as independently as possible.
>
> PACE provides an alternative to traditional nursing facility care by offering pre-paid, capitated, comprehensive health care services designed to meet the following objectives:
>
> - Enhance the quality of life and autonomy for frail, older adults;
> - Maximize the dignity of, and respect for, older adults;
> - Enable frail, older adults to live in the community as long as medically and socially feasible; and
> - Preserve and support the older adult's family unit.
>
> .

The PACE capitated benefit was authorized by the Balanced Budget Act of 1997 and features a comprehensive service delivery system with integrated Medicare and Medicaid financing.

An interdisciplinary team, consisting of professional and paraprofessional staff, assesses beneficiary needs, develops a plan of care, and monitors delivery of all services (including acute care services as well as nursing facility services, when necessary) within an integrated system for a seamless provision of total care. Typically, PACE organizations provide social and medical services in an adult day health center supplemented by in-home and other services as needed.

The financing model combines payments from Medicare and Medicaid, allowing PACE organizations to provide all needed services rather than be limited to those reimbursable under the Medicare and Medicaid fee-for-service systems. PACE organizations assume full financial risk for beneficiary care without limits on amount, duration, or scope of services.

Physicians currently treating Medicaid patients who are in need of nursing facility care may consider PACE as an option. Hospital discharge planners may also identify suitable candidates for referral to PACE as an alternative to a nursing facility. (Refer to the Directory Appendix for PACE contact information.)

* * *

## SECTION 3 – ELIGIBILITY AND ENROLLMENT

### 3.1 ELIGIBILITY REQUIREMENTS

To be eligible for PACE enrollment, applicants must meet the following requirements:

- Be age 55 years or older.
- Meet applicable Medicaid financial eligibility requirements. (Eligibility determinations will be made by the Michigan Department of Human Services.)
- Reside in the PACE organization's service area.

- Be capable of safely residing in the community without jeopardizing health or safety while receiving services offered by the PACE organization.

- Receive a comprehensive assessment of participant needs by an interdisciplinary team.

- A determination of functional/medical eligibility based upon the online version of the Michigan Medicaid Nursing Facility Level of Care Determination (LOCD) that was conducted online within fourteen (14) calendar days from the date of enrollment into the PACE organization.

- Be provided timely and accurate information to support Informed Choice for all appropriate Medicaid options for Long Term Care.

- Not concurrently enrolled in the MI Choice program.

- Not concurrently enrolled in an HMO.

**3.2 COMPLETION OF THE MEDICAID NURSING FACILITY LOC DETERMINATION**

A PACE applicant's eligibility for coverage of nursing facility services and enrollment in the PACE organization is determined by the online application of the Michigan Medicaid Nursing Facility Level of Care Determination (LOCD). The PACE organization will not be reimbursed for nursing facility services rendered when the applicant is determined not to meet the LOCD criteria. Providers must submit the LOCD information into its online version no later than fourteen (14) calendar days following the start of services. Instructions and required forms related to the completion of the Medicaid Nursing Facility Level of Care Determination are available on the MDCH website. (Refer to the Directory Appendix for website information.)

The LOCD must be completed by a health professional (physician, registered nurse, licensed practical nurse, clinical social worker (BSW or MSW), or physician assistant) representing the proposed provider. Nonclinical staff may perform the evaluation when clinical oversight by a

> professional is performed. The PACE organization will be held responsible for enrolling only those participants who meet the criteria outlined in this section.
>
> The Michigan Medicaid Nursing Facility Level of Care Determination must be completed using the online version in the following situations:
>
> - all new enrollments of Medicaid-eligible beneficiaries.
> - re-enrollment of Medicaid-eligible beneficiaries.
> - significant change in condition of a current PACE Medicaid-eligible beneficiary.
>
> The online LOCD must be completed only once for each admission or readmission to the program.
>
> *MPM, October 1, 2014 version*
> *PACE Chapter, pages 3-4*

The December 11, 2014 LOCD was the basis for the action at issue in this case. In order to be found eligible for Medicaid nursing facility coverage JN must have met the requirements of at least one door in that LOCD.

