

ISSUE

Did the Department properly determine that Petitioner does not require a Medicaid reimbursable Nursing Facility (NF) Level of Care (LOC)?

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 Medicaid beneficiary and current resident of REDACTED Terrace. (Exhibit A, p 14; Testimony)
2. On October 23, 2023, a passive redetermination record was created in CHAMPS for Petitioner, who was determined eligible for nursing facility level of care through Door 3: Physician Involvement. (Exhibit A, pp 14, 49-55; Testimony)

3. On October 23, 2023, Petitioner was assessed by REDACTED Terrace under the Nursing Facility (NF) Level of Care Determination (LOCD) and found to be ineligible to receive Medicaid reimbursed NF services. Petitioner did not meet the LOCD criteria within the seven-day look-back period for Doors 1, 2, 5 and 6, nor did he meet the criteria in Doors 3 and 4 within the fourteen-day look-back period. The three criteria required in Door 7 were also not met. (Exhibit A, pp 14, 39-48; Testimony.)
4. On October 26, 2023, a secondary review was initiated by iMPROve Health per Petitioner's request. On October 31, 2023, after reviewing Petitioner's records, iMPROve Health's Nurse Reviewer determined that Petitioner did not meet the secondary review criteria, including Door 8. (Exhibit A, pp 81-84; Testimony)
5. On October 31, 2023, Petitioner was advised of the Department's action via Advance Action Notice. (Exhibit B, p 10; Testimony)
6. On January 26, 2024, Petitioner's request for hearing was received by the Michigan Office of Administrative Hearings and Rules. (Exhibit A, pp 6-13)

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.

The Michigan Department of Health and Human Services (MDHHS) implemented functional/ medical eligibility criteria for Medicaid nursing facilities. Federal regulations require that Medicaid pay for services only for those beneficiaries who meet specified level of care criteria.

The Medicaid Provider Manual (MPM) articulates Medicaid policy in Michigan. With regard to nursing facility eligibility, the MPM provides, in pertinent part:

SECTION 1 — GENERAL INFORMATION

The Michigan Department of Health and Human Services (MDHHS) is required to assess all individuals seeking Medicaid-funded long-term services and supports (LTSS) that require level of care eligibility to determine their functional need for those services. The determination is an essential component of eligibility for services in nursing facilities, the MI Choice Waiver Program, the Program of All-Inclusive Care for the Elderly (PACE), and the MI Health Link HCBS Waiver Program. Policies contained herein apply equally and consistently to each of these programs except as noted.

Providers may access the LOCD online in the Community Health Automated Medicaid Processing System (CHAMPS) through the MILogin application. (Refer to the Directory Appendix for website information.) LOCD assessment data is entered and processed in CHAMPS.

The LOCD is a "point in time" assessment; that is, it determines the individual's functional eligibility at the time of the assessment. MDHHS assumes that beneficiaries will maintain functional eligibility until they are determined otherwise through a reassessment or the LOCD's End Date. An LOCD is an in-person meeting between the qualified and licensed health professional and the individual seeking functional eligibility.

SECTION 2 - ELIGIBILITY REQUIREMENTS

Individuals seeking Medicaid-funded services from nursing facilities, MI Choice Waiver Program, PACE, or the MI Health Link HCBS Waiver Program must meet eligibility criteria. These criteria must be met before Medicaid payment is made for services rendered. Each beneficiary must be eligible for Medicaid services, demonstrate a need for nursing facility level of care, and meet all additional program-specific requirements. Medicaid reimbursement for covered services is only appropriate when both financial and functional eligibility have been established, and the individual meets other program-specific eligibility criteria.

2.1 BASIC MEDICAID ELIGIBILITY

Eligibility for Medicaid is determined by a variety of factors including, but not limited to, financial rules, age, health status, state residency and citizenship status. Providers are instructed to refer individuals who are not yet Medicaid eligible to a local MDHHS office or the MDHHS website for assistance. (Refer to the Directory Appendix for website information.)

2.2 NEED FOR NURSING FACILITY LEVEL OF CARE

An individual's need for nursing facility level of care is determined through the Nursing Facility Level of Care Determination (LOCD) assessment tool. The LOCD is a scientifically-validated and reliability-tested tool utilized during initial application and program eligibility redeterminations. This chapter describes the criteria and processes for administering the LOCD.

2.3 PROGRAM SPECIFIED ELIGIBILITY REQUIREMENTS

In addition to meeting Medicaid financial and functional eligibility requirements, individuals must also meet all program specific requirements before they can be determined eligible for that program. (Refer to the Nursing Facility Coverages, the MI Choice Waiver, the

Program of All-Inclusive Care for the Elderly, and the MI Health Link chapters or to provider contracts for specific program requirements.) This chapter applies only to the LOCD process and is not intended to replace program-specific requirements.