Here, the Department determined that JN did not pass through any of the seven Doors in the LOCD, and that she was therefore ineligible for PACE services. Petitioner in turn argues that JN passed through Door 2.

With respect to Door 2, the LOCD provides:

> **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."
>
> *Petitioner's Exhibit B, page 4*

Accordingly, to qualify through Door 2, JN 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 JN has a memory problem, but can be understood. Therefore, JN must be at least “Moderately Impaired” in her cognitive skills for daily decision making to pass through Door 2.

Regarding Door 2 in general and Cognitive Skills for Daily Decision Making specifically, the LOCD Field Definition Guidelines provide:

> 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 15-18*

Here, as discussed above, after MPRO conducted a retrospective review on the Department's behalf and determined that JN was not eligible for PACE services through any of the doors of the LOCD, the Department decided to take adverse action to recover payments made to Petitioner with respect to JN.

Petitioner has appealed that decision and, in support of Petitioner's appeal, its representative argues that JN met Door 2 when enrolled and will continue to do so for the rest of her life as she has vascular dementia, which is a chronic disease that only gets worse over time. Moreover, while he did concede that there is conflicting evidence in the record, which he attributed to the LOCD being performed by a new team that was still learning and that did not recognize the difference between vascular dementia and Alzheimer's disease, Petitioner's representative also argued that there was still sufficient evidence to find that JN met the criteria for Door 2. In particular, he noted that Petitioner's assessment was the third LOCD in a fourteen-month period that found that JN passed through Door 2 and that he remained confused over the Department's determination given the uniform findings of the LOCDs conducted by three separate agencies.

████████ identified herself as an expert in dementia diagnoses/screening and testified that, while she has not examined JN, she has reviewed the relevant documentation and concluded that JN has vascular dementia. She also testified that vascular dementia is an entirely different animal from Alzheimer's dementia, with different symptoms and effects, and that most tests are not designed to test for vascular dementia. In particular, she testified that the MMSE utilized in this case is not a test designed for vascular

dementia and is therefore useless in evaluating JN. She also testified that patients with vascular dementia like JN only worsen over time.

testified that JN undisputedly has a memory problem and at least moderately impaired decision making at the time of the LOCD. In particular, he noted the language in the applicable Field Definition Guidelines providing that an applicant should be considered to have impaired performance in decision making 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 her level of capability. According to , that is what has occurred in this case as JN's husband decides things for her, does most things for her, and significantly assists her with other tasks.

Similarly, testified that she was the social worker who assessed JN for Petitioner and that, during her assessment, she found that JN's husband had assumed most responsibilities and decision-making for JN. For example, JN could dress herself, but her husband would tell her what to wear. also testified that JN would have to ask lots of questions and that JN's husband would keep her day structured.

In response, , the Department's LOCD Policy Specialist, testified that the LOCD is the singular assessment for several programs, including PACE, and that the Cognitive Performance Scale required to identify applicants with cognitive difficulties is built into the LOCD. She also testified regarding the use of other examinations such as the MMSE or the Brief Interview for Mental Status (BIMS) in conjunction with the LOCD, but agreed that there is no specific screen for vascular dementia required in policy. She further noted that the above policies do not lay out a plan of care; they are designed to determine current medical functioning status; the LOCD requires specific look back periods, not good days or bad days; and that the provider, Petitioner in this case, chooses the day to conduct the LOCD. also testified that there is no annual requirement for a new LOCD, but that one must be completed if there are significant changes in a beneficiary conditions, and that the examples of decision making identified in the Field Definition Guidelines are not an exhaustive list.

, an RN and Nurse Reviewer with MPRO, also testified for the Department and she described the retrospective review process in this case, and the determination that JN did not meet the criteria for PACE. With respect to Door 2, she testified that, while JN has a memory problem, JN is able to make herself understood and did not have a moderate or severe impairment in daily decision-making. Regarding decision making specifically, testified that the review is of the person and not any particular diagnosis, with a focus on severity and function, and she noted the findings in assessments that JN could dial and answer the telephone; groom and dress herself independently; and go to meals and use the space in home appropriately. also testified that JN's family may be fostering her dependence and it is unclear if JN is not performing certain tasks because she cannot do them or because others are simply choosing to do them for her, especially given the lack of any explanation in the record

and the conflicting findings in the assessments performed by Petitioner. She further testified that she has reviewed Petitioner's exhibits and, even when considering the ones that were outside of the applicable time frame and were not considered as part of the decision at issue in this case, they did not change her mind as there was nothing in them to substantiate Petitioner's claims.

As indicated above, the Petitioner must prove by a preponderance of the evidence, that the Department's recovery of payment for PACE services for JN was improper.

Based on the record in this case, the Petitioner has failed to meet that burden and the Department's decision should be affirmed.

The December 11, 2014 LOCD was the basis for the action at issue in this case and, in order to be found eligible for PACE services, JN must have met the requirements of at least one door in the LOCD. In particular, the parties dispute Door 2 and, as discussed above, to qualify through Door 2, an applicant 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 JN has a memory problem, but can be understood. Therefore, JN must be at least "Moderately Impaired" in her cognitive skills for daily decision making to pass through Door 2.

In support of its arguments that JN was at least moderately impaired in her decision making, Petitioner's representative and witnesses note that its decision was consistent with previous findings by two separate agencies that JN passed through Door 2, including a LOCD performed by the Area Agency on Aging 1-B on November 18, 2014, which was less than a month before the LOCD Petitioner performed. They also noted that JN has vascular dementia, which is a chronic disease that only gets worse over time, and that JN therefore would not have approved in her cognitive skills since those previous assessments.

However, each LOCD is considered on its own and the previous determinations cited to Petitioner are not significant in this case given the absence of any documentation, beyond quick notes regarding what those determinations were based on, and the extensive documentation regarding the assessment and determination made by Petitioner. Moreover, as testified to by [redacted], whether or not JN passed through Door 2 does not depend on her specific condition and, instead, the review is focused on the effect of any conditions on her functioning, as described in the LOCD.

The actual LOCD at issue in this case provides that JN passed through Door 2, but there is no place for further explanation and Petitioner relies on the findings of the multiple assessments completed around the same time as the LOCD to support its finding that JN passed through Door 2.

However, those assessments contain significant conflicting information regarding JN's daily decision making abilities and, overall, do not reflect any moderate impairment. For example, while the December 11, 2014 SOAP Note identified a residual deficit from JN's strokes as cognitive impairment with short term memory loss, the MMSE completed the day before showed normal cognition and that specific test is more credible than the broad, unsupported statement found in the note. Moreover, while Petitioner and [redacted] now dispute the appropriateness of using the MMSE in this case, that is the test Petitioner performed and submitted as part of the retrospective review.

Similarly, while the December 11, 2014 RN Assessment found that JN has slightly impaired reasoning skills, occasional lapses in reasoning and poor judgment, and difficulty understanding own needs sometimes, it also identified JN as the primary and reliable source of information for the assessment, with a further note that JN was alert and oriented to self, place and time, and the SW Assessment completed that same day found that JN is independent in structured and unstructured activities. The PT Assessment completed that day, on the other hand, did find that JN needs to be supervised in structured and unstructured activities, with occasional verbal cues to redirect her attention to tasks, but it also noted that she has the ability to follow directions and her safety awareness is fair.

Regarding JN's ADLs and IADLs, the two assessments completed by RNs both found that JN's husband does all of the heavy chores and laundry and most of the shopping and housekeeping, but they also expressly found that JN is independent in grooming, dressing, feeding, toileting, and eating. Moreover, while the December 10, 2014 assessment found that JN has to be monitored while cooking and needs assistance in getting in-and-out of the bathtub, there was nothing to indicate that JN is not otherwise independent in bathing and the December 11, 2014 assessment found that JN is independent in bathing, and planning and preparing light meals.