The MPM also lists the policy for admission and continued eligibility processes for Medicaid-reimbursed nursing facilities. This process includes a subsequent or additional web-based LOCD upon determination of a significant change in the beneficiary's condition as noted in provider notes or minimum data sets, and that these changes may affect the beneficiary's current medical/functional eligibility status.

The LOCD is required for all Medicaid-reimbursed admissions to nursing facilities. A subsequent LOCD must be completed when there has been a significant change in condition that may affect the NF resident's current medical/functional eligibility status.

The Michigan Medicaid Nursing Facility LOC Determination's medical/functional criteria include eight domains of need:

- Activities of Daily Living
- Cognitive Performance
- Physician Involvement
- Treatments and Conditions
- Skilled Rehabilitative Therapies
- Behavior
- Service Dependency, and
- Frailty

If the provider determines through the LOCD that an individual is no longer eligible for nursing facility level of care paid for by Medicaid, the individual may request a secondary review.

6.4 LOCD SECONDARY REVIEW

The provider or the individual (or their legal representative) may request an LOCD Secondary Review. This review is completed by MDHHS or its designee to ensure full consideration of LOCD eligibility options. The Secondary Review is available only when an LOCD is entered in CHAMPS and results in a Door 0, indicating ineligibility. The review is a secondary review of documentation for all LOCD Doors, including Door 8.

Individual residents or their authorized representatives are allowed to appeal either a determination of financial ineligibility to the Department of Health and Human Services or medical/functional eligibility to the Department of Health and Human Services:

6.5 APPEAL RIGHTS AND MEDICAID FAIR HEARING

When an individual is determined ineligible for services and an appeal is requested, it is an adverse action for the individual. If the individual or their legal representative disagrees with the denial, they may request an administrative hearing.

The Michigan Office of Administrative Hearings and Rules (MOAHR), Administrative Hearings Pamphlet explains the process by which an administrative hearing and a preliminary conference are brought to completion. The pamphlet is available for review on the MDHHS website. (Refer to the Directory Appendix for website information.) Both a provider representative and a MDHHS Long Term Care Policy Section representative must be present at the hearing.

When a beneficiary is determined to no longer be eligible for Medicaid-funded services and an appeal is requested, Medicaid will continue to pay for services if the beneficiary appeals within required program timeframes. If the beneficiary does not appeal the decision, the provider is eligible for Medicaid-reimbursement through the effective date of the advanced action notice, or the date in which the beneficiary stopped receiving services, whichever is first. When the beneficiary appeals the decision in compliance with MDHHS policy, MDHHS will reimburse the provider for services throughout the appeal process. If the beneficiary's appeal is denied, MDHHS will reimburse the provider for up to 30 days from the date of issuance of the hearing decision and order.

*Medicaid Provider Manual
Nursing Facility Level of Care Determination Chapter
October 1, 2023, pp 1-14*

An LOCD is required to be done to continue services in a nursing facility when there has been a significant change in the resident's condition. If the subsequent LOCD shows the resident is ineligible, the resident will be discharged from the facility. Under the LOCD, there is a look back period of 7 days for Doors 1, 2, 5, and 6 and a 14 day look back period for Doors 3 & 4. To be eligible under Door 7, the resident must have been in the facility for over 1 year, must need a nursing facility level of care to maintain current functional status, and there must be no other community, residential, or informal services available to meet the applicant's needs. To be eligible under Door 8, the resident must meet the frailty criteria.

The Department presented testimony and documentary evidence that Petitioner did not meet any of the criteria for Doors 1 through 8. The witnesses from the NF completed a LOCD and determined the Petitioner was not eligible for continued Medicaid covered care in their skilled nursing facility.

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 NF witness reviewers determined that Petitioner was independent with bed mobility, transfers, toilet use, and eating. As such, Petitioner did not qualify through Door 1.

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."

The NF witness reviewers determined that Petitioner's short-term memory was okay, that cognitive skills for daily decision making were independent, and that Petitioner was able to be understood. As such, Petitioner did not qualify under Door 2.

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 Physicians Order changes in the last 14 days, OR
2. At least two Physician Visit exams AND at least two Physicians Order changes in the last 14 days.

Petitioner had 0 physician visits and 0 physician order changes within 14 days of the assessment. As such, Petitioner did not qualify under Door 3.

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

The NF witness reviewers determined that Petitioner did not have any of the conditions listed in Door 4 and was not receiving any of the treatments listed in Door 4. Accordingly, Petitioner did not qualify under Door 4.

Door 5 **Skilled Rehabilitation Therapies**

Scoring Door 5: The Petitioner 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.

The NF witness reviewers determined that Petitioner was not currently receiving any skilled rehabilitation therapies at the time of the LOCD. Accordingly, Petitioner did not 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.

The NF witness reviewers determined that Petitioner did not have any delusions or hallucinations within seven days of the LOCD. Petitioner did not exhibit wandering, physically abusive behavior, socially inappropriate/disruptive behavior, or resist care within the seven days of the LOCD. Accordingly, Petitioner did not qualify under Door 6.

Door 7 **Service Dependency**

Scoring Door 7: The applicant must be a current participant and demonstrate service dependency under Door 7.

The LOC Determination provides that the Petitioner 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.

The NF witness reviewers determined that Petitioner did not meet all of the criteria under Door 7. The NF witness reviewers indicated that while Petitioner had been a resident in the NF for more than one year, he was no longer receiving any skilled nursing services, so did not require ongoing services in the NF to maintain current functional status. The NF also determined that there are other community, residential, or informal services that can meet Petitioner's needs.

Door 8 **Frailty**

Scoring Door 8: Individuals who exhibit certain behaviors and treatment characteristics that indicate frailty may be admitted or enrolled to LTSS programs requiring an LOCD. The Nursing Facility Level of Care Exception Process criteria is set forth below:

An applicant need trigger only one element to be considered for an exception.

Frail

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.

iMPROve Health's Nurse Reviewer testified that upon review of Petitioner's records, Petitioner did not meet any of the exception requirements for Door 8. iMPROve Health's Nurse Reviewer indicated that there was nothing in the records indicating that Petitioner took an unreasonable amount of time to complete ADL's or had consistent shortness of breath or pain that interfered with the completion of ADL's. iMPROve Health's Nurse Reviewer testified that Petitioner had no history of falls, no evidence of poor nutrition or weight loss, and no emergency room visits, and no inappropriate behaviors within the lookback period.

Petitioner argues that the LOCD tool is grossly biased against persons like him whose disabilities are not readily apparent to the average person or medical personnel. Petitioner argues that his fibromyalgia has taken away his balance, stability, and mobility while his atrial fibrillation further reduces his stamina and mobility. Petitioner also argues that his urinary incontinence makes it very difficult to live anywhere but a NF. Petitioner argues that his conditions have gotten worse since his intake at the NF in October 2022. Petitioner argues that he now has an oxygen concentrator in his room so he should qualify under Door 4 — Treatments and Conditions.

Petitioner also argues that the LOCD should have been conducted by the nurses who see him every day, not the Assistant Director of Nursing, who works mostly in management of the NF. Petitioner argues that when he walks from his room to the dining hall with his walker, he has to stop one to three times to catch his breath, and when he gets back to his room he often has to lay down with oxygen to recover. Petitioner also argues that his lack of stamina has prevented him from seeing friends on the far side of the NF and from seeking needed clinical appointments in the NF.

Petitioner argues that he does not have the physical capacity to prepare his own meals or clean up after meals. Petitioner argues that he would not be able to clean his own apartment or do his own laundry. Petitioner also argues that his laundry is much more difficult than that of an average person because of his urinary incontinence. Petitioner argues that while he can bath himself now with the equipment provided in the NF, he would be scared to bath in his own apartment because of a fear of falling.

Petitioner argues that he meets the criteria for Door 7 - Service Dependency because there are no available services that meet his needs. Petitioner argues that any income restricted apartments for Medicaid beneficiaries have a one to two year waiting period and most of the new housing in the area for income restricted apartments is for working families, not the disabled. Petitioner also argues that under Door 7, the services must be available within a reasonable distance, and there are no apartments available anywhere close to him. Petitioner argues that he has no family that can take care of him.

Finally, Petitioner argues that the LOCD under-emphasizes an individual's social and emotional needs. Petitioner argues that prior to coming to the NF, he had become something of a shut-in with no friends or family to assist him. Petitioner argues that the

NF gives him a well-rounded experience, both physically and emotionally, while a handicapped accessible apartment would not.

Based on the evidence presented the Department adequately demonstrated that the Petitioner did not meet LOCD eligibility on the review conducted on October 23, 2023, nor the secondary review completed on October 31, 2023. Petitioner had previously met the LOCD criteria through Door 3, but on October 23, 2023, Petitioner did not qualify through any Doors. This does not imply that Petitioner does not need any assistance or that he does not have any medical problems, only that he was not eligible to receive ongoing services paid for by Medicaid through the NF at the time of the assessment. And while Petitioner is correct that it will be difficult for him to move, that is not enough to allow Petitioner to stay in the NF paid for by Medicaid.