Regarding JN's telephone use, both RN Assessments found that, even she cannot remember telephone numbers, JN dials telephone numbers and answers calls appropriately and as desired, with the December 10, 2014 assessment also adding that JN can locate and activate emergency call systems.

With respect to JN's taking medications in particular, the December 10, 2014 RN Assessment found that is able to both remember when to take her medications and to take her medications as instructed, while the SW Assessment found that she only remembers to take them sometimes, and the December 11, 2014 RN Assessment stated at different points that JN is able to take her medications on her own and that she needs some assistance with oral medication.

Petitioner attempted to clarify at least some of the conflicts within the assessments through its exhibits, including addendums by the social worker to her earlier assessment and letters from a nurse and a doctor regarding assessments they performed, but the

undersigned Administrative Law Judge does not find that later evidence to be particularly persuasive to the extent they conflict with the assessments completed at the time, given that they was generated much later and after both the LOCD and retrospective review were completed.
Similarly, the undersigned Administrative Law Judge is not persuaded by Petitioner's reliance on the language in the applicable Field Definition Guidelines providing that an applicant should be considered to have impaired performance in decision making 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 her level of capability. According to Petitioner's witnesses, that is what has occurred in this case, with Petitioner's husband making everyday decisions for JN and completing most tasks or ADLs for JN, with significant assistance with other tasks.

However, while Petitioner properly interprets that language, [redacted] also correctly notes that the Field Definition Guidelines alert assessors to a possible mismatch between the applicant's abilities and her current level of performance, with family inadvertently fostering the applicant's dependence, and there is no evidence in the record that JN's husband completes some daily tasks for JN because of any cognitive impairment.

Instead of sufficiently supporting Petitioner's broad claims that JN does not and cannot participate in decision making, the assessments instead are either conflicting, like one assessment finding that JN needs to be supervised during structured and unstructured tasks while another finding that she is independent in such tasks, or they suggest that JN makes her own decisions. For example, the assessments found that JN dresses herself, grooms herself, eats independently, toilets herself, bathes herself, and prepares and plans light meals; and, even if she may need physical assistance in getting in-and-out of the tub or monitoring while cooking, as stated in just one assessment, there is no indication that JN does not make her own decisions with respect to her activities or that she needs assistance in choosing appropriate items of clothing, knowing when to go to meals or what meals to have, or knowing and using space in her home appropriately. The intent of the cognitive skills for daily decision making section of Door 2 is to record the applicant's actual performance in making everyday decisions about the tasks or activities of daily living and the record simply fails to reflect that JN's performance is at least moderately impaired in that area.

For the above reasons, the undersigned Administrative Law Judge therefore finds that Petitioner has failed to meet its burden of proving by preponderance of the evidence that JN met the criteria for PACE services in this case by being at least moderately impaired in her cognitive skills for daily decision making or that the Department improperly decided to recover payments made to Petitioner for those PACE services. Accordingly, the undersigned Administrative Law Judge also recommends that the Department's decision be affirmed.

**PROPOSED DECISION**

Now therefore, based on the above findings of fact and conclusions of law, the undersigned Administrative Law Judge recommends that the Department's decision be AFFIRMED.

**EXCEPTIONS**

Any party may, within ten (10) days from the date of mailing this decision, file exceptions with the Michigan Administrative Hearing System for the Department of Health and Human Services, P.O. Box 30639, 611 W. Ottawa, 2nd Floor, Lansing, Michigan 48909-8143. Exceptions shall be served on all parties.

SK/tm

Steven Kibit
Administrative Law Judge

## PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed below this 8th day of March, 2017.

Antonette M. Mehi

Antonette Mehi
**Michigan Administrative Hearing System**