Petitioner's arguments to the contrary are not persuasive. First, Petitioner's argument that the LOCD is biased against individuals with his conditions is without merit. The LOCD is the tool the Department has developed with Medicaid approval, to determine eligibility for NF stays; and the undersigned has no authority to ignore it.

Second, Petitioner's arguments regarding his balance, stability and mobility are without merit as they are adequately addressed through Door 1 — Activities of Daily Living and Door 8 - Frailty. In fact, Door 8 specifically considers whether an individual takes an unreasonable amount of time to complete ADL's due to fatigue or being out of breath. Here, Petitioner does not take an unreasonable amount of time to complete his ADL's. (Exhibit A, p 83.)

Third, Petitioner's argument that he cannot live anywhere but a NF because of his urinary incontinence and the extensive resulting laundry, is without merit. There are services available in the community, such as Home Help Services, that will take care of Petitioner's laundry, regardless of how extensive the laundry is.

Fourth, Petitioner's argument that he now meets the criteria through Door 4 — Treatment and Conditions because he has an oxygen concentrator in his room is without merit. To qualify under Door 4 for oxygen therapy, an individual must include both a physician order for oxygen and documentation of the individual's limited ability to perform ADL's. (Exhibit A, p 77.) Here, Petitioner is independent with all his ADL's; and he does not require an unreasonable amount of time to complete his ADL's.

Fifth, Petitioner's argument that the LOCD should be conducted by a floor nurse that is more familiar with his conditions is without merit. LOCD's are based on both observations of an individual and a review of the individual's medical records. Here, the Assistant Director of Nursing was familiar with Petitioner had observed Petitioner, spoke to Petitioner during the LOCD process, and conducted a thorough review of Petitioner's medical records. The proper method for completing the LOCD was followed in this case.

Sixth, Petitioner's argument that he qualifies for a NFLOC because he gets out of breath walking to and from the dining room, or going to visit friends, or going to clinical appointments is without merit. Again, being fatigued and out of breath applies in the LOCD only as far as it effects ADL's. Here, Petitioner is independent with his ADL's and does not require an unreasonable amount of time to complete his ADL's.

Seventh, Petitioner's argument that he does not have the physical capacity to prepare his own meals, clean up after meals, clean his apartment or do his own laundry is without merit. As indicated above, there are services available in the community, such as Home Help Services, that can take care of an individual's IADL's. In addition, the equipment Petitioner needs to bath on his own as he does in the NF, such as a shower chair and grab bars, are available in handicapped accessible accommodations in the community.

Eighth, Petitioner's argument that he meets the criteria for Door 7 — Service Dependency because there are no *available* services that meet his needs has some merit but does not mean that Petitioner meets all three Door 7 criteria. Regarding the third criteria for Door 7, the NF LOCD Field Definition Guidelines Supplement provides, in relevant part:

"Other community services" would include those services for which the beneficiary is eligible, such as Home Help and other Medicaid services, Behavioral Health services, Medicare, private insurance, Veterans' benefits or Older American Act services. In addition to eligibility, the service must be available, i.e. no waiting lists, within a reasonable traveling distance. (Exhibit A, p 78.)

Here, the NF agrees that income restricted, handicapped accessible apartments in the Detroit area have 1-2 year waiting lists. If Petitioner goes further out, such as the Downriver area, there are still waiting lists, but only for a matter of months. So, Petitioner is correct that he meets the third criteria of Door 7. However, the NF is also arguing that Petitioner does not meet the second criteria of Door 7 — requires ongoing services to maintain current functional status, and the undersigned agrees. Here, Petitioner is receiving NO skilled nursing services in the NF currently. As such, there are NO services to take away that might lead to a decline in Petitioner's functional status. Therefore, Petitioner does not meet all three Door 7 criteria.

Finally, Petitioner's argument that the LOCD under emphasizes an individual's social and emotional needs is without merit. Again, the LOCD is the tool the Department has developed with Medicaid approval to determine eligibility for NF stays; and the undersigned has no authority to ignore it. Whether the tool under emphasizes certain needs is beyond the scope of this hearing.

Given the above, the ALJ finds that Petitioner failed to prove, by a preponderance of the evidence, that the Department erred in reviewing Petitioner's medical/functional

eligibility status. Petitioner did not require Medicaid reimbursed NF level of care when the LOCD and secondary review were conducted.

DECISION AND ORDER

The Administrative Law Judge, based upon the above findings of fact and conclusions of law, decides that the Department correctly determined that Petitioner did not require a Medicaid Nursing Facility Level of Care.

IT IS THEREFORE ORDERED that:

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